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Rhetorics of the Judicial Opinion

The Judicial Opinion as Literary Genre

Robert A. Ferguson*

I. GENRE THEORY AND THE LAW

The tendency in combinations of law and literature has been to reach for similarities and confections in method, theme, and approach.¹ This search for similarities has helped legal scholars to think past the assumed autonomy of their field.² In the long run, however, with growing general recognition of the complementary relation of law to other disciplines, there may be a greater need for combinations of law and literature that do just the opposite—combinations that keep in mind the conceptual integrity of distinct disciplines. This essay seeks to demonstrate the value of just such an approach.

Instead of tracing connections, the aim here will be to use literary criticism to identify ways in which the law provides its own peculiar kinds of statement. Since the most creative and generally read literary form in the

* Copyright © 1990 Robert A. Ferguson. The criticisms of Cass R. Sunstein and Richard A. Posner have contributed greatly to the development of this essay.

1. See, for example, James Boyd White, "Law as Language: Reading Law and Reading Literature," *Texas Law Review* 60 (1982): 415-45. See, more generally, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison: University of Wisconsin Press, 1985). In the latter, see, in particular, "The Judicial Opinion and The Poem," 107-38, where White discusses "remarkably similar" standards and methodologies. More recently, White, who deserves credit as a founder of law and literature studies, has summarized his work as the search for "a method . . . that can afford the grounds upon which we can engage with legal and literary texts alike." White, "Judicial Criticism," in Sanford Levinson and Steven Mailloux, eds., *Interpreting Law and Literature: A Hermeneutic Reader* (Evanston: Northwestern University Press, 1988), 394.

2. See, in particular, Richard A. Posner, "The Decline of Law As An Autonomous Discipline: 1962-1987," *Harvard Law Review* 100 (1987): 761-80.

law is the appellate judicial opinion, we will concentrate on that form for purposes of demonstration. Indeed, a literary treatment of the appellate opinion may prove doubly useful. Judicial writing is often so wrapped in legal paraphernalia as to seem an hermetically sealed and therefore mysterious genre to the general reader. Our ultimate goal, then, is to identify and clarify the appellate judicial opinion as a distinct literary genre within the larger civic literature of the American republic of laws.³

To think about a theory of genre in judicial writing for even a moment is to recognize the potential value of the enterprise. From the literary side, genre is perhaps the single most powerful explanatory tool available to a critic. Writers create with recognizable forms in mind, and their struggle for better expression is always a function of that previous act of recognition.⁴ Meanwhile, within the law, the judicial decision is at once a uniquely personal literary product and—from one written opinion to the next—a powerful and continuous publication in American political life. Judges, alone in American officialdom, explain every action with an individual writing, which then becomes the self-conscious measure of their performance.⁵ Since judges in their writings also rely heavily on the forms, substance, and expression of previous courtroom opinions, we should expect generic recognitions to play a special role in their efforts. Frequency of production, professional inclination, and political routinization all reinforce the importance of genre in a judicial language that must match experience and form in ways that a citizenry can recognize and accept.

A test of hypothetical considerations requires a proving ground, and the example here will be the flag salute cases of the early 1940s. The choice is

3. There have been very few attempts to apply the insights of critical methods to civic literature. William Raymond Smith's *The Rhetoric of American Politics: A Study of Documents* (Westport, Conn.: Greenwood Publishing, 1969) remains the standard work in the field. For a summary of specific, recent analyses that use more contemporary critical methods in analyzing particular court decisions, see Richard A. Posner, *Law and Literature: A Misunderstood Relation* (Cambridge: Harvard University Press, 1988), 269-316 and particularly 281-88.

4. For standard commentary on the nature and importance of genre theory in contemporary criticism, see Alastair Fowler, *Kinds of Literature: An Introduction to the Theory of Genres and Modes* (Cambridge: Harvard University Press, 1982) and Adena Rosmarin, *The Power of Genre* (Minneapolis: University of Minneapolis Press, 1985). As Fowler and Rosmarin explain, both creativity and understanding take place within the repetitions and variations of form, theme, and context. Genres, in a sense, are the rooms that writers and readers decide to inhabit; they supply, to use Fowler's terminology, a habitation of mediated definiteness, a proportioned mental space, a literary matrix by which to order experience.

5. As judges relinquish more and more aspects of the judicial opinion to their court clerks, or even to groups of clerks, there is some reason to qualify the designation of "personal" or "individual" writing. But to qualify does not mean to discard the idea altogether. As long as the actual written product remains "the self-conscious measure" of judicial performance, clerks will write with the style and philosophy of their judge in mind, and judges will monitor language and ideas to make sure that opinions remain in some sense their own. Clerks, in other words, work within the assumption of a personalized authority in the genre of the judicial opinion. The same assumption, that of a personal authority in the very form of the statement, also nourishes the interest and involvement of the imputed author, the judge who signs the opinion. Of course, these elements of individuality or of a guiding hand become that much more significant when the decision is an important one.

an arbitrary one in that any case or series of cases or level of cases might serve. Even so, the two Supreme Court cases in question, *Minersville School District v. Gobitis*⁶ in 1940 and *West Virginia State Board of Education v. Barnette*⁷ in 1943, seem particularly useful for present purposes. As the most important trials in the thirty-one Jehovah's Witnesses cases that lead to sixteen civil liberties opinions from the Supreme Court between 1938 and 1944, they are tolerably familiar to both legal scholars and a general audience. Certainly, the larger importance of the flag salute cases in modern civil liberties law has kept them in the public eye.

Other factors also support a larger critical analysis of *Gobitis* and *Barnette*. The issue involved in both cases—the enforcement of the flag salute and pledge of allegiance in the nation's schools—remains a volatile theme in American thought as the 1988 Presidential election campaign recently demonstrated.⁸ Just as important, *Gobitis* and *Barnette* together represent one of those rare instances in which the Supreme Court has reversed itself on a crucial matter within a short period of time. For all of these reasons, we find judicial language at its most engaged in these opinions. Circumstance, ideological difference, institutional authority, public disagreement, and political explosiveness combine to make language especially memorable.

