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BALLS AND STRIKES

*Charles Fried**

When the editors of the *Emory Law Journal* invited me to open this symposium on judging, they proposed that I reflect on the present Chief Justice's widely debated statement of his conception of judging.

John Roberts has been both praised and scorned for the metaphor he presented to the Senate Judiciary Committee at the hearing on his confirmation to be Chief Justice of the United States: “[I]t’s my job to call balls and strikes.”¹ It was an arresting use of language because, unlike so many metaphors that litter the discourse in and about the law—think of “sweeps too broadly” or “paints with a broad brush”—it is not so timeworn that, as George Orwell has noted, the original meaning has drained out of it and we are left only with a cliché, a ponderous way of saying something that could be said more directly.² No, here we catch a flash of a pitcher, a catcher, and standing behind him a distinctively shirted official, and a ball hurtling toward the batter’s head or far off, “wide of the mark”—another cliché, by the way. And just because the phrase is alive with resonance, it provokes—rather than deadens—thought.

Fans applauded because it signaled a restrained, modest, and almost anonymous role for the judge. (I recall that, in the court on which I served, it was the custom in discussing a trial judge’s ruling almost always to refer to “the court,” sometimes to the “superior court judge,” but never to the judge by name.) Critics balked because the metaphor suggests that there is always, at least in principle, an objectively correct call, the umpire being only a necessarily imperfect human approximation of what an accurate electronic monitor could settle beyond possibility of dispute—as is done in determining the order of finish in a horse race (a photo finish). This conception would make

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¹ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) [hereinafter *Roberts Hearing*] (statement of John G. Roberts, Jr., J., D.C. Circuit).

² The classic discussion of this degradation of language and the associated degradation of thought is George Orwell, *Politics and the English Language*, 13 *HORIZON* 252 (1946), an essay that every aspiring writer, journalist, and politician should be required to read.

the human element—the element of judgment—not a virtue but a regrettable second best.

As so often happens, the commentary reached a pitch in either direction only because the commentators did not bother to read the whole statement, bowdlerizing from the accounts of others who also had not read the whole. Here I supply the context:

Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.

...
... I come before the Committee with no agenda. I have no platform. Judges are not politicians who can promise to do certain things in exchange for votes. I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench, and I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it's my job to call balls and strikes, and not to pitch or bat.³

Here we catch the wider resonance, and it offers much to think—rather than scream—about. First, there is the dominant point: the judge's role, while important, is subordinate. He enforces the rules, but he does not make them. That is the first and crucial antithesis.

Related to Roberts's dominant point, though not quite the same, is the last antithesis—"to call balls and strikes, and not to pitch or bat." Here Roberts calls attention to the difference not between a judge and legislator—rule applier and rule maker—but between a player and rule enforcer; only the former can be said to win or lose. This connects to Roberts's most striking and substantive commitment: "I come before the Committee with no agenda. I have no platform." This stands in contrast to those who do make the rules and are contestants: "Judges are not politicians." Finally, and most fetchingly, is a phrase that represents the very epitome of judicial modesty: "Nobody ever went to a ball game to see the umpire."

³ *Roberts Hearing*, *supra* note 1, at 55–56.

