



Winter 1-1-2002

Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions

Laura Krugman Ray

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Jurisprudence Commons](#)

Recommended Citation

Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 Wash. & Lee L. Rev. 193 (2002).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol59/iss1/6>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions

Laura Krugman Ray*

Table of Contents

I. Introduction	193
II. The Roosevelt Court Quartet: Four Judicial Voices	195
A. Finding a Voice	195
B. The Quartet Speaks	197
1. Justice Black: The People's Justice	198
2. Justice Frankfurter: The Democratic Elitist	201
3. Justice Douglas: The Rugged Individualist	205
4. Justice Jackson: The Pragmatic Man of Letters	208
C. Personal Revelations and Neutral Decisionmakers	211
1. Past Careers and Present Opinions: Jackson and Black	213
2. Personal Experience and Private Identity: Douglas and Frankfurter	217
III. The Rehnquist Court Quartet: Strategic Responses	221
A. Losing a Voice	221
B. Emotional Experience and Judicial Response	223
1. Justice Kennedy: Agonized Ambivalence	223
2. Chief Justice Rehnquist: Strategic Emotionalism	225
3. Justice Scalia: Indignant Conversation	226
4. Justice Blackmun: Institutional Emotionalism	229
IV. Conclusion	233

I. Introduction

The Roosevelt Court and the Rehnquist Court, separated by half a century, share a reputation for producing splintered decisions with strong concurrences and dissents by individualistic Justices. The members of the Roosevelt Court were the trailblazers, rejecting a long-established tradition that favored consen-

* Professor of Law and H. Albert Young Fellow in Constitutional Law, Widener University School of Law. Ph.D., J.D., Yale University, A.B. Bryn Mawr College. I am grateful to Jean Macchiaroli Eggen, Alan Garfield, Philip Ray, and Florence Wagman Roisman for their helpful readings of earlier drafts of this Article.

sus opinions with limited disagreement and adopting instead a mode of decisionmaking that favored separate opinions by dissident Justices. Although subsequent Courts followed the Roosevelt Court model, it is the Rehnquist Court that has made separate opinions the hallmark of its practice. Linda Greenhouse's recent review of the Court's 2000 Term was aptly headlined *The High Court and the Triumph of Discord*.¹

The transformation of the Court's jurisprudential tradition from consensus to discord has been accompanied by a shift in focus from the Court as a unitary institution to the Court as an assemblage of distinctive individuals. Just as they challenged the idea of decisionmaking by consensus, the Roosevelt Court Justices also challenged the norm of impersonal judicial prose. The leaders of the Court wrote their opinions in distinctive styles, from Felix Frankfurter's academic density to Robert Jackson's tart elegance and Hugo Black's homespun simplicity, that personalized their jurisprudence. As law clerks came to dominate the opinion writing practices of the Court, however, many Justices' opinions, even dissents and concurrences, took on the bland and featureless style of law review prose. On the Rehnquist Court only Antonin Scalia writes in an immediately recognizable style, but his colleagues have found other ways to personalize their opinions, sometimes by allowing powerful emotional responses to appear through their otherwise neutral prose.

Court opinions personalized by style, content, or both, enliven the often dreary pages of the *U.S. Reports*, but they also raise difficult questions about the role of judicial personality in the decisionmaking process. In his influential essay *Reason, Passion, and "The Progress of the Law,"* Justice Brennan challenged the idea that judges should speak only in the impersonal tones of a detached and dispassionate professional.² Returning to Justice Cardozo's classic work *The Nature of the Judicial Process*,³ Brennan agreed with Cardozo that such impersonality is not possible and that judges inevitably infuse their work with elements of their own distinctive natures.⁴ Recognizing this, Brennan argued that we should acknowledge that "this internal dialogue of reason and passion" is essential to the "vitality" of the decisionmaking process.⁵ Although Cardozo also had recognized the effect of a judge's individual nature on the judicial process, he was less enthusiastic than Brennan. Cardozo regretted that "[t]he great tides and currents which engulf the rest of

1. Linda Greenhouse, *The High Court and the Triumph of Discord*, N.Y. TIMES, July 15, 2001, at § 4, p. 1.

2. William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3 (1988).

3. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

4. Brennan, *supra* note 2, at 3 (stating thesis that "internal dialogue of reason and passion, does not taint the judicial process, but is in fact central to its vitality").

5. Brennan, *supra* note 2, at 3.

men do not turn aside in their course and pass the judges by"⁶ and affirmed a judicial responsibility to resist those subjective currents in favor of broader community standards. Like Brennan, though, he conceded that the myth of pure judicial impersonality was an "ideal . . . beyond the reach of human faculties to attain."⁷

To acknowledge with Cardozo or to celebrate with Brennan the idea that the judge's individual nature is part of the judicial process is to suggest the related idea that even formal judicial prose can convey the personality of its author. The Justices of the Roosevelt and Rehnquist Courts illustrate this idea with the use of a variety of rhetorical strategies to contain their personal responses to the cases before them. An examination of the prose styles of four prominent Roosevelt Court Justices reveals the diverse ways in which judicial personality can assert itself and, at the same time, serve to express the author's jurisprudential vision. Their counterparts on the Rehnquist Court reveal their personal reactions in more oblique and complicated ways, but they too illustrate Cardozo's insight that even stylistic discipline and platoons of law clerks cannot extinguish the spark of personality from the work of Justices who draw on emotion and experience, as well as intellect, in shaping their judicial responses.

II. *The Roosevelt Court Quartet: Four Judicial Voices*

A. *Finding a Voice*

The formalist legal tradition, in which judicial decisions were said to be determined by the neutral forces of reason and logic, left little room for personalized opinions. Nineteenth century Supreme Court opinions reflect this tradition, and in an era when law clerks had not yet assumed a ghost-writing role, the Justices' opinions nonetheless display a uniformity that largely conceals the stamp of personality. In the early decades of the twentieth century, two of the Court's greatest stylists, Justices Holmes and Cardozo, transformed the bland Court landscape with their distinctive prose – Holmes's concise, lucid, and epigrammatic opinions⁸ and Cardozo's elegant literary compositions.⁹ Because Cardozo succeeded to Holmes's seat, however, the two

6. CARDOZO, *supra* note 3, at 168.

7. *Id.* at 169. The relation of a judge's personal beliefs to his or her jurisprudence was also linked to the more complex Legal Realist movement of the 1920s and 1930s, especially by its critics who "often caricatured [the Realist credo] as the proposition that how a judge decides a case on a given day depends primarily on what he or she had for breakfast." AMERICAN LEGAL REALISM xiv (William W. Fisher III, Morton J. Horwitz, & Thomas A. Reed eds., 1996).

8. See, e.g., Richard A. Posner, *Introduction*, THE ESSENTIAL HOLMES xiii-iv, xvi-xvii (1992) (discussing Holmes's literary qualities).

9. For a balanced discussion of Cardozo's style, see ANDREW L. KAUFMAN, CARDOZO 447-51 (1998). For a warmer appreciation, see LOUIS AUCHINCLOSS, *The Styles of Mr. Justice*

never wrote for the same Court, and their opinions never offered readers competing treatments of the same legal problem.

The Roosevelt Court, however, changed the tone of the Court. President Franklin Roosevelt's appointments included four of the most intellectually talented, ambitious, and self-assured men ever to occupy the bench: Hugo Black, Felix Frankfurter, William O. Douglas, and Robert Jackson. They continued to occupy it, in varying combinations, for an overlapping period of over thirty years, from 1939, when Frankfurter and Douglas joined Black, until 1971, when Black's resignation left Douglas as the last survivor. These Justices, whose alliances and antagonisms have become the stuff of Court legend,¹⁰ wrote their opinions in a spirit of conviction sharpened by competition for the votes of their more malleable colleagues and for the attention of the political and academic observers who followed the Court. Their terms of service covered a broad swath of American history, from the New Deal and World War II through the civil rights movement and the social revolution of the 1960s. And their opinions replaced the uniform and sober certainties of an earlier generation of Justices with a variety of assertive styles that broke with tradition in their eagerness to communicate, to persuade, and to triumph.

This new approach to opinion writing is identifiable in both form and manner. As scholars have amply documented, the incidence of concurrences and dissents exploded during the Roosevelt Court, whose members were the first to normalize the practice of writing separately to distinguish or qualify their opinions or to reject the opinions of their colleagues.¹¹ The author of a concurrence or dissent was freed from the obligation to win votes by accommodating the preferences and reservations of his colleagues. These Roosevelt Court Justices appreciated this freedom and applied different standards to their separate opinions. They might share, up to a point, Black's belief that a majority opinion could never be eloquent,¹² but they felt entitled in their concurrences and dissents to stamp their work with a personal style.

Cardozo, in LIFE, LAW AND LETTERS 47 (1979). Cardozo himself wrote an essay on the literary qualities of judicial opinions, which Auchincloss applied to Cardozo's own style. Benjamin Cardozo, *Law and Literature*, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 3 (1931); see Jerome Frank (writing anonymously), *The Speech of Judges: A Dissenting Opinion*, 29 VA. L. REV. 625, 629-39 (1943) (providing strong critique of Cardozo's style).

10. See generally JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* (1989) (analyzing friction between Black and Frankfurter); MELVIN I. UROFSKY, *DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941-1953* (1997) (providing broader study of internal disagreements on Stone and Vinson Courts).

11. See C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937-1947*, at 23-45 (1963) (analyzing incidence of dissent).

12. ROGER NEWMAN, *HUGO BLACK* 417 (1994).

As a consequence, their opinions often speak in a distinctive voice that replaces bland legal prose with a range of rhetorical strategies calculated to persuade the reader. All four Roosevelt Court Justices were accomplished oralists, whether as courtroom advocate, political speaker, teacher, or conversationalist. All had experience using the force of their strong personalities to persuade others, and their opinions capture those personalities within the constraints of legal prose. The voices that emanate from their opinions are recognizable – a reader would be unlikely to confuse Black with Frankfurter, Douglas with Jackson, or even Black with Douglas. An examination of selected opinions suggests both how these voices were constructed and what they tell us about their creators.

B. *The Quartet Speaks*

The Roosevelt Court Justices came to the bench from extraordinarily diverse backgrounds: Black, a United States senator from rural Alabama who graduated from the University of Alabama Law School but never earned an undergraduate degree;¹³ Frankfurter, a Harvard Law School professor who arrived in New York City as a non-English speaking Austrian immigrant at the age of twelve, received an undergraduate degree from City College, and graduated first in his class from Harvard Law School;¹⁴ Douglas, a Yale Law School professor and a commissioner of the Securities and Exchange Commission who suffered from polio during his impoverished boyhood in Washington before distinguishing himself at Whitman College and Columbia Law School;¹⁵ and Jackson, Franklin Roosevelt's solicitor general and attorney general, a country lawyer from upstate New York who entered legal practice with neither a college nor a law school degree.¹⁶ The academic credentials of these four Justices reflect a transitional period in American legal education during which it was not uncommon to enroll in law school without a bachelor's degree, as Black did,¹⁷ or to study law as an apprentice without any academic degrees, as Jackson did.¹⁸ It was also possible, although not usual, for intellectually gifted young men without any financial

13. THE OXFORD COMPANION TO THE SUPREME COURT 72 (Kermit L. Hall ed., 1992) [hereinafter OXFORD COMPANION]; THE SUPREME COURT A TO Z 39-40 (Elder Witt ed., 1994).

14. OXFORD COMPANION, *supra* note 13, at 314-16.

15. *Id.* at 233.

16. *Id.* at 443.

17. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1950S TO THE 1980S 36 (1983).

18. In 1927, no state required law school education for admission to the bar. *Id.* at 174. Jackson was a student at Albany Law School where he completed the two-year law program in one year. THE SUPREME COURT A TO Z, *supra* note 13, at 208.

resources to attend the nation's most prestigious law schools, as Frankfurter and Douglas did.¹⁹

We might expect these variations in background and educational preparation to be reflected in the legal voices of these Justices, and in fact they are, though not in the most predictable way. Frankfurter, for whom English was not his native language, wrote the most formal and elaborate prose of the four. Jackson, with the slenderest formal education, wrote the most artful and allusive. Both Black and Douglas developed a plain style, although Black's simplicity was the result of careful study while Douglas's was often the result of rapid composition. Even without substantive clues to the author's identity, an opinion, particularly one of concurrence or dissent, may carry the mark of its maker in more subtle ways. For these Justices, all strong personalities with diverse experiences and accomplishments, the legal voice is an agent of calculated self-revelation.