To summarize, the Court in *Minersville School District v. Gobitis* decided by an 8-1 margin, with Justice Felix Frankfurter writing the opinion and Justice Harlan Stone dissenting, that the rights of a pupil who refuses to salute and pledge allegiance to the flag in a public school are *not* infringed by a requirement that all students participate and that, consequently, such a pupil *cannot* claim violations of due process of law and religious liberty under the fourteenth amendment. Writing for a 6-3 majority three years later, Justice Robert Jackson overruled *Gobitis* in *West Virginia State Board of Education v. Barnette*, holding that West Virginia regulations enforcing a compulsory flag salute in the public schools were unconstitutional. As such, the second flag salute case marks the Court's first clear-cut commitment to strict review of legislation challenged under the First Amendment (either directly or as incorporated into the Fourteenth Amendment). *Barnette* serves, as well, as a dividing line in

6. 310 U.S. 586 (1940).

7. 319 U.S. 624 (1943).

8. Whether the Pledge of Allegiance should be required of schoolchildren became a major campaign issue in the last two weeks of August, 1988, when George Bush criticized Michael Dukakis for vetoing a state law that would have required teachers to lead their students in the pledge. The controversy, with frequent allusion to the flag salute cases, remained central to both campaign oratory and reportage for more than a month, through the first television debate of September 25, 1988. See Linda Greenhouse, "Patriotism and the Pledge," *New York Times*, 27 Aug. 1988, sec. 1, p. 4; Jon C. Blue, "One Nation, Divisible, With Liberty for None," *New York Times*, 2 Sept. 1988, sec. 1, p. 27; "Quayle Embraces Patriotic Themes and Attacks Dukakis on Pledge," *New York Times*, 6 Sept. 1988, sec. 4, p. 12; "Dukakis Likens G.O.P. Attacks to McCarthy's," *New York Times*, 10 Sept. 1988, sec. 1, p. 8; and transcript of the first debate, *New York Times*, 26 Sept. 1988, sec. 1, p. 17.

debate over the doctrines of strict restraint and liberal activism in judicial review.⁹

This summary, however brief, suggests a final source of power in the example: we are in the presence of literary masters of their craft. All of the vital opinions in both flag salute cases are drafted by major talents on the modern court: Frankfurter, Stone, Jackson, Hugo Black, and William Douglas. In other words, *Gobitis* and *Barnette* offer examples of the best judicial thought and language under maximal pressure. They enable an appropriate test of generic possibilities through the strain and expression of intelligent and deeply felt differences of opinion.

What, then, can be said about the judicial opinion as a literary genre? Traditional notions about deliberative oratory, the formula of facts stated and opinions rendered, and the binding psychologies of rule and precedent are actually rather unhelpful in this regard. These identifications are easily made, but their very easiness has blocked access to deeper structures in the judicial opinion.¹⁰ Current genre theory cares less about issues of classification and definition than it does about principles of reconstruction and interpretation. Critics think not about surface traits but about the driving impulses of the type under immediate examination.¹¹ Four such impulses mark the modern judicial opinion—identifications that do not classify so much as they convey the tonal, methodological, and rhetorical life of this kind of writing. They are the monologic voice, the interrogative mode, the declarative tone, and the rhetoric of inevitability in judicial writing.

II. THE MONOLOGIC VOICE

We can begin by recognizing "the enormous significance of the motif of the speaking person . . . in the realm of . . . legal thought and discourse."¹² The modern court transcript and record should not disguise the fact that attorneys, defendants, witnesses, experts, and judges speak their words in court. Courtroom ceremony triggers an orientation toward voice. The appellate decisions of our highest courts are written as if read aloud in a courtroom where adversaries and other interested parties meet to participate in due process of law.¹³

9. *Gobitis*, 310 U.S. 586 (1940), and *Barnette*, 319 U.S. 624 (1943). See also Archibald Cox, *The Court and The Constitution* (Boston: Houghton Mifflin, 1987), 192-198 and Edward F. Waite, "The Debt Of Constitutional Law To Jehovah's Witnesses," *Minnesota Law Review* 28 (1944): 209-46.

10. For interpretations in these terms, see Smith, *The Rhetoric of American Politics*, 407-17, and Benjamin N. Cardozo, "Law and Literature," in *Selected Writings of Benjamin Nathan Cardozo*, ed. Margaret E. Hall (New York: Fallon Publications, 1947), 339-56.

11. See Fowler, *Kinds of Literature*, 37-39, 256-76.

12. Oddly the great importance of the spoken word in law is most immediately recognized by outsiders. My language here is taken from M.M. Bakhtin, *The Dialogic Imagination*, ed. Michael Holquist, trans. Caryl Emerson and Michael Holquist (Austin: University of Texas Press, 1981), 349-50.

13. The qualification in this sentence—"as if"—deserves explanation. In recent years, the oral

Well beyond ceremony, however, there is a peculiar dynamic of voice in the judicial opinion, and the first impulse in the genre of the judicial opinion has to do with this peculiarity: the speaking judge in the act of judgment and after is profoundly monologic in voice and ideological thrust. When Felix Frankfurter delivers his opinion in *Minersville District v. Gobitis*, he speaks for seven other justices as well, but only Frankfurter actually speaks. The language and tone are his own, and his personal investment is clear from the anger and stridency of his subsequent dissent in *Board of Education v. Barnette*.

The monologic quality of the judicial opinion obtains in several subsidiary characteristics. Most obviously, the judicial voice works to appropriate all other voices into its own monologue. The goal of judgment is to subsume difference in an act of explanation and a moment of decision. Thus, in both *Gobitis* and *Barnette*, alternative views are raised but entirely within the controlling voice of the judicial speaker and with the foreknowledge that these alternatives will submit to that speaker's own authorial intentions. The rhetorical subtleties in this movement are many, but the essential act of expropriation should be clear enough to all.¹⁴ Differences from the speaking voice in the judicial opinion are raised only to be answered by it.

