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Keeping Up: Walking with Justice Douglas

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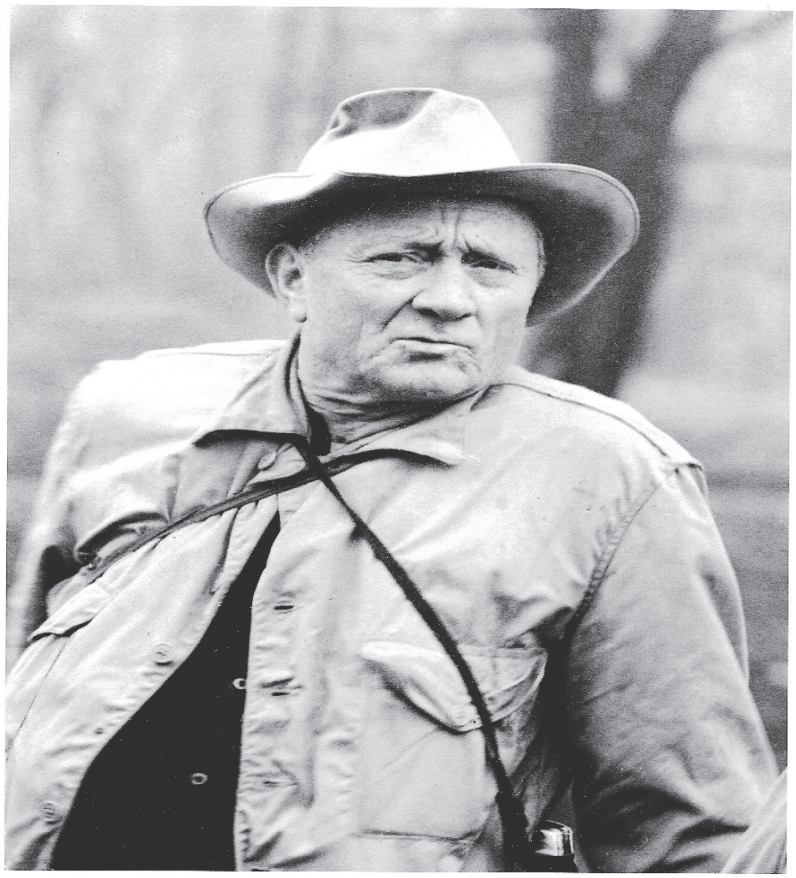

In 1955 Justice William O. Douglas, the longest-serving justice in Supreme Court history, needed a walking companion for his Sunday walks along the towpath of the C&O Canal, which runs parallel to the Potomac River. He liked to choose a different segment for each Sunday walk and he preferred to walk for five or six hours with a companion if possible. During the 1953-54 Term of the Supreme Court I had been one of two law clerks serving Justice Hugo L. Black. I was friendly with Douglas' then-walking companion, soon to become his second wife: Mercedes Davidson. I'd gotten to know Mercedes while she worked as a research assistant in Justice Douglas' chambers. Now the day of their marriage was looming and she made it clear that she would have far too many duties to continue the very long Sunday walks. A substitute was required, and Mercedes thought I might be the right fit.

The Justice liked to walk and talk. He preferred to walk with just one other person so that the conversation could be focused. It was important that his walking partner, in addition to being a very good listener and occasional good talker, possess absolute discretion and absolute trustworthiness. Readiness to abide by the Justice's punctilious ritual must be beyond question. An ability to connect with a notoriously suspicious, impatient, and at the same time remarkably visionary man, was a requisite. I had been Justice Hugo L. Black's law clerk for a year, during which I lived in his home, so Justice Douglas' best friend and most trusted colleague on the Court had found me reliable and worthy of confidence. Furthermore, I was employed at Arnold, Fortas and Porter, where two of the senior partners, Thurman Arnold and Abe Fortas, were Douglas's former colleagues and still close friends. He also knew that I intended to return to Yale Law School as a faculty member and teach subjects that we would be discussing, and therefore could be an asset to him, someone who might be able to perpetuate his ideas in the academic world. He hoped I would be a person who understood his views on constitutional law as clearly as possible and would be able to give an accurate interpretation of those views, whether I agreed with them or not.

Beyond these qualifications Mercedes advised me that the only requirement was to "keep up."

I lived alone in an apartment house on Connecticut Ave., not far from where the Justice lived. One Sunday morning, very early, the phone rang and it was Douglas' unmistakable voice. "Want to go for a walk, Charlie?" he asked. "Yes, Mr. Justice," I said. "Can you be

ready at nine?" he asked. And, of course, my answer was yes. With Mercedes as the driver, we were off on our first expedition.

* * *

Along a 185-mile stretch of the Potomac River a barge canal had been constructed as a form of transportation from the Appalachians to Washington, D.C. at the terminus of the river. The barges were drawn by mules or horses, which walked along a towpath that accompanied the canal. There was a series of locks where the canal descended a few feet to accompany the flow of the nearby river. Long after the commercial use of the barge canal had ceased, the towpath remained as a place enjoyed by hikers who made recreational use of what had formerly been an avenue of commerce.

In the year that I first began my clerkship with Justice Black, the towpath was threatened by proposals to build a highway along its length. Justice Douglas wrote a letter to *The Washington Post* opposing the highway and challenging the editors to see the length and beauty of the towpath by walking the 185-mile length. The event actually happened in the spring of 1954 and became a major event with boy scouts, bagpipers, reporters, photographers, and daily stories on the front page of the *Post*. Justice Black read these stories aloud at the breakfast table with wry commentary.[1] In the end, the highway project was abandoned. The entire length was preserved for the hikers and there is now a plaque honoring Douglas there. This is where we walked.

* * *

Our first hike proved that Mercedes' intuitions about me had been correct. For the next five years that I lived and worked in Washington, D.C., between October and June, Justice Douglas and I took as many Sunday walks as possible on the towpath. I would meet Justice Douglas in front of his home and we would drive to whatever parking spot he chose, from wherever we would begin our hike. Sometimes Mercedes met us in a specified parking area and sometimes a different arrangement was devised if Justice Douglas and I drove ourselves, but our expeditions always went like clockwork.

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[1] The Washington Post published the letter on January 19, 1954. *See Justice Douglas' Famous Hike,* NATIONAL PARK SERVICE, https://www.nps.gov/choh/learn/historyculture/douglas-hike-of-1954.htm (Feb. 22, 2018). *See also* Donna St. George, *A Walk Down Memory Towpath*, WASH. POST (April 18, 1999), https://www.washingtonpost.com/archive/local/1999/04/18/a-walk-down-memory-towpath/79530f11-e003-406c-a40e-b3ebfc4c8d95/.

The towpath was wide enough for two to walk comfortably abreast. We always walked downstream, most often looking straight ahead as we walked in the direction of Washington, D.C. Douglas invariably walked on the side closer to the river and I walked close to the canal. Our average was sixteen miles, although I can remember both a record-breaking twenty-three miles and a more hurried ten miles. We both carried water canteens and Justice Douglas often had his camera slung around his neck as well.

Once the Justice began walking, his stride never varied regardless of the number of hours agreed upon. Despite his nonstop ethic, an unusual bird might necessitate an interruption, as Douglas whipped out his binoculars for a closer look. Mercedes gave each of us a delicious sandwich for lunch, and we took a momentary break to eat. Once in a while another hiker recognized him and asked to take a photograph, another momentary pause. Otherwise we kept up a brisk pace, steady and vigorous enough for a young man who had always liked walking. Once in a while we arrived at an arranged rendezvous early. "Mercy has forgotten all about us," or "She's in contempt of court," the Judge would invariably say, even though she was just as predictably pulling in to the lot.

A major element of Justice Douglas' makeup was impatience. According to his beleaguered law clerk, Douglas could never relax for a second. On the trail he did not like to wait for anybody. If a hiking partner decided to stop, the Justice would continue on, seemingly oblivious. One day his visiting older sister Martha joined our walk. He seemed pleased to have her along, but never noticed when she sat down on a log to rest. Her brother continued to stride ahead. "What can I do?" I asked Martha. "Hurry and catch up with him," she told me. "I'll find my way back. Orville thinks he's taking me for a walk. He doesn't realize that I can't keep going. Hurry up now. I'm sure he wants to talk." Another Sunday morning Justice Douglas was driving to our starting place when he remarked, "Dave Bazelon is going to join us. We're meeting at the Great Falls parking lot at 9am." Judge David Bazelon was a prominent, much-respected member of the U.S. Court of Appeals. I looked forward to meeting the famous judge, a Yale Law School hero. We arrived fifteen minutes early. At nine o'clock Justice Douglas quickly surveyed the parking lot. No Judge Bazelon. "I guess Dave decided not to come," he said. "Let's go." Without waiting a minute past nine, off we went.

Our hikes would always start as soon as the Judge looked at his watch and announced the starting time. It was never difficult to get a conversation going. Douglas was full of things he wanted to talk about. At the same time, I decided I had better think carefully about what I might talk about—I should have something worthwhile to say and raise questions that he would find deserving a discussion. Because I was particularly interested in his legal views, I asked about constitutional philosophy whenever I had the chance. It would require tact but I found ways to ask him about preceding cases in which he had participated. Whenever I could, I would bring up that most contentious of issues—how does the Court reach its decisions? The Supreme Court's continuing mystery is the unknown and perhaps unknowable process by which cases are actually decided.

While I felt the need to be on the intellectual alert at all times, I took no notes and kept no notebook. (In fact, writing anything down would have felt like a betrayal of confidence.) I was satisfied being primarily an active, interested listener, and believed that my role resembled that of a very fortunate law clerk who does none of the hard work at the office but spends the best quality time with the Justice—when he is thinking. And like my favorite fictional detectives, Justice Douglas was fond of thinking aloud. He seemed always to be processing new information. He would say things you never heard anyone else say. Rarely, if ever, did he repeat himself.

