# Justice Douglas and Freedom of Speech

*compiled and with an introduction by*

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The Scarecrow Press, Inc.
Metuchen, N.J., & London 1980

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**Library of Congress Cataloging in Publication Data**

Douglas, William Orville, 1898-
Justice Douglas and freedom of speech.

Includes index.
1. Liberty of speech--United States--Cases.
2. Freedom of information--United States--Cases.
3. Douglas, William Orville, 1898- I. Bosmajian, Haig A. II. Title.
KF4772.A7D68 342'.73'0850264 79-26635
ISBN 0-8108-1276-2



Manufactured in the United States of America

# INTRODUCTION

By September 1922, when William Orville Douglas had taken a freight train out of Yakima, Washington, to go east to study law at Columbia University, he had witnessed as a youth the mistreatment of the poor, the injustices heaped upon the migrant workers, and the violence against the Wobblies in the Yakima Valley. As a child not yet in his teens, he had fought a bout with infantile paralysis, strengthening his spindly legs by hiking in the Cascade foothills and mountains.

After his father, a minister, died in 1904, when the future Supreme Court Justice was only six years old, the Douglas family moved to Yakima. There the young William developed a dislike of the clergy, except for a Dr. William Robinson, whose appeal, declared Douglas in Go East, Young Man, "was in his application of the teachings of Christ to the problems of life--and in particular to those of the Yakima Valley." The other preachers, said Douglas,

> seemed to be defenders of the status quo and against the rabble. The rabble were the hundreds of itinerant workers who came north with the sun, picked Yakima's fruit, and moved on to Canada's wheat harvest. Some were IWW's (Industrial Workers of the World); others were families traveling by jitney from valley to valley in pursuit of a livelihood. Dr. Robinson pricked the conscience of Yakima when he talked to them. The other local ministers treated them as scum. Vagrancy was a crime--how much of a crime, I was to discover years later.

A brief boyhood experience as a "stool pigeon" for a minister "bent on ridding Yakima of prostitutes and bootleggers" eventually led Douglas "to feel a warmth for all these miserable people, something I never felt for the high churchman who hired me. They were scum that society had pro-

duced--misfits, maladjusted, disturbed, and really sick." This experience resulted in Douglas's "resentment against hypocrites in church clothes who raise their denunciations against the petty criminals, while their own sins mount high. This feeling somehow aligned me emotionally with the miserable people who make up the chaff of society."

While Douglas spent the summer months working in the orchards and packing houses, the winter found him rummaging in the alleys and garbage cans of Yakima for burlap sacks which he sold to the produce house or searching for "scrap iron for which a junk dealer might pay a pittance." This all left a strong impression on Douglas: "Years later, in Washington, D. C., I saw the junk collectors with their two-wheel carts slowly making their rounds in the early morning hours. They were usually Black men and I felt sorry for them recalling my own experience."

After discussing the discrimination against blacks and Indians in Yakima, Douglas goes on to write: "By the time my teen-age years ended, I had met a different group of outcasts, who made a very deep impression on me. They were the Wobblies, or IWW's, of the Far West.... Though Yakima denounced them as criminals, I came to know the Wobblies as people who deserved more than our society had meted out to them."

The mistreatment of the Wobblies was made especially clear to Douglas in 1917, when at the age of nineteen he witnessed a trainload of workers rounded up by the government. Douglas describes his reaction: "The train that passed through Yakima was not carrying men on display. These were sealed boxcars carrying human beings, thirty or forty in each car. The authorities were taking outcasts through our city. There were no toilets, no food, no water, just sealed boxcars with these poor bastards inside. I walked home with tears in my eyes."

As for the police, young Douglas saw them as representing "the ultimate personality of the Establishment that owned and ran the Yakima Valley. They were harsh and relentless and bore down heavily on the nonconformist.... I knew their victims too intimately to align myself with the police. My heart was with the impoverished, restless underdogs who were IWW's."