Because the monologic voice must speak entirely for and through itself, it is also necessarily self-dramatizing. It has, in effect, no other choice. Judges often solve this difficulty by stressing the importance of a decision that only they can make. Frankfurter, for example, opens his *Gobitis* opinion with the phrase "a grave responsibility confronts this Court," and this solemnity carries directly into the enticing promise that "judicial conscience is put to its severest test" in "the present controversy."¹⁵ The whole thrust of this self-dramatization reverses what one normally finds in a poetic dramatic monologue.¹⁶ For while the dramatic monologue works to distinguish the characterized speaker's meaning from that of the

tradition in the courtroom has suffered under the growing complexity and machinery of modern case law. The reading of opinions aloud, except in crucial cases, has waned, and federal judges, including those of the Supreme Court, "deliver" only summaries in open court. For a comment on the decline of the oral tradition and its implications, with the related problem of "the unpublished opinion," see Richard A. Posner, *The Federal Courts: Crisis and Reform* (Cambridge: Harvard University Press, 1985), 119-27.

14. In a similar context, Bakhtin writes "language is not a neutral medium that passes freely and easily into the private property of the speaker's intentions; it is populated—overpopulated—with the intentions of others. Expropriating it, forcing it to submit to one's own intentions and accents, is a difficult and complicated process." In addressing this problem, Bakhtin demonstrates some of the ways in which "the authoritative voice" works to overcome the natural "heteroglossia of language." See Bakhtin, *The Dialogic Imagination*, 294, 264-71, 342-44.

15. 310 U.S. at 591.

16. See, for example, Rosmarin, *The Power of Genre*, 46-47, and, more generally, Robert Langbaum, *The Poetry of Experience: The Dramatic Monologue in Modern Literary Theory* (New York: W.W. Norton, 1957).

poem, the monologic voice of the judicial opinion seeks an absolute identification between character and text.

The need for an identification of speaker and text can be seen in a more subtle stratagem of self-dramatization. The monologic voice sometimes seeks its own embodiment by projecting an actual judicial persona into the frame of an opinion. Again, Frankfurter provides the best but not the only example in the cases at hand. In *Gobitis* and *Barnette*, he distinguishes between "my purely personal attitude" and "judicial obligations" and, more poignantly, between his marginal Jewish identity as "one who belongs to the most vilified and persecuted minority in history" and his powerful and central political role on the Supreme Court, where "the duty as a judge . . . is not that of the ordinary person."¹⁷ From the opposite side of *Barnette*, Justice Jackson creates his own image of judicial integrity by contrasting "the oversimplification so handy in political debate" with "the precision necessary to postulates of judicial reasoning."¹⁸ Justice Frank Murphy's concurrence, in turn, dwells almost entirely upon the visionary responsibility of office: "reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold . . . spiritual freedom to its farthest reaches."¹⁹

Judicial self-fashioning is a complicated phenomenon.²⁰ Nevertheless, its many variations serve essentially two purposes within the genre of the judicial decision. Most fundamentally, image and voice reassure each other and the listener-reader of a level of virtue above and beyond ordinary human behavior. The more difficult the case, the more important this reassurance or personification of ideal power becomes. In this way, the judicial figure resembles Walter Benjamin's story-teller; both are narrators who know and incorporate earlier tellings and thereby insure the truth or meaning of the whole. In both, as well, ultimate acceptance by a listener-reader requires an appraisal of character beyond narrative. As with the storyteller, the judge is "the figure in which the righteous man encounters himself."²¹

Character aside, judicial self-fashioning serves a second central purpose in the judicial opinion. Frankfurter's language of obligations, Jackson's precision in judicial reasoning, Murphy's loftier duty—all point to a level of compelled performance. The one thing a judge never admits in the mo-

17. 319 U.S. at 646-47, and 310 U.S. at 596.

18. 319 U.S. at 636.

19. *Id.* at 645.

20. For an extended treatment of this subject, see Robert A. Ferguson, "Holmes and the Judicial Figure," *University of Chicago Law Review* 55 (1988): 506-47. "Ethnographic self-fashioning" as a more general critical tool of analysis has been treated in Stephen J. Greenblatt, *Renaissance Self-Fashioning* (Chicago: University of Chicago Press, 1980) and in James Clifford, *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art* (Cambridge: Harvard University Press, 1988), 92-113.

21. Walter Benjamin, *Illuminations*, ed. Hannah Arendt, trans. Harry Zohn (New York: Schocken Books, 1969), 93, 106-9.

ment of decision is freedom of choice. The monologic voice of the opinion can never presume to act on its own. It must instead appear as if forced to its inevitable conclusion by the logic of the situation and the duties of office, which together eliminate all thought of an unfettered hand. Over and over again, *Gobitis* and *Barnette* play on the theme of the social boundedness of judicial decision-making. "[W]hen the issue demands judicial determination," runs a typical Frankfurter warning, "it is not the personal notion of judges . . . which must prevail."²² Or again, "it can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench."²³

These quotations suggest a necessary inversion. Free from direct interference, the monologic voice nonetheless assumes a larger persona that is enmeshed within the social machinery of decision-making. The voice speaks alone, but the persona behind it accepts and moves on a stage of perceived boundaries, compelled narratives, and inevitable decisions. The tension here is intrinsic to judicial performance; the more self-conscious the monologue, the greater the speaker's search for an implied chorus of support in the background. Accordingly, "doing one's duty on the bench" does not mean impersonality, as Frankfurter characterized it ("one's own opinion about the wisdom or evil of a law should be excluded"); rather, it raises the prospect of a collective personality of right-thinking figures, all of whom will reach the same decision *because* they are thinking correctly.

Self-consciousness, in this sense, grows out of the knowledge of vulnerability. The monologic voice is the very type of the judiciary's non-majoritarian status in a democratic republic.²⁴ Unelected and largely unaccountable, the speaking judge must always respond to the fundamental inconsistency of imposing a separate authority on the democratic process, and the inconsistency helps to explain why judicial formalisms of all kinds continue to thrive long after the loss of professional consensus on objective decision-making.²⁵

Somewhere in every judicial decision a belief in neutral judgment deflects criticism. The presumed removal of personal predilections allows all parties to accept a compelled decision, one that every fair judge would

22. 310 U.S. at 596.