As I have said, every live metaphor provokes thought. To begin my reflections, I mention both what is right and what is wrong about this one. Rule maker, not rule applier: even putting aside the common law, including the federal common law, functions of the judge (of which more when I come to my real protagonist, Robert Jackson, and his concurring opinion in *D'oench, Duhme & Co. v. FDIC*⁴), this is truer when a court applies a statute or regulation than it is in constitutional cases. But even in the former, the strike-zone analogy is only partially apt. Consider the long-running dispute between Justices Scalia and Breyer on statutory interpretation. Scalia insists that the Court goes astray when it moves beyond the strike zone of the words of the statute itself.⁵ Breyer insists that the Court does its job to make our democracy work—drawing on the title of his latest book—by collaborating with the legislature in implementing the purposes it had in mind, which often means going well beyond the words in which the legislature embodied those purposes to consider the legislative history, and even the subsequent legislative history, of the statute.⁶ I do not want to get into the question here of who is right and who is wrong. Rather, I point out that both Justices claim to be calling balls and strikes according to the statute, so there must be a further game—a meta-game, as it were—according to which one or the other approach to statutory interpretation is correct. But that meta-game is nowhere set down. It is a product of legal and political reflection—and, in respect to that, the judge is rule maker, player, and rule applier. Nonetheless, both Breyer and Scalia believe that they are judging a meta-game: they speak with great certitude—like an umpire calling a beanball—when they call, say, a committee report a ball or a strike. And so Roberts's metaphor shows itself richly suggestive. Breyer and Scalia both believe they are servants of truth, and not of their tastes or preferences, in admitting or denying the relevance of a committee report. And if Scalia were to admit, *per impossible*, that a committee report or some other bit of legislative history was relevant, he might very well come to the same conclusion as Breyer, while if Breyer were to adopt Scalia's method, his conclusion in a particular case might be Scalia's. So, player, umpire, or rule maker? Do not misunderstand me: I do not scorn Chief Justice Roberts's metaphor. Rather, I honor it.

⁴ See *infra* text accompanying notes 44–48 (discussing 315 U.S. 447 (1942)).

⁵ See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997).

⁶ See STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* 100–02 (2010).

The player/umpire antithesis is more subtle than the rule-maker/rule-applier antithesis. After all, whoever devises the rules for Major League Baseball (or softball or Little League) is not on the field, but the players and umpires are. The players are competitors, and the fans are ardent supporters of one or the other side, which is why it is important that nominee Roberts assured the Committee, “I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability.” And this ties into the winsome statement that “[n]obody ever went to a ball game to see the umpire.” But judges do have their fans. At New York University School of Law there is a Brennan Center for Justice,⁷ but there is no Hall of Fame for umpires.⁸ During graduation season, Supreme Court Justices garner honorary degrees by the bushel. And as for coming to see the umpire, I ask why is it that we parse the umpires’ words with almost obsessional concentration, and who—if not the umpires—do crowds regularly line up on First Street to see? The advocates, perhaps (the players), but surely those nine black-robed umpires.

Yet Roberts makes a point that must be excavated more deeply. There *is* something special about the office of judge, and it antedates our Constitution by far. I have several times cited⁹ the words of the Islamic jurist Ahmad ibn Hanbal, who died in Baghdad in 855 CE:

The just qādī [judge] will be brought on the Judgment Day, and confronted with such a harsh accounting that he will wish that he had never judged between any two, even as to a single date¹⁰

[Judges] are three: two in the Fire, and one in Paradise. A man who has knowledge, and judges by what he knows—he is in Paradise. A man who is ignorant, and judges according to his ignorance—he is in the Fire. A man who has knowledge, and judges by something other than his knowledge—he is in the Fire.¹¹

When Roberts told the Committee that judges are not politicians, that he has no agenda, and that he would decide each case on the arguments, the record, and

⁷ See BRENNAN CENTER FOR JUST., <http://www.brennancenter.org> (last visited July 5, 2012).

⁸ Although, there are nine umpires included in the Baseball Hall of Fame. See *Hall of Famers*, NAT’L BASEBALL HALL OF FAME & MUSEUM, <http://baseballhall.org/hall-famers/> (search “Hall of Famer Search” for “Umpire” under the “Position” heading) (last visited July 5, 2012).

⁹ E.g., CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 73–74 (2004); Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL’Y 807, 807 (2000).

¹⁰ 8 FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA 19–20 (translating Ibn Hanbal, 6:75; al-Bayhaqī, 10:96) (internal quotation marks omitted).

