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## Justice Jackson and the Second Flag-Salute Case: Reason and Passion in Opinion Writing

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**Justice Jackson and the Second Flag-Salute Case:**

**Reason and Passion In Opinion Writing**

**by Douglas E. Abrams**

University of Missouri  
School of Law

(36 JOURNAL OF SUPREME COURT HISTORY 30 (2011))

## **Justice Jackson and the Second Flag-Salute Case: Reason and Passion In Judicial Opinion Writing**

### I. INTRODUCTION

In 1943, the Supreme Court handed down *West Virginia State Board of Education v. Barnette*.<sup>1</sup> With Justice Robert H. Jackson writing for the six-Justice majority, the Court upheld the First Amendment right of Jehovah's Witnesses schoolchildren to refuse to salute the flag or recite the Pledge of Allegiance, state-imposed obligations that the children and their parents contended were acts of idolatry that violated Biblical commands. Judge Richard A. Posner has said that Justice Jackson's effort "may be the most eloquent majority opinion in the history of the Supreme Court."<sup>2</sup>

*Barnette* reached the Court as the nation waged global war, a dire moment in history that Part II of this article describes. For its high drama and the endurance of its doctrine, the case continues to engage historians and students of the Court.<sup>3</sup> This article concerns the singular

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<sup>1</sup> 319 U.S. 624 (1943).

<sup>2</sup> Richard A. Posner, *THE PROBLEMS OF JURISPRUDENCE* 147 (1990).

<sup>3</sup> See, e.g., David R. Manwaring, *RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY* (1962); Shawn Francis Peters, *JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION* (2000); Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, in *CONSTITUTIONAL LAW STORIES* 443-45 (Michael C. Dorf ed., 2004); Irving Dilliard, *The Flag-Salute Cases*, in *QUARRELS THAT HAVE SHAPED THE CONSTITUTION* (John A. Garraty ed., 1988); *The Flag Salute Cases*, in *THE PURSUIT OF JUSTICE: SUPREME COURT DECISIONS THAT SHAPED AMERICA* (Kermit L. Hall & John J. Patrick eds., 2006); Robert L. Tsai, *Reconsidering Gobitis: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363 (2008); Charles Alan Wright, *My Favorite Opinion – The Second Flag-Salute Case*, 74 TEX. L. REV. 1297 (1996).

eloquence pinpointed by Judge Posner and others.<sup>4</sup> Justice Jackson adroitly balanced two ingredients – reason and passion – that (as Part III describes) have marked assessments of rhetoric and human experience since ancient times, that guided the nation’s Founders and early Presidents, that have now moved President Obama in both of his memoirs, and that otherwise continue as dual touchstones frequently applied in law and popular culture.

Few cases summon the high drama that energized the Court in *Barnette* during wartime, but (as Part IV describes) focusing on reason and passion throughout the opinion writing process remains a useful judicial compass today. Justice Jackson’s blend of these two ingredients, and his mastery of the written language, 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.<sup>5</sup>

## II. “AMONG THE DARKEST TIMES IN RECENT MEMORY”

*Barnette*’s record began in early January of 1942, barely a month after Japan attacked the Pacific naval fleet at Pearl Harbor. Historian David McCullough recalls these days as “[a]mong the darkest times in recent memory.”<sup>6</sup> “Hitler’s armies were nearly to Moscow; . . . German submarines were sinking our oil tankers off the coasts of Florida and New Jersey, within sight of the beaches, and there was not a thing we could do about it; . . . half our navy had been destroyed at Pearl Harbor. We had scarcely any air force. Army recruits were drilling with wooden rifles.

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<sup>4</sup> See, e.g., Blasi & Shiffrin, *supra* note 3, at 448 (calling *Barnette*’s majority opinion “among the most eloquent to be found in the whole of the U.S. Reports”); *The Flag-Salute Cases* (Hall & Patrick), *supra* note 3, at 101 (“one of the greatest statements on civil liberties ever written”); Robert L. Tsai, *supra* note 3, at 365 (discussing the “sparkling decision penned by Robert H. Jackson”).

<sup>5</sup> Wright, *supra* note 3, at 1299.

<sup>6</sup> David McCullough, *The Course of Human Events* 1 (2003 Jefferson Lecture In the Humanities), available at <http://www.neh.gov/whoweare/mccullough/lecture.html> (last visited June 25, 2010).

And there was no guarantee whatever that the Nazi war machine could be stopped.”<sup>7</sup>

General James H. Doolittle’s daring raid over Tokyo and other Japanese cities would buoy American morale, but the raid was still a few months away (April 18). So too were the first great American victories, in the Battle of the Coral Sea (May 4-8), and at Midway Island (June 4-7). Without the reassurance of hindsight available to later generations who know the war’s outcome, Americans in mid-winter 1942 remained resolute and committed, yet aware that the nation faced an epic challenge to vanquish the Axis Powers in total war.

In the weeks following Pearl Harbor, appeals to patriotism summoning young and old spread quickly from coast to coast. On January 9, 1942, the West Virginia State Board of Education followed a number of other state and local school boards by passing a resolution that required all public school students and teachers to salute the flag and recite the Pledge of Allegiance each day.<sup>8</sup> The West Virginia resolution allowed no exemptions because, the state board found, “national unity is the basis of national security.”<sup>9</sup>

Noncompliance carried draconian punishment. Where West Virginia schoolchildren refused to salute or recite in their classrooms, their parents faced imprisonment for violating compulsory education acts and citation for child neglect, which might cause temporary or permanent loss of custody.<sup>10</sup> The children themselves faced not only expulsion from school, but also delinquency proceedings and confinement for “insubordination” in state reformatories, austere institutions notorious for locking up vulnerable dependent children in close quarters with murderers, rapists and other predatory and sometimes mentally ill adolescent criminals supervised

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<sup>7</sup> *Id.*

<sup>8</sup> Peter Irons, *THE COURAGE OF THEIR CONVICTIONS* 16 (1988).