After graduating from high school, Douglas continued

his education on a scholarship at Whitman College in Walla Walla, Washington. The impact of young Douglas's education and work on his later tolerance and encouragement of unorthodox speech is alluded to by Vern Countryman in Douglas of the Supreme Court:

> He arrived there [Whitman College] in the fall of 1916 with little else but the bicycle he rode. Varying jobs as store clerk, waiter, and janitor provided food and a tent provided shelter during the school terms. During summer vacations there was employment in the wheat fields and an opportunity to debate with other laborers the revolutionary doctrines of the Industrial Workers of the World. This experience may have built up some immunity against alarm over extravagant political discussion, but it did not produce a revolutionary.

By the time Douglas left for his studies at the Columbia Law School in 1922, his spirit of independence, tolerance, and self-reliance had been developed in the agricultural fields of Washington, the streets of Yakima, and the mountains of the Cascades. "I learned early," Douglas wrote in the autobiographical Of Men and Mountains, "that the richness of life is found in adventure. Adventure calls on all the faculties of mind and spirit. It develops self-reliance and independence. Life then teems with excitement. But man is not ready for adventure unless he is rid of fear. For fear confines him and limits his scope. He stays tethered by strings of doubt and indecisions and has only a small and narrow world to explore."

Again and again one finds in Go East, Young Man a concern for conquering a variety of fears; Douglas concluded the chapter entitled "Fear" with: "Once I wrote: When man knows how to live dangerously, he is not afraid to die. When he is not afraid to die, he is, strangely, free to live. With the passage of time, I would state the basic idea a bit differently. Death is inevitable, but the thought of it usually breeds fear. Yet the fear that is truly debilitating is the fear of the unknown in the environment around us. When we rid ourselves of that fear, we are free to live and can become bold, courageous, and reliant."

The fear that the young Douglas experienced at his father's funeral in August 1904 was somewhat overcome by the presence of the nearby towering mountains: "As I stood

by the edge of the grave a wave of lonesomeness swept over me. Then I became afraid--afraid of being left alone, afraid because the grave held my defender and protector. These feelings were deepened by the realization that Mother was afraid and lonely too. My throat choked up and I started to cry. I remembered the words of the minister, who had said to me, 'You must now be a man, sonny.' I tried to steel myself and control my emotions." Then Douglas looked toward the mountains and saw Mt. Adams "towering over us on the west. It was dark purple and white in the August day and its shoulders of basalt were heavy with glacial snow. It was a giant whose head touched the sky." The six-year-old Douglas stopped crying: "My eyes dried. Adams stood cool and calm, unperturbed by the event that had stirred us so deeply. Suddenly the mountain seemed to be a friend, a force for me to tie to, a symbol of stability and strength."

The transitory nature of the lives of humans and their inventions and the permanence of nature and the universe were "facts" that made a deep impression on Douglas and influenced his outlook toward people. His Physics and Geology professor at Whitman College, Dr. Benjamin Brown, wrote Douglas,

> lived at the cosmic level, not the ideological one. Russia had gone Red in the revolution of 1917, but Daddy Brown knew that come spring, the fields of Russia would be alive with the brilliance of wildflowers. Creeds and dogma come and go, but planetary life goes on undisturbed. He taught us man's small role in the universe, the immensity of the Glacial age, the magnitude of the Pleistocene, and so on. He taught us to observe the winds and the rocks. Rocks become round by rolling, and that was all we needed to know to find old watercourses. Wind carried dust. Who loses the dust? Who gets it? Solve that, and you know what lands are becoming poorer, what lands richer. That lesson was useful to me years later in North Africa.

Douglas shared Professor Brown's concept of life after death: "The loveliest image Daddy Brown could draw was illustrated by a skull he had unearthed near an apple tree. The root of the tree had grown through the eyes of the skull, sucking up into the tree the entire brain of the deceased. 'How wonderful to become an apple tree!' he exclaimed. 'Can anyone think of anything more choice for

an afterlife?'" Concludes Douglas: "Father would have been shocked, but I shared Daddy Brown's feelings."

This view of life and death, coupled with his attitude toward fear, came to be reflected in Douglas's tolerance for diversity, for new ideas, for "foreign" ideologies; with such a cosmic conception of life, seemingly immediate dangers, physical and ideological, come to be perceived as less perilous to society, dangerous only to those who are afraid. Douglas clearly agreed with Justice Brandeis, whom he greatly admired; in his 1951 Dennis dissent he quoted at length from Brandeis's famous Whitney concurring opinion. "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men fear witches and burnt women. It is the function of speech to free men from the bondage of irrational fears." "Those who won our independence by revolution," Brandeis wrote, "were not cowards. They did not fear political change. They did not exalt order at the cost of liberty." These were sentiments Douglas could easily accept.