1. Justice Black: *The People's Justice*

The voice that speaks through Hugo Black's opinions is clear and straightforward. According to Roger Newman, his biographer, Black believed that "[w]riting in language that people cannot understand is one of the judicial sins of our times."²⁰ His strong preference for simple diction and uncomplicated syntax was a sophisticated choice; when Earl Warren, new to the Court, asked Black to recommend a book on opinion writing, Black suggested the "one book which is far better than anything published before or after," *Aristotle on Rhetoric*.²¹ As a self-conscious stylist, Black wanted his prose to be accessible to ordinary people because he wanted them to understand and appreciate for themselves the legal protections the Constitution provided. In Black's view, it was the Court's duty to respect and apply the unadorned words of the Constitution.²² Just as he rejected judicial qualifications of constitutional

19. Frankfurter recalled that, after graduating from college, he worked for a year as a clerk in the Tenement House Department of the City of New York to earn his law school tuition. FELIX FRANKFURTER, FELIX FRANKFURTER REMINISCES 14-15 (Harlan B. Phillips ed., 1960). At the time, Harvard's "tuition fee was \$150 You could live on very little." *Id.* at 16. Denied a loan or scholarship by Columbia Law School, Douglas found through its employment office a job drafting a business law correspondence course and managed to earn his tuition while attending law school. JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 64-65 (1980).

20. NEWMAN, *supra* note 12, at 325. According to Newman, "Black wanted litigants, people in barber shops, 'your mamma,' he once told a clerk, to understand his opinions." *Id.*

21. *Id.* at 427.

22. See, e.g., *In re Anastaplo*, 366 U.S. 82, 116 (1961) (Black, J., dissenting) ("If we are to pass on that great heritage of freedom, we must return to the original language of the Bill of Rights. We must not be afraid to be free.").

language that altered its original meaning, so he rejected complicated rhetoric that prevented the Court from explaining the law directly to the people. Black's chosen style, in other words, was directly linked to his jurisprudence.

A typical Black opinion has the cadences of spoken language, what Newman calls "the continuation of the oral tradition of the South."²³ Black often wrote by dictating his first drafts,²⁴ and his separate opinions are filled with rhetorical simulations of speech. One such device is the frequent use of "I" or "me" to evoke immediacy. Dissenting in *Betts v. Brady*,²⁵ for example, Black posed the question of whether the defendant was denied a constitutional right to counsel and answers in a brief sentence: "I think he was."²⁶ The concluding sentence of the dissent combines a casual personal reference with more formal legal diction: "Any other practice seems to me to defeat the promise of our democratic society to provide equal justice under the law."²⁷ The phrase "to me" is syntactically unnecessary, but stylistically it serves to personalize an otherwise abstract formulation. Black also used conversational diction to make his historical references less academic in tone. Thus, Ann Hutchinson "was tried, if trial it can be called," for her religious views, and on the question of whether she was afforded a privilege against self-incrimination, the answer is a short and emphatic sentence: "Of course not."²⁸ Black even chose a metaphor to domesticate an historical point: he "cannot consider the Bill of Rights to be an outworn 18th Century 'strait jacket.'"²⁹ The adjective "outworn" adds a homely touch to the deliberately sinister "strait jacket," conveying in a vivid image Black's frequent theme of the Constitution's agelessness. In one of Black's most quoted passages, he has found a simple but potent metaphor for the role of the courts as protectors of constitutional rights for the dispossessed: The "courts stand against any winds that blow as havens of refuge for those who might otherwise suffer."³⁰

These rhetorical strategies dominate one of Black's most memorable dissents, his rejection of the right to privacy identified by the majority in *Griswold v. Connecticut*.³¹ The theme of the opinion is Black's refusal to accept a new constitutional right, however attractive, that is not expressly authorized by constitutional language. That point is made early in the opinion

23. NEWMAN, *supra* note 12, at 486.

24. *Id.*

25. 316 U.S. 455 (1942).

26. *Betts v. Brady*, 316 U.S. 455, 474 (1942) (Black, J., dissenting).

27. *Id.* at 477 (Black, J., dissenting).

28. *Adamson v. California*, 332 U.S. 46, 88 (1947) (Black, J., dissenting).

29. *Id.* at 89 (Black, J., dissenting).

30. *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

31. 381 U.S. 479, 507 (1965) (Black, J., dissenting).

in a sentence that carefully mixes colloquialism with more conventional judicial language: "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."³² The first part of the sentence is conversational, even folksy, in its assertion of common ground with a widespread human response; the second part raises the level of diction to make the judge's technical point that this perfectly understandable taste for privacy must still be supported by the language of the Constitution. The remainder of the opinion is laced with similar contrasts of informal and judicial diction. Black "get[s] nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions,"³³ rejecting as an illogical dead end Douglas's "penumbra" theory that relies on shadowy emanations rather than firm constitutional language to support the new right. Such clever strategies, Black implied, are only disingenuous evasions that transfer policy-making power from the legislatures to the courts by substituting vague standards for constitutional specifics. Thus, he rejected "[t]he use by federal courts of such a formula or doctrine or what-not to veto federal or state laws,"³⁴ with "whatnot" suggesting the frivolous imprecision of the majority's approach. The lightly mocking tone is echoed by his related observation that "the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the '[collective] conscience of our people.'"³⁵ The use of "gadget" deliberately evokes mechanical trickery, again suggesting that any departure from constitutional language is necessarily unreliable and unsound.

This last point derives from another major theme of Black's jurisprudence: his rejection of attempts by the Court "to keep the Constitution in tune with the times" by interpretation rather than by amendment.³⁶ Black sharpened the contrast between these opposing views by describing his adversaries as "good and able men [who] have eloquently spoken and written, sometimes in rhapsodical strains," in support of their position.³⁷ He set against the well-meaning rhapsodists his alliance with the framers of the Constitution who required amendments ratified by the people: "That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me."³⁸ The phrase "our Fathers" allies Black at once with his readers and with the framers of the Constitution. To be "old-fashioned" in this

32. *Griswold v. Connecticut*, 381 U.S. 479, 510 (1965) (Black, J., dissenting).

33. *Id.* at 509-10 (Black, J., dissenting).

34. *Id.* at 513 (Black, J., dissenting).

35. *Id.* at 519 (Black, J., dissenting).

36. *Id.* at 522 (Black, J., dissenting).

37. *Id.* (Black, J., dissenting).

38. *Id.* (Black, J., dissenting).

context is clearly to choose the historical bedrock of the Constitution over the airy and unanchored views of the modernizers. The conversational tone of Black's conclusion completes the contrast. His opinions speak not in "rhapsodical strains" but in the plain and well-grounded diction of a sensible man who respects the wisdom of the past.

The voice that emerges from Black's opinions speaks to both legal and lay readers with clarity and directness. Although Black was a voracious reader of literature, history, and political theory, he wore his learning lightly, and his opinions never overwhelm or condescend to the reader. They are a rhetorical expression of his populist politics during his Senate career, and are always mindful of the people whose lives will be affected by the Court's decisions. Black's reverence for the text of the Constitution made him highly sensitive to the nuances of language. His diction is a deliberate blend of the folksy and the formal, and at its best his prose retains the cadences of spoken language. Like the successful trial lawyer he was before entering politics, Black tailored his voice to persuade his chosen audience, not just his colleagues on the bench or the legal profession, but the wider community as well. He continued to believe, as he was taught by a professor of English, "that the best way to tell any story is to tell it as simply as possible, in the simplest words possible, and in the shortest way possible."³⁹ Translated into the specialized realm of opinion writing, that meant an economical opinion that attempted to persuade ("[t]hat's why I put rhetoric in my opinions," Black said) by speaking directly to the reader as much as possible in the diction and syntax of intelligent conversation.⁴⁰

2. Justice Frankfurter: The Democratic Elitist

If Black wanted his opinions to speak to a broad readership, Frankfurter, his frequent antagonist on the Court, had no similar intent. Frankfurter's opinions were written in the language of intellectual rather than personal discourse. Frankfurter's diction is Latinate, formal, and abstract; his syntax is complicated and even tortuous. Jerome Frank apparently once wrote a parody of Frankfurter's style: the Gettysburg Address as an opinion rendered in Frankfurterese, which begins "A semi-centennial, three decades and seven winter solstices preceding the present, our paternal progenitors gestated and regurgitated upon the western hemisphere (49 longitude 38 latitude) a pristine commonwealth."⁴¹ Like most successful parodies, it reveals something im-

39. NEWMAN, *supra* note 12, at 19 (quoting Black). In law school Black took a course in rhetoric, American literature, and English composition from Dr. Charles H. Barnwell, who, "whether he knew it or not," taught Black the virtues of brevity. *Id.*

40. NEWMAN, *supra* note 12, at 404 (quoting Black).

41. ROBERT J. GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW* 203 n.103 (1985). Glennon cautions that although the typescript was found

portant about its target. A Frankfurter opinion, even an authentic one, was addressed to the educated reader who was prepared to wrestle with the author's dense prose rather than to Black's common reader. Whereas Black's style implied a direct link between the Court's decisions and all Americans, Frankfurter's style implied the need for an intermediary to translate the message into the language of laymen.

The idea of the Justice as a rarified expert was natural to Frankfurter, who spent twenty-six years on the Harvard Law School faculty studying and writing about the Court before joining it in 1939. He revered the law school as "the most democratic institution I know anything about,"⁴² a meritocratic society where he had excelled as a student and where he chose to teach only the brightest students.⁴³ G. Edward White has described this tension in Frankfurter between his twin passions for democracy and intellectual excellence:

Frankfurter reconciled intellectual elitism with democracy through the notions of paternalism and social responsibility. He believed that the masses needed opportunities to achieve elite status, but that they could recognize those opportunities only if educated by an elite. Public-mindedness was the obligation attendant on one's rise in the meritocracy. The expertise and elite status achieved in reward for surviving the competition of the educational system was to be used to prepare the way for other entrants. American citizens had the capacity for self-improvement, and even self-government, Frankfurter believed, if shown the proper techniques; those techniques were to be conveyed to them by elite leadership.⁴⁴

To Frankfurter, the Court itself was a highly imperfect meritocracy with himself at its peak, and he enthusiastically assumed the responsibilities of "elite leadership." He treated the courtroom as a classroom by dominating oral argument with his relentless questions⁴⁵ and irritated the other Justices by lecturing them in conference, where Chief Justice Hughes would sometimes call him "Professor Frankfurter,"⁴⁶ and by sending them helpful memos to improve their opinions.⁴⁷ Frankfurter's effort to lead the Court faltered when the Justices he

in Frank's "papers and with his handwriting on it," it is still "possible that Frank only contributed to the final spoof." *Id.* at 204.

42. FRANKFURTER, *supra* note 19, at 19.

43. G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 326 (1976).

44. *Id.* at 326-27.

45. According to Douglas, "Black and Frankfurter probably led the list in intensity of questioning Some of us would often squirm at Frankfurter's seemingly endless questions that took the advocate round and round and round." WILLIAM O. DOUGLAS, *THE COURT YEARS 1939-1975*, at 180-81 (1980).

46. LIVA BAKER, *FELIX FRANKFURTER* 220 (1969).

47. MELVIN I. UROFSKY, *FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES* 46-48 (1991). For Urofsky's account of Frankfurter's failed effort to become the

considered his inferiors refused to accept his guidance, but his belief in the Justice as educator survived in his opinions.

Frankfurter's opinions convey his strong sense of academic superiority even before the reader engages the text. There are frequent footnotes to scholarly sources, which may range in a single opinion from the multi-volume works of Jefferson and Madison⁴⁸ to books by Bagehot and Santayana.⁴⁹ One dissent ends with a three-page passage quoted from James Bradley Thayer⁵⁰ and includes a passing reference to Socrates.⁵¹ Some opinions even come with elaborate appendices. In *Colegrove v. Green*,⁵² in which Frankfurter wrote for the Court to dismiss a redistricting claim as a political question, he attached three pages of tables showing population variations in all states and four pages of districting maps.⁵³ Concurring in *Youngstown Sheet & Tube Co. v. Sawyer*,⁵⁴ he included two appendices of fourteen pages charting all federal legislation authorizing seizure of industrial property and all executive seizures of industrial plants;⁵⁵ each appendix page folds out from the volume to a size more than double that of the rest of the volume. The academic apparatus sends a clear message: this is the work of a scholarly expert, and a willing reader may approach and learn.

The voice that speaks to the reader through the text reinforces that message. The diction is formal and at times slightly archaic. It is hard to imagine any other member of the Roosevelt Court writing about "embroilment in politics"⁵⁶ or the "augustness" of constitutional issues⁵⁷ or whether the Court should "excogitate" a defect in a judgment.⁵⁸ A typical sentence may pile up multi-syllabic words, as when Frankfurter wrote of the effectiveness of the flag salute "in inculcating concededly indispensable feelings,"⁵⁹ or reverse the conventional order of subject and verb, as when he observed that "[f]ive times

Court's acknowledged intellectual leader, see *id.* at 45-63; see also JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 76 (1975).