¹¹ *Id.* at 20 n.41 (translating al-Sadr al-Shahīd, *Adab al-Qādī*, 1:163–64) (internal quotation marks omitted).

the rule of law, he was really promising, in words of ibn Hanbal, to judge according to “knowledge.” Knowledge of what? The law. But surely Roberts—and ibn Hanbal—must decide what makes up the law, where to find it, and how to apply it. Consider again the contrasting views of Justices Scalia and Breyer on statutory interpretation: it is inevitable that a judge has some such idea about the subject, but that does not make the judge a politician or enlist him in an agenda.

There is now a fashion for diligent research into the behavior of courts and judges. A recent example was reported by Adam Liptak in the *New York Times*.¹² The study on which he reports concluded that the Roberts Court is measurably more business-friendly than past Courts—and that this is shown by, among other things, the proportion of times that the Court agrees with the position taken by the United States Chamber of Commerce as *amicus curiae*.¹³ Such studies typically ignore qualitative distinctions: How important was the case, how far reaching a precedent would it establish, or how broadly was it decided? And they ignore entirely the reasons for the decision.¹⁴ This kind of “research” does treat judges as politicians pursuing an agenda—if only unconsciously. For instance, *Citizens United v. FEC*¹⁵ was of great importance to business, but it matters a great deal whether the case was decided to amplify the voice of businesses or—as I believe—to further extend its author’s consistent position that government has a very limited role in silencing speech on any subject, no matter the speaker. This supposed trend is said to be exemplified by cases forcing individuals, pursuant to agreements they have signed, to submit their claims against businesses to arbitration, rather than to the tender mercies of juries,¹⁶ or by cases in which individual claimants are denied class action status¹⁷ or must litigate in federal, not state, courts—all cases in which business interests may have been the winners. But such research does not take into account that many of these results are controlled by acts of Congress whose very intention was to procure such pro-business results.¹⁸

¹² Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES, Dec. 19, 2010, at A1. The study’s authors are Lee Epstein, William Landes, and Judge Richard A. Posner, than whom no one more intelligent and skeptical exists. *Id.*

¹³ *Id.*

¹⁴ See Ilya Somin, *The “Pro-Business” Supreme Court Revisited*, VOLOKH CONSPIRACY (Dec. 20, 2010, 10:51 PM), <http://volokh.com/2010/12/20/the-pro-business-supreme-court-revisited/>.

¹⁵ 130 S. Ct. 876 (2010).

¹⁶ See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

¹⁷ See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

¹⁸ See, e.g., Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

And yet the balls-and-strikes metaphor does seem to slight an important truth: it fails to explain why we remember the names of judges but not umpires. The difference is not only that umpires referee games and judges umpire actual—not contrived—conflicts, and that judicially umpired conflicts often have great significance—sometimes life-and-death significance for the participants. This is certainly a crucial difference, but not necessarily an illuminating one. After all, it is the function of a metaphor to display on a different scale the puzzle we are trying to solve.

I shall look elsewhere: one reason we do not remember umpires but do remember judges—at least Justices of our High Court—is that the Justices write opinions to explain, announce, and indeed constitute their rulings, but umpires do not. One reason I think I am on to something—something, not everything—is that the judges of certain European courts are a bit more like umpires in that their rulings are often hardly explanations at all; they offer only a list of considerations, an invocation of authorities, and an announcement of the conclusion. Although the names of the participating judges may be given, the author is not specified—perhaps because he or she may only be a bureaucrat attached to the court whose duty it is to formulate the announcement. In some courts there are no concurring or dissenting opinions; indeed, there are in a full sense no opinions at all.¹⁹ From the beginning of our Supreme Court, and well before that in the tradition on which it draws, judgments have been embodied in opinions. Each opinion carries the reasons for its conclusion. Each opinion is the operative act of the Court. And this takes me to what I believe is at least one reason why we have confirmation hearings, remember the names of our Justices, and pay such attention to them—inviting them to conferences, honoring them at dinners, and hanging on their most trivial utterances (a regard the nations whose judicial roles I have just described would consider out of place—bizarre).