<sup>9</sup> *Barnette*, 319 U.S. at 626.

<sup>10</sup> *Barnette*, *id.* at 626, 629-30; Peters, *supra* note 3, at 164-77.

by physically and emotionally abusive guards. In 1950, one study condemned these institutions as “incompatible with human dignity, . . . a black record of human tragedy, of social and economic waste, of gross brutality, crass stupidity, totalitarian regimentation . . . and a corroding monotony even deadlier than physical violence.”<sup>11</sup>

The brunt of statutes and resolutions like West Virginia’s fell heavily on the Jehovah’s Witnesses, a small religious group despised by many Americans for their sometimes aggressive public proselytizing, and for their refusal to serve in the military or to salute the flag or recite the Pledge. And for their success in court. When Justice Harlan Fiske Stone wrote in 1941 that the Jehovah’s Witnesses “ought to have an endowment in view of the aid which they give in solving the legal problems of civil liberties,”<sup>12</sup> he was not dispensing gratuitous praise; he was observing that the Witnesses had appeared regularly before the Justices to seek the law’s refuge from dominant majorities, and had frequently won.<sup>13</sup>

In 1942, legislators and school authorities in West Virginia and elsewhere stood on solid constitutional ground because only two years earlier, in *Minersville School District v. Gobitis*, the Supreme Court had firmly rejected religious freedom claims by Witnesses families and held that the First Amendment permitted states and localities to mandate flag salutes and recitation of the Pledge in the public schools.<sup>14</sup> Less than three weeks before the Fall of France to the Nazis, Justice Felix Frankfurter wrote for the eight-Justice *Gobitis* majority, and Justice Stone stood alone in dissent despite Frankfurter’s private entreaties for unanimity.<sup>15</sup> “History teaches us,” Justice Stone read from his dissent in open Court, “that there have been but few infringements of

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<sup>11</sup> Albert Deutsch, *OUR REJECTED CHILDREN* xix, 162 (1950).

<sup>12</sup> Peters, *supra* note 3, at 186.

<sup>13</sup> *Id.* at 12-13, 183.

<sup>14</sup> 310 U.S. 586, 595, 626 (1940), overruled, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

personal liberty by the state which have not been justified . . . in the name of righteousness and the public good, and few which have not been directed . . . at politically helpless minorities” such as the Witnesses.<sup>16</sup> Justice Stone rejected “the position that government may, as a supposed education measure and as a means of disciplining the young, compel public affirmations which violate their religious conscience.”<sup>17</sup>

Few Supreme Court decisions,” wrote one historian, “have ever provoked as violent a public reaction as the *Gobitis* opinion.”<sup>18</sup> The decision drew immediate condemnation from more than 170 leading newspapers and support from only a few, but the swift reaction extended beyond ritten words.<sup>19</sup> The decision also unleashed a national wave of vigilantism against the Witnesses, whose refusal to salute or pledge allegiance to the flag appeared disloyal or even treasonous to Americans who perceived these acts as domestic obligations with war clouds looming, and who feared domestic subversion (the so-called Fifth Column). Witnesses families suffered beatings, physical intimidation, and property destruction from mobs, often while local sheriffs and other law enforcement officials stood watching in evident approval, without intervening to secure the victims’ safety.<sup>20</sup>

“Because lawless mobs may have misunderstood [*Gobitis*’] meaning is not in itself a reason to change it,” wrote Justice Jackson’s law clerk in an undated confidential memorandum.<sup>21</sup> Most historians acknowledge, however, that the intensity of the post-*Gobitis* brutality surprised and likely shocked Justices who had not anticipated such a bloody backlash against the small,

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<sup>15</sup> Dilliard, *supra* note 3, at 294-96; *The Flag Salute Cases* (Hall & Patrick), *supra* note 3, at 97.

<sup>16</sup> *Gobitis*, 310 U.S. at 604 (Stone, J., dissenting); Dilliard, *supra* note 3, at 297-98.

<sup>17</sup> *Id.* at 602.

<sup>18</sup> Irons, *supra* note 8, at 22.

<sup>19</sup> Dilliard, *supra* note 3, at 298.

<sup>20</sup> Peters, *supra* note 3, at 8-16, 72-152.

<sup>21</sup> Robert L. Tsai, *The Law Clerk’s Memo to Robert Jackson in Barnette* (2009), available at

peaceable religious group that had summoned their protection.<sup>22</sup>

In the wake of *Gobitis*, as many as two thousand Witnesses children were expelled from the nation's public schools and many of their parents landed in criminal court.<sup>23</sup> On October 6, 1942, the special three-judge West Virginia federal district court hearing *Barnette v. West Virginia State Board of Education* enjoined enforcement of the board's resolution against more than a half dozen expelled Witnesses children, including Walter Barnett's two young daughters who attended Slip Hill Grade School outside Charleston.<sup>24</sup> The unanimous panel decision was written by Fourth Circuit Judge John J. Parker, who would have been sitting on the Supreme Court, except that the Senate by the scant margin of two votes had refused to confirm him after President Herbert Hoover nominated him in 1930.<sup>25</sup>

The three-judge panel recognized that lower courts ordinarily apply Supreme Court precedents until the Court itself overrules them,<sup>26</sup> but the panel declined to apply *Gobitis*, which the Court already appeared on the verge of rejecting. Judge Parker noted that in *Jones v. City of Opelika* (1942), another First Amendment appeal brought by Jehovah's Witnesses, the Court had

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<http://legalhistoryblog.blogspot.com/2009/04/law-clerks-memo-to-robert-jackson-in.html> (last visited June 24, 2010).

<sup>22</sup> See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 447-48 (1944) (Murphy, J., dissenting) (the Jehovah's Witnesses "have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes"); Blasi & Shiffrin, *supra* note 3, at 443-45; Peters, *supra* note 3, at 237-38, 251 (discussing reaction on the Supreme Court); *The Flag Salute Cases* (Hall & Patrick), *supra* note 3, at 97; but see Tsai, *supra* note 3, at 374 ("The Justices might have been horrified at the ferocity of the reprisals, but they would have been unbelievably naive to think that their original decision did not expose recalcitrant students and their parents to a series of collateral legal and extra-legal ramifications.").