48. See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594 n.3 (1940).

49. See *id.* at 597 n.5.

50. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 667-71 (1943) (Frankfurter, J., dissenting).

51. See *id.* at 655 (Frankfurter, J., dissenting).

52. 328 U.S. 549 (1946).

53. *Colegrove v. Green*, 328 U.S. 549, 557-63 (1946).

54. 343 U.S. 579 (1952).

55. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 615-28 (1952) (Frankfurter, J., concurring).

56. *Colegrove v. Green*, 328 U.S. at 554.

57. *Barnette*, 319 U.S. at 651 (Frankfurter, J., dissenting).

58. *Terminiello v. Chicago*, 337 U.S. 1, 12 (1949) (Frankfurter, J., dissenting).

59. *Barnette*, 319 U.S. at 662 (Frankfurter, J., dissenting).

has the precise question now before us been adjudicated."⁶⁰ A single sentence from Frankfurter's concurrence in *Youngstown Sheet & Tube* illustrates the cumulative impact of high diction and elaborate syntax: "It would be not merely infelicitous draftsmanship but almost offensive gaucherie to write such a restriction upon the President's power in terms into a statute rather than to have it authoritatively expounded, as it was, by controlling legislative history."⁶¹ The point is not a complex one – he argued that congressional purpose may be found outside statutory text – but the sentence openly challenges the reader to untangle the expression. On one of the rare occasions when he attempted playfulness, the result landed with a thud. This passage opens Frankfurter's *Youngstown* concurrence: "Before the cares of the White House were his own, President Harding is reported to have said that government after all is a very simple thing. He must have said that, if he said it, as a fleeting inhabitant of fairyland. The opposite is the truth."⁶² The first sentence makes its point with straightforward diction and syntax, though the phrase "were his own" has a slightly old-fashioned ring. It is the next sentence, with its "fleeting inhabitant of fairyland," that reveals Frankfurter's discomfort with even mild humor in an opinion setting and his inability to strike a whimsical note. Although he was a conversationalist of humor and charm, as his sessions for the Columbia University oral history project illustrate, to Frankfurter opinion writing remained serious, even solemn, business.⁶³

Frankfurter wrote in the voice of the scholar and, at times, of the pedant. Unlike Black, who aimed his opinions directly at a broad readership, Frankfurter wrote for members of a select society, the serious readers able to penetrate his syntax and decipher his language. His constant theme is the need for judicial restraint and deference to the democratic will, but his unapologetically elitist style reflects an unwillingness to restrain his academic tendencies in the service of unmediated communication of his message to the lay public. The tension White has identified between Frankfurter's meritocratic and elitist strains finds expression in opinions whose content seems perpetually at war with their form. Although Frankfurter once wrote that "legal opinions are not conducive to biographical revelation,"⁶⁴ his own opinions prove the opposite. In their style and form they reveal the central elements of his professional life: his academic triumphs at Harvard, his scholar's pride, and his preferred judicial role as a professor of the law.

60. *Id.* at 664 (Frankfurter, J., dissenting).

61. *Youngstown*, 343 U.S. at 603 (Frankfurter, J., concurring).

62. *Id.* at 593 (Frankfurter, J., concurring).

63. *See generally* FRANKFURTER, *supra* note 19.

64. FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 45 (1961).

3. Justice Douglas: The Rugged Individualist

If Frankfurter wrote for the specialists and Black for the general public, then Douglas in one sense wrote for himself. The Court's premier individualist, Douglas saw himself as the champion of society's outsiders, and his constitutional jurisprudence consistently upholds the rights of minorities, workers, and assorted nonconformists in the face of restrictive statutes and doctrines. His opinions, as critics have long noted, reject the conventional judicial tools of legal analysis and precedent in favor of bald assertions of Douglas's preferred values.⁶⁵ These values can be traced in Douglas's autobiographical works to his boyhood experiences climbing the mountains of the Pacific Northwest, riding the rails with the dispossessed, and absorbing the poetry of Wordsworth and Whitman.⁶⁶ This Romantic strain in Douglas's thought led him to identify with the outcast, a solitary figure who is always in pursuit of personal freedom from the constraints of a conformist society.⁶⁷

Douglas's Romanticism also led him to adopt a mode of opinion writing that drew directly on his personal vision of American life. Douglas had a tough, analytic mind that, particularly in his early legal career, he applied to difficult regulatory problems such as those in the securities industry. As a Justice, however, Douglas tended to rely on what, as he appreciatively noted, Wordsworth had called the "feeling intellect," the apprehension of truth through emotional rather than strictly intellectual channels.⁶⁸ When Douglas determined that a liberty interest was central to human experience, he wasted little time or intellectual energy in crafting a conventional legal argument that it was also protected by the Constitution; his own conviction was sufficient support, and he wrote the opinion accordingly. If Douglas's opinions tended to disregard external legal sources in favor of personal validation, they also tended to worry less about the audience than about the author. Douglas wrote quickly and rarely looked back; his confidence in his own work product was

65. For a review of criticism of Douglas's jurisprudence, see Melvin I. Urofsky, *William O. Douglas as a Common Law Judge*, 41 DUKE L.J. 133, 134-40 (1991).

66. Douglas's two autobiographical accounts of his youth are *Of Men and Mountains* (1950) and *Go East, Young Man: The Early Years* (1974).

67. See Laura Krugman Ray, *Autobiography and Opinion: The Romantic Jurisprudence of Justice William O. Douglas*, 60 U. PITT. L. REV. 707, 711-23 (1999) (providing study of Romantic elements in Douglas's thought).

68. Douglas cited the phrase "feeling intellect" in the preface to *Go East, Young Man*, the first volume of his autobiography. WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS* xi (1974). Douglas attributes the phrase to Wordsworth without giving the precise source; it appears in Book Fourteenth of *The Prelude*, the poet's autobiographical poem which describes the role played by nature in his emotional and literary development. WILLIAM WORDSWORTH, *THE PRELUDE*: 1799, 1805, 1850 at 471 (Jonathan Wordsworth et al. eds., 1979). See Ray, *supra* note 67, at 711-18, 737-38 (discussing role played by Wordsworth and Whitman in Douglas's intellectual development).

absolute.⁶⁹ Unlike Black, who worked with his law clerks to revise and hone his drafts, Douglas treated opinion writing as an essentially solitary enterprise, using his clerks principally to research large issues and review first drafts for errors.⁷⁰ In the solipsistic Douglas chambers, the Justice played all the roles; he was simultaneously the source of the law announced by the opinion, its efficient author, and its approving reader.

Douglas's opinions on the right to travel illustrate the perfect assurance of the judicial voice that speaks from its own experience.⁷¹ An inveterate hiker and traveler himself, Douglas spent his summers in the American wilderness or on trips abroad financed by publishing numerous books about his adventures in remote locations. That appetite for travel finds expression as well in his majority opinion for *Kent v. Dulles*,⁷² where the Court declared the right to travel a liberty interest protected by the Fifth Amendment.⁷³ Douglas wrote with simplicity and directness that travel "may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of travel is basic in our scheme of values."⁷⁴ The personal force of that position became clearer when Douglas again wrote for the Court in *Papachristou v. City of Jacksonville*⁷⁵ to strike down an overbroad vagrancy ordinance as unconstitutional.⁷⁶ This time the right at issue was one even closer to Douglas's heart, the right he described as "loafing" or "wandering" or "strolling," moving aimlessly through the landscape for the pure pleasure of movement. Again, Douglas writes with the unqualified confidence of a lifelong wanderer:

These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.⁷⁷

69. SIMON, *supra* note 19, at 12, 352.

70. Black asked his clerks to revise his drafts and then worked with them through the editing process. NEWMAN, *supra* note 12, at 326; cf. SIMON, *supra* note 19, at 225 (providing account of Douglas's much more limited use of his clerks). When Vern Countryman, then Douglas's clerk, reworked a Douglas draft, the Justice included only a single footnote from Countryman's version in the final product. *Id.* at 226.

71. See Ray, *supra* note 67, at 735-44 (detailing Romantic elements in Douglas's opinions).

72. 357 U.S. 116 (1958).

73. *Kent v. Dulles*, 357 U.S. 116 (1958).

74. *Id.* at 126.

75. 405 U.S. 156 (1972).

76. See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (finding ordinance unconstitutionally void for vagueness).

77. *Id.* at 164.

The elements of the Douglas self that appear in his autobiographical works are all contained in this passage: the independent outsider who rejects convention; the dissident who defies authority; the exuberant, creative mind that refuses to be limited by the tradition of judicial restraint and decorum. The "unwritten amenities" are those that figure prominently in the life of the traveler and outdoorsman that Douglas shaped for himself and that he found protected by the Constitution. In *Kent* he relied on three case citations and a long quotation from a scholar's article to support his basic proposition.⁷⁸ In *Papachristou*, written fourteen years later, the authorities cited are literary rather than legal and reflect Douglas's personal vision of the quintessential American canon: The amenities are "embedded in Walt Whitman's writings, especially in his 'Song of the Open Road.' They are reflected, too, in the spirit of Vachel Lindsay's 'I Want to Go Wandering,' and by Henry D. Thoreau."⁷⁹ In this opinion, constitutional jurisprudence and personal experience merge in a text that presents the law as an expression of the author's life.⁸⁰ This is jurisprudence as autobiography, a form of opinion writing unique to Douglas.

The voice that speaks in *Papachristou* has the authentic ring of the unmediated self. Whereas Frankfurter saw the revelation of the self as a betrayal of the judicial role and carefully adopted a scholarly voice for his opinions, Douglas rejected the distinction between person and judge. A case that challenged the practice of broadcasting radio programs in District of Columbia streetcars illustrates the contrast between their two approaches to opinion writing.⁸¹ For Frankfurter, who was a frequent streetcar passenger, there was no choice but recusal. As he elaborated in an unusual statement published as part of the case, a judge must "submerge private feelings on every aspect of a case,"⁸² but that restraint was not possible here. Thus, he concluded, "[m]y feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it."⁸³ This sharp separation of the personal from the judicial was as alien to Douglas as it was gospel to Frankfurter. For Douglas, personal experience qualified a Justice to write with authority, just as his years as a practiced wanderer qualified him to protect the right to loaf. In opinions like *Papachristou*, the boundary between

78. *Kent*, 357 U.S. at 126-27.

79. *Papachristou*, 405 U.S. at 164.

80. Douglas made a similar point a term later, in *Doe v. Bolton*, in which he concurred in striking down abortion regulations. See 410 U.S. 179, 209 (1973) (Douglas, J., concurring). Douglas catalogued unenumerated constitutional rights, including "freedom to walk, stroll, or loaf." *Id.* at 213.

81. See *Pub. Utils. Comm'n v. Pollak*, 343 U.S. 451 (1952) (finding operation of radio service and city's decision to permit operation constitutional).

82. *Id.* at 466 (Frankfurter, J., mem.).

83. *Id.* at 467 (Frankfurter, J., mem.).

private and professional life dissolves, and the voice that speaks is that of a person rather than a persona.

4. Justice Jackson: *The Pragmatic Man of Letters*

Self-revelation does not guarantee self-knowledge. Douglas observed critically of Robert Jackson, the fourth member of the quartet to join the Roosevelt Court, that "[h]e loved to write essays and publish them as opinions,"⁸⁴ a charge that could apply just as easily to its maker. As was often the case with Douglas, however, he had a point. Jackson might not have enjoyed the same educational advantages as his colleagues, but he combined an acute intelligence with a love of literature and a remarkable ear for language. His opinions display a distinctive style and range of allusion that identify them at once as Jackson's work. When he wrote at the peak of his form, his opinions occupied a niche of their own, somewhere between conventional judicial analysis and elegant jurisprudential essays.

What most distinguishes Jackson from almost all other Supreme Court Justices – Holmes and Cardozo are the exceptions – is his sure touch. Jackson's choice of diction is often slightly surprising but, on reflection, precise and revealing. The practice of expelling aliens after a long residence here "bristles with severities";⁸⁵ the Constitution's due process language is "cryptic and vagrant";⁸⁶ workers may be "so crafty and subtle as to constitute a special menace."⁸⁷ Jackson's metaphors also tend to startle and illuminate. An inadequate court record "shows us something of the strings as well as the marionettes";⁸⁸ in striking down an ordinance regulating speech the majority may "convert the constitutional Bill of Rights into a suicide pact";⁸⁹ unless citizenship guarantees the right to enter any state, "our heritage of constitutional privileges and immunities is only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will."⁹⁰ Although these images have a literary surface, they also have a solid core of sense that can withstand logical as well as stylistic analysis.

Jackson's literary range is evident as well in the breadth of his allusions, which include Plato,⁹¹ Milton,⁹² Gilbert and Sullivan,⁹³ and Mark Twain.⁹⁴

84. DOUGLAS, *supra* note 45, at 32.

85. *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 (1952).

