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Reason and Passion: Justice Jackson and the Second Flag Salute Case (Part II)

By Douglas E. Abrams

In the summer issue of *Precedent*, Part I of this article said that carefully balancing reason and passion can invigorate not only judicial opinion-writing, but also the written advocacy of counsel who seek to persuade the decision makers. Part I recited the story behind Justice Robert H. Jackson's majority opinion in *West Virginia State Board of Education v. Barnette*, and presented the rich historical pedigree of reason and passion as complementary rhetorical forces.

This concluding Part II now examines the balance that Justice Jackson struck in *Barnette* and discusses the contemporary roles that reason and passion can play in opinion-writing and advocacy. Law school teaches students to reason their way to a conclusion, but many cases can evoke passion in reasonable advocates and reasonable judges as they apply the law to the facts.

Reason and Passion in Judicial Opinion-Writing

Throughout our nation's history, much has been said about the extent to which judges can or should let personal feelings affect the decision-making process.[1] The debate continues today as partisans frequently accuse opponents of choosing "judicial activists," judges who assertedly decide important cases based on their own personal predilections rather than by strictly applying precedents, statutes, and other relevant sources of law.[2]

This debate is not the issue here, which concerns not how judges reach decisions, but how vigorous, forceful writing can justify and explain decisions. The Court decided *Barnette* by internal debate and vote in conference before Justice Jackson ever put pen to paper.

Judges write opinions as public officers vested by constitution and statute with authority to speak with the force of law. Formulas do not decide cases, but in constitutional and non-constitutional decision-making alike, "reason" loosely means application of relevant legal doctrine to the facts, and "passion" loosely means vigorous, forceful opinion writing that justifies and explains the decision's grounding in fact and law. The core aspiration, says Justice Stephen Breyer, is that "when a judge writes an opinion, even in a highly visible, politically controversial case with public feeling running high, the opinion's reasoning – not simply the author's conclusion – can make all the difference."[3]

Balance

On a collegial appellate court, the appropriate balance of reason and passion depends in significant measure on whether the judge is writing a majority, concurring or dissenting opinion. "[A] strong opinion," says Justice Breyer, "is principled, reasoned, transparent, and informative. And a strong opinion should prove persuasive, making a lasting impression on the minds of those who read it, and (if a dissent) eventually influence the law to move in the direction it proposes."[4]

A majority opinion determines the parties' rights and obligations while creating precedents and rationales for future cases. Reason may rein in passion because the writer seeking to maintain the coalition knows that every paragraph, sentence and clause – including every passage tinged with emotion – remains grist for later citation and potential application. A later court may find a particular passage to constitute holding, or else to constitute dictum warranting distinction or some measure of persuasive effect, but the passage's effect as a source of law derives from the court's constitutional and statutory authority to decide cases.

Writers of concurring and dissenting opinions may feel less need to restrain emotion because their writings, by themselves, convey no immediate law. If the writer so chooses, a concurrence and particularly a dissent can rely more on passion, freer from the need to maintain a majority coalition or to exercise circumspection in decision-making. Dean Roscoe Pound said that on a court of last resort, a dissenting opinion "should express [the judge's] reason, not his feelings."[5] At one time

or another, however, most of the recent justices have seen the media call many of their dissents "passionate."[6]

"A dissent in a court of last resort," wrote Chief Justice Charles Evans Hughes, is "an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[7] The dissenter's appeal to posterity stands a better chance with a disciplined dose of reason than with scarcely restrained passion. From one era to the next, justices such as Oliver Wendell Holmes and John Marshall Harlan have held the title of a "Great Dissenter," but their most influential dissents persuaded future Courts with reasoned legal analysis delivered forcefully, and not with unadorned fist-pounding or shrill emotion.

Barnette

Barnette demonstrates that focused passion may invigorate a majority opinion's reasoned analysis. From the outset, every participant in the flag-salute drama sensed the high stakes at issue. Few claims of right command the respect that accompanies sincere invocations of religious liberty, and few justifications for government action command greater force than invocations of national security in wartime. As the Court applied the First Amendment during the struggle against totalitarian regimes, Justice Jackson sought to instruct that Americans would tolerate personal conscience, even when reverence for the flag was at stake.