<sup>23</sup> Blasi & Shiffrin, *supra* note 3, at 445.

<sup>24</sup> *Barnette v. West Va. State Bd. of Educ.*, 47 F. Supp. 251 (S.D. W.Va. 1942), *aff'd*, 319 U.S. 624 (1943); David L. Hudson, Jr., *Woman in Barnette Reflects on Famous Flag-Salute Case* (2009), available at <http://www.firstamendmentcenter.org/analysis.aspx?id=22441> (last visited June 27, 2010). The Barnett and Gobitis families achieved different results in the Supreme Court, but they shared a common legacy: because of evident clerks' errors below, the Court's decisions misspelled their surnames.

<sup>25</sup> See, e.g., Paul Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1154 (1988). Ernesto J. Sanchez, *John J. Parker and the Beginning of the Modern Confirmation Process*, 32 J. SUP. CT. HIST. 22 (2007).

<sup>26</sup> *Barnette v. West Va. State Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D. W.Va. 1942), *aff'd*, 319 U.S. 624 (1943); see also, e.g., *Hohn v. United States*, 524 U.S. 236, 252-53 (1998).

distinguished the earlier decision and three members of the *Gobitis* majority (Justices Hugo L. Black, William O. Douglas and Frank Murphy) had called *Gobitis* “wrongly decided,”<sup>27</sup> Justice Stone’s earlier approach in dissent.

“Under such circumstances and believing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs,” wrote Judge Parker, “we feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties.”<sup>28</sup>

*Gobitis* dissenter Justice Stone and the two newest members of the Court (Justices Robert H. Jackson and Wiley B. Rutledge, Jr.) also seemed poised to join the *Opelika* trio and overrule the earlier decision. Jackson’s distaste for *Gobitis* was known within the Roosevelt Administration while he was U.S. Attorney General before his appointment to the Court in 1941.<sup>29</sup> When Jackson wrote *The Struggle For Judicial Supremacy* a few months before he joined the Court, he cited *Gobitis* as inconsistent with the Court’s usual “vigilan[ce] in stamping out attempts by local authorities to suppress the free dissemination of ideas, upon which the system of responsible democratic government rests.”<sup>30</sup>

On the U.S. Court of Appeals for the District of Columbia Circuit in 1942, a few months before Judge Parker wrote, Judge Rutledge dissented from a panel decision that upheld the convictions of two Jehovah’s Witnesses for selling their religious literature on a public street

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<sup>27</sup> *Jones v. City of Opelika*, 316 U.S. 584, 623-24 (1942) (dissenting opinion); see also *Barnette v. West Va. State Bd. of Educ.*, 47 F. Supp. 251, 253 (D W.Va. 1942), aff’d, 319 U.S. 624 (1943).

<sup>28</sup> *Barnette v. West Va. State Bd. of Educ.*, 47 F. Supp. 251, 253 (D W.Va. 1942), aff’d, 319 U.S. 624 (1943).

<sup>29</sup> Robert L. Tsai, *supra* note 3, at 397-98.

without securing a license or paying a tax.<sup>31</sup> In an apparent reference to *Gobitis*, Rutledge lamented that the Witnesses “have had to choose between their consciences and public education for their children.”<sup>32</sup>

The Supreme Court periodically overrules prior decisions, but rarely one so freshly minted as the near-unanimous *Gobitis*. With the nation and the world watching, and with ultimate victory over the Axis by no means assured, however, *Gobitis* indeed fell in *West Virginia State Board of Education v. Barnette*, often remembered as the “second flag salute case.” With unmistakable symbolism, the Court handed down the new decision on Flag Day, June 14, 1943.

*Barnette* left Justice Frankfurter was in dissent, together with Justices Owen J. Roberts and Stanley B. Reed, who tersely noted their adherence to *Gobitis* but declined to join the Frankfurter opinion.<sup>33</sup> Responsibility for explaining the Court’s unusual about-face fell to Justice Jackson, who may have seemed an unlikely candidate for the role. Justice Stone had ascended to the Chief Justiceship when Charles Evans Hughes retired in 1941, and by assigning the *Barnette* opinion to himself, he could have vindicated his lonely stand in *Gobitis* for protecting “freedom of mind and spirit,” an appeal to conscience that one historian says “still ranks as one of the Court’s finest dissents.”<sup>34</sup> Whatever the reason for the assignment, Justice Jackson did not disappoint the confidence that the Chief Justice placed in him.

### III. REASON AND PASSION IN HISTORICAL PERSPECTIVE

Barely a week after announcement of *Barnette*, *Time* magazine, under the headline “Blot Removed,” wrote the Court had “reaffirmed its faith in the Bill of Rights – which, in 1940 [in

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<sup>30</sup> Robert H. Jackson, THE STRUGGLE FOR JUDICIAL SUPREMACY 284 & n.48 (1941).

<sup>31</sup> *Busey v. District of Columbia*, 129 F.2d 24, 38 (D.C. Cir. 1942) (Rutledge, J., dissenting), vacated and remanded, 319 U.S. 579 (1942), on remand, 138 F.2d 592 (D.C. Cir. 1943).

<sup>32</sup> *Busey*, 129 F.2d at 38.

<sup>33</sup> *Barnette*, 318 U.S. at 642-43.

*Gobitis*], it had come perilously close to outlawing.”<sup>35</sup> Justice Jackson had accomplished his mission with a majority opinion that balanced reason and passion, two guideposts familiar to historians and observers of contemporary political and popular culture.