23. 319 U.S. at 647.

24. To take John Hart Ely's description of the non-majoritarian dilemma, "a body that is not elected or otherwise politically responsible in any significant way *is telling* the people's elected representatives that they cannot govern as they'd like." Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), 5 (emphasis added).

25. The continuing search for "objectivity" as a standard of judicial decision-making can be seen most recently in Owen Fiss's hope for "the idea of disciplining rules, which constrain the interpreter" and in "the idea of an interpretive community." These ideas together are meant to provide "a professional grammar" or "set of norms that transcend the particular vantage point of the person offering the interpretation." Owen Fiss, "Objectivity and Interpretation," *Stanford Law Review* 34 (1982): 739, 744-45.

reach despite differences in style and approach. Hidden in the belief is a vital strategy of explanation; the assumption of a neutral decision is the easiest way—some would say the only way—to convince a democratic society that independent judges work within the spirit of justice for all. The importance of this point cannot be overstated. Judicial formalism is not just a legal philosophy that can be put aside or an intellectual residue of the history of ideas. It is an innate psychological impulse at work in the occasion of judicial performance and, hence, in the record of performance, the genre of the judicial opinion.

III. THE INTERROGATIVE MODE

The real creativity in a judicial decision lies in the question that judges decide to accept as the basis of their deliberations. This question and its competitors are peculiar as well as central to the judicial opinion—so peculiar and so central as to make the interrogative mode the methodological anchor of judicial rhetoric. Every court makes a fundamental decision about the question before it, and the wording in that first decision controls all others. In fact, the Supreme Court literalizes the inclination in its own procedures. The first page of every legal brief submitted to the Court consists of one thing: the question presented. In an activity crucial to the art of advocacy, counsel often spend hours on this one page to lead the Court toward just the right formulation of the issue in their client's case. They understand what an earlier member of the profession, Francis Bacon, observed four centuries ago: the questions we ask shape our knowledge far more than do the theories we propose.²⁶

Generic considerations in the judicial opinion magnify Bacon's observation a hundred-fold. In *Crowds and Power*, Elias Canetti observes that power adheres to the questioner who is answered and that in judicial examinations "questioning gives the questioner . . . a retrospective omniscience."²⁷ Indeed, one might think of the ultimate power of the judge as the right to ask the last question—and then to answer it. Inevitably, all questions in the deciding opinion of a court are rhetorical in scope because they are asked with an answer already firmly in mind. The march from questions to answers thus forms much of the routinized ceremony of judgment.

These symptoms of the interrogative mode are readily apparent in the majority decision of *Minersville v. Gobitis*.²⁸ Justice Frankfurter asks four

26. Here I take William Chambliss' paraphrase of Francis Bacon in David Kairys, ed., *The Politics of Law: A Progressive Critique* (New York: Pantheon Books, 1982), 230. But see also Suzanne Langer, *Philosophy in a New Key: A Study in the Symbolism of Reason, Rite, and Art* (Cambridge: Harvard University Press, 1942) 3-4, 14, and Bacon, *The Philosophical Works*, ed. John M. Robertson (London: Routledge and Sons, 1905), 271.

27. Elias Canetti, *Crowds and Power*, trans. Carol Stewart (New York: Farrar Straus Giroux, 1984), 284-89.

28. My analysis in the following paragraph relies upon Richard Danzig, "How Questions Begot

versions of the same question in successive refinements that preclude in the process all possibility of disagreement. "We must decide," he begins, "whether the requirement of participation in [the pledge of allegiance], exacted from a child who refuses upon sincere religious grounds, infringes without due process of law the liberty guaranteed by the Fourteenth Amendment."²⁹ Within three paragraphs, the question has begun to shift from a theory of rights toward a justification of authority. "When does the constitutional guarantee [of religious freedom]," asks the Court, "compel exemption from doing what society thinks necessary for the promotion of some great common end . . . ?"³⁰ Two pages later this version has hardened into a justification of authority for the sake of unity: "the question remains whether school children, like the Gobitis children, must be excused from conduct required of all the other children in the promotion of national cohesion."³¹ Predictably, by the end, Frankfurter's question has been utterly transformed: "the precise issue, then, for us to decide is whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious."³²

Clearly, the questions that Frankfurter decides to ask are the keys to the judgment that he wants to reach (in this case rejection of the claim that a compulsory flag salute violates the Constitutional rights of the Gobitis children). Each shift in the interrogative mode incorporates more listener-readers into an already coded response of national identifications. Similarly, as each sequential question is coded more and more to primal allegiances, the price of standing out against it grows. Justice Benjamin Cardozo, though in a different context, summarizes the strategy at hand. "The common denominator silences and satisfies. . . . We glide into acquiescence when negation seems to question our kinship with the crowd."³³

In this dynamic of power, the interrogative mode joins the monologic voice. M.M. Bakhtin writes that "all rhetorical forms, monologic in their compositional structure, are oriented toward the listener and his answer."³⁴ The power of American judges can be gauged almost entirely in their ability to frame the question that courtroom parties and, by exten-

Answers in Felix Frankfurter's First Flag Salute Opinion," *Supreme Court Review* 1977: 257-74. Among other things, Danzig suggests a series of terms like "differential focusing" and "inflation" for identifying the manipulations of questions in judicial decisions. In the immediate context, however, it is the centrality and creativity of that manipulation that interest us.

29. 310 U.S. at 592-93.

30. *Id.* at 593.

31. *Id.* at 595.

32. *Id.* at 597.