The reasoned instruction would have fallen flat if *Barnette's* majority delivered what then-Professor Felix Frankfurter had disparaged in 1931 as "the inevitable lawyer's writing – the dull qualifications and circumlocutions that sink any literary barque or even freighter, the lifeless tags and rags that preclude grace and stifle spontaneity."[8] Turgid legalese would have decided the case for the parties, but would also likely have destined the decision for little more than swift deposit in the U.S. Reports, barely remembered among later decisions that would reaffirm similar constitutional propositions. Instead, Justice Jackson assured *Barnette's* immortality by combining reason with passion to dismantle the four specific grounds that Justice Frankfurter had advanced in *Gobitis*:

Gobitis *Ground # 1*: *Granting some public school children exemptions from mandatory flag salute and recitation of the Pledge of Allegiance would make the government appear "too weak to maintain its own existence."*[9]

Justice Jackson scoffed at the notion that "the strength of government to maintain itself would be impressively vindicated by our confirming power of the state to expel a handful of children from school."[10] "Government of limited power need not be anemic government," he continued, with passion accompanying the statement of reason. "Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. . . . To enforce [the Bill of Rights] today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end."[11]

Gobitis *Ground # 2: By creating constitutionally-based exemptions to mandatory in-school flag salutes, federal judges would become "the school board for the country."*[12]

The Fourteenth Amendment, Justice Jackson countered, "protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted."[13] Once again, passion took center stage. School boards "have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[14]

Gobitis *Ground # 3: Because exemptions from mandatory in-school flag salutes raise disciplinary issues beyond the competence of federal judges, exemptions should be won at the ballot box and not in the courts.*[15]

"The very purpose of a Bill of Rights," Justice Jackson responded with a firm, passionate voice, "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[16]

"[W]e act in these matters," Justice

Jackson continued, "not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed."[17]

Gobitis *Ground # 4*: *The Constitution permits mandatory in-school flag salutes because "[t]he ultimate foundation of a free society is the binding tie of cohesive sentiment."*[18]

"Those who begin coercive elimination of dissent," Justice Jackson wrote, "soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."[19]

"[W]e apply the limitations of the Constitution," he explained, "with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization."[20]

> To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.[21]

Justice Jackson closed his opinion with a reasoned, yet passionate endorsement of individual freedom that has been called "the most illuminating definition of Americanism in the history of the Court": "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[22]

After more than 60 years, *Barnette* remains the basis for the First Amendment right to "refrain from speaking."[23] *Gobitis* had applied the First Amendment's religion clauses; by ruling instead under the First Amendment Speech Clause, *Barnette* conferred rights on all claimants who establish entitlement, and not only on claimants moved by religious belief.[24]

By the time Justice Jackson finished, his blend of reason and passion had bequeathed a decision whose bedrock First Amendment holding, according to Professor Charles Alan Wright, "teems with vivid expressions and memorable statements" that still enrich the fabric of the law as statements of core American values.[25]

Reason and Passion in Written Advocacy

In the adversary system of civil and criminal justice, judges hold no monopoly on the effective use of reason and passion in written expression. Indeed, judicial decision-making begins with the parties' advocates, who raise, frame and argue issues of law and fact. Judge Irving R. Kaufman of the U.S. Court of Appeals for the 2nd Circuit described "the partnership between advocates and judges."[26]

Recognition of this partnership reaches the highest levels. "The law is made by the Bar, even more than by the Bench," said then-Judge Oliver Wendell Holmes in 1885.[27] "A judge rarely performs his functions adequately," added Justice Louis D. Brandeis, "unless the case before him is adequately presented."[28] Justice Felix Frankfurter reported that in the Supreme Court and lower courts alike, "the judicial process [is] at its best" when courts receive "comprehensive briefs and powerful arguments on both sides."[29]

Balance

By carefully balancing reason and passion, the advocates' briefs can help influence the court's opinion. As "a representative of clients" and "an officer of the legal system,"[30] an advocate expects that the opinion may incorporate portions of the prevailing brief's argument and analysis.[31] Indeed, incorporation can be a professional badge of honor for counsel who prevails. "When an attorney writes such an excellent brief that some of its passages make their way into the eventual decision, he experiences a sense of gratification," said Chief Justice George Rossman of the Oregon Supreme Court.[32]

Brief writers walk a tightrope when they seek to balance reason and passion. The court "does not want a law review article," said Judge Kaufman, but it "does not want rhetoric or flamboyance either."[33] The consensus appears to be that judges want, expect and need each party's reasoned argument, delivered

passionately, for why the party should prevail under the law.