As complementary and sometimes antagonistic forces for assessing performance or behavior, reason and passion hold an imposing pedigree that now reaches to the highest levels of our national life. In *The Audacity of Hope*, Barack Obama wrote that “the Constitution envisions a road map by which we marry passion to reason, the ideal of individual freedom to the demands of community.”<sup>36</sup> Discussing his own religious upbringing in his other memoir, *Dreams From My Father*, the future President also invoked the two forces, writing that his grandmother’s family “read the Bible but generally shunned the tent revival circuit, preferring a straight-backed form of Methodism that valued reason over passion and temperance over both.”<sup>37</sup>

The synergy of reason and passion dates at least from Plato (c. 470-399 B.C.), who asked in *The Republic* whether “passion [is] different from reason,” and concluded that “the one ruling principle of reason [is] that reason ought to rule.”<sup>38</sup> Aristotle (384-322 B.C.) said that “[a]ll the acts of man are necessarily done from seven causes: chance, nature, compulsions, habit, reason, passion, desire.”<sup>39</sup> “The law,” concluded Aristotle, “is reason free from passion.”<sup>40</sup>

The interplay between reason and passion helped shape American legal and political thought from the nation’s earliest years, beginning with the writings of Alexander Hamilton,

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<sup>34</sup> *Gobitis*, 310 U.S. at 606 (Stone, J., dissenting); Peters, *supra* note 3, at 60.

<sup>35</sup> *Judiciary: Blot Removed*, TIME, June 21, 1943, available at <http://www.time.com/time/magazine/article/0,9171,766726,00.html?internalid=ACA> (last visited June 25, 2010).

<sup>36</sup> Barack Obama, THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM 113 (2008).

<sup>37</sup> Barack Obama, DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE 14 (2004).

<sup>38</sup> Plato, THE REPUBLIC, Book IV, at 159-62 (Jowett, B. ed.).

<sup>39</sup> THE RHETORIC OF ARISTOTLE, 1.10, at 57 (Lane Cooper ed., 1932).

<sup>40</sup> Aristotle, THE POLITICS OF ARISTOTLE 146 (Ernest Baker trans., 1946).

James Madison and John Jay in *The Federalist*, the essays that throughout 1787 and 1788 advocated ratification of the federal Constitution in the thirteen new states. *Federalist No. 15*, for example, argued for replacing the weak Articles of Confederation because “the passions of men will not conform to the dictates of reason and justice, without constraint.”<sup>41</sup>

*Federalist No. 49*, rejected arguments that future constitutional questions would be resolved best by frequent constitutional conventions: “The *passions* . . . not *the reason*, of the public, would sit in judgment.”<sup>42</sup> “[I]t is the reason of the public alone that ought to controul and regulate the government, the essay explained. “The passions ought to be controuled and regulated by the government.”<sup>43</sup> *Federalist No. 50* disparaged the outcomes of earlier state experiences, where “*passion*, not *reason*, must have presided.”<sup>44</sup>

*Federalist No. 55* argued for limiting the size of the House of Representatives because “passion never fails to wrest the sceptre from reason” in a multitude.<sup>45</sup> “[T]he more numerous any assembly may be. . .,” *Federalist No. 58* continued, “the greater is known to be the ascendancy of passion over reason.”<sup>46</sup> *Federalist No. 63* argued that the smaller, more deliberative Senate would check the impulses of “the people stimulated by some irregular passion, . . . until reason, justice and truth, can regain their authority over the public mind.”<sup>47</sup>

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<sup>41</sup> THE FEDERALIST, *The Federalist No. 15*, at 91, 96 (Jacob E. Cooke ed., 1961).

<sup>42</sup> *Id.*, *The Federalist No. 49*, at 338, 343 (emphasis in original).

<sup>43</sup>*Id.*

<sup>44</sup> *Id.*, *The Federalist No. 50*, at 343, 346 (emphasis in original).

<sup>45</sup> *Id.*, *The Federalist No. 55*, at 372, 374.

<sup>46</sup> *Id.*, *The Federalist No. 58*, at 391, 395-96.

<sup>47</sup> *Id.*, *The Federalist No. 63*, at 422, 425. *See also, e.g., id.*, *Federalist No. 10*, at 56, 58 (1787) (Jacob E. Cooke ed., 1961) (discussing the likelihood that political factions would arise in a political democracy: “As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves.”); *id.*, *The Federalist No. 48*, at 332, 333-34 (1788) (stating that the executive and legislative branches should be designed to counterbalance one another: “where the legislative power is exercised by an assembly, which is . . . sufficiently

Long before George Washington presided over the Constitutional Convention, reason and passion guided his personal and public life. As a schoolboy not yet sixteen, he had fulfilled a school exercise by copying 110 “Rules of Civility and Decent Behaviour in Company and Conversation,” drawn from an English translation of a book that French Jesuits had compiled in the late 1500’s.<sup>48</sup> The 58th Rule taught the future President as he transcribed: “[I]n all Causes of Passion [ad]mit Reason to Govern.”<sup>49</sup>

Washington’s personal and public life so fully reflected the Rules that biographers have regarded their lessons as “formative influences in the development of his character.”<sup>50</sup> In 1783, for example, General Washington learned that some of his officers privately planned a meeting to discuss grievances against Congress, which had not paid them promised salaries or pensions; his Newburgh Address to the officers dissuaded them from pursuing the plan, which he condemned as “addressed more to the feelings of passions than to the reason & judgment of the army.”<sup>51</sup>

Shortly after returning home from the Constitutional Convention in 1787, Washington wrote that “[a]ll the opposition to [the Constitution] is . . . addressed more to the passions than to the reason.”<sup>52</sup> Weathering criticism in 1795 that his administration yielded too much to Britain in Jay’s Treaty, Washington wrote to his Attorney General Edmund Randolph that he looked forward to a “time when passion shall have yielded to sober reason.”<sup>53</sup>

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numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes.”)

<sup>48</sup> GEORGE WASHINGTON’S RULES OF CIVILITY & DECENT BEHAVIOUR IN COMPANY AND CONVERSATION (Charles Moore ed., 1926); *see also* *id.* at x, xiv.