86. *Brown v. Allen*, 344 U.S. 443, 534 (1953) (Jackson, J., concurring).

87. *Pollock v. Williams*, 322 U.S. 4, 16 (1944).

88. *Douglas v. City of Jeannette*, 319 U.S. 157, 166 (1943) (Jackson, J., concurring).

89. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

90. *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

91. See *Douglas*, 319 U.S. at 166 (Jackson, J., concurring) (advocating informed decisionmaking).

But Jackson never scattered these allusions through the text in a mere show of erudition. When, for example, Jackson rejected the Court's explanation for upholding an administrative decision that was previously disapproved, he turned to Twain to capture the commonsensical quality of his objection to the Court's inconsistency: "I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'"⁹⁵ On another occasion his allusion underscores the contradictory strands in a Court opinion that endorses separation of church and state while approving public support for transportation to parochial schools: "The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent," – consented."⁹⁶ Byron's poem of ironic seduction would not immediately come to most, if any, judicial minds, and the linkage seems at first an example of metaphysical wit, "the most heterogeneous ideas . . . yoked by violence together."⁹⁷ But Jackson's point is the ease with which the majority, like Julia, could speak the conventional rhetoric of denial while succumbing to the temptation of a sympathetic factual situation. Like Douglas in *Papachristou*, Jackson relied on a literary rather than a legal precedent, but in Jackson's hands the reference makes a sharp point about judicial methodology.

The stylistic quality most characteristic of Jackson's prose is inversion, a deft twist that transforms a direct statement into a complex perception or even a paradox. These inversions express what Paul Freund has called Jackson's "dialectical mind – recognizing principles in collision,"⁹⁸ a skeptical strain that usually kept Jackson from embracing easy options. Jackson was more likely to see both sides of an issue, to weigh them against each other, and to choose what he considered a pragmatic resolution to a particular case.⁹⁹ This tendency made him particularly sensitive to unexamined abstractions, which his opin-

92. See *Craig v. Harney*, 331 U.S. 367, 396 (1947) (Jackson, J., dissenting) (discussing nature of judges).

93. See *Ray v. Blair*, 343 U.S. 214, 232 (1952) (Jackson, J., dissenting) (discussing faults of electoral college).

94. See *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 214 (1947) (Jackson, J., dissenting) (expressing confusion over majority's reasoning).

95. *Id.* (Jackson, J., dissenting).

96. *Everson v. Bd. of Educ.*, 330 U.S. 1, 19 (1947) (Jackson, J., dissenting).

97. Samuel Johnson, *Cowley*, in *LIVES OF THE ENGLISH POETS*, vol. 1, 20 (G.B. Hill ed., 1905); see T.S. Eliot, *The Metaphysical Poets*, *SELECTED ESSAYS* 241 (1912) (providing classic discussion of metaphysical imagery).

98. Paul A. Freund, *Mr. Justice Jackson and Individual Rights* 29, 36, in *MR. JUSTICE JACKSON: FOUR LECTURES IN HIS HONOR* (1969).

99. See Laura K. Ray, *A Law Clerk and His Justice: What William Rehnquist Did Not Learn from Robert Jackson*, 29 *IND. L. REV.* 535, 559-67 (1996) (discussing Jackson's dialectical jurisprudence).

ions often puncture with a tidy thrust. Responding to the majority's contention that judges as a group are impervious to criticism, Jackson found them to be all too human: "And if fame – a good public name – is, as Milton said, the 'last infirmity of noble mind,' it is frequently the first infirmity of a mediocre one."¹⁰⁰ He could, at the same time, reject both Communism and government censorship: "It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error."¹⁰¹ His most celebrated inversion is a deflation of the Court's institutional majesty: "We are not final because we are infallible, but we are infallible only because we are final."¹⁰² Like most of Jackson's rhetorical flourishes, this formulation is not merely clever; it distills his own skeptical perspective on the limits of the Court's role.

Jackson came to the Court from the executive branch, in which he served as a zealous advocate for all of Roosevelt's initiatives, including the lend-lease program and the ill-fated court-packing plan. As a Justice, however, he recognized that his new role required a reorientation. Jackson's celebrated concurrence in *Youngstown Sheet & Tube*, probably his most famous opinion, illustrates the way in which he detached himself from his earlier career without abandoning its lessons. Counsel for the government modeled its argument in support of seizure on Jackson's position paper as attorney general in an earlier case, and Jackson opened his concurrence with an oblique acknowledgment of his former role.¹⁰³ "Anyone," he observes, "who has served as legal adviser to a President in time of transition and public anxiety" would understand the benefits and dangers of "undefined presidential powers."¹⁰⁴ The shift to the first person in the next sentence makes explicit that Jackson himself had that experience and that it was probably "a more realistic influence on my views than the conventional materials of judicial decision."¹⁰⁵ That assessment turns out to be more of a disclaimer than a confession, however, and Jackson's writing is quite precise in differentiating between the perspective of an executive branch official and that of a judge. He could, after his time in the cabinet, appreciate counsel's sweeping assertion of inherent presidential power, but, as he drily noted, his current role precluded agreement: "[A] judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional

100. *Craig v. Harney*, 331 U.S. 367, 396 (1947) (Jackson, J., dissenting).

101. *Am. Communications Ass'n v. Douds*, 339 U.S. 382, 442-43 (1950) (Jackson, J., concurring and dissenting).

102. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

103. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

104. *Id.* (Jackson, J., concurring).

105. *Id.* (Jackson, J., concurring).

question, even if the advocate was himself."¹⁰⁶ A judge could, however, draw on his executive branch experience for his pragmatic sense of the broad power available to a president outside the constitutional framework, which becomes in turn an argument against an expansive interpretation of Article II. That pragmatic sense of where government power actually resides is expressed, characteristically, by way of metaphor: "We may say that the power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."¹⁰⁷ The opinion illustrates Jackson's usual approach to a legal problem: first viewing the issue from disparate angles and then reaching a practical solution that favors one position without entirely discarding the other. This dialectical quality to Jackson's opinions, captured stylistically by inversion and metaphor, gives them their unmistakable tone of slightly detached urbanity.

Jackson spoke in the most complex voice of the Roosevelt Court quartet and in its only voice that rose to the level of literary style. The elegance of Jackson's prose should have the effect of distancing the reader, and it is true that his work lacks the easy accessibility of a Black or Douglas opinion, although it also lacks the stiffness of Frankfurter's academic prose. Instead of distancing the reader, however, Jackson's prose instead invites the reader to join, or at least to eavesdrop on, the kind of conversation that we might expect to hear at a Washington political salon in a Gore Vidal novel. Jackson's voice is that of a witty and self-deprecating companion who can invoke William James one minute and the Easter bunny the next, at once erudite and charming.¹⁰⁸ An ambitious man who at various times aspired to become president or chief justice, Jackson remained skeptical about the possibility of complete judicial detachment, grouping "dispassionate judges" together with "Santa Claus or Uncle Sam or Easter bunnies" as mythical beings.¹⁰⁹ His style reflects that stance, slightly aloof but never disengaged, part of the Court but better able, or more willing, than most of his colleagues to acknowledge the imperfections of the judicial process. If Black crafted his opinions for the common man and Frankfurter for the intellectual elite, then Jackson wrote for the sophisticated reader who could appreciate the art of striking delicate judicial balances in elegant prose.

C. *Personal Revelations and Neutral Decisionmakers*

The distinctive styles of Black, Frankfurter, Douglas, and Jackson reveal something about each author's personality, but they provide almost no hard

106. *Id.* at 647 (Jackson, J., concurring).

107. *Id.* at 654 (Jackson, J., concurring).

108. See *United States v. Ballard*, 322 U.S. 78, 93-94 (1944) (Jackson, J., dissenting) (noting that right to make enormous assumptions lies at core of religious liberty).

109. *Id.* at 94.

facts. A reader of Jackson's opinions would learn that he had been counsel to a president, but not that he had practiced law in Jamestown, New York, or served as a much admired Solicitor General. A reader of Black's opinions would learn that he had been a Senator, but would learn nothing about his Alabama roots or his passion for tennis. And a reader of Frankfurter's opinions would never learn that he had been a student and professor at Harvard Law School. A reader of Douglas's opinions might learn a bit more – that Douglas grew up in the West, for example, or that he traveled widely. In general, however, even these Justices who felt free to write in personalized prose styles did not feel free to write about aspects of their personal or professional lives that might have been relevant to the cases before them. That reserve has remained one of the durable conventions of opinion writing. Although a judicial author is identified by name and although biographical information may be widely known or readily available, within the four corners of an opinion the author assumes a featureless mask that conceals the particularities of background or professional experience or individual taste.

The convention of impersonality in opinion writing is closely tied to a cornerstone of our legal system, the idea that cases are resolved by neutral decisionmakers. A judge, who discloses any personal preferences risks suspicion that he decides cases to advance those preferences, while a judge who presents a blank façade seems more likely to be relying on neutral legal principles. The presumption is clearly flawed: a circumspect judge may stealthily pursue a private agenda, while a judge inclined to confide in the reader may well apply the law scrupulously. Our judicial system, particularly at the Supreme Court level, has nonetheless adopted the model of judicial reserve as a way of assuring both the appearance and the reality of impersonal jurisprudence.

A corollary of that model is the powerful belief that the members of a collegial court should conduct their discussions in private, during which they may air highly personal and even confrontational views, but that published opinions should adopt a tone of genteel decorum. In the last years of the nineteenth century, when the dissenting opinion was itself regarded as suspect for disclosing internal conflicts, one commentator compared the decision-making process to family squabbles that should be decently concealed from public view.¹¹⁰ The Supreme Court has long accepted and acted on this belief in privacy and decorum. The Court's conferences are attended only by the Justices themselves, who ceremonially shake hands with one another in a gesture of fellowship before the session begins. Until recently, the members of

110. According to Henry Wollman, "The curtain should not be raised to present the disagreeable picture of family discord and want of harmony." Henry Wollman, *Evils of Dissenting Opinions*, 57 ALB. L. REV. 74, 75 (1898).

the Court also subscribed to the tradition of genteel disagreement in print, although some of Justice Scalia's pointed separate opinions have introduced a more candid rhetoric of dissent.

The four Roosevelt Court Justices challenged some of these conventions of Court behavior. They tended to divide into two clearly defined jurisprudential camps – Black and Douglas allied against Frankfurter and Jackson – and the relations between Justices were sometimes fractious, with an occasional episode of open warfare that exposed the Court to unaccustomed publicity.¹¹¹ Opinions were at times the chosen weapons for their conflicts, with threats of strong language and public denunciation, but the Justices generally backed down at the last minute and preserved surface decorum.¹¹² Although some sniping continued in private messages circulated among them, their opinions never became a public battleground for their personal antagonisms.

If they generally observed the convention of decorum in opinion writing, the Roosevelt quartet on occasion disregarded the convention of absolute impersonality. There are a handful of opinions in which an autobiographical fact is dropped into an opinion, like a clue in a mystery novel, to offer the alert reader a slightly altered perspective on the argument presented. A later generation of Justices made a more direct assault on the convention, introducing powerful emotional responses into their opinions and undermining the idea of the impersonal decisionmaker. A comparison of these two varieties of self-revelation, the factual and the emotional, suggests that there is a limit to the degree of personalized discourse that Court opinions can accommodate.

1. *Past Careers and Present Opinions: Jackson and Black*

Jackson was the most direct of the four Justices in invoking his own past, perhaps because he had the greatest need to do so. As both Attorney General and Solicitor General for the Roosevelt administration and later as the United States's chief war crimes prosecutor at Nuremberg, Jackson had played a vis-

111. In the most celebrated incident, Jackson criticized Black for failing to recuse himself in a case argued by a former law partner, angering Black and prompting press coverage of the dispute. See Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203-43 (offering thorough account of this episode and its ramifications).

112. When the Court confronted the conviction of Julius and Ethel Rosenberg for conspiracy to commit espionage, Douglas threatened to publish a dissent from the Court's denial of certiorari. Jackson responded by announcing that he would change his vote to support a grant, and Douglas withdrew his dissent. For an account of the entire *Rosenberg* episode, see SIMON, *supra* note 19, at 301-313. For two accounts disagreeing about Douglas's behavior, see generally William Cohen, *Justice Douglas and the Rosenberg Case: Setting the Record Straight*, 70 CORNELL L. REV. 211 (1985); Michael E. Parrish, *Justice Douglas and the Rosenberg Case: A Rejoinder*, 70 CORNELL L. REV. 1048 (1985).

ible role in some of the major events of the century, and that role had a way of reappearing in the Supreme Court chamber. During the *Youngstown* argument, the Solicitor General, Philip Perlman, openly acknowledged that the government's case relied heavily on Jackson's earlier defense of presidential seizure.¹¹³ Jackson deftly acknowledged his assertion of broad executive power while at the same time disowning his prior position: "I claimed everything, of course, like every Attorney General does," he told Perlman; "[i]t was a custom that did not leave the Department of Justice when I did."¹¹⁴ After this courtroom exchange in a high profile case, Jackson apparently felt compelled to make clear in his concurrence as well that the Justice was distinct from the former Attorney General. After noting that a judge could not accept a government attorney's advocacy as constitutional authority "even if the advocate was himself,"¹¹⁵ Jackson sharpened the point further. Even if he were to consider the earlier case as precedent, his own advocacy would "not bind present judicial judgment."¹¹⁶ Although the repeated disclaimers emphasize Jackson's political past, in context they support the norm of the neutral decisionmaker by insisting on a complete severance of that past from his judicial present.