Judges in our system may not have agendas and may not be politicians—although this is not always so, at least Chief Justice Roberts proclaims an ideal—but what Roberts does not deny to judges, or to himself, is a character, a personality, and a style. If an umpire had any of these, it would be a distraction, an anomaly (as if he had a nose ring or a neck tattoo, though it need not interfere with his work if he had either of these). But our great

¹⁹ See JAMES G. APPLE & ROBERT P. DEYLING, FED. JUDICIAL CTR., A PRIMER ON THE CIVIL-LAW SYSTEM 35, 37 (1995), available at [http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf).

Justices all had just that: a style, a personality, a character. These are quite different from their having agendas or being politicians, and yet they are not just ornaments or distractions. Unlike my fictional umpire's nose ring, these traits are part of who Justices are and what they do as judges. So I would like to think further about the style and character of judges and how this intersects with the work they do, the product they deliver. And you will see, I hope, how inadequate are the political-science accounts of judging—how those accounts are to the essence of judging as would be accounts of the frequency of particular major and minor keys to the essence of music.

And to do that I have chosen one particular Justice, Robert Jackson, for several reasons: My colleague Noah Feldman's splendid new book, *Scorpions*,²⁰ about the four dominant Roosevelt Justices (Black, Frankfurter, Douglas, and Jackson) reawakened in me my fascination with the man. Justice Jackson made some of the best and boldest decisions in the whole of our constitutional jurisprudence—my particular favorite is *West Virginia State Board of Education v. Barnette*, the flag-salute case²¹—as well as some of the most perplexing and opaque ones. He stands with Justices Marshall and Holmes as one of the great writers on the High Court. And the Justice for whom I clerked and whose memory I revere, John Marshall Harlan, filled not only his seat but, in some sense, his role. Harlan was succeeded by William Rehnquist, who had clerked for Jackson and for whom John Roberts, he of the balls and strikes, clerked and whose chair as Chief Justice he now fills. All four men in this apostolic succession indeed shared some—far from all—characteristics: a magisterial style, a certain aloofness, a disdain for sentimentality, and passages of passion and rhetoric.

It is the interpenetration of style (and it was a great style) with substance in Jackson's work as a Justice on which I want to reflect. If this were a lecture on a great composer, then I would go to the piano from time to time to illustrate my point or to offer more matter for the exposition. In just that way, I will give you passages from Jackson's oeuvre. And just as happens in such talks, sometimes one wishes the lecturer would just shut up and keep playing.

²⁰ NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES* (2010).

²¹ 319 U.S. 624 (1943).

I will start with some passages he wrote—and there is no doubt *he* wrote them—that were not judicial opinions at all.²² They are drawn from his opening statement as prosecutor at the Nuremberg trials. This is how he begins:

The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.

This Tribunal, while it is novel and experimental, is not the product of abstract speculations nor is it created to vindicate legalistic theories. . . . The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched.²³

Here we find some of Jackson's characteristic rhetorical tropes. He uses balanced antitheses,²⁴ or a series of terms of increasing intensity: "so calculated," "so malignant," "so devastating,"²⁵ "that civilization cannot tolerate their being ignored, because it cannot survive their being repeated," "[r]eproached by the humiliation of those they have led almost as bitterly as by the desolation of those they have attacked."²⁶ The trope is decidedly Lincoln-esque and has become a cliché in political speechifying—"ask not what your country"²⁷ and so on—but to what magnificent effect it is used by both Jackson and Lincoln. Recall Lincoln's Second Inaugural Address:

²² See generally Bernard D. Meltzer, Tribute, *Robert H. Jackson: Nuremberg's Architect and Advocate*, 68 ALB. L. REV. 55 (2004).

²³ 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 98–99 (1947) [hereinafter NUREMBERG OPENING STATEMENT].

²⁴ The technical term is *dirimens copulatio*. See RICHARD A. LANHAM, A HANDBOOK OF RHETORICAL TERMS 56 (2d ed. 1991).

²⁵ The technical term is *auxesis*. See *id.* at 26–28.