<sup>49</sup> *Id.* at 13 (brackets in original).

<sup>50</sup> *Id.* at ix.

<sup>51</sup> Quoted in David Ramsay, *The Life of George Washington* ch. 9, “Archiving Early America.”

<sup>52</sup> THE GEORGE WASHINGTON PAPERS AT THE LIBRARY OF CONGRESS, 1741-1799, *George Washington to Charles Carter* (Dec. 14, 1787), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field\(DOCID+@lit\(gw290261\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw290261))) (last visited June 25, 2010).

<sup>53</sup> *Id.*, *George Washington to Edmund Randolph* (letter) (July 31, 1795), available at

In his Farewell Address in 1796, Washington warned the nation not to “adopt[] through passion what reason would reject,”<sup>54</sup> advice that he would repeat during his brief retirement at Mount Vernon before his death in 1799.<sup>55</sup>

As one of history’s great political philosophers and as an opponent of the Federalists before he became the nation’s third President, Thomas Jefferson likely knew the writings of the ancient Greeks and surely knew the influence of the more recent *Federalist* essays. “Let nothing be spared of either reason or passion,” Jefferson wrote in 1810, “to preserve the public confidence entire, as the only rock of our safety.”<sup>56</sup> During the War of 1812, he opposed suspension of U.S. exports as “dictated by passion, not by reason.”<sup>57</sup>

In one of his earliest published speeches, delivered in 1838, twenty-eight-year-old Abraham Lincoln spoke out against a rash of lynchings for reflecting a “growing disposition to substitute the wild and furious passions, in lieu of the sober judgment of the Courts.”<sup>58</sup> “Passion has helped us” by igniting the Revolution that won independence from Britain, the young Lincoln explained, but unrestrained passion “will in future be our enemy. Reason, cold, calculating, unimpassioned reason, must furnish all the materials for our future support and defence.”<sup>59</sup>

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[http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field\(DOCID+@lit\(gw340194\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw340194))) (last visited June 25, 2010).

<sup>54</sup> *The Farewell Address of President George Washington* (Sept. 17, 1796), available at [http://avalon.law.yale.edu/18th\\_century/washing.asp](http://avalon.law.yale.edu/18th_century/washing.asp) (last visited June 25, 2010).

<sup>55</sup> THE GEORGE WASHINGTON PAPERS, *supra* note 52, *George Washington to Prof. John Luzac* (letter) (Dec. 2, 1797), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field\(DOCID+@lit\(gw360082\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw360082))) (last visited June 25, 2010).

<sup>56</sup> Library of Congress, THE THOMAS JEFFERSON PAPERS, *Thomas Jefferson to Caesar A. Rodney*, Feb. 10, 1810 (letter), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field\(DOCID+@lit\(tj110070\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field(DOCID+@lit(tj110070))) (last visited June 25, 2010).

<sup>57</sup> *Id.*, *Thomas Jefferson to William Short*, June 18, 1813 (letter), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field\(DOCID+@lit\(ws03051\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field(DOCID+@lit(ws03051))) (last visited June 25, 2010).

<sup>58</sup> Abraham Lincoln, *The Perpetuation of Our Political Institutions: Address Before the Young Men's Lyceum of Springfield, Ill., Jan. 27, 1838*, in ABRAHAM LINCOLN: A DOCUMENTARY PORTRAIT THROUGH HIS SPEECHES AND WRITINGS 35-36 (Don E. Fehrenbacher ed., 1977).

<sup>59</sup> *Id.* at 43.

Abolitionist leader and former slave Frederick Douglass wrote more generally about racial justice in 1855. “There is no relation more unfavorable to the development of honorable character, than that sustained by the slaveholder to the slave. Reason is imprisoned here, and passions run wild.”<sup>60</sup>

In our own time, partisans in public policy debates frequently urge resort to reason, not passion.<sup>61</sup> The tandem also figures in Presidential messages and, as it has since at least 1837, House and Senate proceedings.<sup>62</sup> During the House Judiciary Committee’s Watergate hearings in 1974, for example, Congress member Barbara Jordan riveted the nation with her plea that “[i]t is reason, and not passion, which must guide our deliberations, guide our debate, and guide our decision.”<sup>63</sup>

Reason and passion also sometimes constrain judicial action. A civil judgment may be overturned or reversed on appeal, for example, when counsel’s appeal to juror bias produces a verdict that “reflects passion rather than reason.”<sup>64</sup> In cases charging capital crimes or other serious offenses, courts and commentators regularly summon jurors to return verdicts, judges to

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<sup>60</sup> Frederick Douglass, *MY BONDAGE AND MY FREEDOM* 32 (John Stauffer ed., 2003).

<sup>61</sup> See, e.g., *When Passion, Not Reason, Rules*, SAN FRANCISCO CHRONICLE, Aug. 6, 2004, at B8 (editorial) (California’s “three strikes” sentencing law); *Do More For Bilingual Ed? Yes Judge’s Ruling of State’s Failure is No Surprise*, ARIZ. REPUBLIC, Feb. 3, 2000, at 6B (bilingual education); William E. Gibson, *Bill Lowers Cuban Refugee Status*, SUN-SENTINEL (Fort Lauderdale, Fla.), Mar. 15, 1995, at 3A (immigration bill concerning Cuban refugees; quoting Sen. Paul Simon: “Our policy toward Cuba is one that has grown out of passion, not reason.”).

<sup>62</sup> See, e.g., 146 CONG. REC. S 11552, 11553 (Dec. 5, 2000) (remarks of Sen. Biden on the Bankruptcy Reform Act of 2000; “I hope reason will overcome passion”); 136 CONG. REC. S 8355, 8355 (June 20, 1990) (remarks of Sen. Akaka on the Flag Protection Act of 1990; “we should be guided by the light of reason, not the heat of political passion”).