The independence, tolerance, and self-reliance developed by the youthful Douglas was to be reflected years later in his First Amendment decisions related to the civil liberties of "dangerous" political propagandists, unpopular religious groups, outspoken street-corner agitators, nonconformist professors, protesting students, annoying distributors of obscene materials, and minorities demonstrating to get civil rights long denied them.

But Douglas's encouragement of tolerance of differing political and religious views, his criticism of Yakima's political and religious leaders, and his spirit of independence did not set well with all the citizens of his hometown. When Franklin Roosevelt named Douglas to the Supreme Court, the Yakima Daily Republic published an editorial alluding to Douglas's "strange isms that are not compatible with Americanism," concluding with, "We want to go on record that Yakima is not to blame." "This editorial," Douglas says in Go East, Young Man, "was written by N. K. Buck, one-time police judge and later mayor.... The piece delighted me no end, and I foolishly carried it in my wallet for so long that it finally crumbled away. Unfortunately, someone destroyed that entire edition of the paper after a few hundred copies were run off, and apparently no copies are extant."

The Daily Republic, however, did make some positive editorial comments in other issues. The March 21, 1939, issue ran an editorial beginning with the following paragraph: "By appointing William O. Douglas to the supreme court, President Roosevelt put on the high bench a young man worthy to follow in the tradition of Justice Louis D. Brandeis. Douglas is a leading New Dealer, but he is no weak-kneed sycophant, no mealy-mouthed yes-man. He is a man long since arrived at his liberal conclusions through independent judgment and hard mental application. His knowledge of social and economic organization was tempered by struggle against adversity. Even those persons who cannot agree with Douglas' outlook on life still respect his views because they are honest views." An editorial on the following day, March 22, 1939, stated: "It is not alone because William Orville Douglas has a Yakima background that his nomination is highly satisfactory to the residents of this community. The consensus is that he is qualified to fill the high position to which he has been named.... Douglas has ability of the first rank. He has made his own way. He stands as a refutation of the complaint that there is no longer opportunity for a young man."

On April 4, 1939 the United States Senate confirmed Douglas's nomination to the Supreme Court. But the story was given short shrift by the Daily Republic, which had as its April 4 headline: "MOB SLAYS ENGLISH CONSUL AT MOSUL." In smaller type the paper reported: "Douglas Gains Vote of 62 to 4 on Court Post." The other local paper, the Yakima Morning Herald, on its April 4, 1939 front page carried stories related to an emergency defense bill and the freeing of some New York kidnap suspects. Nowhere was there any mention of the Senate confirmation of Douglas. Nor did the April 5 issue contain any news item related to the appointment of Yakima's most famous resident to the Supreme Court. Meanwhile, 150 miles away, the April 4 Seattle Times carried the headline "SENATE CONFIRMS DOUGLAS."

When Douglas took his seat on the Court several days later, the Daily Republic on April 17 ran a headline dealing with the Court's decision that former membership in the Communist Party did not subject an alien to deportation. Below this story there appeared in smaller type a story about Douglas taking the oath: "An oath to support the constitution and to administer justice impartially today made 40-year-old William O. Douglas the youngest member

of the supreme court in 127 years." This was followed with mention of Douglas's Yakima background: "The former chairman of the Securities Commission, who rose in life from a Yakima newsboy and janitor, took his seat on the nation's highest tribunal before a packed courtroom." The Morning Herald did not even bother to mention that Douglas had taken the oath and was now officially seated on the Supreme Court. (Its April 18 issue did, however, have on its front page a large picture of Adolf Hitler, who was celebrating his fiftieth birthday on April 20.)

