

reviewed by Marc D. Alexander

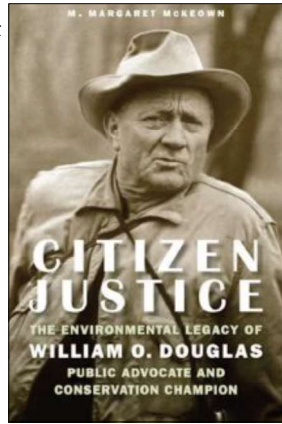
By the Book

During his lifetime, Associate Justice William O. Douglas, a prodigious author of over 40 books, burnished his legacy. The first volume of his autobiography, *Go East, Young Man: The Early Years*, promoted the Douglas legend of a resolute man of the West who grew up under hardscrabble circumstances, rode the rails to the East Coast, and, through indomitable will and hard work, succeeded against obscure origins. Once Douglas was on the East Coast, writes the Honorable M. Margaret McKeown in her illuminating 2022 biography of Douglas, *Citizen Justice: The Environmental Legacy of William O. Douglas Public Advocate and Conservation Champion*, “The obscurity of his Western origins left Douglas more or less free to define himself for his new colleagues. He cast himself as a character out of a frontier tall tale: ‘The Yakima Apple Knocker.’ He played up the story of his early life, claiming that he had helped feed his family by knocking apples off trees.” Digging up the facts of Douglas’s remarkable life in 1980, biographer James F. Simon punctured parts of the Douglas legend. Since then, more original source material has been opened up for biographers, and much more has been written.

Judge McKeown is well qualified to add to the public understanding of Douglas and, in particular, of his environmental legacy. Now a

senior U.S. circuit judge, McKeown has served on the Ninth Circuit since 1998. She was also a White House Fellow and a special assistant to Secretary of the Interior Cecil Andrus while he was engaged in a fight to preserve as much Alaska wilderness as possible against the pressures of oil, gas, and mining interests to exploit Alaska resources. Indeed, if Douglas is a son of the West, McKeown, born in Casper, Wyoming, is a daughter of the West.

However, does Douglas deserve another book? He has a reputation as a womanizer, a lousy husband to three of his four wives, a distant father, the author of too many quirky and slipshod legal opinions but also as a man of enormous intelligence, ambition, and energy who did not fulfill his early promise. If he is remembered today in law schools, it is probably for his authorship of the Supreme Court’s opinion in *Griswold v. Connecticut*¹ and his dissent in *Sierra Club v. Morton*.²



**CITIZEN JUSTICE
THE ENVIRONMENTAL
LEGACY OF WILLIAM O.
DOUGLAS—PUBLIC
ADVOCATE AND
CONSERVATION CHAMPION**
By M. Margaret McKeown
Potomac Press, 2022
288 pages, \$29.95

In *Griswold*, the majority found that a right of privacy allowed married couples to use contraception. Douglas wrote “that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”

Countless law professors and judges have feasted on the carcass of the phrase, “penumbras and emanations.” While the phrase may be a cause for mirth, it also demonstrates that Douglas believed the Constitution embodies values essential to our republic, including the right to privacy. The phrase may also exemplify a belief in a natural law that precedes written law and undergirds the Constitution.

Another iconic phrase for which Douglas is known is “trees have standing.” This was the basis for his dissent in the *Sierra Club* decision and his argument that the *Sierra Club* should have standing to oppose the Disney Corporation’s plans to develop pristine wilderness.

“With all respect”, Douglas explained, “the problem is to make certain that the inanimate objects, which are the very core of America’s beauty, have spokesmen before they are destroyed.” Though Douglas’s standing argument did not prevail, his concern for the environment and his effort to find standing for a spokesperson for the wilderness helped point the way for environmentalists, forced to acknowledge they had to show persons, not just trees, were injured. Some local jurisdictions and nations have now provided standing to protect the natural environment, just as other entities, such as corporations, have standing. Meanwhile, the *Sierra Club*, asserting injury to its members, obtained standing.

Douglas’s interest in preserving the environment provides the hook for *Citizen Justice*. Neither interring nor resurrecting Douglas, Judge McKeown looks at his life from a different angle. “Citizen” refers to Douglas’s expansive view of his right as a taxpayer and citizen to advocate outside the court. Specifically, Douglas was a staunch environmental advocate. “Justice” is the office Douglas held on the Supreme Court from 1939 to 1975. “Justice” may also refer to an expansive view of the law, for Douglas once observed in a speech, “just because something is legal doesn’t necessarily mean it’s right.” In other words, Douglas viewed a justice’s role as doing justice.