Jackson had used self-revelation as a defensive tactic in an earlier case, *Hirota v. MacArthur*,¹¹⁷ where he appended an explanation of his decision not to recuse himself from the Court's consideration of whether it had jurisdiction to review Japanese war crimes convictions.¹¹⁸ As in *Youngstown*, Jackson's past, this time his role at Nuremberg, raised a question of his neutrality. Jackson acknowledged that he had "been so identified with the subject of war crimes that, if it involved my personal preferences alone, I should not sit in this case."¹¹⁹ The fact that the Court was divided four to four, however, persuaded Jackson that he should participate to create a majority, but he believed that "a candid disclosure" of the reasons for his decision was owed not only to the litigants but "in justice to the Court and to myself."¹²⁰ By surfacing the question of his own potential bias, Jackson hoped to disarm any potential critics. The revelation is less about his involvement with war crimes

113. According to Maeva Marcus, Perlman told Jackson that the government did "lay a lot of it at your door." MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 172 (1977).

114. *Id.*

115. *Youngstown*, 343 U.S. at 647.

116. *Id.* at 649 n.17.

117. 335 U.S. 876 (1948).

118. *Hirota v. MacArthur*, 335 U.S. 876 (1948).

119. *Id.* at 879 (Jackson, J., mem.).

120. *Id.* at 881 (Jackson, J., mem.).

law, which is widely known, than about his personal feelings about that involvement; Jackson asserted something that is impossible to demonstrate, his belief in his own openmindedness. As he recognized, "he cannot expect others to consider him as detached and dispassionate on the subject as he thinks himself to be."¹²¹ The formulation is revealing. Jackson, who elsewhere made clear his skepticism about dispassionate judges, thought that on this issue he was "detached and dispassionate," but he made no bolder claim of certainty. His final disclosure was his hope that a Court majority later would form on the substantive issue without the need for his vote.¹²² Jackson's explanatory statement broke with Court convention in two ways. First, it forthrightly raised the question of recusal, which almost always was handled in complete silence (Frankfurter's statement in *Pollak* is another rare exception). Second, it exposed to view a Justice's personal evaluation of the degree to which his earlier conduct may have compromised his impartiality. The *Hirota* statement was written not with Jackson's usual cool urbanity but with the warmer tones of a Justice caught between what he recognized as "disagreeable alternatives" and willing for once to expose to view his assessment of himself.¹²³

Jackson's urbanity was restored two years later in *McGrath v. Kristensen*,¹²⁴ in which he again confronted and expressly disowned his earlier attorney general's opinion on an immigration law issue before the Court.¹²⁵ The concurrence is both candid and self-deprecating in its treatment of his prior position, which he called "as foggy as the statute the Attorney General was asked to interpret."¹²⁶ Jackson admitted to having personally argued this flawed position to the Court, and thus no "confession and avoidance can excuse the then Attorney General."¹²⁷ The final paragraph of the opinion is cited often, most recently by Justice Souter when he changed his mind on a First Amendment issue, for its artful apology.¹²⁸ After quoting the formulations used by other judges caught in the same predicament, Jackson concluded in his distinctive voice: "If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke

121. *Id.* (Jackson, J., mem.).

122. *Id.* (Jackson, J., mem.).

123. *Id.* at 879 (Jackson, J., mem.).

124. 340 U.S. 162 (1950).

125. *McGrath v. Kristensen*, 340 U.S. 162, 176 (1950) (Jackson, J., concurring).

126. *Id.* (Jackson, J., concurring).

127. *Id.* at 177 (Jackson, J., concurring).

128. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 316-17 (2000) (Souter, J., concurring and dissenting). In *City of Erie*, Souter acknowledged his past failure to demand an evidentiary basis for his decision. *Id.* Souter quoted "Justice Jackson's foolproof explanation of a lapse of his own, when he quoted Samuel Johnson, 'Ignorance, sir, ignorance.'" *Id.* at 316.

them all.¹²⁹ The issue in *McGrath*, a provision of the Immigration Act, was considerably less weighty than the presidential seizure of *Youngstown* or the war crimes of *Hirota*, and Jackson could afford to approach his shift in perspective in a more playful spirit. The strategy, however, remained the same: Jackson invoked his past role as Attorney General to defend his judicial performance, this time from the charge of inconsistency.

Jackson's defensive treatment of his past career contrasts strongly with Black's invocation of his Senate career as useful training for the bench. Although Black did not refer often to his political career, his concurrence in *Duncan v. Louisiana*¹³⁰ draws a direct line between the work of a Senator and the work of a judge.¹³¹ Black concurred in the Court's holding that the Fourteenth Amendment guarantees trial by jury, but he continued to assert his long-standing position that the entire Bill of Rights is incorporated in the Fourteenth Amendment. Referring to his 1947 dissent in *Adamson v. California*, which included a thirty page appendix describing the history of the passage of the Fourteenth Amendment,¹³² Black explicitly tied his historical analysis to his service in the Senate:

My appraisal of the legislative history followed 10 years of legislative experience as a Senator of the United States, not a bad way, I suspect, to learn the value of what is said in legislative debates, committee discussions, committee reports, and various other steps taken in the course of passage of bills, resolutions, and proposed constitutional amendments.¹³³

The characteristically conversational tone – "not a bad way, I suspect" – gently asserts Black's senatorial expertise, a point reinforced a page later when he insisted on the strong influence of congressional leaders on the votes of members as something "I know from my years in the United States Senate."¹³⁴ Black could have made the same point in a more oblique way, referring generally to what "anyone acquainted with the realities of the United States Senate knows."¹³⁵ Either way, the message is the same: a Justice who has written legislation, steered it through the committee process, and voted on the floor is a more qualified reader of legislative history than an academic like Frankfurter or a practitioner like Harlan, two opponents on the incorporation issue.¹³⁶

129. *McGrath*, 340 U.S. at 178.

130. 391 U.S. 145 (1968).

131. *Duncan v. Louisiana*, 391 U.S. 145, 162 (1968) (Black, J., concurring).

132. 332 U.S. 46, 68 (1947) (Black, J., dissenting).

133. *Duncan*, 391 U.S. at 164-65 (Black, J., concurring).

134. *Id.* at 165 (Black, J., concurring).

135. *Zuber v. Allen*, 396 U.S. 168, 203 (1969) (Black, J., dissenting).

136. In his *Duncan* concurrence Black responded to a 1947 law review article by the distinguished scholar Charles Fairman that had criticized his account of the passage of the Four-

2. *Personal Experience and Private Identity: Douglas and Frankfurter*

Just as Black turned to his senatorial career to bolster his authority, Douglas typically relied on his personal experience to underscore his strong views. Dissenting in *DeFunis v. Odegaard*¹³⁷ from the Court's refusal to hear a law school affirmative action case, Douglas offered his perspective on the differences among cultural minorities. He began by invoking his background in the Northwest:

I do know, coming as I do from Indian country in Washington, that many of the young Indians know little about Adam Smith or Karl Marx but are deeply imbued with the spirit and philosophy of Chief Robert B. Jim of the Yakimas, Chief Seattle of the Muckleshoots, and Chief Joseph of the Nez Perce which offer competitive attitudes towards life, fellow man, and nature.¹³⁸

The passage has an air of showing off, with Douglas taking pleasure in the assertion of expertise that no one is likely to challenge because it comes from a source no one can duplicate.¹³⁹ The clear implication is that Douglas was familiar with both philosophical traditions. In his obscenity dissents, Douglas referred to his travels abroad to illustrate his criticism of censorship: "One of the most offensive experiences of my life was a visit to a nation where book-stalls were filled only with books on mathematics and books on religion."¹⁴⁰ The suggestion, once again, is that Douglas was a man of wider experience than his colleagues and could place the issue in a broader context. Even when Douglas had to concede lack of direct knowledge, as he did in his *Sierra Club v. Morton*¹⁴¹ dissent by admitting that "I do not know Mineral King,"¹⁴² that lack is easily repaired because "Mineral King is doubtless like other wonders

teenth Amendment. 391 U.S. at 165. According to Newman, "Like the snake that kept rising up, Fairman's article was always on Black's mind." NEWMAN, *supra* note 12, at 359.

137. 416 U.S. 312 (1974).

138. *DeFunis v. Odegaard*, 416 U.S. 312, 335 (1974) (Douglas, J., dissenting).

139. Douglas also relied on pure personal knowledge offered without any explanation. Speaking of the value of the LSAT in evaluating minorities, he noted that "I personally know that admissions tests were once used to eliminate Jews." *Id.* He was equally likely to disclaim direct knowledge, as when he said that "I do not know the extent to which blacks in this country are imbued with ideas of African Socialism." *Id.* The clear implication was that his colleagues were not likely to know, either.

140. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 71 (1973) (Douglas, J., dissenting). Douglas had made the same point a few years earlier in another dissent: "I once visited a foreign nation where the regime of censorship was so strict that all I could find in the bookstalls were tracts on religion and tracts on mathematics." *Ginsberg v. New York*, 390 U.S. 629, 654 (1968) (Douglas, J., dissenting).

141. 405 U.S. 727 (1972).

142. *Sierra Club v. Morton*, 405 U.S. 727, 743 (1972) (Douglas, J., dissenting).

of the Sierra Nevada such as Tuolumne Meadows and the John Muir Trail,¹⁴³ which he did know. Douglas's injection of personal experience into his opinions is a form of self-aggrandizement. He had traveled more widely, had had contact with more cultures, and had seen more of the world than his colleagues. In his last full Term at the Court, debilitated by a stroke, Douglas still found in his ill health an experience that distinguished him and that he was willing to disclose publicly. Insisting that a Justice could do the work of the Court in only four days each week, Douglas announced that "I have found it a comfortable burden carried even in my months of hospitalization."¹⁴⁴ The comment was intended to support his liberal interpretation of standing doctrine, but its subtext is the familiar Douglas anthem of the self: even in his weakened condition, he was a more capable Justice than his overworked colleagues.

Jackson, Black, and Douglas used their carefully rationed disclosures of professional or personal experience to strengthen their claims of neutrality, expertise, or individual merit. By briefly opening a window from conventional judicial prose into autobiographical reference, they appealed to the reader as the men beneath the robes, products of particularized lives who had earned the right to speak with special authority on a given issue. These occasional disclosures also had an unintended effect, the slightly titillating sensation that accompanies a glimpse of usually forbidden territory. Supreme Court Justices are the last high government officials to preserve their privacy from the media. The bulk of their work is performed in chambers or in conference, where the press and the Freedom of Information Act cannot penetrate. They wear professional uniforms which tend to standardize them, concealing differences of size or shape and even muting gender differences. Within this remote judicial culture, even an occasional sighting of the individual beneath the robe has a powerful impact on the reader.

It is therefore not surprising that the opening of Justice Frankfurter's dissent in *West Virginia Board of Education v. Barnette*¹⁴⁵ is the most famous instance of judicial self-revelation in the Court's history. Only three years earlier, in *Minersville School District v. Gobitis*,¹⁴⁶ Frankfurter had written for a majority of eight that the state could compel Jehovah's Witness school children to salute the American flag.¹⁴⁷ When the Court revisited the issue in *Barnette*, Frankfurter found himself in dissent while Jackson wrote for the new majority which held that compelled flag salutes violated the First and

143. *Id.* at 744 (Douglas, J., dissenting).

144. *Warth v. Seldin*, 422 U.S. 490, 519 (1975) (Douglas, J., dissenting).

145. 319 U.S. 624 (1943).

146. 310 U.S. 586 (1940).

147. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

Fourteenth Amendments. Two other Justices, Roberts and Reed, also dissented but did not join Frankfurter's opinion for reasons that the opening paragraph makes clear.¹⁴⁸ As Robert Burt has observed, "Frankfurter wrote his dissent itself in a manner that made it impossible for any other justice to join".¹⁴⁹

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores.¹⁵⁰

Far from seeking to join, Roberts had told Frankfurter that the opening sentences were "a mistake",¹⁵¹ even Frank Murphy, who voted with the majority, urged Frankfurter as a friend to remove them because inclusion would be "catapulting a personal issue into the arena."¹⁵² According to his diaries, Frankfurter offered each Justice a different rationale for rejecting his counsel. He told Roberts that he felt compelled, despite his own distaste for "public manifestations," to include the passage because ever since *Gobitis* appeared, he had received numerous letters telling him that as a Jew and an immigrant he had an obligation to protect the rights of minorities.¹⁵³ Frankfurter responded to Murphy by denying that the passage was "personal" because it was the point of the opinion that individual identity should play no role in judicial decisionmaking.¹⁵⁴ These conflicting positions suggest how complicated Frankfurter's motives were for departing from his characteristically detached style in *Barnette*.

Although the opening of Frankfurter's dissent contains an unexpectedly intimate self-revelation, it is immediately clear that this is not a piece of uncontrolled emotionalism but a carefully constructed rhetorical strategy. Frankfurter chose "one," not "I," as the subject of his first sentence, simulta-

148. See *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 646-47 (1943) (Frankfurter, J., dissenting) (referring to religious identity).

149. ROBERT A. BURT, *TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND* 49 (1988).

150. 319 U.S. at 646-47 (Frankfurter, J., dissenting).

151. LASH, *supra* note 47, at 253. Roberts objected specifically to the first two sentences.

152. *Id.* at 254.

153. See *id.* (answering Roberts's objections to opening sentences at conference).

154. *Id.* at 254.

neously preparing to disclose his religious identity while distancing himself from that act of disclosure. It is also clear in context that Jews are the group described as "the most vilified and persecuted minority in history." The word "Jew," however, is not mentioned until the third sentence, in which it is paired with an opposite, "Gentile," and followed by a second pair of opposites, "Catholic" and "agnostic," to indicate a broad range of possible affiliations. The next sentence expands the field by pairing the earliest and latest American immigrants. The point of the passage is to undermine these categories by finding them irrelevant to the judge's task. Because judges are "neither Jew nor Gentile, neither Catholic nor agnostic," Frankfurter's own religion could have no effect on the opinion to follow. If it did – "[w]ere my purely personal attitude relevant" – then Frankfurter would be on the other side, voting with the majority to support the rights of the Jehovah's Witnesses. The passage is thus a deliberate paradox. As a Jewish Justice, Frankfurter was particularly sensitive to the protections of the Constitution, but as a Jewish Justice he could not allow that sensitivity to influence his decisionmaking. The dramatic disclosure of his own identity turns out to be a straw man, a construct set up only to be knocked down, because the whole idea of judicial identity precludes any attachment to personal identity.

Frankfurter himself supported the view that the opening sentences are part of a rhetorical strategy rather than an emotional gesture. His diary entry for June 14, the day the opinion was issued, makes clear that this was no anguished effusion:

In any event, the sentences will stay in because they are not the products of a moment's or an hour's or a day's or a week's thought – I had thought about the matter for months and I deem it necessary to say and put into print in the U.S. Reports what I conceive to be the basic function of this Court and the duty of the Justices of this Court.¹⁵⁵

The judicial duty to suppress personal identity coincides with Frankfurter's powerful belief in meritocracy, the lesson learned at Harvard where he found himself to be "a little fellow" surrounded by tall, self-confident, athletic members of the Establishment who, at the end of the first year, had flunked out while Frankfurter ranked first in his class.¹⁵⁶ Although Frankfurter encountered anti-Semitism in the legal profession, he rejected advice to change his "'odd, fun-making'" name¹⁵⁷ and adopted instead what he called "a very profoundly wise attitude toward the whole fact that I was a Jew, the essence of which is that you should be a biped and walk on the two legs that man

155. *Id.*

156. FRANKFURTER, *supra* note 19, at 18-19.

157. *Id.* at 38.

has.¹⁵⁸ In a meritocratic universe, there was no need to disguise or conceal one's origins. As Richard Danzig has argued, Frankfurter "believed that assimilation could be made compatible with a distinctive ethnic and religious identity by insisting on the irrelevance of 'race or religion or the accidents of antecedents' in the realms to which he sought admission."¹⁵⁹ The disclosure of Frankfurter's Jewishness, a widely known fact, in a Court opinion reflects not a painful dilemma of conflicting personal and professional loyalties but a confident assertion of the primacy of Frankfurter's judicial identity.

The sentences remained in Frankfurter's dissent because they expressed in a particularly vivid and unorthodox manner the highly conventional idea of judicial neutrality. Frankfurter's point is thus very much like Jackson's *Youngstown* disclaimers. Whereas Jackson was at pains to assert that his prior professional experience as Roosevelt's attorney made him no more likely than any other Justice to favor a claim of inherent presidential power, Frankfurter made a parallel assertion that his personal experience as a Jew made him no more likely to protect First Amendment rights claimed by members of another vilified and persecuted minority. Frankfurter's true opposite on the Court, in this as in so many other respects, was Douglas, who openly invoked his personal experience as a basis for taking jurisprudential positions. In a curious way, Frankfurter's most personal opinion is not *Barnette* but *Public Utilities Commission v. Pollak*,¹⁶⁰ in which his identity as a passenger on Washington streetcars prevented him from deciding whether radio broadcasts violated privacy rights.¹⁶¹ As a Jew, he could disengage himself from "the thought and action of a lifetime,"¹⁶² but as a passenger his emotions were "so strongly engaged" that he could not trust himself to perform his judicial duty with the required neutrality.¹⁶³

III. The Rehnquist Court Quartet: Strategic Responses

A. Losing a Voice

The remarkably rich and diverse opinion-writing styles of the Roosevelt Court quartet represent the end of a judicial golden age. All four of the Justices largely wrote their own opinions, particularly for the important cases,

158. *Id.* at 37.

159. Richard Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 STAN. L. REV. 675, 696-97 (1984).

160. 343 U.S. 451 (1951).

161. *Pub. Utils. Comm'n v. Pollak*, 343 U.S. 451, 467 (1951).

162. *Barnette*, 319 U.S. at 646-47 (Frankfurter, J., dissenting).

163. *Pollak*, 343 U.S. at 467.

and stamped their work with their distinctive perspectives and personalities.¹⁶⁴ In the years that have followed, however, the task of opinion writing has fallen increasingly to law clerks rather than to the Justices. In 1947, each Justice was provided with a second law clerk;¹⁶⁵ the number has since increased to four law clerks per Justice.¹⁶⁶ These larger staffs have contributed to the current practice whereby law clerks prepare first drafts for comment and revision by their Justices, the reverse of the way in which Black, for example, wrote his opinions. The initial choices of structure and diction are made by recent law school graduates trained in the ponderous, impersonal style favored by law reviews. "The result," according to Richard Posner, "is not just a loss of flavor but a loss of information. A judge's style conveys a sense of the judge that can be used to help piece out his judicial philosophy from his opinions."¹⁶⁷ When judicial style is homogenized by authors who are under-

164. Black wrote or dictated his first drafts and gave them to his clerk for revision. *NEWMAN*, *supra* note 12, at 325-26. By the late sixties, however, health problems forced Black to give his clerks a larger role, and they "started to draft opinions on a regular basis." *Id.* at 562. According to John Frank, one of Black's law clerks, Black wrote his own first drafts in the early 1940s "except that toward the end of the year he would let the youngster try his hand at one first draft of something extremely unimportant." JOHN P. FRANK, *MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE* 116-17 (1958). Frankfurter's clerks sometimes were asked to provide him with elaborate memoranda on important issues and at other times drafted opinions for him. DAVID O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 169 (3d ed. 1993). Chief Justice Rehnquist, who clerked for Jackson when *Youngstown* was decided, called Jackson's concurrence "the sort of opinion in which he felt no need for the help of law clerks." WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 93 (1987). Rehnquist and his co-clerk occasionally were asked to do some drafting, *id.* at 61, but for *Youngstown* "[w]e were shown the opinion in draft form, and as I recall, asked to find citations for some of the propositions it contained, but that was about the extent of our participation." *Id.* at 93-94. William Cohen, one of Douglas's law clerks, described his role in the Justice's opinion-writing process:

Normally, the initial circulation of a Douglas opinion to the chambers of other Justices would, save for few formal modifications, be identical to the first handwritten draft. I was allowed to try my hand at a first draft of two or three of the least significant dissents. But the Justice was willing to entrust a first draft of a minor opinion to less capable hands only when he had thoroughly explained his position and had clearly marked the path to be followed. Even then, the finished product might bear less than a family resemblance to my first efforts.

William Cohen, *Justice Douglas: A Law Clerk's View*, 26 U. CHI. L. REV. 6, 7 (1958).

165. Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 OR. L. REV. 299, 303-304 (1961).

166. Martha Swann, *Clerks of the Justices*, in *OXFORD COMPANION*, *supra* note 13, at 160.

167. RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 107 (1985). Posner attributes other trends in opinion writing – increased length, lack of candor, elaborate citations to secondary materials, numerous footnotes – to the inexperience and law review training of the clerks. *Id.* at 108-10.

standably disinclined to take rhetorical chances, a generic judicial voice dominates the *U.S. Reports*, erasing the stamp of judicial personality.

One consequence of this standardized prose is to make any instance of judicial self-revelation unusually vivid and powerful. The members of the Rehnquist Court are not given to the kinds of autobiographical reference that the Roosevelt Court Justices occasionally used, and with one striking exception – Justice Scalia – they do not produce stylistically distinctive opinions. They do, however, respond at times in their concurrences and dissents with strong emotion, and these moments tend to resonate with unusual force precisely because of the bland background that surrounds them. The sharp contrast between the usually impersonal tenor of the Rehnquist Court opinions and the emotional responses of some Justices to particular issues raises at times the question of when such personal revelations are appropriate and when they cross the acceptable boundaries of the judicial role.

Four members of the Rehnquist Court – Chief Justice Rehnquist, Justices Kennedy and Scalia, and the late Justice Blackmun – have employed four different methods of expressing emotion in their separate opinions. Unlike their Roosevelt Court predecessors, who always remained in control of their judicial prose even when offering the reader a glimpse of their non-judicial pasts, the Rehnquist Court Justices occasionally seem to disregard principles of judicial neutrality and reserve. Their moments of self-revelation startle not simply because they violate conventions of judicial impersonality, but also because they suggest the disturbing possibility that the Court's jurisprudence on highly controversial topics might come to be based not on reason and precedent, but on the far shakier ground of judicial emotion.

B. Emotional Experience and Judicial Response

1. Justice Kennedy: Agonized Ambivalence

In *Texas v. Johnson*,¹⁶⁸ the flag-burning case that occasioned both political and public controversy, two members of the Rehnquist Court wrote separate opinions that expressed in very different ways their personal responses to the Court's resolution of a highly contentious issue.¹⁶⁹ Justice Kennedy joined Justice Brennan's majority opinion striking down a Texas statute prohibiting flag burning because it violated the First Amendment, but he appended a brief concurrence to note that his agreement "exact[s] its personal toll."¹⁷⁰ Kennedy has described himself as "an agonizer" in his deci-

168. 491 U.S. 397 (1989).

169. *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring); *id.* at 421 (Rehnquist, C.J., dissenting).

170. *Id.* at 420 (Kennedy, J., concurring).

sionmaking process,¹⁷¹ and his *Johnson* opinion brings that agony to the surface of the text:

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.¹⁷²

The concurrence asserts the conflict between Kennedy's respect for the powerful symbolic meaning of the American flag and his professional commitment to enforcing the Constitution, a conflict which can be resolved only through a "painful" judgment.¹⁷³ The sentiment echoes Frankfurter's dissent in *Barnette*, but whereas Frankfurter embraced judicial separation from private emotion as a heroic stance, Kennedy lamented the need for the severance. He seemed uncomfortable aligning himself with the largely liberal majority of Brennan, Marshall, Blackmun, and Scalia, and the concurrence tells disappointed conservatives that his heart, if not his decisive vote, remained with the dissent.

The ambivalent message conveyed by the concurrence is echoed by Kennedy's subsequent ambivalence about the fact of the concurrence. Seven years after the case was decided, Kennedy wondered aloud whether he should have published his separate opinion. He found "something objectionable" in it, what he called "this hand-wringing thing" and "all the crybaby stuff."¹⁷⁴

Kennedy's discomfort with his own emotionalism is connected with his uncertainty about the precise nature of the audience for Court opinions. He has confessed that "I've never quite had a precise grasp of whom you're writing for,"¹⁷⁵ and his *Johnson* concurrence seems aimed at an ill-defined audience that will both respect and forgive a principled stand if it is accompanied by signs of genuine anguish at the compelled outcome. While Frankfurter deliberately used a similar predicament as an occasion to deny personal emotion any valid role in his jurisprudence, Kennedy seemed ambivalent about his ambivalence, uncertain whether the disclosure of his predicament would dignify his position or expose it to ridicule. Kennedy's revelation of his private emotions exposes a fault line that judges generally deny exists; it is not, after all, part of a Justice's role to like the decisions he renders or to feel pain when he does not. The expression of discomfort in *Johnson* intro-

171. Jeffrey Rosen, *The Agonizer*, NEW YORKER, Nov. 11, 1996, at 82, 85.

172. *Johnson*, 491 U.S. at 420-21 (Kennedy, J., concurring).