33. Cardozo, "Law and Literature," 346.

34. Bakhtin, *The Dialogic Imagination*, 280.

sion, the American people must answer. We can illustrate that power perfectly in noting how easily *Barnette* overrules *Gobitis* by re-casting the problem. Faced with the need to change its mind, the Court simply asks a different question. In the words of Justice Jackson for the Court in *Barnette*: "the *Gobitis* decision . . . assumed . . . that power exists in the State to impose the flag salute discipline upon school children in general. . . . We examine rather than assume existence of this power and, against this broader definition of issues in this case, reexamine specific grounds assigned for the *Gobitis* decision."³⁵

IV. THE DECLARATIVE TONE

If the courtroom opinion as literary genre is rooted in the interrogative mode, it is driven by a declarative tone. The only sincere questions in judicial opinions—sincere in the sense that they ask for answers beyond the ken of the interrogator—appear in dissents. To appreciate this point, compare Frankfurter's orchestration of questions and set responses in *Gobitis* with his more penetrating queries in *Barnette*. The latter still haunt the Court today, half a century after they were asked.³⁶ Dissents unsettle by design. By way of contrast, a controlling opinion uses questions to establish agreed upon solutions. In its insistence upon *an* answer *now*, it resists mystery, complexity, revelation, and even exploration. The selling of an affirmation, namely judgment, forces a language of certainties upon the whole genre.

How does the controlling opinion actually work toward its need for certitude? Typically, it raises complexities only to dismiss them in a decisive act of judgment. Justice Jackson, worrying in *Barnette* about the shifting sands of Constitutional language, nonetheless concludes that "much of the vagueness of the due process clause disappears when the specific prohibitions of the First [Amendment] become its standard." Admitting further, that "changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment," he answers "but we act in these matters not by authority of our competence but by force of our commissions."³⁷ These responses are more tonal

35. 319 U.S. at 635-36. The emphasis in this quotation is Justice Jackson's.

36. The penetrating questions that an aroused Frankfurter asks in *Barnette* include the following. "But the real question is, who is to make such accommodations [for individual beliefs], the courts or the legislature?" "Or is this Court to enter the old controversy between science and religion by unduly defining the limits within which a state may experiment with its school curricula?" "What of the claims for equality of treatment of those parents who, because of religious scruples, cannot send their children to public schools?" "Is it really a fair construction of such a fundamental concept as the right freely to exercise one's religion that a state cannot . . . compel all children to attend public school to listen to the King James version although it may offend the consciences of their parents?" As Frankfurter himself observes, "these questions are not lightly stirred." See 319 U.S. at 651, 659-61.

37. 319 U.S. at 639-40.

than logical. They announce rather than explain the Court's faith in its ability to handle the problems at hand.

The declarative tone succeeds because of a series of implicit assumptions about the complexity and meaning of event in a judicial decision. The single most useful tool of judicial certitude involves the deliberate conflation or, sometimes, confusion of the actual world as a source of representation with the world represented in the text.³⁸ The courtroom, as forum, takes the complexity of event—the original disruption that provokes legal action in the first place—and transfers aspects of that complexity into a narrative, the written form of which is a literal transcript of what has been said in court.

The judicial opinion then appropriates, molds, and condenses that transcript in a far more cohesive narrative of judgment, one that gives the possibility of final interpretation by turning original event into a legal incident for judgment. Judgment, in turn, guides a general cultural understanding of the original event for consumption beyond the courtroom. These acts of transference necessarily work to transpose the scene of particular experience into an acceptable figuration of collective life.³⁹ Every step of the process requires an unavoidable series of simplifications. Judgment must reduce event to an incident and further reduce incident to a narrative about acceptable behavior. This is its mission. Everything about the enterprise, including the listener-reader of the judicial opinion, welcomes the declarative tones that make it possible.

We see some of these elements in circumstances of the flag salute cases that reach the judicial opinion only in altered form. Note, for example, that there is no real legislative enactment in the events that precede the *Gobitis* case except for a Minersville Board of Education requirement passed hastily after the controversy developed. Yet Frankfurter assumes in *Gobitis* that the "case before us must be viewed as though the legislature of Pennsylvania had itself formally directed the flag-salute." Frankfurter makes the inference of a legislative determination and warns against a result that will "stigmatize legislative judgment" because these improvisations simplify the narrative of judgment that he wishes to impose upon a more complex event.⁴⁰

Then, too, *Gobitis* is argued at the high-water mark of American fears concerning the Nazi peril.⁴¹ Although these fears are not raised directly,

38. See Bakhtin, *The Dialogic Imagination*, 253. Bakhtin draws "a sharp and categorical boundary between the actual world as source of representation and the world represented in the work [in the text]," and he discusses the frequent confusion there between. To blur or forget these distinctions is to fall into "naïve realism," and yet to assume a writing as the description of the real world is precisely what the imperatives of judicial decision-making strain to achieve.

39. See Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), 48.

40. 310 U.S. at 597. See also Danzig, "How Questions Begot Answers," 261-64, for an extended discussion of this issue.

41. By June of 1940, when *Gobitis* was announced, Germany had swallowed Austria, Czechoslo-

phrases like "authority to safeguard the nation's fellowship," "the promotion of national cohesion," "national unity is the basis of national security," "the binding tie of cohesive sentiment," "the seeds of sanction for obeisance to a leader," "the deepest patriotism," "a comprehending loyalty," and "the kind of ordered society which is summarized by our flag" all bespeak and address a nation under global threat.⁴² By 1943, Jackson, for the *Barnette* majority, can justly point to "the fast failing efforts of our present totalitarian enemies."⁴³ The Court, without acknowledging the fact, faces a different political situation. Fear of invasion has been transposed to a very different psychological realm in Jackson's finding that "the action of local authorities . . . invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."⁴⁴

By 1943, the nine Justices also have realized an unforeseen marginal cost of their decision in *Gobitis*. The Court's rejection of the Jehovah's Witnesses' position in 1940 branded the sect as an unpatriotic group deserving of punishment, an identification of unacceptable otherness that unwittingly unleashed war-time persecutions against its members. Across America in the early 1940s, starting within weeks of the Court's decision, Witnesses were fired from their jobs, stricken from relief rolls, burned out of their churches, driven from their homes, forced to migrate as an entire group, assaulted individually, mobbed, stoned, jailed as Nazi agents, incarcerated for their own safety, and, in one instance, castrated.⁴⁵

A single, oblique acknowledgment of these problems in *Barnette* reveals how messy events can sometimes be absorbed into a very different clarity of judgment in the courtroom. In their concurring opinion, Justices Douglas and Black observe, somewhat gratuitously, that "the devoutness of [The Jehovah's Witnesses'] belief is evidenced by their willingness to suffer persecution and punishment, rather than make the pledge."⁴⁶ These words transform a shameful and largely forgotten record of persecution into a commendable example of steadfastness in our midst. Douglas and Black have fastened on the one positive aspect of a terrible history—an aspect, again in the language of judgment, that works to re-integrate a group of deviants back into the larger community. Appreciation of the Jehovah's Witnesses' acknowledged sincerity and admirable behavior renders them, once more, thoroughly American.

vakia, Poland, Denmark, Norway, Luxembourg, the Netherlands, and Belgium, and had successfully invaded France. The Allied forces were in the very act of evacuating from Dunkirk, and the Soviet-German nonaggression pact of August, 1939 was still in force.