While Douglas was being disowned by some local residents, his early education, his formative experiences in Yakima, his working associations with the migrant workers and the Wobblies, his reaction to the police, preachers, and propertied class, his hiking in the Cascades--all of these had too great an influence for Yakima to disassociate itself from Douglas. As Fred Rodell has said in Nine Men, "Douglas, despite his Minnesota birth (he was still an infant when his family left the state), was a product of the Pacific Northwest, the last American frontier." Douglas himself observed in Go East, Young Man that the conclusion of the Yakima newspaper that asserted "We want to go on record as saying that Yakima is not to blame" was "humorous, but wrong." Said Douglas: "The Yakima system was in large measure responsible for the kind of person that I became, in the sense that its teachers were quickening influences that helped me see the dimensions of the world of that day."

Fifty-three years after Douglas left Yakima to enter the Columbia Law School and thirty-six years after he was appointed to the Supreme Court, the members of the Court said in their November 14, 1975 message to retiring Justice Douglas: "So much has been said and will be said on other occasions about your remarkable career that no more need be noted now than to recall that it is far more than a record of longevity, for it spanned a period in American history comparable to that of the formative period early in nineteenth century when Marshall and then Taney were here." For thirty-six years the remarkable Justice from Yakima sat on the Court defending especially our First Amendment freedoms against private and governmental censors. Right up to the time of his retirement he took his consistent stand defending freedom of speech.

One month before he left the Court, Douglas was

dissenting in some obscenity cases, when the majority (including all the Nixon appointees) was denying certiorari and in effect upholding the convictions of persons convicted of exhibiting and mailing "obscene" materials. For example, October 14, 1975: "No. 74-1282. RATNER V. UNITED STATES. C.A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view, stated in his previous opinions and those of Mr. Justice Black, that any state or federal ban on, or regulation of, obscenity abridges freedom of speech and of the press contrary to the First and Fourteenth Amendments, would grant certiorari and summarily reverse the judgment. Reported below: 502 F. 2d 1300."

In June 1975, five months before his retirement, Douglas declared in his concurring opinion in Erznoznik v. City of Jacksonville, a case dealing with nudity being shown on a drive-in movie screen visible from a highway: "Any ordinance which regulates movies on the basis of content, whether by an obscenity standard or by some other criterion, impermissibly intrudes upon the free speech rights guaranteed by the First and Fourteenth Amendments." In a footnote to his opinion Douglas reasserted: "I adhere to my view that any state or federal regulation of obscenity is prohibited by the Constitution." For almost two decades since his Roth dissent in 1957 Douglas had consistently taken the position that obscenity was speech protected by the First Amendment.

Amongst all the Justices who have sat on the United States Supreme Court only one has given his full support to the First Amendment's guarantee of freedom of speech as applied to obscenity and symbolic speech and loyalty oaths and group libel and offensive speech and controversial religious and political speech. While other Justices have given First Amendment protection to obscene materials they have not given the same protection to symbolic speech. Other Justices have found offensive speech unprotected; still others have decided loyalty oaths constitute a legitimate governmental inquiry into a person's beliefs and associations. But only Justice Douglas has had the wisdom to see, for over the longest period of time, the value and necessity of giving constitutional protection to a diversity of kinds of speech to maintain and perpetuate the free society. So important is the need to maintain free and open discussion, to be watchful that the State does not get into the business of thought control, to recognize that different people use different means of communication, that Douglas has given

freedom of speech a preferred position in the hierarchy of our constitutional rights. No other Supreme Court Justice has argued at such length for the protection of so many different kinds of expression and means of communication.

After Douglas's appointment to the Court in 1939 very few other Justices came close to his consistent protection of the First Amendment rights, especially freedom of speech. Such Justices as Felix Frankfurter, Robert Jackson, Fred Vinson, Tom Clark, Earl Warren, John Harlan, William Brennan, Potter Stewart, Warren Burger, and others did on occasion find themselves lining up with Douglas on various freedom of speech cases, some agreeing with him more often than others, depending on whether the cases dealt with picketing, obscenity, loyalty oaths, investigating committees, symbolic speech, or distribution of literature on the streets or in shopping centers.