173. *Id.* at 421 (Kennedy, J., concurring).

174. Rosen, *supra* note 171, at 82.

175. *Id.*

duced into the judicial process the idea that a judge's private emotions as well as his intellect ideally should be satisfied by his decisions, and in doing so it comes close to undermining the judicial convention of dispassionate neutrality that Frankfurter and Jackson defended so fiercely.

2. Chief Justice Rehnquist: Strategic Emotionalism

The second variety of emotional expression in *Johnson* comes from Chief Justice Rehnquist's dissenting opinion.¹⁷⁶ Rehnquist, writing as well for Justices White and O'Connor, conveyed his powerful certainty about the protected status of the flag by devoting the first six pages of his opinion to an extraordinary catalogue of the flag's appearances in poetry, song, and historical anecdote. Mark Tushnet has called this "an exercise in cultural analysis,"¹⁷⁷ although there is nothing of the analytic in Rehnquist's decision to assign two pages to the complete text of the poem *Barbara Frietchie* by John Greenleaf Whittier, unaccompanied by any commentary except for its bare introduction as "[o]ne of the great stories of the Civil War."¹⁷⁸ Rehnquist's approach in presenting pages of unassimilated flag lore before mentioning any legal sources might more accurately be termed strategic emotionalism. In an earlier flag desecration dissent, Rehnquist made clear his belief that for this issue, conventional jurisprudence is insufficient: "The significance of the flag, and the deep emotional feelings it arouses in a large part of our citizenry, cannot be fully expressed in the two dimensions of a lawyer's brief or of a judicial opinion."¹⁷⁹ By citing the flag's "unique position as the symbol of our Nation"¹⁸⁰ as the justification for the Texas statute and illustrating that symbolic function with song and story rather than conventional legal analysis, he elevated emotion above logic as the informing principle of his opinion.

Commentators frequently have criticized the legal analysis that follows, particularly Rehnquist's equation of flag burning to "an inarticulate grunt or roar," undeserving of any constitutional protection,¹⁸¹ but that criticism is largely beside the point. Although Rehnquist did not personalize the dissent in the most obvious way, by writing in the first person as Kennedy and Douglas did, his dissent nonetheless was written from a personal perspective that cannot

176. *Johnson*, 491 U.S. at 421 (Rehnquist, C.J., dissenting).

177. Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 302 (1992).

178. *Johnson*, 491 U.S. at 424 (Rehnquist, C.J., dissenting). Rehnquist also quotes a stanza from Ralph Waldo Emerson's *Concord Hymn* and one from *The Star Spangled Banner*. *Id.* at 422-23 (Rehnquist, C.J., dissenting).

179. *Smith v. Goguen*, 415 U.S. 566, 602 (1974) (Rehnquist, J., dissenting).

180. *Johnson*, 491 U.S. at 422 (Rehnquist, C.J., dissenting).

181. *Id.* at 432 (Rehnquist, C.J., dissenting).

be either supported or refuted by cold logic.¹⁸² The most notable aspect of the opinion is that the emotional force on which it relies comes not simply from the author, who did little more than arrange his evidence, but from the reader, who is expected to respond with what Rehnquist called "an almost mystical reverence" to his account of the flag.¹⁸³ In literary terminology, this is sentimentalism, "an excess of emotion to an occasion."¹⁸⁴ The poetic vignettes that Rehnquist selected – Francis Scott Key "[i]ntensely moved" when the flag survives a British bombardment,¹⁸⁵ the Minutemen at Concord firing "the shot heard round the world,"¹⁸⁶ Barbara Frietchie risking her "old gray head" to protect the flag from Confederate troops¹⁸⁷ – all evoke the grade school classroom of an earlier generation, with its patriotic lessons instilled through narrative verse. These vignettes also contain heroic overtones singularly lacking in the circumstances of the case: the burning of a flag by political demonstrators protesting the policies of the Reagan administration during the Republican National Convention and the subsequent burial of the flag by a distressed observer.¹⁸⁸ Although Rehnquist chided the majority for its "regrettably patronizing civics lecture," he offered his own counterpart by overwhelming the mundane facts of the case with more dramatic literary variations. The opinion seeks to substitute emotional response for intellectual argument, revealing in the process something of its author's personal rather than judicial self.

3. Justice Scalia: Indignant Conversation

The third and most complex variety of emotional expression on the Rehnquist Court occurs in the opinions of Justice Scalia, a confident judicial stylist in the manner of the Roosevelt Court Justices. Scalia, like those Justices, writes most of his own opinions¹⁸⁹ and is the only member of the current Court whose work is instantly recognizable by its distinctive rhythm, conversational tone, and surprising diction. Scalia's most personal opinions

182. Rehnquist used the first person pronoun in the dissent's final sentence: "I would uphold the Texas statute as applied in this case." *Id.* at 435 (Rehnquist, C.J., dissenting).

183. *Id.* at 429 (Rehnquist, C.J., dissenting). According to Paul Campos, "the dissent tries to evoke in the reader a visceral, rather than an intellectualized, understanding of its claim." Paul Campos, *Silence and the Word*, 64 U. COLO. L. REV. 1139, 1143 (1993).

184. M.H. ABRAMS, *A GLOSSARY OF LITERARY TERMS* 192 (6th ed. 1993).

185. *Johnson*, 491 U.S. at 423 (Rehnquist, C.J., dissenting).

186. *Id.* at 422 (Rehnquist, C.J., dissenting).

187. *Id.* at 425 (Rehnquist, C.J., dissenting).

188. For a persuasive argument that Whittier's account of Barbara Frietchie – an elderly woman heroically flying the national flag in defiance of Confederate troops entering Frederick, Maryland – is "unadulterated fiction" rather than accurate history, see Calvin R. Massey, *The Jurisprudence of Poetic License*, 1989 DUKE L.J. 1047, 1049-51.

189. See MARY ANN GLENDON, *A NATION UNDER LAWYERS* 146 (1994); EDWARD LAZARUS, *CLOSED CHAMBERS* 271 (1998).

are those in which he seems to speak directly to the reader in the voice of a man of common sense whose patience is tried beyond endurance by the follies of his colleagues. That voice is a carefully constructed artifice, the persona that conveys emotional reactions as well as legal arguments. Its closest literary analogue is the speaker of a dramatic monologue, the form in which poets, most prominently Robert Browning, create a character distinct from its author through speech alone.¹⁹⁰ The typical dramatic monologue gradually, through artful literary clues, reveals to the reader the character and situation of the speaker, which may be quite different from the way in which the speaker presents himself. In Browning's "My Last Duchess," for example, the speaker, who seems at first to be simply a Renaissance duke showing a visitor the treasures of his art collection, reveals himself to be a cruel husband who brutalized his first duchess for failing to value the honor of being his wife.¹⁹¹ In such accomplished poems, the dramatic monologue is the literary form that embodies self-revelation. Even in a non-literary setting, the skillful creation of character through voice engages the interest and emotions of the reader in a way that ordinary narrative or intellectual argument rarely can.

Scalia's most potent separate opinions resemble the dramatic monologue in their strongly defined voice and what it reveals about the speaker. The opinions treat conventional legal materials, such as case law, statutes, and constitutional history, but at the same time they establish a distance between the judicial voice and the legal argument it constructs. That voice distinguishes itself from "society's law-trained elite," the misguided Justices in the majority who are imposing their "countermajoritarian preferences" on the sensible democratic majority.¹⁹² Scalia uses an assortment of rhetorical devices to shape this voice. He sprinkles his formal prose with the occasional colloquialism: the Court's vague standard for gender discrimination is "Supreme Court peek-a-boo,"¹⁹³ which will prevent any "state official in his right mind"¹⁹⁴ from risking litigation by testing it. His syntax is at times informal or even conversational. Rejecting the Court's criticism of early educators, he

190. The classic study of the dramatic monologue is ROBERT LANGBAUM, *THE POETRY OF EXPERIENCE* (1957). Robert A. Ferguson has identified what he terms "the monologic voice" in judicial opinions, a device which "sometimes seeks its own embodiment by projecting an actual judicial persona into the frame of an opinion." Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 *YALE J.L. & HUMAN.* 201, 206 (1990).

191. ROBERT BROWNING, *My Last Duchess*, in *THE POEMS AND PLAYS OF ROBERT BROWNING* 94 (1934).

192. *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting). In *Romer v. Evans*, Scalia scolds the majority for siding "with the knights rather than the villeins" in the culture wars and "reflecting the views and values of the lawyer class from which the Court's Members are drawn." 517 U.S. 620, 652 (1996) (Scalia, J., dissenting).

193. *Virginia*, 518 U.S. at 574 (Scalia, J., dissenting).

194. *Id.* at 597 (Scalia, J., dissenting).

asks the reader to "let me say a word in their praise,"¹⁹⁵ and he mocks the Court's "ad-hocery"¹⁹⁶ in departing from precedent by imagining that a state "should have known that what this Court expected of it was . . . yes!, the creation of a state all-women's program."¹⁹⁷ Even an example of cooperative conduct is drawn from athletics – "the game of soccer."¹⁹⁸

The persona that emerges is a down-to-earth figure, different from his colleagues with their arrogant pretensions and murky abstractions. Reading these opinions, one finds it hard to remember that this persona bears little resemblance to Scalia's actual resumé as the son of an academic, a distinguished graduate of Georgetown University and Harvard Law School, a practitioner with a prestigious law firm, a prominent attorney and administrator in the Nixon and Ford administrations, and a professor of law at Georgetown and the University of Chicago.¹⁹⁹ A prime insider, Scalia recreates himself as the shrewd outsider who has taken upon himself the thankless task of calling his colleagues to account for their departures from principle, common sense, and their duty to the democratic majority.

The opinion that most fully illustrates this rhetorical strategy is Scalia's part concurrence, part dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁰⁰ in which the Court reaffirmed the central holding of *Roe v. Wade*.²⁰¹ The opinion opens with a restrained statement of Scalia's position on the question of whether the right to abortion is a constitutionally protected liberty interest: "I am sure it is not."²⁰² This simple diction and lean syntax distinguish his position from what he termed the "exalted" view of the Court opinion, which speaks of the "concept of existence, of meaning, of the universe, and of the mystery of human life."²⁰³ The plainspoken and restrained persona, however, was compelled against his inclination to address "a few of the more outrageous arguments in today's opinion, which it is beyond human nature to leave unanswered."²⁰⁴ The remainder of the opinion is framed as a dialogue of sorts, quoting each "outrageous" passage from the Court's opinion and following it with a critical response.

195. *Id.* at 567 (Scalia, J., dissenting).

196. *Id.* at 600 (Scalia, J., dissenting).

197. *Id.* at 594 (Scalia, J., dissenting).

198. *Id.* at 584 (Scalia, J., dissenting).

199. See Sally Katzen, *Antonin Scalia*, in *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1995*, at 511-12 (Clare Cushman ed., 2d ed. 1995).

200. 505 U.S. 833, 979 (1992) (Scalia, J., concurring and dissenting).

201. 410 U.S. 113 (1973).

202. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring and dissenting).

203. *Id.* (Scalia, J., concurring and dissenting) (quoting majority opinion).

204. *Id.* at 981 (Scalia, J., concurring and dissenting).

Scalia's *Casey* opinion makes clear who the adversary is. It is "[t]he Imperial Judiciary" with its "Nietzschean vision of us unelected, life-tenured judges – leading a Volk who will be 'tested by following.'"²⁰⁵ The diction is powerfully allusive, deliberately evoking the tyrannies of imperial Rome and the mythology of German nationalism. Scalia allied himself with the "Volk" by using a much simpler diction to deflate the pretensions of the Court majority. In accusing his opponents of playing a "verbal shell game" to hide their "raw judicial policy choices," he reduced imperial tyrants to ordinary con artists.²⁰⁶ Rejecting the Court's treatment of *stare decisis*, Scalia "confess[ed] never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version,"²⁰⁷ again the man of common sense confounded by a judicial absurdity. The colloquial interjections – "come to think of it,"²⁰⁸ "[i]t is beyond me,"²⁰⁹ "even in the head of someone like me"²¹⁰ – reinforce the sense of a bond between the speaker and the reader, who together can see through the self-aggrandizing tendencies of the misguided majority.

