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CHARLES REICH, NEW DEALER

*John Q. Barrett**

My encounters with Charles Reich began long before I had any personal contact with him. I read his 1970 bestseller *The Greening of America*¹ late in that decade, when I was in high school. From then on, I always owned a copy of that book, until it would disappear in a move or on “loan” to some friend.

Luckily so many copies of *Greening* are in print that I easily would find it anew in used bookstores. So, I often restocked, reread in the book, and got to feel afresh the lift of Reich’s spirit and his words.

Consider, for example, the book’s closing paragraphs, which will enchant me always:

We have all known the loneliness, the emptiness, the plastic isolation of contemporary America. Our forebears came thousands of miles for the promise of a better life. Now there is a new promise. Shall we not seize it? Shall we not be pioneers once more, since luck and fortune have given us a vision of hope?

* Copyright © 2020 by John Q. Barrett. All rights reserved. Professor of Law, St. John’s University, and Elizabeth S. Lenna Fellow, Robert H. Jackson Center. This essay is based upon my lecture on January 30, 2020, at Touro College Jacob D. Fuchsberg Law Center’s superb conference, “Charles A. Reich: A Commemoration of His Life and Legacy.” A video of my lecture is available at www.youtube.com/watch?v=55X1BMLhfPo&t=23s. I am deeply grateful to the late Charles Reich for his writing, teaching, friendship, and inspiration—I am so lucky to have known him. I also remember the late Dr. Peter Reich, M.D., with gratitude for his kindness and wisdom. I thank Drs. Lee, Alice, and Daniel Reich for their generous friendship; Rodger Citron, Charles’s devoted friend and biographer, for friendship, deep expertise, organizing this conference, and shepherding this publication; Dean Elena Langan and Professor Rena Seplowitz for their leadership; each Touro conference participant, who was super; Danielle M. Stefanucci and Sarah E. Catterson for excellent research assistance; and the editors of the *Touro Law Review* for great work.

¹ CHARLES A. REICH, *THE GREENING OF AMERICA* (1970).

The extraordinary thing about this new consciousness is that it has emerged out of the wasteland of the Corporate State, like flowers pushing up through the concrete pavement. Whatever it touches it beautifies and renews: a freeway entrance is festooned with happy hitchhikers, the sidewalk is decorated with street people, the humorless steps of an official building are given warmth by a group of musicians. And every barrier falls before it. ... We have all been induced to give up our dreams of adventure and romance in favor of the escalator of success, but it says that the escalator is a sham and the dream is real. And these things, buried, hidden, and disowned in so many of us, are shouted out loud, believed in, affirmed by a growing multitude of young people who seem too healthy, intelligent, and alive to be wholly insane, who appear, in their collective strength, capable of making it happen. For one almost convinced that it was necessary to accept ugliness and evil, that it was necessary to be a miser of dreams, it is an invitation to cry or laugh. For one who thought the world was irretrievably encased in metal and plastic and sterile stone, it seems a veritable greening of America.²

When I became a law professor, I began to understand Charles Reich's brilliance as a law thinker, teacher, and scholar. On someone's recommendation, I read a number of the "greatest" law review articles. The first of them, deserving of that ranking, was Charles Reich's *The New Property*.³

In 2002, I contacted Charles Reich. I was researching and writing, for a Yale Law School conference, an article on Judge A. Leon Higginbotham, Jr., for whom I had the great fortune to be a law clerk. Leon and Charles had been classmates in the Yale Law School class of 1952. John P. Frank was one of their professors. I was writing about how Professor Frank, once a law clerk to Justice Hugo L. Black, had taken Leon Higginbotham, one of the few African-American students

² *Id.* at 394-95. I thank my children who, in their middle school-ish years, indulged my reading those paragraphs aloud to them.

³ Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

then at Yale, to the Supreme Court in April 1950 to hear the oral arguments in *Sweatt v. Painter*.⁴ Two months later, the Court held unanimously in that case that it was unconstitutional for the state of Texas to bar a Black man, based on his race, from attending the University of Texas Law School.⁵ I called Charles in San Francisco to ask about Leon, John Frank, that Washington trip, and Yale Law School in those days. That began my friendship with Charles.

I recall Charles asking me, early on, “What do you want to work on?” I said that I was interested in constitutional law, the Supreme Court, and, increasingly, Robert H. Jackson and his time period. Charles took that in. He then told me his recollection of being a law professor. He said that he got ready, as summer began, to start on a writing project. He got a big table in the Yale Law School Library and amassed there all the books that he might want. He then focused on his topic: “I decided to write about America.” I remember thinking that the water here is very deep.

It was a great privilege to be Charles’s friend. I mean not to overstate our friendship, but I got to talk to him by telephone, to write back-and-forth with him, on paper and by email, and to spend time talking with him in person in some of his special places. They included Manhattan, where Charles was born and raised (and where I live, purely coincidentally, in the building where he lived as a teenager). I also was Charles’s and his family’s guest at their house in the Adirondacks—a location that was incredibly special to Charles for all of his life and did much to form his spirit. I visited him at his apartment in San Francisco, where his large work table was positioned so that he could, when he wanted not to look down at his work or straight ahead at an interior wall, turn his head rightward to look out of his picture window on the Mark Hopkins Hotel and Russian Hill. Those were good places for Charles to be, to sit, to think, to write. Sometimes I also got to watch him at work, reading in front of a fire, or sitting and writing (actually he mostly printed, in a very clear hand), moving his preferred blue pen on his favored pads of white paper.

Charles was always thinking, sharing his ideas, asking questions, listening, writing, and then thinking some more. He was filled

⁴ *Sweatt v. Painter*, 339 U.S. 629 (1950).

⁵ See *id.* at 635-36. See generally John Q. Barrett, *Teacher, Student, Ticket: John Frank, Leon Higginbotham, and One Afternoon at the Supreme Court—Not a Trifling Thing*, 20 YALE L. & POL’Y REV. 311 (2002).

with memories and knowledge, including lots of history. He followed public issues and public figures. He knew very much, and cared deeply, about constitutional law and the Supreme Court, where he had clerked for Justice Black during 1953-54. He was a very fine lawyer, thinking both precisely and discursively about legal issues. He loved, both shyly and intensely, individuals, humanity, and the world we inhabit. He worried about politics and the security of people. His engagement with everything, including his lovely curiosity about anything that he did not know, never flagged. I have draft book proposals, concept papers, and book drafts that he sent to me for comment, and I know that others have them too. These drafts and unfinished projects will be, in his papers at Yale, intellectual stimulus for generations to come.

Although Charles now is gone, he is all around us intellectually, in societal and legal contexts. I noted two examples in the days before this conference.

One was the obituary of the comedian Buck Henry. He was a performer on *Saturday Night Live*, involved in various films, and part of writing the film *The Graduate*.⁶ Released in 1967, the film depicts the alienation of young people during the time period when Charles was teaching them at Yale. We know that his students moved from alienation to protest to higher consciousness. In other words, the younger siblings of *The Graduate* became the students celebrated in *The Greening of America*.

The other example comes from current constitutional law and politics. During the Senate trial of impeached President Trump, defense counsel Patrick Philbin made an argument about the constitutional importance of cross-examination. He claimed that President Trump had been denied the opportunity to cross-examine witnesses who testified before House committees. Mr. Philbin called this outrageous because, he claimed, it ran against the constitutional protection recognized fifty years ago by the Supreme Court in *Goldberg v. Kelly*.⁷

⁶ See Bruce Weber, *Buck Henry, Who Helped Create 'Get Smart' and Adapt 'The Graduate,' Dies at 89*, N.Y. TIMES, Jan. 10, 2020, at A24.