²⁶ NUREMBERG OPENING STATEMENT, *supra* note 23, at 99.

²⁷ John Fitzgerald Kennedy, Inaugural Address (Jan. 20, 1961), in THE WORLD'S GREAT SPEECHES 739, 741 (Lewis Copeland et al. eds., Dover Publ'ns, Inc. 4th ed. 1999) (1942).

Neither party expected for the war, the magnitude, or the duration, which it has already attained. . . . Both read the same Bible, and pray to the same God; and each invokes His aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces; but let us judge not that we be not judged. The prayers of both could not be answered. . . . Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue . . . until every drop of blood drawn with the lash[] shall be paid by another drawn with the sword, . . . so still it must be said “the judgments of the Lord, are true and righteous altogether.”²⁸

Both Jackson and Lincoln invoke not only principle but also morality and a common sense of decency. And the concluding phrase of the first paragraph of Jackson's opening statement at Nuremburg—“one of the most significant tributes that Power has ever paid to Reason”—surely captures the highest aspiration of law better than any before or since.²⁹

What kind of man is capable of such words, and being capable of them, what kind of judgment can we expect of him? Justice Jackson was obviously an ambitious man who had, by dint of hard work, talent, and shrewdness, risen up from working as a small-town, western New York lawyer to a situation of prominence in New York politics and, then, to being the point man for Roosevelt in the legal pursuit of Andrew Mellon and in defense of the Court-packing plan. He allowed himself to be seduced into staying in the Administration by Roosevelt, who dangled before him support for Jackson's candidacy for the governorship of New York and the prospect of a run for the presidency in 1940.³⁰ His maneuvering and disappointment around the Chief Justiceship in 1945 are well known.³¹ He was passionate, irascible, and vain—surely the only Justice to be named best dressed man in America by the Custom Tailors Guild.³² It might be said that the elegance of his language was in keeping with Jackson's sense of style generally, but that would slight the passion and intelligence that his style clothed.

²⁸ President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), *in* N.Y. TIMES, Jan. 20, 1973, at 31.

²⁹ This is an example of a Senecan sententia.

³⁰ See FELDMAN, *supra* note 20, at 122–30.

³¹ See *id.* at 293–302.

³² See *id.* at 126.

First, the style—like the passion and intelligence that I celebrate—is clearly Jackson’s own³³—a point that it is embarrassing even to have to mention (rather like saying of a distinguished clergyman that, so far as is known, he never once stole from the collection plate), but these degraded times require it. Here is an early example from a speech Jackson, as Attorney General, gave to an assembly of Justice Department lawyers:

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen’s friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. . . .

. . . .
If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.³⁴

Here is the same rhetorical sense we heard in the Nuremberg opening statement: an accumulation of instances culminating in a phrase so memorable, original, and apt that it sounds like a cliché, but only because frequent quotation and repeated plagiarism soon would make it one. In the Nuremberg opener, it is the description of authority submitting itself to law as the

³³ See Phil C. Neal, Tribute, *Justice Jackson: A Law Clerk’s Recollections*, 68 ALB. L. REV. 549, 550 (2005) (“Unlike most other Justices I have known or heard about, Jackson did not use law clerks to write drafts of opinions. He made some revisions in his drafts in response to a law clerk’s comments, but nearly every word of his opinions came from his own pen.”).

³⁴ Robert H. Jackson, Att’y Gen., *The Federal Prosecutor*, Address Delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), in 24 J. AM. JUDICATURE SOC’Y 18, 18–19 (1940). This passage was referred to by Justice Scalia in his dissenting opinion in *Morrison v. Olson*. See 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) (citing Jackson, *supra*).