42. 310 U.S. at 591, 595, 598, 600.

43. 319 U.S. at 641.

44. *Id.* at 642.

45. See Cox, *The Court and The Constitution*, 194-95. See also Jon C. Blue, "One Nation, Divisible, With Liberty for None," *New York Times*, 2 Sept. 1988, sec. 1, p. 27.

46. 319 U.S. at 643.

The language of affirmation in the judicial opinion is encompassing and inclusive. The distanced zone of judicial language instinctively brings everyone under its umbrella. Hyperbole, certitude, assertion, simplification, and abstraction are the essential tools of the declarative tone as it reaches down from above in a way that can be accepted from below. No significant Supreme Court decision is without them.

V. THE RHETORIC OF INEVITABILITY

The monologic voice, the interrogative mode, and the declarative tone build together in what might be called a rhetoric of inevitability. Notably, it is only in the juxtaposition of positions—in the friction *between* majority opinions and registered dissents—that *Gobitis* and *Barnette* give evidence of alternative possibilities. Inevitability, in this sense, is part of the compelled narrative of the individual opinion, but it is also a function of larger philosophical emphases at work in the law.

We arise to a concept of inevitability, in the critic Kenneth Burke's use of the term, by seeing present or future things in terms of the past; legal precedents establish just such a relationship by creating an "immutable scene . . . of 'eternal truth, equity, and justice.'"⁴⁷ Consider, as well, the single most famous discussion of determinism in modern times, Leo Tolstoy's epilogue to *War and Peace*, where "history," "reason," and "form" are the hallmarks of inevitability in human life. As Tolstoy explains, "the more remote in history the object of our observation . . . the more manifest becomes the law of necessity." And again, "Reason gives expression to the laws of necessity. Consciousness gives expression to the reality of free-will. . . . Freedom is the thing examined, Necessity is the examiner. Freedom is the content. Necessity is the form."⁴⁸ The same three factors—history, reason, and form—are also methodological preoccupations in judicial decision-making and explanation.

The judicial opinion uses reason and a belief in measured form to articulate and justify the hold of the past over the present. Philosophically, these affinities come out of the common law tradition and receive their most vivid expression in the writings of Edmund Burke.⁴⁹ Alexander Bickel has summarized the continuing importance of the Burkean framework in modern American law:

We find our visions of good and evil and the denominations we compute where Burke told us to look, in the experience of the past, in

47. Kenneth Burke, *A Grammar of Motives* (1945; reprint, Berkeley: University of California Press, 1969), 258-59, 379-80.

48. Leo Tolstoy, *War and Peace*, trans. Rosemary Edmonds, 2 vols. (Baltimore: Penguin Books, 1961), 2:1433-34, 1438-39 (Epilogue: Part 2).

49. See J.G.A. Pocock, "Burke and the Ancient Constitution: A Problem in the History of Ideas," *Politics, Language, and Time: Essays on Political Thought and History* (New York: Atheneum, 1973), 202-232.

our tradition, in the secular religion of the American republic. . . .
This is not, as Holmes once remarked, a duty, it is a necessity.⁵⁰

When judges "deliver the opinion of the Court," as Justices Frankfurter and Jackson do respectively in *Gobitis* and *Barnette*, they impose a cumulative history along with the decision of an immediate institution. They are, in every sense of the word, the keepers of the past and, through this role, holders who safeguard the present. It is not too much to suggest that precedent, experience, tradition, and an articulated knowledge of the long history of the Court (literally the vision of good and evil) make judicial "duty" everyone's "necessity." In that process, "the experience of the past" and "our tradition" become one and the same thing.

One way of thinking about the rhetoric of inevitability is to note how compulsively judges associate their own views with a correct course in history. Even more than historians, they need to find themselves on the victorious side in a continuum of past, present, and future, and their natural recourse is the telling example, which brings history to bear in manageable doses. Judgment, after all, is not a record of the past; it uses the past selectively in an assessment of normality or, more rarely, in a prescription for a possible normalization.⁵¹ That the past controls the present in this discovery of the norm is a given. What *was* and what *is* come together in the ruling expectation of what *must be*.

The problem, of course, is that the complexity of the past can justify a variety of conclusions. "History" authenticates every position taken in *Gobitis* and *Barnette*. In the former, Justice Frankfurter refers to the "centuries of strife" that lead to "a guarantee for religious freedom in the Bill of Rights" and to "the judicial enforcement of religious freedom" as "a historic concept," but he also concludes that "it mocks reason and denies our whole history to find in the allowance of a requirement to salute our flag on fitting occasions the seeds of sanction for obeisance to a leader."⁵² Justice Stone, in dissent, complains that "the law which is thus sustained is unique in the history of Anglo-American legislation," and he warns that "history teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good."⁵³ In Justice Jackson's controlling opinion in *Barnette*, "history" condemns "officially disciplined uniformity" of the kind involved in a compulsory pledge, and it also "authenticates . . . the function of this court" in the majority's

50. Alexander M. Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1975), 24. For Bickel's full explanation of Burke's absolute centrality in American legal thought, see more generally 11-25.

51. Michel Foucault, *Discipline & Punish: The Birth Of The Prison*, trans. Alan Sheridan (New York: Random House, 1979), 20-21.

52. 310 U.S. at 593, 594, 598.