Marc D. Alexander is an attorney and an ADR neutral affiliated with Alternative Resolution Centers.

McKeown's focus on "environmental legacy" is significant. The book is not about Douglas's legacy as a civil libertarian. By focusing on Douglas's environmental legacy, McKeown sheds new light on Douglas as a person, citizen, and judge. Indeed, the reader may conclude that Douglas's greatest legacy is as an environmental advocate and that his advocacy provides the best context in which to understand what made him tick. For example, what drove Douglas's passion for the environment, and what

Douglas was becoming bored by work on the Supreme Court and searching for new purpose. He eventually found it in conservationism.

Fourth, through personal connections, Douglas found himself drawn into environmental advocacy. John Muir, founder of the Sierra Club, became one of Douglas's environmental heroes, and Douglas joined the Sierra Club. Margaret Murie and Olaus J. Murie, ardent conservationists, joined Douglas on protest hikes and became friends. To

extent of his environmental activism.

Douglas compartmentalized his life as "citizen" and as "Justice." He lived in a different time when it was not uncommon for Supreme Court justices to have political entanglements. An intriguing example of how Douglas stretched ethical limits is the backstory of *Sierra Club v. Morton*. A member of the Sierra Club, Douglas resigned from the organization at a time when he surely was aware that its important case was wending its way to the Supreme Court. Douglas wanted to hear environmental cases and certainly did not wish to recuse himself from *Sierra Club*. Through clerkship channels, Douglas received advanced notice of law Professor Christopher Stone's article, "Should Trees Have Standing?—Toward Legal Rights for Natural Objects."³ This ex parte communication enabled Douglas to incorporate Stone's research and conclusion into his dissent. This was not illegal. Still the episode underscores that the absence of a mechanism requiring justices to follow ethical guidelines presents a problem that did not just spring up yesterday.

While Douglas did not leave a coherent judicial philosophy for successors, he did have clear ideas about protecting the environment. McKeown explains how Douglas progressed from an outdoorsman to a conservationist concerned with regulating the use of natural resources to a preservationist with a more absolute vision of preserving nature intact and, finally, to an "intuitive understanding of what we now call ecology—the study of the interconnectedness of natural systems."

Douglas deplored the "mixed use" approach of the National Parks Service—the legacy of Theodore Roosevelt's Forest Service Chief, Gifford Pinchot, who favored limited commercial use of forest reserves. For Douglas, preservation of the wilderness outweighed the building of roads and dams, mining, and lumbering. For Douglas, the destruction of wilderness marked a tipping point: Wilderness once lost would likely be lost forever.

Douglas's preservationist perspective exposed him to charges of elitism. Few persons owned three wilderness cabins, as did Douglas. Few were likely to go on formidable wilderness hikes as Douglas did. Yet Douglas's clerks remembered him as a man who "cared deeply for the underdog" and "the person at the bottom of the heap." So, one must ask how Douglas was able to prioritize his

WHILE DOUGLAS DID NOT leave a coherent judicial philosophy for successors, he did have clear ideas about protecting the environment.

drew him into environmental advocacy?

First, Douglas grew up in Washington State, surrounded by nature. An early photograph shows him dressed for the rugged outdoors. Second, there are clues throughout *Citizen Justice* that the wilderness evoked feelings of spirituality in Douglas. Though Douglas's father was a preacher, there is no hint in the book that Douglas was religious in the traditional sense. Instead, the spirituality in Douglas must have been a sense of awe instilled by nature. In *Of Men and Mountains* (1950), Douglas described how, in the "thickets, ridges, cliffs, and peaks" of the Pacific Northwest, one "can find deep solitude...he can come to know both himself and God." Of the Arctic, Douglas wrote, "All the noises of civilization have been left behind; now the music of the wilderness can be heard." When Alaska's North Slope was opened for mining, Douglas asked, "Are we looting paradise?" Douglas commended Thoreau's attention to "the wonders of creation...those wonders which are at our feet and yet which we seldom see." The word "sanctuary," which appears in Douglas's writing and throughout McKeown's book, derives from the Latin *sanctus* (holy).