Soon I knew all of his favorite subjects, as well as those that were off limits. Since I was no longer a law clerk, anything pending before the Court was off limits, but not cases already decided. If he brought up one of his colleagues, I was eager to listen, but I never took the liberty of bringing other Justices into our conversations. My instinct was one of caution: avoid questions that might be over the line or presumptuous. My thinking was based on what I guessed about his thinking. Anything personal was off limits. His family—Mercedes and her two children—was off limits. Though his current law clerk was off limits, previous law clerks were not. My life was off limits. Aching feet were off limits. This was part of the unspoken protocol of our walks. We got along well.

When the hike was over, various things might happen. I might wave goodbye and jump into my car. I might be asked to come in for a drink if we had ended our trip at the house. Sometimes there was a guest waiting whom Douglas wanted me to meet. Sometimes he had

blisters and demanded a hot tub furnished by Mercedes, while he complained about shoe manufacturers. Once after a long hike, when they were still living at their Connecticut Ave. apartment, Douglas looked at me and said, "Why don't you stay for dinner? You'll enjoy it." The guests crowding around the small kitchen table included Lyndon and Lady Bird Johnson and Speaker Sam Rayburn. The bourbon was passed for the Speaker; Johnson, loud and funny, did most of the talking; Douglas looked at home; Mercedes was having fun; and I felt lucky to be there.

* * *

Justice Douglas could be a spellbinder. He'd been a brilliant young law professor at Yale, then an intimate of FDR and the Kennedy patriarch Joseph P. and his family; served as the Chairman of the Securities and Exchange Commission from 1937-1939; then vaulted to the Supreme Court at the age of forty, at that time one of the youngest justices to ever be appointed, determined to honor the seat of his revered predecessor, Justice Louis D. Brandeis. Douglas became the most important advocate of bringing the concept of liberty into the world of the twentieth century and a pioneer ecological prophet who was keenly interested in the use and misuse of natural resources. He had the common touch so that he talked to local people along the canal, but he also had ready access to Shahs, Emirs, and Prime Ministers. A dedicated traveler, he became a superb observer of the world as a whole. He authored more than thirty books on mountains, travel, liberty, freedom of the mind, including *An Almanac of Liberty*, an utterly one-of-a-kind book containing a brief entry on the subject of liberty on every calendar page—often a historical incident, sometimes a key legislative act or Court decision.[2]

He was a paradoxical combination of a very social person on familiar terms with every important figure in Washington, D.C., instantly recognizable around town and on the trail, happy to be stopped for a photograph on our otherwise unstoppable hikes—and an aloof man, close to few, if any, individuals, mentally remote, inscrutable, lost in his own thoughts, who frequently had little patience for any other human being.

A stern judicial figure in his robes, snapping his fingers at one of the four page boys in dark suits who stood behind the chairs of the Justices whenever they were in session, Justice Douglas will be remembered for something of far greater consequence: he is the only

[2] *See* WILLIAM O. DOUGLAS, AN ALMANAC OF LIBERTY (1954).

justice in the Court's history to invent, propose and then successfully persuade the Court to formally recognize a new and controversial constitutional right—privacy. Privacy became a critically important right, the subject of cases every Term, even though a "right of privacy," unlike other rights, has no textual basis. This monumental achievement took him more than a decade to gain the agreement of the majority of his colleagues, but he finally prevailed. In doing so, he left future law students to puzzle over two mysterious, powerful, non-legal words—"emanations" and "penumbras"—never before used in constitutional law, which indicated the future possibilities of the constitutional word "liberty."[3]

He also was an early environmentalist, the first national figure to believe in and place a focus on man-made threats to nature, the first and only Justice to advocate constitutional representation and protection for animals and other living elements of the environment. He believed that the degradation of the environment is a threat to "life" as guaranteed by the Constitution.[4]

There were two aspects of how he approached his work that stood out immediately: (1) He saw himself as an independent observer learning the facts about society, not just to be familiar with the law. His curiosity about the world was, for him, not just a key element of his job but was *how he did his job*; and (2) He was concerned with every exercise of governmental power, wherever it took place—in a remote part of the world, behind prison bars, or in institutional settings called "private."

We continued as hiking partners for more than fifteen years, covering the time when Justice Douglas successfully created the right of privacy and unsuccessfully fought for wilderness voices to be heard on the Supreme Court. If he had a famously difficult personality, I rarely saw it. I saw a man who was largely free of ideology, but loved liberty and hated lawless power.

* * *

Fate played an exceptionally powerful and not altogether friendly role in the life of Justice Douglas. His father, a protestant minister, died when he was six years old, leaving his mother to raise three children on her own in Yakama, Washington, in circumstances of dire poverty. Douglas, who was born in 1898, married Mildred, a girl from his local high school, and together they had two children,

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[3] Griswold v. Connecticut, 381 U.S. 479 (1965).

[4] *See, e.g.,* Sierra Club v. Morton, 405 U.S. 727 (1972) (Douglas, J., dissenting).

Millie and Bill. By the end of the 1920s the family had relocated from the Pacific Northwest so that Douglas could join the Yale Law School faculty. Millie and the children loved small town life in New Haven, and Douglas quickly became a prominent authority on corporate finance.

By 1934, their stay in New Haven was over and they had moved to Washington, D.C. Douglas began a quick rise in the Securities and Exchange Commission, becoming its chairman and an important figure in Washington in the space of just a few years. Then, in 1939, when Douglas was forty years old, he was summoned to the White House by FDR.

In the Oval Office, FDR said, "I've got a new assignment for you." "Yes, Mr. President," said Douglas. "I'm putting you on the Supreme Court," the President said.

FDR had gone out of his way to pick the youngest man he could find and perhaps the man most likely to anger the old guard in Washington. While there was good reason to appoint Douglas because of his brilliance as a jurisprudential thinker, and FDR knew he would be loyal to the New Deal, Douglas had to say yes right there and then to a lifetime job that was utterly unsuited to his character and personality.

Douglas had made his reputation as a man of action on the SEC and at Yale. Suddenly he was put in a job where he would be forced to listen to others for four hours a day, during what would tally thirty-six years. It is hard to imagine a more unsuitable job for an active man who had never in his life shown any interest in sitting behind the Bench listening to others. I eventually learned that as extraordinary a person as he was, as exciting a life as he led, he also was unmistakably a sad man.

* * *

Justice Douglas was appointed in April 1939, when I was almost eleven years old. An avid listener to the radio news and an equally avid lover of hiking in the Adirondack wilderness, I was excited that a wilderness lover and mountaineer, as he was described on the news, had been appointed to the Supreme Court. A newspaper photo showed him with his feet up on his desk and a grin on his face. While this did not seem in keeping with the dignity expected of a Supreme Court justice, I liked what I saw and from then on I followed his career and looked for newspaper stories about him.

While I was at Oberlin College, beginning in the spring of 1946, Justice Douglas became important to me in a new way: his opposition to President Truman's loyalty program directed against government employees, their political speech and associations.[5] After Truman became President, civil liberty became a matter of great concern in a postwar, anti-Communist America, and I saw that Justice Douglas was consistently on the side of liberty. I thought of Douglas as the leader of those trying to hold the line against hysteria and repression.

In the spring of 1948, when I was twenty years old, part of me wanted to be a history professor, but there was a strong pull toward applying to Yale Law School—a pull that was strengthened by my knowledge that Justice Douglas had been a leading faculty member there. I felt very fortunate when I was accepted as a first-year student for the fall of 1949. I was interested in law because I was interested in human society and how it worked. I came from a medical family and retained a special regard for diagnosis. Diagnosing the ills of society is what I imagined doing, and I believed Yale Law School would be the best place to begin such a study.

First-year students lived in the dormitory section of the Sterling Law Building and had breakfast in the cafeteria. Dean Wesley Sturges was always at a small table there with his coffee and newspaper. One day early in the term I saw Dean Sturges looking at the front page of *The New York Times* with an unmistakable expression of gravity and dismay. I quickly opened my own copy and saw the stark headline: "Justice Injured."[6] Justice Douglas had been seriously injured when his horse slipped and fell on a steep mountain trail in the Cascade Mountains. A long recovery was predicted before he could return to the Court. (I later learned that this enforced idleness had started him writing books—his first was *Of Men and Mountains*—because he couldn't stand sitting around in the hospital.[7] Once he started he never stopped. After his accident and during his remaining years on the Court, he wrote book after book—nonstop, like his Sunday walks.)

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[5] President Truman signed the Loyalty Order on March 21, 1947. *See* Exec. Order No. 9835, 12 Fed. Reg. 1935 (1947).

[6] *See Justice Douglas Injured in 20-Foot Mountain* Fall, GEN DISASTERS, http://www.gendisasters.com/washington/5326/yakima-wa-justice-douglas-injured-in-fall-horse-oct-1949.

[7] *See* WILLIAM O. DOUGLAS, OF MEN AND MOUNTAINS (1950).

As law school continued, the opinions of Justice Douglas were read in nearly every class and casebook and gave me ample food for thought. We heard more about Justice Douglas in Constitutional Law (taught by Professor Thomas I. Emerson) and Taxation I, where Professor Fred Rodell managed to talk mostly about Justices Douglas and Felix Frankfurter.

In my second and third years, the *Law Journal* was my main occupation and a Comment being written by my classmate Warren Saltzman became the focus of everyone's attention.[8] The subject of the Saltzman Comment was the State Department's practice of denying passports to people who were considered left-wingers, such as Paul Robeson, the great singer and actor. Sooner or later everyone on *The Yale Law Journal* became involved with the Saltzman Comment and the intriguing question of whether a passport is a right or a mere privilege that the State Department could deny. Together with Fred Rowe and Joseph Goldstein, I tried to find support for the theory that a passport is a right that cannot be arbitrarily denied, and once again Justice Douglas entered the picture. His opinions gave us our best arguments. Years later I was thrilled when the Supreme Court upheld Warren Saltzman's view in *Kent v. Dulles*.[9]

Time passed and in August 1953 I began my clerkship for Justice Black. None of the justices were in town when I first started work, but then Chief Justice Vinson suddenly died and all the law clerks went in a group to the funeral at the National Cathedral. We were all sitting in a reserved section near the front when the members of the Court marched in together down the center aisle and I got my first sighting of Justice Douglas, looking in complexion and demeanor as if he had just emerged from the mountains.