53. *Id.* at 601, 604.

decision.⁵⁴ But these assertions do not keep Frankfurter, in response, from feeling "fortified in my view of this case by the history of the flag salute controversy in this Court," and they do not assuage his fears that the majority has forgotten how to "decide this case with due regard for what went before and no less regard for what may come after."⁵⁵

Not surprisingly, the fiercest battles over history in American law take place over the intentions of the Founders. The lengthy and tangled writing careers of Thomas Jefferson, James Madison, John Adams, Benjamin Franklin, and Abraham Lincoln serve many different purposes in *Gobitis* and *Barnette*. Certainly, Justices Frankfurter, Stone, Jackson, and Murphy prove equally adept in resorting to "the framers" both by name and collectively in support of their positions.⁵⁶ Frankfurter, for one, acknowledges the dangers in this practice when, in *Barnette*, he recognizes "too tempting a basis for finding in one's personal views the purposes of the Founders."⁵⁷ Even so, and this is the significant point, Frankfurter's act of recognition does not prevent him from citing the Founders more frequently than any other justice in the flag salute controversy.

Intentionalist arguments and controversies remain, despite glimmerings about their limitations, precisely because the judicial rhetoric of inevitability cannot do without a directed or selective sense of history. The Founders, in this context, are not so much sources of remedial wisdom as they are timeless elements out of a past that is assumed to be "correct" or "providential" or "victorious" or "clear." Their original intentions, so stated, represent a steady course between *then* (the patriotic past) and *now* (the vexed but still manageable present). To use Frankfurter's language, the Founders operate in the judicial opinion as one of "those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization."⁵⁸

Cast in these terms, intentionalism, like judicial formalism, is a device that no court can resist completely. Both devices—a faith in origins still evident and verifiable in the course of the republic, on the one hand, and belief in objective judgment, on the other—reinforce a rhetoric of inevitability that translates effectively into a language of obedience. Together,

54. 319 U.S. at 637, 640.

55. *Id.* at 664, 660-61.

56. Frankfurter refers directly to given writings of Lincoln, Jefferson, and Madison in *Gobitis*. He also invokes the names of Jefferson, Madison, John Adams, and Benjamin Franklin in his *Barnette* dissent and gives, as well, a detailed argument about the intention of the framers in the federal convention. Stone, in dissent in *Gobitis*, offers his own contrasting argument about the intention of the framers as a collectivity. Jackson counters Frankfurter's use of Lincoln in *Barnette* and gives his own general reading of the intentions of the Founders. Finally, Murphy's concurring opinion in *Barnette* refers directly to Jefferson's writings. See 310 U.S. at 596, 594 n. 3, 589, 604-5, and 319 U.S. at 653, 667, 649-50, 636, 639-40, 646.

57. 319 U.S. at 666.

58. 310 U.S. at 596.

they ease the problematic where obedience is both a necessary condition of judgment and an unavoidable threat to democratic values. "[Law] rests in large measure upon compulsion," writes Frankfurter in *Barnette*, but he also recognizes that compulsion in a free society depends less upon force than upon a common understanding or upon what he designates in *Gobitis* "the binding tie of cohesive sentiment."⁵⁹ The ultimate task of the judicial decision is to transform common understanding into a tie that will, in fact, bind. More often than not, that tie comes through a presentation of history commonly understood and, because understood, accepted.

VI. CONCLUSION

What have we learned? Foremost, study of the generic impulses in the judicial opinion can lead to better appreciation of the skills and creativity in such writing. Greater concentration on the nature and development of questions asked, sharper scrutiny of uses and abuses of history, some notice of judicial self-fashioning, more concern for the projected assumptions in decision-making, and a deeper awareness of both the hidden perspectives and projected certitudes in the judicial voice are bound to improve our understanding. These elements will never replace the lawyer's traditional distinctions between holdings and dicta; nor should they, but they do inform judicial choice. The driving impulses of the opinion, properly understood, are the grammar of judicial decision-making.

A better appreciation of judicial language also requires a different stance toward it. Despite their foundations in reason and precedent, judicial opinions are written to be taken on faith or with Frankfurter's "binding tie of cohesive sentiment" in mind. Rhetorically, they privilege an acceptance of explanation. But to stop with acceptance or even with a narrow understanding of decisions reached is to miss much of the resourcefulness in judicial writing. Accordingly, the critic must not assume any of the places that judicial language instinctively makes for its audience: that of the interested party, the working practitioner, or the concerned citizen. A certain distance or linguistic skepticism, what one literary scholar terms "methodical quizzicality towards language," is the best tool for examining literary ingenuity.⁶⁰ In the judicial opinion in particular, skepticism facilitates a unique appreciation of the strategies that instill conviction, and a knowledge of generic impulses furnishes some of the critical distance necessary for that stance.

We have also seen how a knowledge of form in judicial writing gives a different perspective on some standard problems. Scholarly exchanges over judicial formalism, historicism, and intentionalism tend to take place en-

59. 319 U.S. at 655 and 310 U.S. at 596.

60. Burke, *A Grammar of Motives*, 441-42.

tirely on the high and absolute ground of philosophical debate.⁶¹ It helps to realize that all three concepts are also deeply embedded in the psychology of daily judicial performance and that judicial resort to them often transcends philosophical difference. To be sure, judicial language changes under the influence of philosophical discourse, but change is in degree rather than in kind when the necessities of formalist, historicist, and intentionalist rhetoric are at stake.

Judges resemble other literary figures in this regard. The burdens of composition force every writer back upon convention and give established forms a life of their own. Objectivity in decision-making, the touchstone of historical truth, and the virtue of civic origins are such conventions in the law, and they assume fixed forms in the judicial opinion. Put another way, generic acceptances are not just a function of conscious authorial intentions; they also build out of inescapable familiarities, preoccupations, and vulnerabilities, and never more so than in the law. The need for communal approbation—the ultimate vulnerability in writing—is, if anything, greater for judges than for other writers.⁶² Acknowledgement of these pressures does not question the importance of philosophical debate in discussions of judicial decision-making, but it should lead away from absolutist conclusions. The issue is not the acceptance or rejection of objectifications in judicial language but rather their changing form and altered placement in actual use. How, we might ask, have historicist or intentionalist arguments been modified in the light of contemporary thought and practice?