⁷ See 166 CONG. REC. S577 (daily ed. Jan. 25, 2020) (remarks of Patrick Philbin) (“For 71 days of that [House of Representatives impeachment] process, for 71 days of the hearing and taking of depositions and hearing testimony, the President was completely locked out. He couldn’t be represented by counsel. He couldn’t cross-examine witnesses. He couldn’t present evidence. He couldn’t present witnesses for 71 of the 78 days. That is not due process. . . . [C]ross-examination in our legal

We know that that landmark decision grew in the field seeded by Charles Reich in *The New Property*.⁸

Charles shared with me, more than once, his memories of listening many times to President Franklin D. Roosevelt on the radio, and of seeing him once in Manhattan. That sighting happened in early November 1944. F.D.R. was in New York City near the close of his campaign for a fourth term. He spoke that day in Ebbets Field in Brooklyn. When his motorcade got to Manhattan, it was pouring rain. Huge crowds nonetheless turned out to see the president, and he saw them from his open car.⁹ On Broadway, two young men in the crowd, in the rain, seeing their president, were Charles Reich, then sixteen, and his brother Peter, three years younger.

Charles Reich was a son of the New Deal. He was born in 1928. He lived a 1930s boyhood in New York. His parents were Democrats and Jewish. In his young adulthood, Charles became a close colleague and friend of former New Dealers, including: Justice Black, who not only employed Charles as a law clerk but shared his home with him and his co-clerk that year; Justice William O. Douglas, with whom Charles as a young lawyer hiked regularly; lawyers Thurman Arnold, Abe Fortas, and Paul Porter, in whose law firm Charles worked; and Thomas I. Emerson, who was Charles's revered Yale Law School colleague. Charles Reich was a New Deal liberal.

Yet Charles's writings are filled with anti-New Deal commentary, or at least they contain passing language that can be grabbed and used to make criticisms of the New Deal. So, I wish to touch on the question that raises: Are his ideas in fact support for anti-“administrative state,” our-bureaucracy-verges-on-tyranny thinking that is out there today, including on the U.S. Supreme Court?¹⁰ I think not. Charles Reich's “New Deal” was and is, when you read his work

system is regarded as the greatest legal engine ever invented for the discovery of truth. It is essential. The Supreme Court has said in *Goldberg v. Kelly*, for any determination that is important, that requires determining facts, cross-examination has been one of the keys for due process.”).

⁸ See *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 & 265 (1970) (citing Reich, *The New Property*, *supra* note 3) (also quoting, at length, Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)).

⁹ Newsreel film of this F.D.R. motorcade is available at www.youtube.com/watch?v=WdpCQyX9-Ig.

¹⁰ See generally Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

carefully and look at how he lived, really a longing for the old deal that was the best of his youth. It was perhaps overly romantic, but he longed for more of the times and spaces of his own individual flourishing.

Charles Reich's unified perspective on life was his identification of stages of individual consciousness. They are something of an American history (remember "write about America"?). "Consciousness I" is the task-oriented, self-governing, free, and advancing life of the American pioneer. "Consciousness II" is when the individual becomes penned in, victimized by bureaucracy. "Consciousness III" is the break-out to, in comfort and safety, a life of relationships, human values, and deep meaning. And these stages can be visualized not only along an oscillating line, but also as a circle, and as a clockwise journey around it: a high start, then a decline, and then a rise again toward something of, but more fully informed and realized than where the individual began.

In Charles's life, part of his starting high, to which his rising recovery returned, was the 1930s and 1940s, the good parts of his and Peter's boyhoods, including their applause for their candidate F.D.R. on Broadway in 1944. It was the Reichs', and Roosevelt's, embrace of care, of Great Depression-rescue public assistance, of increasing decency. That New Deal assisted individuals to get away from the bad, just as Charles, in various ways across his life, found ways to navigate away from the tryingly complex and even bad to the more congenial and true. He did this in his family, in his close relationship with his brother, in his private law practice years, in his professor time at Yale, in his San Francisco life and years, in—always—the Adirondacks, and in his return to Yale Law School in the 1990s.