Following that glimpse I began seeing Justice Douglas up close as he sat in his place on the Bench of the Supreme Court. The law clerks sat very close to the Bench on the right-hand side and since Justice Douglas also sat on the right side we could see him very clearly. While most of the other justices sat back in their chairs during argument, listening to the lawyer standing at the rostrum, Justice Douglas appeared to be immersed in other matters, writing furiously, with a pile of papers and books in front of him. He kept the four page boys busy running errands, signaling to them with a flick of his hand when he

[8] Comment, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L. J. 171 (1952).

[9] Kent v. Dulles, 357 U.S. 116, 117 (1958).

wanted a book or other materials, and handing them papers to be taken back to his office. Not only was he writing, he seemed to be addressing envelopes, stuffing messages into them and, I imagined, pasting on stamps.

But it would be a great mistake to assume he was not paying attention. Without any warning he would lean forward, look over his glasses at the lawyer who was arguing the case, and ask a sharply-worded law professor's question that showed that Douglas knew exactly what the case was about. And if the lawyer stumbled and stammered in reply, Justice Douglas would resume his other tasks, a serious multi-tasker before that term was invented.

At the same time, all the law clerks heard tales of how Justice Douglas demanded that his own law clerk must work endless hours. Douglas insisted on hiring only one, who did the work of two in every other office. His notoriously hard treatment of his clerks became a well-known Bill Douglas conundrum. They were selected by a surrogate, they always came from the West, and after their appointment were treated badly—so badly that it was known all over the Court. But once their year was over, Douglas would help them whenever he could. His frigidity was due to proximity—so a psychiatrist might say.

Justice Black's grown children did not want him living alone (his wife had died a year earlier) and so he asked his law clerks to live with him in his old and beautiful house in Alexandria. Whenever there was a guest for dinner, my co-clerk David Vann and I were present. And one day in the fall of 1953, Justice Black casually announced that, "Bill Douglas will be coming for dinner tonight." And David and I were to be there! I was actually going to meet him at dinner! And he was to be the sole guest! Douglas arrived alone, driving his own car—no bodyguard, no chauffeur—and I was sent downstairs to open the door and usher him upstairs, where Justice Black received his guests. It was an exciting moment. David and I sat quietly and watched the two justices exchange greetings.

After dinner Justice Black led us back upstairs to his study, arranged with a massive wall of books looking historic and formidable contrasting with another wall featuring signed photographs of persons of great dignity and fame, including one affectionately inscribed "From Bill to Hugo." Justice Black sat in his swivel chair behind the desk, folded his hands carefully to indicate that we should all sit, and then leaned back, ready to listen, the same way he reclined behind the

bench in Court. Justice Douglas settled into the chair in the study reserved for guests.

Justice Black was a patriarchal figure who seemed much older than Douglas than Black really was, while Douglas had a youthfulness that never left him, even in old age. He was very fond of Black, his closest ally on civil liberties, and often looked to him for leadership. In turn, nobody was a greater admirer of Justice Douglas than Justice Black. "Bill's a genius," I heard him say many times. By observing Justice Black carefully that evening I learned how to best spend an evening with Douglas, J.: give him a drink, feed him a good steak, then sit back and let him do the talking.

Black smiled and started. "Well, Bill . . . ." And for the rest of the evening Justice Black was Listener-in-Chief, and David and I were Assistant Listeners. Justice Douglas talked about one fascinating thing after another—the Court, other justices, politics, his academic friends from the days when Hutchins was the Dean of Yale Law School, and especially his travels to other countries—what he had seen, what was happening there. Justice Black, as well as David and I, would ask an encouraging question once in a while. That's all it took. At about 10 P.M. Justice Black muttered something about his bedtime, and Justice Douglas put on his cowboy hat, said good night, stomped downstairs and roared off in his Oldsmobile. David and I were left to sit up, going over all the amazing things we had heard.

One day in the spring of 1954 Justice Black picked up the phone and said, "Bill, I'm sending my law clerk down the hall with my *Barsky* dissent."[10] I had taken a special interest in the case ever since it had arrived at the Court and there were many intense discussions with David and Justice Black concerning *Barsky*. Ultimately the case was so important to me that I wrote more than one law review article on the issues that it raised. "The New Property" is one example of an article based on *Barsky*—or rather, on Douglas' dissent in *Barsky*.[11]

The case involved a New York physician whose license to practice medicine was revoked for six months—not because of anything connected with his practice, but because Dr. Barsky had been found in contempt of the House Un-American Activities Committee, which was investigating his political affiliations.[12]

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[10] Barsky v. Bd. of Regents of Univ. of N.Y., 347 U.S. 442, 456 (1954) (Black, J., dissenting).

[11] Charles A. Reich, *The New Property*, 73 YALE L. J. 733 (1964).

[12] *See Barsky,* 347 U.S. at 444.

The *Barsky* case suggested the urgent need for a constitutional right to work and that is what I hoped Justice Black would say in his dissent. But Justice Black resisted the idea of a right to work and refused to base his dissent on any such nontextual reading of the Constitution. He was still determined to dissent and ultimately found other grounds. When a draft was finally ready we received copies from the printer. Justice Black sent me down the hall with a copy to see if Justice Douglas would concur in the dissent.

I found Douglas and handed him the dissent, and while he was reading I looked around the office, filled with spectacular photographs from all over the world as well as of the Cascade Mountains. Justice Douglas finished reading and, instead of saying anything, he handed me something to read. He had written his own dissent.[13]

It was just seven paragraphs long but it unequivocally insisted on the existence of a constitutional right to work.[14] Indeed, Justice Douglas paid such eloquent tribute to the importance of work that he can still be quoted today. "The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property."[15]

Justice Douglas then quoted Emerson from his Essay on Politics—"A man has a right to be employed, to be trusted, to be loved, to be revered"—before continuing: "It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb."[16]

In their dissents, Douglas and Black approached the interrogation of Dr. Barsky in distinctly different ways. Considering how different the two dissents were, I wondered if they might conflict with each other. Justice Douglas met my worried look with a grin. For a few minutes, he became a professor of law again, and we talked about the two dissimilar dissenting opinions. Justice Douglas said he would concur with Justice Black's dissent, and he would be happy if Justice Black would concur with his dissent. I stood up to leave. "I like hiking," I said, opened the door and exited before Justice Douglas had time to reply.

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[13] *Id.* at 472.
[14] *Id.*
[15] *Id.*
[16] *Id.*

When I got back to my own office, I brought the Douglas opinion with me and Justice Black read it quickly. He picked up the phone and said, "Bill, I am concurring with your dissent." I remember being totally amazed and stupefied. How could he concur with a dissent that said precisely what he refused to say himself? Of all my moments of insight about the Supreme Court, this moment stands out as most revealing.

* * *

On our hikes there was a wide range of subjects that interested him unfailingly, and I quickly discovered that Justice Douglas had an astonishing ability to pick up facts wherever he was on whatever subject interested him. As his many books about foreign countries attest, he was constantly learning facts about the places he visited, particularly ecological and economic needs. And he presented facts in a way that was vivid and understandable. His memory was extraordinary. He could provide details about the places and people he visited just as he could supply cases from the Court's own history in support or opposition to his views. On every hike there was at least one lengthy description drawn from his travels in Asia. In 1955 he was following the battle for leadership in Iran. I first heard the name of Prime Minister Mohammad Mosaddegh from Justice Douglas on one of our hikes. He considered Mosaddegh a progressive force in Iran and was deeply critical of American efforts to oust the prime minister and replace him with the Shah.

There were topics off limits for official reasons: cases pending before the Court and matters of business at my law firm. He always wanted to mention something about what happened in conference but we both understood that he couldn't say too much. He would, however, allow that the brethren had endured a singularly long and scholarly lecture by Justice Felix Frankfurter, after which he would turn one of his rare glances in my direction and grin, "I don't complain."

The Court had heard employee loyalty cases before our walks began so it was okay to discuss them. These cases brought out the side of Justice Douglas that I most admired: his genuine, unflinching defense of personal liberty as the most important of all American values. President Truman's executive order established a Loyalty Program targeting employees of the government suspected as being disloyal.[17] This outrageous, arbitrary decision-making caught in its net some dis-

[17] S*upra* note 5.

tinguished figures that only the bravest Washington lawyers were willing to defend. Douglas soon made a reputation as one of Washington's most determined opponents of the President's Loyalty Program and one who frequently expressed his outrage in decisions rendered by the Court.

Some of his favorite topics were people he knew. Each week Douglas had little or nothing to say about most of his eight colleagues but some recent anecdote about "Felix" was practically guaranteed. Surely Justice Frankfurter and Justice Douglas were put on the planet for the sole purpose of annoying each other. There was virtually no subject, big or small, that came before the Court on which they did not heatedly disagree. It mattered little whether the subject was procedural or substantive, federal or state, common law or statutory law, New Deal regulations or old frontier treaties—if these two could find a way to drive each other crazy, they would and they did.