<sup>63</sup> Barbara Jordan, *Opening Statement To The House Judiciary Committee, Proceedings On The Impeachment Of Richard Nixon* (July 25, 1974), available at <http://gos.sbc.edu/j/jordan3.html> (last visited June 25, 2010).

<sup>64</sup> *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 395 (Mich. 2004) (reversing \$21 million plaintiff’s verdict in sexual harassment case).

impose sentences, and citizens to retain attitudes that are grounded in reason, free from passion.<sup>65</sup>

In a 2006 commencement address, Secretary of State Condoleezza Rice told Boston College graduates about “five important responsibilities of educated people,” including “the commitment to reason” and “the responsibility to find and follow your passion.”<sup>66</sup> A year later, Massachusetts Governor Deval Patrick told local community college graduates that “[t]he willingness to face down passion and fear with reason and courage . . . is the hallmark of the active citizen.”<sup>67</sup>

Writers have advanced various formulas for managing reason and passion.<sup>68</sup> So too have contemporary philosophers, political theorists, theologians and biographers, sometimes in the titles of books whose discussion strives to balance the two.<sup>69</sup> Reviewers and commentators

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<sup>65</sup> See, e.g., *Post v. Ohio*, 484 U.S. 1079, 1082 (1982) (Marshall, J., dissenting) (“the presumption that judges know and apply the rules of evidence should not be converted into license to conclude that judges are inhuman, incapable of being moved by passion as well as by reason”); Joshua Berman, *A Triumph For U.S. Justice: The Moussaoui Trial Could Easily Have Turned Into a Circus*, CHI. SUN-TIMES, May 9, 2006, at 32 (praising the jury for “balanc[ing] reason and passion by focusing on the facts” in trial of alleged terrorist); Bill Press, *Closed-Circuit TV Death of McVeigh Is a Sick, New Low*, ORLANDO (FLA.) SENTINEL, Apr. 15, 2001, at G3 (arguing that U.S. Justice Dep’t decision to permit closed-circuit televising of the execution of Oklahoma City bomber Timothy McVeigh “undermines our system of justice – letting passion, not reason, rule”); Carl Rowan, *Reason Yields to Passion in O.J. Aftermath*, CHI. SUN-TIMES, Oct. 15, 1995, at 39.

<sup>66</sup> *Secretary Condoleezza Rice Commencement Address At Boston College*, May 22, 2006, available at <http://www.educatednation.com/2006/06/06/secretary-condoleezza-ice-commencement-address-at-boston-college/> (last visited June 25, 2010).

<sup>67</sup> Connie Paige, *Patrick Rips Bush In Commencement Speech – Says Nation Is Governed By Fear*, BOSTON GLOBE, May 18, 2007, at B3.

<sup>68</sup> See, e.g., John Locke, THE SECOND TREATISE OF GOVERNMENT 13, 87-91, 125, in TWO TREATISES OF GOVERNMENT 293-94, 341-44, 369 (P. Laslett ed., 1960) (“I desire to know what kind of government that is, and how much better it is than the State of Nature, where one Man commanding a multitude, has the Liberty to be Judge in his own Case, and may do to all his Subjects whatever he pleases, without the least liberty to any one to question or controle those who Execute his Pleasure? And in whatsoever he doth, whether led by Reason, Mistake, or Passion, must be submitted to?”); Alexander Pope, ESSAY ON MAN, Epistle ii, line 107 (1733-34) (“On life’s vast ocean diversely we sail, Reason the card, but passion is the gale.”); Robert C. Solomon, NO PASSION’S SLAVE: EMOTIONS AND CHOICE 127 (rev. ed. 2001) (quoting British philosopher David Hume); Bill Swainson, ENCARTA BOOK OF QUOTATIONS 228 (2000) (quoting British writer and journalist Cyril Connolly; “The man who is master of his passions is Reason’s slave.”); William James, *Reason, Passion and the Religious Hypothesis*, in William James, THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY, ch. 1 (1897); see also Khalil Gibran, THE PROPHET 45 (1923) (“Your reason and your passion are the rudder and sails of your seafaring soul.”).

<sup>69</sup> See, e.g., David A. Wilson, THOMAS D’ARCY MCGEE: PASSION, REASON, AND POLITICS, 1825-1857 (2008); Christopher Tilmouth, PASSION’S TRIUMPH OVER REASON: A HISTORY OF THE MORAL IMAGINATION FROM SPENSER

frequently cite the spice that calibrated reason and passion can bring to fiction and non-fiction books, movies, plays, opera, music, and sports.<sup>70</sup> Speaking to the La Jolla (Calif.) Music Society in 2004, for example, Justice Sandra Day O'Connor said that law and music each represent "a fusion of reason and passion."<sup>71</sup>

#### IV. 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 decisionmaking process.<sup>72</sup> The debate continues today as partisans frequently accuse opponents of nominating and confirming "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.<sup>73</sup>

This debate is not the issue here. This article concerns not how judges reach decisions, but how vigorous, forceful writing can justify and explain decisions to the lawyers and parties; to future courts, lawyers, and litigants under our system of *stare decisis*; and sometimes also to lay readers in decisions such as *Barnette*, which touch on matters of wider social concern. The Court

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TO ROCHESTER (2005); Cheryl Hall, *THE TROUBLE WITH PASSION: POLITICAL THEORY BEYOND THE REIGN OF REASON* (2005); Richard S. Lazarus & Bernice N. Lazarus, *PASSION AND REASON: MAKING SENSE OF OUR EMOTIONS* (1994); Robert H. Frank, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF EMOTIONS* (1988).