Third, life events drove Douglas away from an earlier ambition and towards environmental advocacy. Douglas wanted to be president but was passed over as a vice presidential candidate by Roosevelt in FDR's last term. In 1948, Douglas declined an offer to be Harry Truman's running mate, saying he "could not be a number two man to a number two man." Perhaps, too, by the early 1950s, the energetic, ambitious

promote his causes, Douglas developed a web of useful relationships with conservationists and their organizations, influential and powerful politicians, and the media.

The first of Douglas's many environmental crusades was in 1954, organized to save the towpath along the C&O Canal starting near Georgetown, from being paved into a parkway. Douglas invited the author of a *Washington Post* editorial favoring the parkway to walk with him and experience the wilderness. The *Post* took the bait and sent editors to join along the 189-mile hike. Rather than begin the trek in Washington D.C., Douglas made Washington the destination—a strategy designed to maximize media coverage at the end. Douglas enlisted support from leaders in The Wilderness Society, the National Parks Association, conservationists, and scholars. *Time* and *Life* magazines ran illustrated stories, and the hike was covered by other media, including the three major television networks. The parkway was built but not over the towpath. In 1966, Douglas wrote to Secretary of the Interior Stewart Udall, entreating him to turn the C&O property into a national park. In 1971, President Richard Nixon signed the bill turning the C&O Canal into a National Historic Park.

In Douglas's first protest hike lay the seed of an ethics issue. How could Douglas, as a sitting justice, campaign openly and solicit the secretary of the interior to create a national park? The problem didn't trouble Douglas, who wanted to prod decision makers to make the law more relevant to life. Curiously, his clerks were often oblivious of the full

preservationist environmental philosophy above a utilitarian mixed-use philosophy. Perhaps it was an act of faith to be explained by the spiritual appeal of nature to Douglas. Or perhaps it is to be explained by a belief that paradise lost was indeed an irreversible tragedy.

If Douglas were alive today, one suspects he would again be criticized by corporate interests seeking to develop oil, gas, mining, and lumber reserves and to build pipelines and roads in the wilderness. He would be criticized for a lack of faith that market solutions will sufficiently protect the environment. However, instead of thinking in the short-term about our immediate economic needs and fulfillment, Douglas might respond with concerns about long-term prospects for the planet, the oceans, polar ice caps, glaciers, the air we breathe, and the wilderness. Today, Douglas might be interested in pursuing ecological issues such as global warming, alternative energy sources, and pollution. One clue about Douglas's ecological perspective is that he wrote an effusive review of Rachel Carson's 1962 book, *Silent Spring*, about the harmful effects of DDT, calling it "the most important chronicle of this century for the human race."

Douglas has been harshly judged. Historian David J. Garrow wrote, "He was a man of great ideals, but his career on the Supreme Court unfortunately represented only a witness to those ideals, rather than their actual attainment or realization.... Douglas, as 'a man of action, not reflection,' was 'miscast in the judiciary.'" Judge Richard Posner called Douglas "one of the most unwholesome figures in modern American political history."

McKeown is kinder in her judgment, describing Douglas as "the epitome of an imperfect hero." This judgment necessarily follows from McKeown's study of Douglas's record as a champion of the environment. Viewed as a judge, Douglas disappointed critics of his shoddy legal craftsmanship and lack of a coherent legal philosophy. Douglas's legacy is tarnished by poor behavior in his personal life and lack of concern about judicial ethics. Yet, viewed as an advocate for the environment, Douglas's legacy shines. ■

¹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

² *Sierra Club v. Morton*, 405 U.S. 727 (1972).

³ Christopher D. Stone, *Should Trees Have Standing—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

ACMAS

LOS ANGELES COUNTY BAR ASSOCIATION

FEE DISPUTE SERVICES

▶ **Mandatory Fee Arbitration:**

Subject to Business and Professions Code sections 6200-6206.

▶ **Voluntary Fee Arbitration:**

Not subject to BPCs.

▶ **Law Firm Mediation:**

Internal disputes involving partners, associates, staff attorneys, and support staff, including firm name disputes, firm to firm, dissolution, experts, sanction liability, expenses, and other issues.

Contact ACMAS today:

(213) 896-6426, ACMAS@lacba.org,

LACBA.org/ACMAS

Interested in becoming a fee dispute arbitrator or mediator for LACBA?
Contact ACMAS for details.

LACBA

A service of the Los Angeles
County Bar Association