The backgrounds of the two justices differed greatly. Douglas was a preacher's son determined to succeed on his own. Frankfurter, born in Austria, dazzled Harvard Law School with his intellect and addressed his opinions to an audience of legal scholars, whereas Douglas addressed his opinions to what he imagined to be an audience of fellow citizens. Their perpetual bickering was a subject Douglas raised at some point on every hike. Frankfurter was a born combatant. He sought intellectual battle wherever he could find it—including any stray law clerk that came his way. Both Douglas and Frankfurter were former law professors, competitive in the way that law professors are competitive, whose careers required skill at argument and who were expected to have ideas, influence, and it is hoped, a lasting impact on the law. Both were very politically connected and intimates of the high and mighty, including FDR, to whom Frankfurter gave learned counsel and, rumor had it, Douglas offered outrageous, scatological stories. On the same bench they were bound to clash.

But I do not believe the stories that these two hated each other, or that they were such great ideological opponents. There wasn't hatred; there was irritation. They were like two faculty members who had learned the most elegant ways to taunt each other and had been at it for decades. What I observed was two people gifted with the ability to annoy each other successfully—and Felix certainly exerted his privileges to the utmost. I actually enjoyed listening to the endless good-humored complaints about Frankfurter. One day Douglas said that in

conference they were discussing whether they should install microphones because the acoustics were so bad in the courtroom. He turned and looked at me and said, "I told Felix he already had a microphone built in." Then he grinned his grin.

If Justice Douglas were to be believed, FF, as we clerks spoke of him, talked to the other justices in conference as if they were first-year law students. This was particularly galling to Justice Douglas, who had been Sterling Professor of Law at Yale Law School. (In comparison, Justice Black apparently took it all with post-senatorial calm.) One day Felix had lectured the conference for what seemed like half an hour. "I took out my letter writing paper," Douglas told me.

At this time there was a very real rivalry and jurisprudential difference between Harvard Law School and Yale Law School, and in consequence both of the sparring justices were sure to have followers—followers in academia even more outspoken than those they were defending.

I had recently been a student at the law school for three years and I continued to have many contacts with the school after I graduated. I found it easy to talk with him about the law school's strengths and deficiencies. He wanted to know about the faculty, what they taught, who was denied tenure and why, what the students were like, and if there were any true rebels carrying forth the banner of legal realism. He wanted to know about his critics and what they were saying. He wanted to know if Yale was awakening to the need for a course in environmental law. He wanted to know if there were still some professors who kept the students on their toes.

One aspect of my personal life in which Justice Douglas *did* take an interest was the prospect of my teaching at Yale Law School. For a while he expressed doubts about whether I would thrive there. In the first place, he felt that Yale's Dean, Eugene V. Rostow, was intent upon "Harvardizing" the Yale Law School. To Douglas, this meant that the school would welcome more conventional teachers and treat with disdain teachers inclined to rock the boat. Justice Douglas believed that were I to stand by my principles my position there could be jeopardized. This warning troubled me greatly.

At the time of our conversations, Yale was in the process of denying tenure to three one-time Supreme Court law clerks, including Vern Countryman, who had served Douglas as a law clerk and was one of my most esteemed teachers. The second was a former Black law clerk, John P. Frank. And the third, John Thompson, had clerked for

the Chief Justice. Why were they being let go? Nobody doubted their brilliance. Countryman was a remarkably fine teacher, as I can personally testify, and he ended up with a long and distinguished career at Harvard. Why was he unwelcome as a permanent faculty member at Yale? Knowing that I visited New Haven regularly, Justice Douglas asked me to see Dean Harry Shulman and tell him that Justice Douglas was very concerned over the treatment of Countryman. I undertook this and learned that the faculty had voted to promote Countryman, but President A. Whitney Griswold refused to support his permanent employment. I reported back to no avail.

For several years Douglas was highly critical of Yale Law School and unenthusiastic about my joining the faculty. Then he did an about-face. He changed his mind and urged me to accept a position at Yale. Though he warned that I could face considerable difficulty, he believed I could be successful, and added a battle cry: I should help to "seize the ramparts." There were causes that needed an advocate, and issues that needed to be brought to the attention of the next generation.

There was usually some news of the day that brought up the subject of someone Douglas knew well—sometimes an individual we both knew such as Thurman Arnold. Arnold, a fellow westerner, was a favorite topic of Douglas'. He loved to recall stories about Arnold and was always glad to hear anything new. I knew Arnold as the senior partner at my law firm; Douglas knew Arnold as a member of the same faculty at Yale Law School. Arnold the man, both past and present, was a continuing source of fascination and pleasure to Douglas. He thought that Arnold had the best mind of any legal thinker he knew. Arnold embodied qualities that Douglas admired but could rarely emulate. Arnold was outrageous and flamboyant. Arnold was spontaneously funny. Arnold was debonair. Arnold was an intellectual leader of the pack.

A second name that always brought a response was Justice Louis Brandeis, whose seat on the Supreme Court Douglas succeeded to and who remained a hero and intellectual role model. Brandeis was a fighter—the real thing—not one to limit his battles to the faculty lounge. He spoke of Brandeis frequently, and always with the greatest respect. He often mentioned that Brandeis was a friend of the wilderness as well as a friend of liberty. In any case involving civil liberties one can detect the Brandeis spirit in Douglas.

Justice Black was another of Douglas' heroes. The difference in age was not that great. The difference in how far they had come was not that great. But Black possessed a kind of dignity that Douglas did not quite attain.

Another guaranteed subject might be a most recent failure of the Forest Service to respond to an ecological emergency. Justice Douglas, already nationally known as a noteworthy environmentalist, had a perpetual quarrel with the Forest Service over what he believed to be its failure to understand the value of untouched wilderness. He thought bureaucracy was the worst possible form of nature-management.

After we exhausted the other regular subjects the talk would turn to law. Justice Douglas might bring up something that was bothering him and was part of the constitutional work of the Court. Excluding pending cases, there were many issues that came before the Court again and again, and therefore invited discussion. The first case that we discussed on the towpath remains the most vivid in my mind: the *Rosenberg* case.[18] It had all happened not so long before our towpath hikes began, in the spring of 1953. On at least two occasions when the Rosenbergs' lawyers sought to petition for review, Douglas had voted no and the Supreme Court had never been able to review the case.[19] But at the last minute before the execution date, and while Justice Douglas was preparing to leave town for the West, lawyers not previously connected to the case sought to petition the Court for a stay of execution on the ground that a legal error had been made, unrecognized by the Rosenbergs' previous lawyers or anyone else. The members of the Supreme Court were preparing to leave for their three month summer holiday when new lawyers, carrying a new petition, sought to find one justice who would listen to this irregular plea. Eight refused. Justice Black gave orders that no one should answer his doorbell in Alexandria. But Justice Douglas, though eager to leave town, said he would take a look at the petition. This is where his story began.

He told me that initially he did not want to hear it, he did not like the case, he detested Communists and spies, but finally he could not help but listen and take a look at the petition. (Despite my curiosity,

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[18] Rosenberg v. United States, 346 U.S. 273 (1953).

[19] United States v. Rosenberg, 195 F.2d 583 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952), *and rehearing denied*, 344 U.S. 889 (1952). For a more detailed discussion of Justice Douglas' votes in the Rosenberg case, see William Cohen, *Justice Douglas and the Rosenberg Case: Setting the Record Straight*, 70 Cornell L. Rev. 211 (1985).

I never asked him why he had twice failed to vote for certiorari in the *Rosenberg* case. He never explained his previous negative votes, to me or to anyone else.) The new lawyers' point was simple: the death sentence was in violation of the statute governing atomic energy, which required a jury recommendation. There was no such recommendation in this case.

The moment Justice Douglas got the point—and he was a very quick study—everything changed. He postponed his travel plans. His own clerk having departed for the summer, he borrowed Buddy Cleveland, a clerk from Justice Black's office, and together they engaged in a fury of research. They looked everywhere for cases resolved one way or the other. They worked at a frantic pace for two days, looking at statutes, reading and reading. They concluded that the new petition was correct, the executions would be unlawful, and a stay should be granted until the full Court could consider the case in the fall. Douglas, as is the privilege of all justices, issued a stay, then jumped in his car and left town.[20]

Driving alone, he stopped at a motel in Pennsylvania, and turned on an early version of television. To his amazement, the Court had been called back into totally unprecedented special session in order to overturn the stay. Apparently, this action was at President Eisenhower's behest. No one seemed to understand that an entirely new issue had been raised—an issue never recognized by the Rosenbergs' original lawyers, and never considered when the original petitions for certiorari were denied. Justice Douglas knew he would be wrongly accused of inconsistency. He knew he would be accused of grandstanding. He wanted it known that he had been right on the law, and that the Court, in a rush to execution, had never taken the time to study the newly raised issue. Justice Douglas was still furious about this. His normally ruddy face turned red with anger as he recounted his colleagues' failure to do their job.

The story continued. Douglas packed his bags and rushed back to Washington, appearing on the bench for suddenly scheduled arguments for which the lawyers on both sides, having had only a few hours notice, were embarrassingly unprepared. But the Court was not unprepared. Chief Justice Vinson had assured the President that the stay would be reversed. By a six-to-three vote it ordered the immediate

[20] *Rosenberg*, 346 U.S. at 277, 282–84. *See also id.* at 310–13 (Douglas, J., dissenting).

execution of the Rosenbergs.[21] In fact, they were executed that very night. Opinions were withheld until later. Justice Black dissented on the ground that Douglas' stay was valid and should have been upheld.[22] Justice Frankfurter supplied the third, and profoundly moving, dissent.[23] Much as he might find his Brother Douglas a difficult colleague, a valid stay had been issued and the Court overturned it without due study and deliberation. Because, in Frankfurter's memorable phrase, "History also has its claims," he would uphold the stay that Douglas had granted.[24] All those who would prefer a Frankfurter-Douglas feud should note his impassioned support for his colleague's actions.

I felt certain that Justice Douglas knew that his original negative votes would be held against him, and that he needed to explain how the events of the case had unfolded. From his account, I could see how much Douglas cared about the verdict of history, and how outraged he could be at his colleagues and their indifference.