The rhetorical strategy of *Casey* allowed Scalia to express strong emotions without appearing to abandon professional control. The conversational quality of the judicial voice triangulates the opinion by creating an invisible third party, the reader who shares with the speaker his sense of justified indignation at the overreaching of the majority. This rhetorical setting reflects Scalia's signature substantive argument, that his adversaries violate the constitutional design by imposing their personal value choices instead of respecting the choices made by a democratic majority through its elected representatives. By including that majority in the world of the opinion, Scalia attempts to position himself not as the scourge of his adversaries but as the champion of the people, respecting their values and speaking their language. The strategy may not always work – Scalia's harsh criticisms have at times alienated potential allies on the Court and raised serious concerns about civility in judicial discourse. But it is an inventive attempt to integrate emotional response with legal argument by creating a sympathetic judicial persona who reaches beyond the ordinary boundaries of his role.

4. Justice Blackmun: Institutional Emotionalism

Whereas Justice Scalia channels his emotional responses by constructing a judicial persona, Justice Blackmun employed no comparable rhetorical arti-

205. *Id.* at 996 (Scalia, J., concurring and dissenting).

206. *Id.* at 987 (Scalia, J., concurring and dissenting).

207. *Id.* at 993 (Scalia, J., concurring and dissenting).

208. *Id.* at 994 (Scalia, J., concurring and dissenting).

209. *Id.* at 997 (Scalia, J., concurring and dissenting).

210. *Id.* at 998 (Scalia, J., concurring and dissenting).

fic. His most famous and most controversial separate opinions offer the remarkable spectacle of a Justice speaking directly and emotionally to the reader without any pretense of dispassionate neutrality. Reaction to these opinions has been sharply divided. For Blackmun's many admirers, who include a number of his former law clerks, the opinions reflect his compassion and his "real-world sensitivity," giving the Court "its natural sympathy, its human face."²¹¹ His critics, while respecting Blackmun's personal modesty and humanity, focus instead on what Jeffrey Rosen terms "the jurisprudence of sentiment," the "resort to personal sympathy in order to justify liberal results."²¹² There is, however, no dispute over Blackmun's primacy as the author of the Court's most self-revelatory opinions.

Although his opinions usually are discussed together, they more naturally divide into two distinct varieties of emotionalism. The first variety, represented most famously by what is commonly known as Blackmun's "Poor Joshua!" opinion, responds emotionally to the plight of the litigants and builds on that response to define the Court's legal obligation to provide assistance.²¹³ The second variety, represented most vividly by Blackmun's efforts to defend his landmark abortion rights opinion in *Roe v. Wade*,²¹⁴ exposes directly the author's reaction to his own position on the Court. The first is a situational emotionalism, based on the particular facts of the case, while the second is an institutional emotionalism, based instead on a Justice's relationship to the Court itself. In Blackmun's hands, both varieties stretched the boundaries of conventional jurisprudence, but it is his institutional emotionalism that raised the more serious challenge.

Blackmun's dissent in *DeShaney v. Winnebago County Department of Social Services* expresses strong compassion for the plaintiff, a child severely beaten by his father after social workers allowed him to remain in his father's custody. In addition to the *cri de coeur* "Poor Joshua!",²¹⁵ which has attracted so much attention, the brief opinion gives the child's full name, Joshua DeShaney, twice in less than two pages.²¹⁶ Blackmun's determined effort to put

211. Harold Hongju Koh, *A Tribute to Justice Harry A. Blackmun*, 108 HARV. L. REV. 20, 21-22 (1994). In another piece, Koh, a former law clerk to the Justice, argues that Blackmun's detractors "confused emotionalism with candor, doctrinal wavering with maturing judgment." Harold Hongju Koh, *Justice Blackmun and the "World Out There"*, 104 YALE L.J. 23, 27 (1994).

212. Jeffrey Rosen, *Sentimental Journey*, THE NEW REPUBLIC 13 (May 2, 1994). Posner calls the opinions "embarrassing performances." Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1434 (1995).

213. *DeShaney v. Winnebago Co. Dep't of Soc. Serv.*, 489 U.S. 189, 212 (1989) (Blackmun, J., dissenting).

214. 410 U.S. 113 (1973).

215. *DeShaney*, 489 U.S. at 213 (Blackmun, J., dissenting).

216. *Id.* at 212, 213 (Blackmun, J., dissenting).

a human face on the plaintiff's suffering was intended also to discredit the majority, which he rebuked for positioning itself as "the dispassionate oracle of the law, unmoved by 'natural sympathy,'" in deciding that the Fourteenth Amendment offered the plaintiff no protection.²¹⁷ While Jackson questioned the existence of dispassionate judges, Blackmun found them all too real and insisted that human emotion can properly inform constitutional interpretation. He failed, however, to support his point with legal argument; instead, he illustrated it with a bluntness that makes the reader uncomfortably aware of its obvious pitfall, the overwhelming of reason by understandable but undisciplined sympathy. The opinion ignores the advice Blackmun recalled receiving from Justice Black during the brief period when the two overlapped at the Court: "Always go for the jugular, but don't agonize in public."²¹⁸

Blackmun employed a similar strategy more successfully in his dissent from the denial of certiorari in a death penalty case in which he opened his opinion by projecting one day into the future and imagining the execution of Bruce Edwin Callins, the defendant, that the Court's vote had now made inevitable.²¹⁹ Blackmun described Callins at the moment the latter is about to receive his lethal injection, "no longer a defendant, an appellant, or a petitioner, but a man, strapped to a gurney, and seconds away from extinction."²²⁰ The point, more fully argued than in *DeShaney*, is the human consequence of unavoidable unfairness in the administration of the death penalty; and in this context, the humanizing of the defendant, though bordering on the melodramatic, seems relevant and justified. The more serious difficulty with *Callins* is its shift from situational to institutional emotionalism when Blackmun, only five months from his retirement, staked out a new position on death penalty cases. In the most quoted line from the opinion – "From this day forward, I no longer shall tinker with the machinery of death"²²¹ – Blackmun used metaphor to evoke the Justices as casual mechanics indifferent to the human dimension of such "tinkering" with an imperfect machine. Even more striking than the metaphor is the directness of its resolution, the shift in focus from the future of the defendant to the future of the author. The first appearance of the pronoun "I" signals a self-dramatizing turn in the opinion that reaches its climax in the extraordinary conclusion, in which Blackmun expressed his hope that the Court eventually would adopt his position: "I may not live to see

217. *Id.* at 212 (Blackmun, J., dissenting).

218. Philippa Strum, *Change and Continuity on the Supreme Court: Conversations with Justice Harry A. Blackmun*, 34 U. RICH. L. REV. 285, 297 (2000). Blackmun conceded that "I probably agonize over cases more than I should, and more than most of my colleagues do." *Id.* at 300.

219. *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting).

220. *Id.* (Blackmun, J., dissenting).

221. *Id.* at 1145 (Blackmun, J., dissenting).

that day, but I have faith that eventually it will arrive."²²² The dissent that opened by invoking the certain death of the defendant closes by invoking the less imminent but equally certain death of the author, who now replaces Callins as the emotional center of the opinion.

Blackmun was most likely to position himself center stage when defending his signature opinion, *Roe v. Wade*, from the increasing threats of reversal by the Rehnquist Court. In *Webster v. Reproductive Health Services*,²²³ Blackmun dissented from a Court resolution that, although leaving *Roe* intact, seemed to invite further challenges to abortion rights.²²⁴ His opinion includes a somber prophecy: "I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided. I fear for the integrity of, and public esteem for, this Court."²²⁵ The three sentences, each beginning with "I," express concern for women and for the Court itself, but the rhetorical effect of the repeated pronoun is instead to insist on Blackmun as the protagonist, the author who is personally threatened by the reversal of *Roe*. The close association of Blackmun with *Roe* – he predicted, accurately, that it would follow him to his grave²²⁶ – makes the threat to overturn it a personal assault on him.

This tendency to shift the focus to himself reached its apotheosis in *Casey*, where Blackmun saw *Roe*'s survival as measured by "but a single vote"²²⁷ separating the world of abortion rights from the world of prohibition. His opinion ends with the most remarkable instance of self-revelation in the Court's history: "I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made."²²⁸ By disclosing his age, Blackmun

222. *Id.* at 1159 (Blackmun, J., dissenting).

223. 492 U.S. 490 (1989).

224. *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 537 (1989) (Blackmun, J., concurring and dissenting).

225. *Id.* at 538 (Blackmun, J., concurring and dissenting).

226. *Blackmun Accepts Aftermath of Writing Abortion Opinion*, N.Y. TIMES, Jan. 18, 1983. Blackmun's prediction proved correct when his obituaries led with his role as the author of *Roe*. See Linda Greenhouse, *Justice Blackmun, Author of Abortion Rights, Dies: Onetime Conservative, 90, Shifted on Court to Hardy Liberal*, N.Y. TIMES, Mar. 5, 1999. Radhika Rao, a former law clerk, notes in this context that "[a]t times, Justice Blackmun seemed to regret his close connection with *Roe*" but that he "also appeared to identify himself with this decision, as is evident in the unusually personal and passionate tone of his dissents in cases where he felt the abortion right to be under assault." Radhika Rao, *The Author of Roe*, 26 HASTINGS CONST. L.Q. 21, 22 (1998).

227. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 943 (1992) (Blackmun, J., concurring and dissenting).

228. *Id.* (Blackmun, J., concurring and dissenting).

violated the Court convention of judicial impersonality in a way that no earlier Justice, not even Douglas, had attempted. He identified himself not simply as a Justice but as an elderly man who saw his tenure on the Court coming to an end. Even more striking, Blackmun's reference to his own advanced age and imminent departure introduced into the text the idea of judicial succession and of the political maneuvering that has characterized the appointment process in recent years. It has long been conventional for the Court to speak of itself as a continuing entity undisturbed by changes in personnel; thus, a 1999 opinion may note that "we" ruled in 1899 on a certain point in a certain way. Blackmun's opinion undermined this fiction of continuity and replaced it with the stark reality of an institution that is altered by the identity of the men and women who occupy its seats. The reference to the way in which his successor would likely be chosen – based on firmly held positions – also insists that the decisionmaking model of neutral principles and detached Justices is another polite legal fiction. The reality, Blackmun asserted, is that his successor would be chosen by political actors for essentially political reasons. Blackmun presented himself as the besieged defender of the faith, weakened by age and surrounded by the hostile forces of the opposition, both on and off the Court. Far from a member of a collegial institution that operates on principles of professionalism and continuity, Blackmun spoke as an outsider, a Justice who was at the same time both part of, and alienated from, the Court. It is an extraordinary rhetorical performance, one that exposes not simply the Justice beneath the robe but the transitory nature of his power and the political process that will inevitably replace him.

IV. Conclusion

As the Roosevelt Court voices demonstrate, judicial neutrality does not require impersonality. The distinctive styles of the Roosevelt Court Justices communicate the force of judicial personality without suggesting that emotion has overwhelmed reason or principle as the basis for decisionmaking. When those Justices resorted to personal disclosures, whether of professional or personal identity, they did so in a manner that tended to reinforce rather than diminish the neutrality principle. Despite their pasts, they indicated that they sat as members of the Court, rather than as particular individuals who might have permitted their private emotions to control their professional conduct. Whether written with the formality of Frankfurter, the simplicity of Black, the elegance of Jackson, or even the solipsism of Douglas, their opinions convey a recognizable personality restrained in the service of the judicial role.

The voices of the Rehnquist Court send a different message, expressing personal emotion rather than judicial personality. The opinions of Kennedy, Rehnquist, and Blackmun employ a variety of rhetorical strategies to justify

a position or persuade a reader that the majority has erred, but these strategies work by channeling powerful emotions rather than communicating a sense of coherent judicial personality. Even Scalia, whose distinctive style comes closest to the approach of the Roosevelt Court Justices, works in opinions like *Casey* to engage the reader in his rhetoric of indignation. It is, however, the opinions of Justice Blackmun that illustrate most clearly the risk of allowing emotion to overwhelm the constraints of the judicial role. When, in *Casey*, he introduced into the text of his opinion the specter of his own imminent departure from the Court, Blackmun undermined the identity of the Court as an ageless institution whose individual members, although always changing, remain constant in their commitment to neutral principles of law and justice.

As Justice Cardozo cautioned, there is no way to extinguish the personal identity of a judge and leave behind only a dispassionate professional decisionmaker. The challenge for strongminded judges, especially those assigned the extraordinary powers of Supreme Court Justices, is to harness personal identity in the service of judicial neutrality. Two generations ago the Roosevelt Court Justices found a way to transform their individual identities into judicial personalities that expressed coherent legal visions without sacrificing neutrality to emotion. In an era of splintered opinions and multiple law clerks, the Rehnquist Court Justices are still struggling to meet that challenge.

**THE WASHINGTON AND LEE
LAW ALUMNI ASSOCIATION
STUDENT NOTES
COLLOQUIUM**