<sup>70</sup> See, e.g., Simon Houpt, *Radcliffe's Great, But the Play's An Old Nag*, *GLOBE & MAIL* (Canada), Sept. 28, 2008 (play); Andrew Druckenbrod, *Opera Theater Courts Byham As Its Venue*, *PITTSBURGH POST-GAZETTE*, Sept. 24, 2007, at E-1 (opera); Nate Chinen, *Three Bandleaders With Rapport First*, *N.Y. TIMES*, Sept. 8, 2008, at 3 (music); Michael Ciment, *The Godfather: Coppola, Scorsese, Stone and Loach Have All Been Influenced By Francesco Rosi*, *THE GUARDIAN* (London), Dec. 3, 2005, at 14 (movie); Toni Bentley, *A "Hyena in Petticoats,"* *N.Y. TIMES*, May 29, 2005, at 5 (book); Hugh MacDonald, *Don't Look to Footballers For Role Models*, *THE HERALD* (Glasgow), Jan. 8, 2004, at 3 (sports).

<sup>71</sup> Mark Swed, *Justice O'Connor Fails to Make Case*, *L.A. TIMES*, Aug. 14, 2004, at 1.

<sup>72</sup> 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).

<sup>73</sup> See *AboutSoniaSotomayor.com* ("Stop Obama from packing the courts with judicial activists") (June 26, 2010); *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.").

decided *Barnette* by internal debate and vote in conference before Justice Jackson ever put pen to paper.

Judges write opinions, not as private citizens, but as public officers vested by constitution and statute with authority to speak with the force of law. Formulas do not decide or explain cases, but in constitutional and non-constitutional decisionmaking alike, “reason” loosely means application of relevant legal doctrine to the facts, and “passion” loosely means vigorous, forceful writing that justifies and explains the decision’s grounding in fact and law.

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. The majority opinion determines the parties’ rights and obligations while creating precedents and rationales for future cases. Reason may rein in passion because the writer knows that our system of precedent means 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 a diminished sense of constraint because their writings, by themselves, make 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 coalition or to exercise circumspection in decisionmaking. Dean Roscoe Pound said that on a court of last resort, a dissenting opinion “should express [the judge’s] reason, not his feelings.”<sup>74</sup>

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Roscoe Pound, *The Heated Judicial Dissent*, 39 AM. BAR ASS’N J. 794, 796-97 (1953).

At one time or another, however, most of the recent Justices have seen the media call their dissents “passionate.”<sup>75</sup>

“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.”<sup>76</sup> The dissenter’s appeal stands a better chance, however, with a healthy dose of reason than with unrestrained 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 influential dissents persuaded future Courts with reasoned legal blueprints delivered forcefully, and not with unadorned fist-pounding or shrill emotion.

*Barnette* demonstrates that focused passion can 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 greater respect than sincere invocations of religious liberty, and few justifications for government action command greater force than invocations of national security in wartime. As the Court fulfilled its constitutional responsibility to apply 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.

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<sup>75</sup> 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).

<sup>76</sup> 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

The reasoned instruction would have fallen flat if *Barnette's* majority had 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.”<sup>77</sup> Turgid legalese would have decided the case for the parties, but would likely also have destined the decision for 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.”*<sup>78</sup>

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.”<sup>79</sup> “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

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salvage for tomorrow the principle that was sacrificed or forgotten today”).

<sup>77</sup> Felix Frankfurter, *When Judge Cardozo Writes*, THE NEW REPUBLIC, Apr. 8, 1931, available at <http://www.tnr.com/articles/all?page=720> (last visited June 26, 2010).

<sup>78</sup> *Gobitis*, 310 U.S. at 595.

disappointing and disastrous end.”<sup>80</sup>

*Gobitis Ground # 2: By creating constitutionally-based exemptions to mandatory in-school flag salutes, federal judges would become “the school board for the country.”*<sup>81</sup>

The Fourteenth Amendment, Justice Jackson countered, “protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted.”<sup>82</sup> 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.”<sup>83</sup>

*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.*<sup>84</sup>

“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;

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<sup>79</sup> *Barnette*, 319 U.S. at 636.

<sup>80</sup> *Barnette*, *id.* at 636-37.

<sup>81</sup> *Gobitis*, 310 U.S. at 598-600.

<sup>82</sup> *Barnette*, 319 U.S. at 637.

<sup>83</sup> *Barnette*, *id.* at 637.

<sup>84</sup> *Gobitis*, 310 U.S. at 597.

they depend on the outcome of no elections.”<sup>85</sup>

“[W]e act in these matters,” Justice Jackson continued, “not by authority of our competence but by the 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 of the function of this Court when liberty is infringed.”<sup>86</sup>

*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.”*<sup>87</sup>

“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.”<sup>88</sup>

“[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.”<sup>89</sup>

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

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<sup>85</sup> *Barnette*, 319 U.S. at 638.

<sup>86</sup> *Barnette*, *id.* at 640.

<sup>87</sup> *Gobitis*, 310 U.S. at 596.

<sup>88</sup> *Barnette*, 319 U.S. at 641.

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.”<sup>90</sup>

Justice Jackson closed his opinion with a passionate endorsement of individual freedom that has been called “the most illuminating definition of Americanism in the history of the Court”.<sup>91</sup>

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.<sup>92</sup>

## V. CONCLUSION

### A. “*The Freedom to Disagree*”

Because Justice Jackson was such a graceful writer, Justice Frankfurter reminisced years later, “his style sometimes stole attention from the substance.”<sup>93</sup> Justice Jackson’s dextrous admixture of reason and passion, however, should not overshadow the durability of *Barnette*’s First Amendment holding. The Court had decided *Gobitis* under the First Amendment’s religion clauses. By ruling instead under the First Amendment’s Speech Clause, *Barnette* conferred rights on all claimants who establish entitlement, and not only on ones moved by religious belief.<sup>94</sup> After more than sixty years, *Barnette* remains the Court’s leading statement of the First Amendment right to “refrain from speaking.”<sup>95</sup>

The distinction between a narrower religious freedom and a broader expressive freedom

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<sup>89</sup> *Id.*

<sup>90</sup> *Barnette*, *id.* at 641-42.

<sup>91</sup> Nat Hentoff, LIVING THE BILL OF RIGHTS 143 (1998).

<sup>92</sup> *Barnette*, 319 U.S. at 642.