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In our second season of walk-and-talks Justice Douglas said he would be giving a lecture in the spring on the subject of privacy and would welcome my help. Thereafter the "talk" part of our walk-and-talk became as important as the "walk" part, and during other days of the week I often found myself thinking about next Sunday's walk-and-talk. In this sense I found walking with the Justice to fill my thoughts all week.

Each year the Court received petitions for a variety of privacy issues, but as yet no clear-cut doctrine on privacy had been formulated. When "the right to be let alone" became a major subject of our conversations I had a good starting point. Just three years earlier, Justice Douglas had written a lone dissent in the so-called captive audience case, *Public Utilities Comm'n v. Pollak*.[25]

The story behind the right of privacy tells a great deal about how constitutional law evolves and how one Justice can contribute to that evolution. All of the circumstances and personalities around the creation of a constitutional right of privacy were unique. There is of course no right of privacy to be found in the Constitution or the Bill of

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[21] *Rosenberg*, 346 U.S. at 288, 289.
[22] *Rosenberg*, 346 U.S. at 296 (Black, J., dissenting).
[23] *Rosenberg*, 346 U.S. at 301 (Frankfurter, J., dissenting).
[24] *Id.* at 310.
[25] Pub. Util. Comm'n of D.C. v. Pollak, 343 U.S. 451, 467 (1952).

Rights or in any amendments. The word privacy does not appear anywhere in the Constitution. But the world keeps changing. The framers could not have imagined that someday there would be such a thing as a "public transportation system" and that using that system might become essential to many peoples' livelihood. Nor could the framers have imagined the development of broadcasting, so that sound could be transmitted, amplified, and directed far from its point of origin. Here the two developments—essential public transportation and the ability to broadcast sound—unexpectedly met on the streets of Washington, D.C. The riders were forced to listen to music or talk coming from a loudspeaker as they rode. There was no escaping the sound. Most riders did not object, but a few objected so strongly that they brought a case against the Public Utilities Commission of the District of Columbia, asking the District Court to stop the noise.[26]

The lower court judge sided with the majority of the passengers and the Public Utilities Commission, on the ground that "no legal right of the petitioners . . . has been invaded."[27] But the objectors pursued their case to an appeal. The panel that heard the *Pollak et al.* appeal consisted of three of the most remarkable federal judges to be found anywhere.[28] They were: first, Chief Judge Henry W. Edgerton, a widely respected and scholarly judge who had once been a law professor; the second judge was David L. Bazelon, one of the best known judicial reformers and thinkers in the United States, a judge whose opinions were studied in every law school; and the third member of the panel was Judge Charles Fahy, a prominent liberal New Dealer.

This panel did what perhaps no other panel would have done—it unanimously voted in favor of *Pollak et al.*, and Chief Judge Edgerton wrote the opinion. He was eloquent, describing "forced listening" as a genuine invasion of a person's rights:

> Until radio was developed and someone realized that the passengers of a transportation monopoly are a captive audience, there was no profitable way of forcing people to listen while they travel between home and work or on necessary errands. Exploitation of this audience through assault on the unavertible sense of hearing

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[26] *Id.* at 453.

[27] *Id.* at 454.

[28] Pollak v. Pub. Util. Comm'n of D.C., 191 F.2d 450, 453 (D.C. Cir. 1951), *rev'd*, 343 U.S. 451 (1952).

> is a new phenomenon . . . But the Bill of Rights, as appellants say in their brief, can keep up with anything an advertising man or an electronics engineer can think of . . . Freedom of attention, which forced listening destroys, is a part of liberty essential to individuals and to society.[29]

Law students of today should take note of how Judge Edgerton uses the phrase "keep up" to describe the way in which the Constitution should be interpreted. He does this by attributing to the constitutional words themselves the ability to "keep up." "Liberty," for example, can keep up with every new threat. (Of course, it is the Court that does the work of "keeping up.")

In effect he declared that wherever Americans go, the constitutional word "liberty" accompanies them, and whatever we invent or create, however new, is still subject to the old word "liberty." This was indeed a splendid vision. But Judge Edgerton did not base his opinion upon any "right of privacy." In that way, he remained completely true to the text of the Constitution, where the word "liberty" *is* to be found more than once.

The Edgerton opinion, however, did not stand. The Supreme Court reversed and decided the case in favor of the Public Utilities Commission.[30] The majority opinion was assigned to Justice Burton, a former Mayor of Cleveland and United States Senator from Ohio who was not one of the Court's leading figures. He was a modest and gentle man and he wrote a modest opinion that said as little as possible and made as little precedent as possible. Thus there was no ringing majority endorsement of "forced listening." Thus the majority gave as little thought as possible to the implications of the case.

Justice Black foresaw that a day would come when there would be political ads to which passengers would be forced to listen. Black said that the majority opinion had failed to guarantee against such political use of the broadcast power in question.[31] Then Justice Frankfurter recused himself from the case.

Justices who recuse themselves are not required to give any explanation. In this case, however, Justice Frankfurter said he felt

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[29] *Id.* at 456.

[30] *Pollak*, 343 U.S. 451, 454 (1952).

[31] *Id.* at 466 (Black, J., concurring) (stating subjecting passengers to broadcasts of news and public speeches would violate the First Amendment).

obliged to give one. His explanation surprised the law clerks and other inhabitants of the Court building. I am "a victim of [the] practice," he wrote.[32] This statement perplexed everyone. A justice has a full-time driver assigned to him, who is always found in the outside office where the secretary works. It is inconceivable that Justice Frankfurter was ever required to take public transportation while he was a justice. Moreover, both of his own law clerks had their own cars parked in the garage downstairs and they were more than ready to take the justice anywhere he wished to go.

At the same time, everyone was familiar with a story found in the newspapers we had all seen that described the Washington celebrity duo of Justice Frankfurter and Dean Acheson regularly walking to work from their Georgetown residences all the way to Acheson's office at which point Frankfurter was picked up by a Court car that had been trailing them.[33] This famous walk of the very tall Secretary and the very short Justice was part of the Court's lore at the time. What made FF's recusal so uncanny was the well-known fact that the Justice did not use public transit. No doubt he used public transportation in his younger days, but at that time there was no forced listening.

Justice Frankfurter's puzzling recusal put Justice Douglas in the position of lone dissenter – and he seized the opportunity. Normally in a case like this there would be others whose views needed to be taken into consideration by the person writing a dissent. Douglas wrote a dissent that did not contain a single legal citation except for the mention of the Constitution. From beginning to end, the opinion was written to be understandable to anyone, including schoolchildren and privacy lovers of all ages. He proceeded to give a straightforward explanation of why privacy is essential to liberty. His words were so clear and simple and his reasoning was so direct that the opinion has become iconic. And its most renowned sentence appears on sweatshirts that can be ordered on the Internet:

"The right to be let alone is indeed the beginning of all freedom."[34]

In Douglas' opinion there is nothing in the discussion of the right to be let alone that suggests that such a right might be applied in highly controversial areas such as reproductive rights. That subject is

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[32] *Id.* at 466.

[33] *Frankfurter and Acheson*, N.Y. TIMES (May 24, 2012, at 11:16 AM), https://www.nytsyn.com/archives/photos/753015.html.

[34] *Pollak,* 343 U.S. 451 (1952) (Douglas, J., dissenting).

left for another time. In *P.U.C. v. Pollak* he carefully keeps the new "right of privacy" to an unthreatening expression of rights long previously recognized. The case "involves a form of coercion to make people listen . . . If liberty is to flourish, government should never be allowed to force people to listen to any radio program. The right of privacy should include the right to pick and choose from competing entertainments, competing propaganda, competing political philosophies."[35]

In 1965 he found a way to bring the rest of the Court along in order to make privacy the law of the land. He would *extend* the right in what would become a landmark case involving a Connecticut law, applied to married couples, which prohibited the use of contraceptives.

The framers of the Constitution never heard of or thought about what is now medical knowledge regarding modern methods of contraception. But once medical contraception was invented, it opened up a new area of dispute about who should control knowledge concerning this contraception—the state, or the individual? The state of Connecticut decided that it was the proper authority to regulate decisions in this area.[36] Accordingly, a licensed physician named Estelle Griswold was arrested and fined $100 for giving medical contraceptive advice to a married couple.[37] Justice Douglas led the Court in ruling that the subject of medical contraception belongs in the protected zone of the individual and is protected from undue interference by the state.[38]

To Justice Black, the fact that he could not find the word "privacy" in the text of the Constitution prevented him from joining the *Griswold v. Connecticut* decision. But to Justice Douglas, the text itself was not determinative. Justice Douglas gave to privacy a place of priority in the Bill of Rights.

The *Griswold* decision is illustrative of legal realism. Legal realism was an approach to law that prevailed when Justice Douglas was a faculty member at Yale Law School in the late 1920s and the early 1930s. It is misleading to think of him only as the lone figure he became during his long service on the Court. At Yale he was a member of a remarkable group, including Robert Hutchins, Thurman Arnold, Jerome Frank, Wesley Sturges, Myres McDougal, and Thomas I. Em-

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[35] *Id.* at 469.
[36] *Id.* at 480.
[37] *Id.*
[38] *Id.* at 484.

erson. Most of them departed for Washington in the 1930s for positions in the New Deal, while Hutchins became president of the University of Chicago. But a few remained, and my class of 1952 was sufficiently mesmerized by Professor McDougal to dedicate our yearbook to him together with a song (to the tune of "McNamara's Band"):

"My name is Myres McDougal,
I'm the leader of the land…"

Myres McDougal taught first year Property by exploding one legal myth after another, leaving the students who were not at all familiar with property law dazed and confused but also exhilarated. McDougal loved making fun of famous professors at the Harvard Law School. We did not know these gentlemen but we enjoyed McDougal's sallies at their expense.