Of the Supreme Court Justices, Hugo Black, who was appointed to the Court two years before Douglas, is the one with whom Douglas has been most often identified on First Amendment issues. But absolutist that he may have been, Black's record on freedom of speech is not the same as Douglas's. In his February 1956 Yale Law Journal article, "Mr. Justice Black: A Biographical Appreciation," John P. Frank said of Black: "His opinions on the subject dearest to him, freedom of speech, are oddly fragmentary; most of the powerful free speech dissents have been by Justice Douglas, and yet the views of the two are not quite the same."

On the freedom of speech issue it was not Hugo Black but Thurgood Marshall with whom Douglas had most in common, Marshall, the great-grandson of a slave, who had been appointed to the Court in 1967, almost thirty years after Douglas had taken his seat on the Court. While Marshall and Black lined up with Douglas on cases related to obscenity, loyalty oaths, and investigating committees, it was Marshall, not Black, who joined Douglas on the several symbolic speech cases, such as Tinker, Logan Valley, and Street.

## Symbolic Speech

Before Marshall joined the Court, Douglas and Black had been at odds on whether First Amendment protection

should be given to such forms of communication as picketing, sit-ins, and demonstrations. While Douglas gave the civil rights demonstrators sitting-in to desegregate a Louisiana public library First Amendment protection in Brown v. Louisiana (1966), Black dissented, declaring: "The First Amendment, I think, protects speech, writings, and expression of view in any manner in which they can be legitimately and validly communicated. But I have never believed that it gives any person or group of persons the constitutional right to go wherever they want, whenever they please, without regard to the rights of private or public property or to state law.... Though the First Amendment guarantees the rights of speech, press, and religion, it does not guarantee to any person the right to use someone else's property, even that owned by government and dedicated to other purposes, as a stage to express dissident ideas."

Again, in Adderley v. Florida (1966), Black argued against finding for the civil rights demonstrators who had assembled in front of a county jail to protest racial segregation, including segregation in the jail. Douglas, with whom Warren, Brennan, and Fortas concurred, disagreed with Black and stated in his dissenting opinion:

> The jailhouse, like an executive mansion, a legislative chamber, a courthouse, or the statehouse itself ... is one of the seats of government, whether it be the Tower of London, the Bastille, or a small county jail. And when it houses political prisoners or those who many think are unjustly held, it is an obvious center for protest. The right to petition for the redress of grievances has an ancient history and is not limited to writing a letter or sending a telegram to a congressman; it is not confined to appearing before the local city council, or writing letters to the President or Governor or Mayor.... Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics

> of obstruction and harassment as long as the assembly and petition are peaceable, as these were.

Black disagreed and speaking for the Court concluded that "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this 'area chosen for the peaceful civil rights demonstration was not only "reasonable" but also particularly appropriate....'"

In still another 1966 Supreme Court decision, Cox v. Louisiana, in which the majority found for the civil rights demonstrators involved in courthouse picketing, Black dissented in one of the judgments in that case. "Picketing," said Black, "though it may be utilized to communicate ideas, is not speech and therefore is not of itself protected by the First Amendment."

One year later, Black joined the majority in Walker v. City of Birmingham upholding the convictions of the Southern Christian Leadership Conference Leaders--Wyatt Walker, Martin Luther King, Ralph Abernathy, Fred Shuttlesworth, Andrew Young, and others--who had violated an injunction against parading and demonstrating in Birmingham, Alabama, in April 1963. Douglas did not join Black but instead argued that the injunction abridged the petitioners' First Amendment rights "peaceably to assemble, and to petition the Government for a redress of grievances."

While Black was no ally of Douglas's in these cases dealing with symbolic speech, the Justice from Yakima found an ally in Thurgood Marshall, the Justice from Baltimore. One year after his appointment in 1967 Marshall delivered the opinion of the Court in Amalgamated Food Employees Union v. Logan Valley Plaza, a case involving picketing at a shopping center. The majority, Douglas included, decided, for the picketing members of the union. Marshall flatly stated: "We start from the premise that peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment." Black dissented, asserting that "petitioners cannot, under the guise of First Amendment rights, trespass on respondent Weis' private property for the purpose of picketing."