<sup>93</sup> Felix Frankfurter, *Mr. Justice Jackson*, 68 HARV. L. REV. 937, 938 (1955).

<sup>94</sup> *Barnette*, 619 U.S. at 634-35.

retains contemporary significance. In 2009, for example, ten-year-old Will Phillips, a fifth grader at the West Fork Middle School in Washington County, Arkansas refused to stand and join his classmates in reciting the Pledge of Allegiance. The reason, he said, was that “I really don’t feel that there’s currently liberty and justice for all” because gays and lesbians could not exercise such rights as the right to marry and the right to adopt children.<sup>96</sup> Like the Gobitas and Barnett children who were about Will’s age when they and their families took their stand decades earlier, Will endured taunting and harsh words from some classmates but support from others.<sup>97</sup>

Will Phillips and his supportive parents made no claim of religious freedom, but school authorities recognized that *Barnette* squarely conferred the First Amendment right to free expression that the young man sought to exercise. Asked what it means to be an American, Will responded, “Freedom of speech. The freedom to disagree. That’s what I think pretty much being an American represents.”<sup>98</sup>

B. “[A]n Excellent Writer, Period”

“Solicitor General for life,” was the title that Justice Louis D. Brandeis would have conferred on Robert H. Jackson, who argued more than four dozen appeals in the Supreme Court as Assistant Attorney General, Solicitor General, and Attorney General before his appointment to the Court in 1941.<sup>99</sup> But Justice Jackson leaves a record as much more than a lawyer who, as Justice Frankfurter put it, approached the bar “specially endowed as an advocate.”<sup>100</sup>

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<sup>95</sup> See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citing *Barnette* for this proposition).

<sup>96</sup> David Koon, *A Boy and His Flag*, ARK. TIMES, Nov. 11, 2009.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> E. Barrett Prettyman, Jr., *Robert H. Jackson: “Solicitor General for Life,”* 1992 J. SUP. CT. HIST. 75, 75-76, 83, 84 n.69.

<sup>100</sup> Felix Frankfurter, *supra* note 93, at 939; see also *Advice From Justice Jackson*, 5 J. APP. PRAC. & PROCESS 215, 216 (2003) (“one of the greatest appellate advocates of his generation.”).

Justice Antonin Scalia calls Justice Jackson his “hero,” someone who “wrote beautiful opinions and was on the right side of things, too.”<sup>101</sup> Professor Charles Alan Wright went a significant step further, calling Justice Jackson “the best writer ever to sit on the Court.”<sup>102</sup>

Justice Jackson achieved his lofty status as the Court’s paramount writer without relying heavily on law clerks or other ghost writers to compose his work or turn a phrase for him. At President Harry S Truman’s request, he took a leave of absence from the Court in 1945 to serve as chief United States prosecutor at the Nuremberg War Crimes Trials. A young assistant, assigned to help prepare Jackson’s closing argument to the international tribunal a year later, felt hurt when the Justice did not use any of his draft. Only later did the assistant learn that “Jackson did not like ‘ghosts.’ He felt that the words of a speaker or writer should be his own words and not those of another.”<sup>103</sup>

In 1957, former Jackson law clerk William H. Rehnquist attested that “[e]ven a casual acquaintance with [Justice Jackson’s] opinions during the 13 years he served on the Court indicates that he neither needed nor used ghost writers.”<sup>104</sup> “The great majority of opinions which he wrote,” Rehnquist continued, “were drafted originally by him and submitted to his clerks for their criticism and suggestions. Frequently such a draft would be batted back and forth between the Justice and the particular clerk working on it several times. The contributions of the clerk by way of research, organization and, to a lesser extent, method of approach, was often substantial.

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<sup>101</sup> A Voice For the Write: Tips On Making Your Case From a Supremely Reliable Source, 94 ABAJ 37, 40 (May 2008).

<sup>102</sup> Charles Alan Wright, *supra* note 3, at 1299.

<sup>103</sup> Henry T. King, Jr., *Remarks*, in *Symposium: The Nuremberg Trials: A Reappraisal and Their Legacy*, 27 CARDOZO L. REV. 1553, 1558 (2006).

<sup>104</sup> William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REP., Dec. 13, 1957, at 74-75 (1957).

But the end product was unquestionably the Justice's own, both in form and in substance."<sup>105</sup>

Six weeks before the *Barnette* decision, Justice Jackson had stressed the Court's responsibility "to do our utmost to make clear and understandable the reasons for deciding cases as we do."<sup>106</sup> *Barnette* delivered on the promise with a clear exposition of reason and passion because Justice Jackson held a distinct personal advantage. "Good legal writing," says Professor Richard C. Wydick, "does not sound as though it had been written by a lawyer."<sup>107</sup> Justice Jackson left a legacy of eloquence because, as in *Barnette*, he indeed did not "write like a lawyer." Professor Fred Rodell even speculated that Justice Jackson "wrote so unlegally well – with the force of plain and pointed talk replacing lawyers' jargon – because he never went through law school nor won a law degree; indeed, . . . he never even went through college, and one ungraduating year of law study . . . was his only formal education after high school."<sup>108</sup>

Justice Jackson was a largely self-taught writer, and he was both a good teacher and an avid learner. In 2003, Chief Justice Rehnquist was right that his mentor "was not simply an excellent legal writer, he was an excellent writer, period."<sup>109</sup>

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<sup>105</sup> *Id.*

<sup>106</sup> *Douglas v. Jeannette*, 319 U.S. 157, 182 (1943) (Jackson J., concurring).

<sup>107</sup> Richard C. Wydick, *PLAIN ENGLISH FOR LAWYERS* 4 (5th ed. 2005).

<sup>108</sup> Fred Rodell, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955*, at 279 (1955).

<sup>109</sup> William H. Rehnquist, *Foreword*, in Eugene C. Gerhart, *ROBERT H. JACKSON: COUNTRY LAWYER, SUPREME COURT JUSTICE, AMERICA'S ADVOCATE* iii (2d ed. 2003).