Legal realism taught that law is forever changing, just as society is forever changing. In law, said the realists, words change their meaning over time. It's impossible to think that the words from 1789 are to be perpetually kept in their original meaning. According to the realists, the duty of the Supreme Court is not discharged by merely studying the text of the Constitution. The realists recognized that a constitution written in the 18th century could not be taken literally to address the needs and conflicts of a twentieth century society. The only approach to law that can preserve its constitutional meaning over time is to seek the *purpose* of the law intended by the framers—its *function* in society. There is no mysterious process which words written by the framers can, by some alchemy, be translated into words that apply to twentieth century problems. Therefore the members of the Supreme Court should be skeptical of mechanically applying old rules that may have lost their original meaning.

When Douglas was appointed to the Court, he was known as an expert on financial affairs, not on constitutional law. Indeed, legal realism had primarily focused on areas of traditional private law, such as contracts or property. It was a highly academic pursuit that, until Douglas' appointment, hadn't been applied to constitutional law. The Yale realists had not reached that point in their studies before they were called to Washington to work as part of the New Deal. When Douglas went on the Court, after just a few famous but brief years as a law professor, he had no known positions on civil liberties, constitutional law, the Bill of Rights, or any of the other subjects that occupy the Supreme Court. It was up to Douglas to develop a constitutional philosophy after his arrival on the Court. In the early years of his service,

he hardly distinguished himself in the area of civil liberties. It is shocking to remember that Douglas voted to uphold the exclusion and internment of Japanese Americans during World War II, surely the greatest mass invasion of civil liberties that America had yet seen.[39] Douglas also voted to uphold a required flag salute by Jehovah's Witnesses who refused to do honor to any "graven image."[40] At any rate, Douglas did not go on the Court as a civil libertarian, and legal realism did not necessarily propel him in that direction. Jerome Frank, another prominent legal realist on the Yale Law School faculty (and, in the spring of 1950, one of my first-year teachers—for Procedure), became a judge on the United States Court of Appeals for the Second Circuit. There, Judge Frank voted to uphold convictions that distressed many civil libertarians, including the conviction and execution of the Rosenbergs.[41] Obviously, legal realism did not automatically translate into civil liberties or even individual rights.

Douglas quickly reversed himself on the flag salute, thereby enraging Frankfurter, who, in two separate cases, voted to uphold this requirement. In the second case, where Douglas reversed himself, Frankfurter's opinion began with a bitter statement in which he wrote that "One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. . . . I cannot bring my mind to believe that the 'liberty' secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen."[42]

The first cases in which Douglas began to emerge as a defender of constitutional liberty occurred after FDR's death, when President Truman instituted a "loyalty program" imposed upon government employees. Here, Douglas' understanding of economic power enabled him to see employment as a relationship in which the individual lacks

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[39] Korematsu v. United States, 323 U.S. 214 (1944).

[40] Minersville School District v. Gobitis, 310 U.S. 586 (1940). Douglas voted with an 8-1 majority to uphold the state law requiring the flag salute. Subsequently, the Court overruled *Gobitis* in *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Douglas voted with the majority in that case as well.

[41] United States v. Rosenberg, 195 F.2d 583 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952).

[42] W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).

the power held by employers. Just as he had once attacked the excessive power of corporations with respect to consumers, Douglas was able to see that employees were also lacking in power when dealing with employers, whether corporate *or* governmental, and thus the legal realist became a civil libertarian as well.

Douglas worried that new forms of power would be created. He foresaw that technology could change the nature of power and that economic organizations could use power to undermine individual liberty. Would the old word "liberty" cover these new threats to the individual? The realist's answer is yes. Justice Douglas' friend, Judge Henry W. Edgerton, wrote eloquently that the constitutional word "liberty" is always up-to-date and always prepared to deal with the issues of today.[43]

Thus it was Douglas who brought legal realism to the Supreme Court. "What is the function of the Constitution?" was the controlling question for him. He saw two primary functions. First, to create a national government, but a government of limited powers, something unknown on the planet at that time, where monarchs, emperors, sultans, shahs and khans held sway with no limit on their powers. The second function of the Constitution was to give individual human beings rights and protections that individuals had never enjoyed in any society before, such as freedom of speech and worship. That portion of the Constitution called the Bill of Rights also makes it clear that there may be other rights, unspecified but to be discovered as needed later as society and human beings evolve. As a legal realist, Douglas was ready to change the law in response to changes in society that threatened the individual.

The legal realist might argue that one of the greatest and most famous examples of a change in reality recognized by the Supreme Court is *Brown v. Board of Education*.[44] When the Fourteenth Amendment was adopted in 1868, it is most unlikely that the phrase "equal protection of the law" was intended to include public education. But by 1954, the world was a different place and the Court was asked to acknowledge this change. It did so in a very carefully drafted opinion that avoided the issue of whether education had been in the minds of the framers of the Fourteenth Amendment. Thus the Court made public education a constitutional right without banning segregation in any

[43] Pollak v. Pub. Util. Comm'n of D.C., 191 F.2d 450 (D.C. Cir. 1951), *rev'd*, 343 U.S. 451 (1952).

[44] Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan., 347 U.S. 483 (1954).

other area of life—that was to come later. It is not unreasonable to say that in *Brown* the Court in effect made public education a new constitutional right, required by a change in society.

At two minutes to twelve, on May 17th, 1954, "separate but equal" was still our national reality. The moment that the unanimous decision in *Brown* was announced, "separate but equal" was no longer reality. There is no such thing, said the Court. Congress had failed to act for decade after decade and it was time for the Court to declare a new reality.

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In 1958 Justice Douglas published a small but potent book that explained the right of free expression and the right of privacy to American readers.[45] It was based on three lectures delivered at Franklin and Marshall College in the spring of 1957, prepared during the fall and spring of 1956-57. Douglas' task was to deliver several lectures to the students with a subject to be chosen by him. His title for the lectures would be "The Right of the People."

During this period our Sunday walks focused on composing these lectures. I felt sure he appreciated my own ability to think about the legal problems of the future, for we found much common ground in discussing the challenges that must be faced by the Constitution and the Court.

The Right of the People is remarkable in numerous ways. When Douglas' focus is on "privacy," there is no mention at all of reproductive privacy, of contraception or abortion. But considering that the Court eventually included contraception, reproductive freedom, and abortion within the scope of "privacy," once that right had been established, it is curious that Douglas would avoid the entire subject as late as *The Right of the People*. Of course he had his reasons for never bringing up what has been the most complicated of all the controversial meanings of the word "privacy." It was to take years before he wrote an opinion in which reproductive rights were included in the definition of privacy.

There is another aspect of *The Right of the People* worth mentioning for those who would attempt to understand Justice Douglas. In the original Foreword, published in 1958 and not reprinted in the paperback version, Douglas encapsulates his core beliefs regarding both the promise and responsibility of America:

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[45] WILLIAM O. DOUGLAS, THE RIGHT OF THE PEOPLE (1958).

> This is the time for us to become the champions of the virtues that have given the West great civilizations. These virtues are reflected in our attitudes and ways of thought, not in our standard of living. They are found in the ideas of justice, liberty, and equality that are written into the American Constitution. They concern the rights of the people against the state. These rights include the right to speak and write as one chooses, the right to follow the dictates of one's conscience, the right to worship as one desires. They include the right to be let alone in a myriad of ways, including the right to defy government at times and tell it not to intermeddle. These rights of the people also include the right to manage the affairs of the nation—civil and military—and to be free of military domination or direction.[46]

However, having observed the persecution during the 1950s of numerous Americans for their political beliefs, Douglas worried that the country was straying from its virtues, abandoning its ideals:

> These are the rights that distinguish us from all totalitarian regimes. The real enemies of freedom are not confined to any nation or any country. They are everywhere. They flourish where injustice, discrimination, ignorance, superstition, intolerance, and arbitrary power exist. We cannot afford to inveigh against them abroad, unless we are alert to guard against them at home. Yet in recent years as we have denounced the loss of liberty abroad we have witnessed its decline here. We have, indeed, been retreating from our democratic ideals at home. We have compromised them for security reasons.[47]

He urges his readers to become the champions of justice, liberty, and equality—"the rights of the people against the state." He sees those rights in jeopardy and his book is a warning:

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[46] WILLIAM O. DOUGLAS, THE RIGHT OF THE PEOPLE 11 (1958).
[47] *Id.* at 11-12.

> It is time to put an end to the retreat. It is time we made these virtues truly positive influences in our policies. We have a moral authority in our ideals of justice, liberty, and equality that is indestructible. If we live by those virtues, we will rejuvenate America. If we make them our offensive at home and abroad, we will quicken the hearts of men the world around. The contest is on for the uncommitted people of the earth. These ideals express the one true advantage we have over communism in that contest.[48]

Justice Douglas would defend this call to the people as very much a part of his job. He represents our founding values in his book as much as he did on the bench.

Legal realism meant demystifying the law. Douglas believed that judges and justices should be persons with a wide knowledge of the social and economic facts of our planet, to say nothing of the natural facts of nature and human needs. Their knowledge of the world would be an asset as they sought to cope with the problems of the day. All of Justice Douglas' many travels were devoted to fact gathering. He wanted to understand conditions of every kind around the globe. He took an equally great interest in economics and politics at home because he felt justices should above all be good observers of the society in which they live.

Additionally, he felt a justice should be endowed with an acute sympathetic concern for the suffering of fellow human beings. This compassionate side did not always show in Justice Douglas' close personal relationships, but it was more than evident in his actions as a Justice. In the *Rosenberg* case, he did not want to grant certiorari, but at the last minute he was persuaded that injustice had been done.[49] Of all the Justices who have served on the Supreme Court, Douglas was surely the most actively concerned with the fairness of our criminal justice system and our prison system. He was ready to read hand-typed petitions from prisoners that the other Justices ignored or left for their law clerks to dispose of. His door was open to petitions from prisoners when every other door was closed.