The practical impulses that we have identified in judicial writing also allow a final, more speculative claim. None of these impulses, with the possible exception of the monologic voice, have developed in a way that encourages a philosophy of judicial activism. As we have seen, the interrogative mode, the monologic voice, the declarative tone, and the rhetoric of inevitability all move in formulaic ways within boundaries that the judicial figure accepts and, in accepting, then expounds. This sense of boundedness is part of the prudential voice in judicial decision-making—a voice that uses its own limits to insist upon a predetermined course of judgment in the moment of decision. Judicial restraint, to use more conventional phraseology, supplies the familiarity in this voice, and, as long as it does, judicial activism will “sound” strange in opinion writing.

61. For good examples, see Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), Martin P. Golding, “Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments,” *Journal of Legal Education* 36 (1986): 441-80, Bruce A. Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980), and Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law* (1962; reprint, Cambridge: Harvard University Press, 1981).

62. Judges alone as writers in American life face the requirement of justifying their official actions in print, and each written justification is supposed to produce a level of approbation that will lead on to full public endorsement. These expectations mean that judges must rely even more than other writers on the established forms that generate acceptance in a reading audience.

The thrust of this claim neither rejects nor supports judicial activism. Descriptive rather than prescriptive, it insists instead upon a discrepancy between thought and form that combatants on all sides would do well to heed. For if critics of judicial performance are ever to clarify their philosophical differences, they must first come to grips with a difficulty that is primarily literary in scope and implication. In essence, judicial activists have not yet found ways to re-shape the language of the judicial opinion to their professed needs; their consequent recourse to established forms often seems incongruous or, to opponents, just wrong. Accusations follow in part because thought and tone do not match in the activist opinion. At least one leading activist, Bruce Ackerman, accepts the challenge in just these terms when he calls for a "new form of activist law-talk," one that will "construct a new language of power . . . responsive to the distinctive demands imposed upon legal discourse by the rise of an activist state."⁶³

Once more, the flag salute cases illustrate the generic problems involved. Activism, or a more dynamic application of the Bill of Rights, leads the Supreme Court in *Board of Education v. Barnette* to question the whole foundation of *Minersville District v. Gobitis*, but this very act, by the Court's own admission, "is one to disturb self-confidence."⁶⁴ In *Gobitis*, self-confidence flows from the Court's articulation of its own limits through the acknowledged rubrics of judicial restraint.⁶⁵ *Barnette* questions those rubrics without substituting another language of decision-making. In resisting the brands of intentionalism and historicism that go with restraint, Justice Jackson distinguishes the "majestic generalities" and "principle of non-interference" of the eighteenth century from the "strengthened government controls" and "problems of the twentieth century." The distinctions are indisputable, and yet Jackson's use of them in *Barnette* forces him to recognize that the same distinctions also undermine the conventions of judicial determinism. "These changed conditions often deprive precedents of reliability," he concludes, "and cast us more than we would choose upon our own judgment."⁶⁶

The rest of *Barnette* struggles to recover from this stark admission of freedom in decision-making. The boundary lines of conventional judicial discourse have been moved. As we have seen, Jackson's language of compulsion resurrects the rhetoric of inevitability: "we act . . . by force of our commissions," "We cannot . . . withhold the judgment that history authenticates," "If there is any fixed star in our constitutional constellation," "If there are any circumstances which permit an exception, they do not

63. See Ackerman, "Foreword: Law in an Activist State," *Yale Law Journal* 92 (1983): 1083, 1098-99, 1084-85.

64. 319 U.S. at 639.

65. As Frankfurter puts the matter, "the courtroom is not the arena for debating issues of educational policy. It is not our province. . . . So to hold would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it." 310 U.S. at 598.

66. 319 U.S. at 639-40.

now occur to us.”⁶⁷ Whatever one thinks of the decision in *Barnette*, this language represents something of a retreat. Activists must come to a more positive rhetorical understanding of their discoveries if they are to achieve greater coherence in their version of the judicial opinion.⁶⁸ The assumption that judges have been “cast” upon their own judgment must be faced squarely and incorporated into the language and form of decision-making.

How judicial activists might actually reconstitute the genre of the opinion is another subject. At the same time, the growing complexity of regulatory law and of competing civil rights has exposed the inadequacy of judicial formalism and other objectivisms in the contemporary courtroom. One way or another, the judicial opinion must adjust to the requirements of the modern nation state. It could be that courts must recognize more contending voices in the language of judgment, that they must learn to entertain competing questions in a more seriously dialogical mode. It could also be that they should acknowledge more forthrightly the levels on which decision-making is arbitrary and the levels on which it is not. To the extent that courts can reach either of several answers in a contest of equal rights, it might help to demonstrate more openly both the tensions and the steps that lead to judgment. The inevitability of a given decision might yield to a different integrity based on decision-making. Significantly, all of these possibilities for change turn on a larger question about the nature of judicial creativity. What kinds and levels of ambiguity, judges must ask, can the courtroom opinion tolerate and still guarantee acceptance of judgment?

Hence, more important than speculations about change is a more scrupulous attention to language itself. We need a better understanding of the complex and often contradictory workings of judicial discourse: how judges work within barely acknowledged constraints that they also shape; how courts construe a shared genre from different venues and levels in the judicial hierarchy; how rhetoric and dogma conspire under pressure. Many tools of understanding apply here, but attention to language is the key. “Books,” writes Henry Thoreau, “must be read as deliberately and reservedly as they were written.”⁶⁹ The judicial opinion deserves the same injunction. Judges use words to secure shared explanations and identifications; they also use them as weapons of control. Deliberation with reservation explores that distinction, and the result is more than understanding. Here and elsewhere, a practiced appreciation or resourcefulness in language is the first safeguard in a republic of laws.

67. *Id.* at 640, 642.

68. For one analysis of the way in which a greater knowledge of rhetoric might lead toward greater textual coherence in legal writing, see White, “Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life,” *University of Chicago Law Review* 52 (1985): 684.

69. Henry D. Thoreau, *Walden*, ed. J. Lyndon Shanley (Princeton: Princeton University Press, 1971), 101.