Charles's upward trajectory—his New Deal-rescue/decency/time for more care trajectory—was his own rebellion against dehumanization, against mechanization, against the machine grinding too much on people and, most deeply felt, of course, on him. Those bad things are located in Charles's "Consciousness II," at the bottom of the circle that I suggest drawing in your mind. Yes, those things and times in Charles's life did grow chronologically out of the New Deal, which was the United States from his boyhood until at least, really, when President Reagan took office, and maybe even then and since. That decline may be what Charles truly meant when he criticized New Deal government bureaucratization. If so, he somewhat misused the label of what was and is, at its core, the care that he valued. His attacks on the "New Deal" might well be understood, in other

words, not as aimed at the 1930s and 1940s of his youth, but as attacking the deteriorations that occurred next, in his young adulthood, in the years of Cold War, McCarthyism, and 1950s and early 1960s repressions. These were the conformity-enforcing times that Charles knew, suffered in, and deplored.

I got to see, in Charles's older age, his own ethic of care, social security, and personal decency. In the Adirondacks, he was impressed by entrepreneurs like Hoss, who ran a big local store. Charles enjoyed talking with people whose lives were not fancy, like Jim and Donna at the Stewart's gas station and store. Although their resources, including education, might not have been comparable, they all knew the difference between people getting by and people being desperate. And across their differing politics, they all wanted a government that assists people, with decency and fairness (which is, of course, the "New Property" insight).

A government that works with care for persons, that acts to get us out of crises like the Great Depression or World War II, is a government that helps people get to happiness moments and places. This is why Charles had at home in San Francisco, on the wall behind his writing table, top and center among many framed items, *Life* magazine's June 27, 1938, cover photograph of smiling F.D.R., captioned "Franklin Roosevelt and His America." (Remember "write about America"?) This is why Charles had, right at hand there, two authentic political campaign buttons, "FDR" and "Carry on FDR" (and, okay, a "Wallace '48" button too).

Charles Reich had a dazzlingly unique life. Jerry Garcia and his Grateful Dead bandmates were Charles's friends in the 1960s and 1970s. More than thirty years later, Charles, who kept up with the best of new music and knew the street in Queens on which my employer St. John's University is located, asked me in a letter if I knew "that the band Fountains of Wayne has a great CD called Utopia Pkwy?"¹¹ Charles had high and low, left and right, east and west, law and very-far-from-law interests, friends, and connections. They added up to his hard-achieved and valued consciousness. In his life, he reached his better destinations. He wanted each of us to do the same. And he wanted the world, including government, to assist us, kindly and personally.

¹¹ Letter from Charles A. Reich to John Q. Barrett, July 27, 2005 (in author's possession).

What I carry forward without Charles as a living friend, but with him as a very powerful, permanent memory that teaches still, is inspiration to find meaning, consciousness, and security, even when “out of phase.”¹² Charles’s spots and moments of happiness included the Reich brothers in their togetherness, seeing F.D.R. in the New York City rain in November 1944 and revering him ever after. Charles and Peter had a fair amount of prosperity. They also had inclinations, together and I think especially with Charles in the lead, to hike out away from that, to rough it, to seek beauty in wilderness, to paddle a hand-made canoe, to find excitement in leaving known trails.

The Touro conference date was not selected specially, but it had a serendipity that Charles would savor. We gathered to remember him, a New Deal believer, on January 30, 2020. It was Franklin D. Roosevelt’s birthday.

¹² Charles Reich’s beloved Yale Law School colleague, dean, and friend Judge Guido Calabresi, speaking at the January 29, 2020, dinner that opened Touro’s Reich conference, used that phrase to describe Charles. It is perfect.

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March 12, 2008: Charles Reich at home in San Francisco, seated in front of his framed 1938 *Life* magazine cover of President Franklin D. Roosevelt and displaying F.D.R. and Henry Wallace political campaign buttons. (Photograph © John Q. Barrett)