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[48] *Id.* at 12.

[49] Rosenberg v. United States, 346 U.S. 273, 310 (1953) (Douglas, J., dissenting).

In principle, if not always in practice, Douglas rejected what Jerome Frank called "the cult of the robe."[50] Frank argued that justices and judges should behave like ordinary mortals. Frank believed that judges should not wear robes, should not sit behind a bench at a higher level than the lawyers, should not talk or write in arcane legal language, should not assume a pompous dignity to set themselves apart, and should be regarded as people doing a job like anyone else. They are public servants, just like other public servants. While Justice Douglas did wear a robe and sit behind a high bench, in many other situations he dressed and acted like an ordinary mortal. He would never quite embody the pomp that was expected of him.

(He never would have tolerated the bodyguards that accompany Supreme Court Justices everywhere today. He wanted to be able to disappear; he would have felt it a huge intrusion on his freedom to be followed around.)

And he wanted the Supreme Court in its opinions to speak directly to the American people, and not merely to the profession. He kept his opinions short and readable. No long pages of tortured reasoning for him. He strove for clarity and often achieved a memorable phrase.

* * *

Constitutional law is a problematic subject at best. As anyone who has studied or taught constitutional law must recognize, one person's interpretations of the Constitution can seem questionable, wrong-headed or even fraudulent to somebody else. An eighteenth century Constitution, itself a product of contention and compromise, which has become virtually unamendable because of political deadlock, must now be applied to urgent problems that could never be anticipated or even imagined by the framers.

For example, they failed to imagine that technology would create weapons like nuclear devices that no nation in the world could tolerate in individual hands. Nor did the framers foresee that their comfortable little group of colonies might evolve into a vast impersonal society in need of a wholly new apparatus of police surveillance and a vast prison system. Nor could the framers have imagined the power of mass communications to stir crowds, mobs, and irrational behavior. The framers never anticipated that education or health care might become necessities like freedom of speech or the right to a fair trial by

[50] *See* JEROME FRANK, *The Cult of the Robe*, in COURTS ON TRIAL 254, 254-61 (1949).

jury in the case of a criminal accusation. But under a Constitution intended above all to protect individual independence and freedom, new necessities will arise and to Douglas the realist the Court's function is to protect the individual.

"Originalism" is the opposite of the approach taken by Justice Douglas. Under "Originalism" the Court would be limited to the original text of the framers, leaving no room for constitutional growth, and no room for the Court to address contemporary problems. The President and Congress would be free to take actions not subject to the rule of law. Its consequences could only be to allow more powers to be exercised outside the rule of law. The bedrock of Justice Douglas' jurisprudence was that all power wherever exercised and by whatever entity must come under the rule of law.

If a future Supreme Court of the United States were to adopt the views of Justice William O. Douglas, there would be great changes in the Court, the country, and around the globe. The Court would hear and decide two, three, or four hundred cases instead of the paltry few it now accepts. Justices would do their own work instead of allowing inexperienced law clerks to draft opinions or make decisions on petitions for certiorari review. Opinions would be much shorter and written so as to be understandable to all. The Justices would be expected to know not merely the facts of cases, but conditions in the country such as unemployment, impoverishment of local governments, pollution, and the fundamental needs of individuals young and old in an ever-changing civilization.

Justice Douglas also believed that the Supreme Court must take jurisdiction over all the overseas actions of the United States, including interrogations, detentions without trial, and military actions where people are injured or killed. Douglas did not live to see the day where the President could order a drone strike to kill certain individuals, but he would surely have wondered if such actions were unconstitutional executions without trials by judge and jury. Nothing could be further from the framers' intent than presidential executions.

Justice Douglas had a special concern about the role and the power of the military. The Constitution explicitly provides that only Congress has the power to declare war. Yet Congress has never declared any war since 1941, the year of Pearl Harbor. Congressional responsibilities for our subsequent wars have ignored the clear, unambiguous, textual intent of the framers. Alone of the justices, Justice Douglas was prepared to hear cases questioning the legality of these

wars. During the undeclared and profoundly divisive Vietnam War, Justice Douglas repeatedly sought to have the Court hear cases challenging that war's legality under the Constitution.[51]

An expert on corporations since his teaching days at Yale and a former chairman of the SEC, Douglas always favored the vigorous enforcement of antitrust. The antitrust laws, dating from the end of the nineteenth century, have virtually constitutional status because they are crucial to the preservation of competition and the free enterprise system. During the past thirty years, successive administrations, both Democrat and Republican, have for all practical purposes abandoned enforcement of the antitrust laws. Today's semi-permanent unemployment, for which economists have been unable to provide a remedy, may well be caused by the stifling effect of the replacement of free enterprise competition by gigantic monopolies and combinations, exercising powers that are virtually governmental and without any regard for American workers.

In a 1949 opinion, disputing whether corporations have rights under the Fourteenth Amendment's Equal Protection Clause, Justice Douglas rejected the idea that a corporation is a "person" entitled to constitutional rights such as due process—which the framers clearly intended to guarantee for natural persons only. In his words:
Section 1 of the [Fourteenth] Amendment provides:

> "All *persons* born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens* of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States; nor shall any State deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws.' (Italics added.)"
>
> "Persons" in the first sentence plainly includes only human beings, for corporations are not "born or naturalized."
>
> Corporations are not "citizens" within the meaning of the first clause of the second sentence.

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[51] One example is *Schlesinger v. Holtzman*, 414 U.S. 1321 (1973). Note that Douglas ordered a stay that the Supreme Court dissolved or vacated. *Id.* at 1322 (Douglas, J., dissenting). *See also What Did William O. Douglas Say?*, 11 GREEN BAG 2D 1 (2007), http://www.greenbag.org/v11n1/v11n1_ex_ante_what.pdf.

> It has never been held that they are persons whom a State may not deprive of "life" within the meaning of the second clause of the second sentence.
> "Liberty" in that clause is "the liberty of natural, not artificial, persons."
> But "property" as used in that clause has been held to include that of a corporation since 1889 when *Minneapolis & St. L.R. Co. v. Beckwith* was decided.[52]

In composing a dissenting opinion in *Wheeling Steel Corp. v. Glander*, Douglas expressed serious misgivings about corporations being granted the same constitutional rights as individual citizens. "We are dealing with a question of vital concern to the people of the nation," he wrote.[53] His words echo loudly from decades past after the Court's decision in *Citizens United v. Federal Election Commission*.[54] The purpose of free speech is to protect democracy. A corporation is an economic machine, not a person. The travesty of supposedly "conservative" and "minimalist" justices giving free speech rights to corporations would have produced a stinging dissent from Justice Douglas, as it did from his Republican-appointed successor, Justice John Paul Stevens.[55]

* * *

The issue of changing realities has become more, not less, important as the Supreme Court has moved into the twenty-first century. One of the key decisions the Court must eventually make is how much constitutional protection should be afforded to the natural environment. Is pollution a threat to "life" within the meaning of "life, liberty, and property" in the Constitution? Will there ever come a time when the Court says that only by means of constitutional protection can the natural environment be saved? When that day comes, Justice Douglas will have proved an excellent prophet.

In 1972, when Douglas had been on the Court for more than thirty years, and we had been hiking on the canal trail for at least fifteen years, he made his last great effort to expand constitutional protection of the natural environment. In *Sierra Club v. Morton*, Douglas' dissent

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[52] Wheeling Steel Corp. v. Glander, 337 U.S. 562, 578-79 (1949) (Douglas, J., dissenting) (footnote omitted) (citations omitted).

[53] *Id.* at 581.

[54] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 318 (2010).

[55] *Id.* at 393 (Stevens, J., dissenting).

drew support from Professor Christopher D. Stone's famous article, "Should Trees Have Standing?" in which Stone argued that the environment must have constitutional protection.[56]

Then, in 1971, the Supreme Court took up the very question that Christopher Stone had asked: Should natural and inanimate parts of the environment be given constitutional standing? In *Sierra Club v. Morton* the majority dismissed an action by the Sierra Club, as plaintiff, to prevent the development of an extensive skiing resort in Sequoia National Forest. The majority of a divided Court held that the Sierra Club had no "legal standing" to bring any action on behalf of the Mineral King Valley in Sequoia National Park.[57] According to the Court majority, the Sierra Club could not "represent" the interests of the wilderness.[58] According to the Court, the Sierra Club could only litigate on behalf of its own private corporate interests, and hence the action was dismissed.[59]

Douglas thought otherwise and he wrote a landmark dissent that is still far ahead of where we are today. Douglas wrote that all members of the natural community—trees, meadows, animals, and every other natural feature, including the atmosphere itself—have a right to be heard in court and represented in court by "their next friend."

And when it was decided, on April 19, 1972, Douglas made his greatest effort to explain and argue this transformative doctrine: "The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively, the land." This is actually a quote from Aldo Leopold, with which Douglas ended an opinion of such extraordinary scope and depth that he might have intended it as his last judicial monument.[60] He explains how the law, from the most ancient times, has always protected inanimate objects

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[56] Sierra Club v. Morton, 405 U.S. 727, 742 (1972) (Douglas, J., dissenting). *See also* Christopher D. Stone, *Should Trees Have Standing? Law, Morality, and the Environment*, 45 S. CAL. L. REV. 450 (1972).

[57] Sierra Club, 405 U.S. at 741.

[58] *Id.*

[59] *Id.*

[60] *Aldo Leopold Quotes from Green Fire,* THE ALDO LEOPOLD FOUNDATION, https://www.aldoleopold.org/teach-learn/green-fire-film/leopold-quotes/#:~:text=%E2%80%9CWe%20abuse%20land%20because%20we,a%20commodity%20belonging%20to%20us.&text=The%20land%20ethic%20simply%20enlarges,kills%20the%20thing%20he%20loves (last visited October 16, 2020).

and nature when necessary, and why the constitutional guarantee of "life" must include all of life.