“tribute[] that Power . . . pa[ys] to Reason.” In the Justice Department address: “[I]t is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching . . . to pin some offense on him”—a perfect description, it must be said, of how matters have proceeded under the various avatars of the disgraced and disgraceful Independent Counsel laws.³⁵

But Jackson’s remarkable qualities as a judge were not simply limited to his talent for aphorism. Each aphorism clothed a deep and original thought that arose in equal part from passion and from intelligence. Jackson had been, of course, an early partisan and, as Solicitor General, advocate for Roosevelt’s New Deal.³⁶ He championed the disestablishment of pre-1936 Supreme Court precedents narrowly defining the range of federal legislative competence under the Commerce Clause and confining the competence of all governmental power—federal or state—by the eponymous *Lochner*³⁷ doctrine in its various manifestations.³⁸ So it is he who, in *Wickard v. Filburn*, wrote: “[Home-consumed] wheat overhangs the market . . . [I]t supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. . . . The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions”³⁹ There is only one better, though less succinct, refutation of the argument now making the rounds that requiring financially competent persons to purchase health insurance is *not* a regulation of commerce. That is by Chief Justice Marshall, in *Gibbons v. Ogden*,⁴⁰ to which Jackson pays due homage in his own opinion.⁴¹

Wickard does not have the passion and poetry of the conclusion of *West Virginia State Board of Education v. Barnette*:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters.

³⁵ See Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732 (expired 1999); Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (expired 1992); Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (1983) (amended 1987).

³⁶ See FELDMAN, *supra* note 20, at 122–23, 129.

³⁷ *Lochner v. New York*, 198 U.S. 45 (1905).

³⁸ See FELDMAN, *supra* note 20, at 112–14, 116–19.

³⁹ 317 U.S. 111, 128 (1942). The rhetorical figure is paradox.

⁴⁰ 22 U.S. (9 Wheat.) 1, 189–97 (1824).

⁴¹ *Wickard*, 317 U.S. at 120–22 (citing *Gibbons*, 22 U.S. (9 Wheat) at 194–95, 197).

Compulsory unification of opinion achieves only the unanimity of the graveyard.

 If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.⁴²

The almost offhand last clause—“they do not now occur to us”—serves only to personalize and intensify the soaring rhetoric of what went before. This is perfect pitch. But *Wickard* has a poetry of its own—it is, as it were, the poetry of reason, an inexorable procession from premise, to corollary, to conclusion.⁴³ In music, too, one sees this. There are few melodies, no heart-wrenching passages as in Bach’s cantata *Ich Habe Genug* in the Goldberg Variations, yet they elicit the thrill of perfected intelligence.

There are other examples. What could be more prosaic than the question of whether the right of the Federal Deposit Insurance Corporation to enforce a note given as an accommodation to a failed bank is governed by state law or by some federal common law? In *D’Oench, Duhme & Co. v. FDIC*, Justice Douglas, writing for the Court, resolves this question by the easy route of construing the enabling statute as providing the governing rule, because if it did, there could be no question but that such a rule would prevail.⁴⁴ Justice Frankfurter finesses the question by stating that state law supplies the answer the FDIC desires.⁴⁵ Justice Jackson writes that this intricate and perplexed question requires that “we should attempt a more explicit answer.”⁴⁶ After several—not too many, I should add—pages of close reasoning, he provides a charter ever more for something called the federal common law: “Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.”⁴⁷

⁴² 319 U.S. 624, 640–42 (1943).

⁴³ I use the figure known as tricolon.

⁴⁴ 315 U.S. 447, 455–56 (1942).

⁴⁵ See *id.* at 462 (Frankfurter, J., concurring) (“Whether the case is governed by the law of one State or the other, . . . the result is the same.”).

⁴⁶ *Id.* at 465 (Jackson, J., concurring).

⁴⁷ *Id.* at 470; accord *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshall, C.J.) (noting that a constitution that attempted to detail every aspect of its own application “would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind”). The subject of the federal

Another example is Jackson's definitive and magisterial opinion in *Mullane v. Central Hanover Bank & Trust Co.*, which dealt with the thrilling question of what kind of notice the trustee of a common trust fund must give to the individual beneficiaries when it seeks to settle its accounts—specifically, was a general notice printed in a legal newspaper sufficient as to beneficiaries whose residence was known to the trustee?⁴⁸ After carefully parsing the circumstances and precedents, Jackson concludes, “[W]hen notice is a person's due, process which is a mere gesture is not due process.”⁴⁹ I call attention to two aspects of this marvelous sentence. First, the words “mere gesture,” which make palpable, indeed visible, what is *not* enough. And then the elegant chiasmus: “[A] person's due . . . is not due process.”