In 1972 (two years after Black had left the Court), the majority of five, four of them Nixon appointees, decided in Lloyd Corp. v. Tanner that the Lloyd Shopping Center in Portland, Oregon, could prohibit the distribution of antiwar handbills in its malls, that "the handbilling by respondents in the malls of the Lloyd Center had no relation to any purpose for which the center was built, and being used." The majority, composed of Powell, Burger, Rehnquist, Blackmun, and White, contended that the handbillers could have passed out their materials on the public sidewalks and streets and that "it would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist." The shopping center's prohibition, the Court decided, was warranted and constitutional.

Marshall filed a dissenting opinion in which Douglas, Brennan and Stewart joined. In his dissent Marshall gave freedom of speech a preferred position: "We must remember that it is a balance that we are striking--a balance between the freedom to speak, a freedom that is given a preferred place in our hierarchy of values, and the freedom of a private property owner to control his property. When the competing interests are fairly weighed, the balance can only be struck in favor of speech." Marshall observed, as Douglas had six years earlier in Adderley, that some people do not have available to them the more traditional forms of communication: "For many persons who do not have easy access to television, radio, the major newspapers, and other forms of mass media, the only way they can express themselves to a broad range of citizens on issues of general public concern is to picket, or to handbill, or to utilize other free or relatively inexpensive means of communication. The only hope that these people have to be able to communicate effectively is to be permitted to speak in those areas in which most of their fellow citizens can be found. One such area is the business district of a city or town or its functional equivalent." Marshall concluded that "when there are no effective means of communication, free speech is a mere shibboleth."

Three decisions in 1968, Tinker v. Des Moines Independent Community School District, Street v. New York, and Gregory v. Chicago again demonstrated the different perspectives Douglas and Black had on the "speech" elements involved in symbolic communication. In Tinker the majority,

including Douglas and Marshall, decided for the Tinker children, who had been suspended from their schools for wearing black armbands to protest the war in Vietnam. In giving First Amendment protection to the children the Court declared: "...the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment." The Court then said in its now classic statement: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech at the schoolhouse gate."

Justice Black dissented in a strongly worded opinion in which he spoke of the immaturity of students and warned of disasters in the schoolhouse. Public school children, said Black, are not "sent to school at public expense to broadcast political or any other views to educate and inform the public.... It may be that the Nation has outworn the old-fashioned slogan that 'children are to be seen not heard,' but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach." Concerned about discipline in the schools, Black then went on to say: "Here a very small number of students have crisply and summarily refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins."

The extent of Black's perturbation is hard to explain. The quiet wearing of the armbands which led to no disruption of school activities--which Tinker was all about--is something quite different from "break-ins" and "smash-ins"--which this case was not about.

In Street v. New York the majority, including Douglas, found for Street, who had been convicted of violating a New York statute that made it a crime to publicly "mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act [any flag of the United States]."

Justice Harlan, speaking for the majority, said: "We have no doubt that the constitutionally guaranteed 'freedom to be intellectually ... diverse or even contrary, and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous." Street had taken his American flag and burned it on a street corner in Brooklyn, New York, in June 1966 after hearing of the shooting of civil rights leader James Meredith by a sniper in Mississippi. At the time of the burning Street was heard to say: "We don't need no damn flag.... Yes, that is my flag; I burned it. If they let that happen to Meredith we don't need an American flag." The Court concluded that "disrespect for our flag is to be deplored no less in these vexed times than in calmer periods of our history.... Nevertheless, we are unable to sustain a conviction that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects."

Black dissented, asserting that "the conviction does not and could not have rested merely on the spoken words but that it rested entirely on the fact that the defendant had publicly burned the American flag--against the law of the State of New York." Black concluded: "It is immaterial to me that words are spoken in connection with the burning. It is the burning of the flag that the State has set its face against.... The talking that was done took place 'as an integral part of conduct in violation of a valid criminal statute' against burning the American flag in public. I would therefore affirm this conviction."

What we have then, is that no other Supreme Court Justice has given so much First Amendment protection to symbolic speech as has Justice Douglas, with Marshall more than any other Justice carrying on the Douglas tradition in giving this form of communication constitutional protection.

## Obscenity

The applicability of the First Amendment to obscenity was never in doubt as far as Douglas was concerned. For almost two decades--from 1957, when the Warren Court gave us the Roth definition of obscenity, to 1973, when the Burger Court gave us the Miller definition--Douglas consis-