His opinion is poetic, but it is something more: a powerful statement of judicial responsibility. According to the Douglas view, resting in turn upon the philosophy of Justices Oliver Wendell Holmes, Jr. and Brandeis, the Constitution is organic and subject to new interpretations. For Douglas, every form of life deserves the same protection. This is radical law indeed, but can anything less protect inanimate nature and can the word "life" in the Constitution mean anything less and accomplish the framers' goal?

If life, the atmosphere, and living things were brought under the protection of the Constitution there would be—let us face it—a great economic change in consequence. Justice Douglas would certainly not deny this fact. But is the change nevertheless one that must be made and hence better under the auspices of law? What would Brandeis say? This is a conversation that the law students and the legal scholars of tomorrow will most certainly be having.

The constitutional right to "life" might be the basis for the Court to find protection for the natural environment in the Constitution if Judge Edgerton's view of the word "liberty" is applied to the other two constitutional words that accompany "liberty": "life" and "property." My point is that Judge Edgerton's interpretation of "liberty" suggests that a broad, contemporary meaning also be given to *each* of the words life, liberty, and property, and that today's contemporary meaning includes such issues as the environment, the state of our public schools, and the ability of our citizens to earn a living.

If today's environmentalists were to adopt the constitutional strategy urged by Justice Douglas, the air we breathe, the water we drink, the living things with which we share the planet would all be protected by the Constitution, would all have a day in court, and the law would once again catch up with reality. I can imagine the dissent in *Sierra Club v. Morton* taking its place with other great dissents that ultimately became the law. That is the task that law must ultimately perform: keeping up.

* * *

While at Yale, I continued to see Justice Douglas. Whenever I went to Washington, D.C., we arranged to take a walk. The Court was just beginning to take a new look at the many forms of valuables that are provided by government, and whether they are protected by due process. This was an area that called for new thinking by the academy

and by the courts. It was exciting to be at the leading edge of law. "Entitlements" were something new. How should the law treat them? How should the law treat the individuals to whom these "entitlements" belonged? These were issues that I was encouraged to talk about, and eventually to write about, as we walked along the towpath.

In 1960, when I started teaching at Yale Law School, Justice Douglas was quick to suggest an article that I should write. He provided the subject—the Forest Service and its management or mismanagement of wilderness—and he also provided a forum where I could present the article in oral form before it was published. Douglas' old friend from Yale, Robert Hutchins, was the founder of an early think tank: The Center for the Study of Democratic Institutions, located in Santa Barbara, California. Douglas was a member of the Board. This organization held meetings at which scholarly papers were presented to a group that included Justice Douglas and others, such as William Prosser, the Dean of the law school at Berkeley. I was given a forum to present my ideas and an agreement to publish in the Center's own magazine, with publication in a law review expected later. Thus I had a made-to-order, professional opportunity to begin my teaching career with an appeal for the preservation of wilderness: "The Public and the Nation's Forests."

I traveled to Santa Barbara and was introduced as the day's guest to the group of board members under Hutchins' chairmanship and with Douglas very actively present. I tried not to be awestruck by the array of dignitaries. Douglas had supplied much of the story about the Forest Service that appeared in the article. But I supplied a beginning and an ending, which was my first opportunity to be legally creative in print. The subsequent article was a very good start for my law school career and put me on track to later writing about public and private property.[61]

Most of my legal writing that followed was based on the belief that just as the natural world was endangered, likewise the individual was endangered and needed more legal protection. Each of my articles approached the danger to the individual in a different context, but together I saw the endangered wilderness and the endangered individual as being subject to the same harmful forces, and I thought we needed a conservation movement for the individual parallel to the existing movement to preserve nature.

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[61] CHARLES A. REICH, BUREAUCRACY AND THE FORESTS: AN OCCASIONAL PAPER ON THE ROLE OF THE POLITICAL PROCESS IN THE FREE SOCIETY (1962).

My concern over the endangered individual eventually led me to teach a college course entitled "The Individual in America." The course grew from a small seminar to a large classroom filled with undergraduates. In a year or so later I began to see my lectures in the course as chapters in a book—a book called *The Individual in America*. The book was well along when I changed the title to *The Greening of America.*[62] Justice Douglas was the first to praise the thinking that became my book—that the struggle to preserve and protect nature and the struggle to preserve and protect human life are one and the same.

One day the two of us had planned a Sunday hike along the Canal towpath, but when we got into his car, Justice Douglas said, "It's such a beautiful day, why don't we go down to the Blue Ridge instead of going to the towpath." We drove south toward the Blue Ridge, all the way to Old Rag Mountain, an impressive twenty-five hundred foot climb with a splendid rocky top and a panoramic view of the Appalachian chain. We made the long ascent by one trail and sat for an hour at the top with sandwiches made by Mercedes. What a spectacular view! The weather offered a perfect mountain day. There was virtually no conversation between us. It was just a pure outing. We descended by a different route and returned to Washington by nightfall, tired and wordless.

* * *

Goose Prairie is a valley in the Cascade Mountains of northwest Washington with a narrow, flat area that is called a prairie. In Goose Prairie, 41 miles from Yakima—where he lived as a boy with his widowed mother and two sisters—Justice Douglas owned a ranch, his summer home, where he kept horses for riding in the valley and up the mountainsides. I visited the Douglas's and stayed at the adjacent Double K Mountain Ranch over a series of summers. The Double K was a guest, or "dude," ranch that boarded horses and ran guided pack trips. The ranch was owned and operated by two unforgettable women: Kay Kershaw and Isabelle Lynn, who took care of the Douglas horses and were the only people I ever met who could tell Justice Douglas what a bad horseman he was and get a grin and not a scowl.

Isabelle was the author of *The City Within*, a well-written, highly readable novel (by "Elisabeth Newbold") about her experiences as a lesbian in Washington, D.C. Justice Douglas never gave the slightest evidence that he noticed that Kay and Isabelle were a lesbian couple. But they were brash with him, unlike most people he knew or

[62] CHARLES A. REICH, THE GREENING OF AMERICA (1970).

encountered. He seemed to take it all with the greatest good humor and showed not a trace of self-importance around the two women. But I still thought it was remarkable how much they could get away with, with a dude named Bill.

Douglas was a frequent guest at their dinner table. There were seldom more than half a dozen guests. Justice Douglas often joined the group, where he was called Bill, as everyone was on a first-name basis (including me in the guise of "Charlie"). He was a troublesome guest at times—he could be sharp and tactless with other guests—but I thought his value as an attraction for the Double K greatly outweighed the unwelcome possibility that his bad disposition might intimidate or offend the other vacationers.

Still later, in 1975, I received a call from Goose Prairie. Like everyone else, I had read about Justice Douglas' devastating stroke on the previous New Year's Eve, and during the many months that followed there was no further news of him or his condition. As the summer of '75 grew later, no one had yet heard whether Justice Douglas was expected to return to the Bench in October. I was at home in San Francisco one morning in early September when the phone rang. There was a familiar voice: "Charlie, can you come up to Goose Prairie this afternoon? I'd like to talk with you."

I was stunned by this unexpected request. I knew that the house at Goose Prairie had no phone of its own, and so Justice Douglas must have been driven eight miles to the ranger's station in order to make this call. Therefore it had to be enormously important. Getting to Goose Prairie by late afternoon would be next-to-impossible, but he expected the impossible and I promised to try. I rushed to the airport, flew to Seattle, rented a car, drove over the Cascades, and arrived miraculously at the Double K Ranch where a room was waiting. "You'd better go see them before dinner," Kay and Isabelle advised me. "You won't like the scene at all. He's in terrible shape."

It was a five-minute walk to the Douglas' home. It was modest in size and décor and filled with official papers from Washington, D.C., which flowed to all the Justices, wherever they were vacationing. His fourth wife, Cathy, and his grown son, Bill, were in the living room with the Justice. His appearance was ghastly. He was both emaciated and partially paralyzed, although his mind and voice seemed unaffected. "We wanted to talk to you about what to do," he said. "Should I try to return to the bench? Do you think I am mentally competent? I have to make a decision about whether to resign or continue to serve,

and I want to talk about it. Will you talk with me tomorrow and give me a truthful answer?"

When the Justice needed to move, his son had to pick him up bodily and carry him to the next room. The thought of him ascending the Bench in this sad condition was appalling. But the only question I had been asked was whether he was still mentally astute. "All right," I said. "I'll be here first thing in the morning, and we'll talk." I promised him I would tell the truth and returned to the Double K. Kay and Isabelle both shook their heads and said, "Good luck tomorrow."

I slept at the Double K and then went over to see Douglas as early as I was asked to. I was ready to talk, ready to listen, ready to discuss the issues. The four of us exchanged our views and feelings throughout the day. Douglas said, "I can still sit on the Bench. I can still hear cases. I can still sign orders. I might save somebody who would otherwise be executed wrongly." He said, "If I serve another year, I might still be able to do some good in the world."

By this time, he'd been on the Court longer than anyone else in history. I said, "You've been there 36 years, and nobody would ever expect you to stay any longer than that, especially under these conditions, where it's so difficult. Certainly you have no obligation whatsoever to keep on serving."

"But," he said, imagining the worst, "you know who they'll replace me with? Somebody really awful. Somebody that'll send people to the death chamber without a fair trial." We went around and around talking about this. I avoided telling him that he should resign. But, I repeated, "Certainly you don't have to continue." At the end of the day I returned to Double K without knowing what he was going to do.

The next morning Douglas said, "Well, we've decided we've got to try. I'm not going to resign till I try it, see what it's like. I just can't resign. If I can't do it, then I'll resign. That's the only way I can deal with this."

Kay and Isabelle came over to take the Douglas horses to their ranch. Then Justice Douglas, his son, and his wife got into their car. "Wish us luck," someone said. They drove off, headed for Washington, D.C.