Speaking about written briefs, Judge Jacques L. Wiener, Jr. of the U.S. Court of Appeals for the 5th Circuit instructs that "[j]udges are human . . . so you must demonstrate both why your client should win (the emotional element) and the proper legal way that your client can win (the intellectual element)."[34] "Your written argument should not be devoid of passion, but it must be grounded in logic, legally supported, and 'readable.'"[35]

Justice Antonin Scalia and Bryan A. Garner say that "[a]ppealing to judges' emotions is misguided because it fundamentally mistakes their motivation. Good judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions."[36] But Scalia and Garner also urge counsel to "[a]ppeal not just to rules but to justice and common sense."[37] "[D]emonstrate, if possible, not only that your client does prevail under applicable law but also that this result is reasonable. . . . [E]xplain why it is that what might seem unjust is in fact fair and equitable – in this very case, if possible – and, if not there, then in the vast majority of cases to which the rule you are urging will apply."[38]

Conclusion: "If It Was an Easy Case, We Wouldn't Have It"

In a 2007 discussion with students and faculty at the Northwestern University School of Law, Chief Justice John G. Roberts, Jr. illustrated how an advocate's reason should constrain but not totally eclipse passion. For some advocates, "passion" may mean simply dressing up a brief's otherwise unadorned sentence with "clearly" or "manifestly." "We get hundreds and hundreds of briefs, and they're all the same," said the Chief Justice. "Somebody says, 'My client clearly deserves to win, the cases clearly do this, the language clearly reads this.' . . . And you pick up the other side and, lo and behold, they think they clearly deserve to win."[39]

The justices, he suggested, find such argument unpersuasive because "if it was an easy case, we wouldn't have it."[40] An advocate's more effective approach may be to abandon fist-pounding and adverbs in favor of passionate, but more focused, discussion about the reasons why the client should prevail under the law and facts – that is, to energize passionate expression with solid explanations grounded in reason.

Endnotes

1 See, e.g., Benjamin N. Cardozo, The Nature of the Judicial Process 167-68 (1921); William J. Brennan, Jr., *Reason, Passion and "The Progress of the Law,"* 10 Cardozo L. Rev. 3, 3 (1988) (42nd Annual Benjamin N. Cardozo Lecture).

2 See *Judicial Activism Against Arizona*, Wash. Times, July 29, 2010, at B2 (editorial) (Democratic appointee's "judicial activism is out of step with the law, out of step with politics and out of step with the good of the country"); *Clean Water at Risk*, N.Y. Times, June 20, 2006, at 16 (editorial) ("For all the talk of liberal judicial activists, it was Justice Antonin Scalia and his fellow conservatives who voted to substitute their own preferences for a decision made by the executive branch . . . interpreting a statute passed by Congress.").

3 Stephen Breyer, Making Our Democracy Work: A Judge's View 43 (2010).

4 *Id*.

5 Roscoe Pound, *The Heated Judicial Dissent*, 39 Am. Bar Ass'n J. 794, 796-97 (1953).

6 See, e.g., Charles Lane, *Court Splits Over Commandments*, Wash. Post, June 28, 2005, at A1 (Justice Scalia); David G. Savage, *Thousands of Cases in Doubt After Decision on Sentencing*, L.A. Times, June 26, 2004, at A15 (Justices O'Connor and Breyer); David Von Drehle, *Court Mirrors Public Opinion*, Wash. Post, June 24, 2003, at A1 (Justice Thomas); *A Blow to Sexual Bullying*, *Hartford Courant*, June 3, 1999, at A14 (Justice Kennedy); Joan Biskupic, *Viewing More As an Affair of States*, Wash. Post, Apr. 1, 1999, at A10 (Justices Stevens, Souter, Ginsburg and Breyer); James J. Kilpatrick, *Marshall's Power Was In His Passion for Justice*, The Oregonian (Portland, Ore.), Jan. 26, 1993, at B9 (Justice Marshall); David G. Savage, *After 33 Years, Brennan Is Still for Underdogs*, L.A. Times, Oct. 1, 1989, at 1 (Justice Brennan); Anthony Lewis, *Glimmers of Hope in Abortion Rulings*, St. Louis Post-Dispatch, July 9, 1989, at 3B (Justice Blackmun).

7 Charles Evans Hughes, The Supreme Court of the United States 68 (1928); see also, e.g., William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. Am. Jud. Soc'y 104, 107 (1948) (a dissent "may salvage for tomorrow the principle that was sacrificed or forgotten today").

8 Felix Frankfurter, *When Judge Cardozo Writes*, The New Republic, Apr. 8, 1931, *available at* http://www.tnr.com/article/politics/when-judge-cardozo-writes (visited June 6, 2011).

9 *Gobitis*, 310 U.S. at 596.

10 *Barnette*, 319 U.S. at 636.

11 *Barnette*, *id*. at 636-37.

12 *Gobitis*, 310 U.S. at 598.

13 *Barnette*, 319 U.S. at 637.

14 *Barnette*, *id*. at 637.

15 *Gobitis*, 310 U.S. at 597.

16 *Barnette*, 319 U.S. at 638.

17 *Barnette*, *id.* at 640.

18 *Gobitis*, 310 U.S. at 596.

19 *Barnette*, 319 U.S. at 641.

20 *Barnette*, *id*. at 641.

21 *Barnette*, *id*. at 641-42.

22 Nat Hentoff, Living the Bill of Rights 143 (1998) ("most illuminating"); *Barnette*, 319 U.S. at 642.

23 See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citing *Barnette* for this proposition).

24 *Barnette*, 619 U.S. at 634-35.

25 Charles Alan Wright, *My Favorite Opinion – The Second Flag-Salute Case*, 74 *Tex. L. Rev*. 1297, 1299 (1996).

26 Hon. Irving R. Kaufman, *Appellate Advocacy in the Federal Courts*, 79 F.R.D. 165, 165 (1978); see also Hon. Frank R. Kenison, *Some Aspects of Appellate Arguments*, 1 N.H. B.J. 5, 13 (Jan. 1959) ("the joint efforts of court and counsel . . . make the judicial process a functional success").

27 Oliver Wendell Holmes, *The Law*, in Speeches by Oliver Wendell Holmes 16, 16 (1934) (speech delivered Feb. 5, 1885).

28 Louis D. Brandeis, *The Living Law*, 10

Ill. L. Rev. 461, 470 (1916).

29 *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring), overruled in part on other grounds, *Malloy v. Hogan*, 378 U.S. 1 (1964).

30 ABA Model Rules of Prof. Conduct, Preamble [1]; see also, e.g., *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (lawyers are "essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'").

31 See, e.g., Hon. Herbert F. Goodrich, *A Case on Appeal – A Judge's View*, in Classic Essays on Legal Advocacy 509, 517 (George Rossman ed., 2010) ("some judges lift a portion of the successful party's brief and incorporate it into the opinion of the court").

32 Hon. George Rossman, *Appellate Practice and Advocacy*, 16 F.R.D. 403, 403 (1955); see also Hon. Frank R. Kenison, supra note 26, at 10 ("Every brief should contain one paragraph or one page which could be used by the opinion writer to dispose of a major issue in the case.").

33 Hon. Irving R. Kaufman, supra note 26, at 169.

34 Hon. Jacques L. Wiener, Jr., *Ruminations from the Bench: Brief Writing and Oral Argument in the Fifth Circuit*, 70 Tul. L. Rev. 187, 194 (1995); see also Whitman Knapp, *Why Argue an Appeal? If So, How?*, 444 Ins. L.J. 29, 3 (Jan. 1960) (the "first function" of appellate advocacy is "to appeal to the emotion of your hearer. . . . Its second is to appeal to his intellect"); Franklin Spears, *Presenting an Effective Appeal: What Judges Expect*, 21 Trial 95, 96 (Nov. 1985) (the brief "must help create sympathy for your position or remove sympathy from your opponent's. Your argument must also establish the logic of why you should win. . . by demonstrating the legal precedent calling for a judgment for your client") (Texas Supreme Court justice).

35 Hon. Jacques L. Wiener, Jr., supra note 34, at 194.

36 Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 32 (2008); see also, e.g., Milton B. Pollack, *Some Practical Aspects of Appellate Advocacy*, 31 N.Y. St. B. Bull. 81, 85 (1959) ("Too often counsel make the mistake of substituting invective and aspersions for analysis, and thereby weaken their case in the eyes of experienced judges.") (future U.S. district judge).

37 Antonin Scalia & Bryan A. Garner, supra note 36, at 26.

38 *Id.* at 27.

39 Robert Barnes, *Chief Justice Counsels Humility*, Wash. Post, Feb. 6, 2007.

40 *Id*.

A longer version of this two-part article appeared in volume 36 of the *Journal of Supreme Court History* (March 2011).

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