The discovery of a way through the perplexed and labyrinthine byways of the law and the display of what reason discovered there in a brief and lapidary phrase is the distinguishing characteristic of Jackson's work. Already by 1953, it had become clear that the habeas jurisdiction of the federal courts implicated some authority, even necessity, to review criminal convictions procured in state courts.⁵⁰ But habeas was—and still is—a vexed issue. How can it be that, in a rational system, a conviction fully litigated through the state courts, with certiorari denied in the Supreme Court, may then be reexamined and perhaps overturned by a single federal judge?⁵¹ Jackson, in a concurring opinion, noted the anomaly and proposed a way out that would limit habeas corpus in a severe but rational way.⁵² It is a way not taken, and perhaps it was too limited, but Jackson deplored the arrogance implicit in giving such power to the federal courts:

Conflict with state courts is the inevitable result of giving the convict a virtual new trial before a federal court sitting without a jury. Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is

common law has become so massive that it has earned a whole lengthy chapter in the most recent edition of RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (6th ed. 2009).

⁴⁸ 339 U.S. 306 (1950).

⁴⁹ *Id.* at 315.

⁵⁰ See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 499–500 (1963).

⁵¹ See generally Bator, *supra* note 50 (examining the circumstances under which the jurisdiction of federal courts should be used to evaluate the merits of federal questions decided in state criminal proceedings).

⁵² *Brown v. Allen*, 344 U.S. 443, 542–48 (1953) (Jackson, J., concurring in the result).

thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.⁵³

So in that case the aphorism lasted longer than the conclusion.

Jackson's determination to unravel and lay bare legal puzzles is evident in cases large and small. In *Railway Express Agency, Inc. v. New York*, for example, the Court considered a constitutional challenge to a New York City regulation forbidding advertising on the sides of trucks unless the advertisement was for the business in which the truck was engaged.⁵⁴ This meant that the trucks that careened about the city streets delivering newspapers to newsstands could also advertise the day's headlines, but Railway Express could not rent out its trucks' flanks to advertise the businesses of others.⁵⁵ Railway Express thought this was an unfair and irrational distinction, depriving it of its constitutional right to the equal protection of the law.⁵⁶ Justice Douglas made short work of that claim, treating it to the same cursory rejection accorded since the demise of *Lochner v. New York* to all claims by businesses that economic regulations deprived them of due process of law.⁵⁷ Justice Jackson, who had been at the forefront of that rejection in defending the New Deal, was not so sure:

There are two clauses of the Fourteenth Amendment which this Court may invoke to invalidate ordinances by which municipal governments seek to solve their local problems. One says that no state shall "deprive any person of life, liberty, or property, without due process of law." The other declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

My philosophy as to the relative readiness with which we should resort to these two clauses is almost diametrically opposed to the philosophy which prevails on this Court. While claims of denial of equal protection are frequently asserted, they are rarely sustained. But the Court frequently uses the due process clause to strike down measures taken by municipalities to deal with activities in their streets and public places which the local authorities consider as creating hazards, annoyances or discomforts to their inhabitants. And

⁵³ *Id.* at 540. The rhetorical trope in the final sentence is a chiasmus.

⁵⁴ 336 U.S. 106 (1949).

⁵⁵ *See id.* at 109–10.

⁵⁶ *Id.*

⁵⁷ *See id.*

I have frequently dissented when I thought local power was improperly denied.

The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance. Even its provident use against municipal regulations frequently disables all government—state, municipal and federal—from dealing with the conduct in question because the requirement of due process is also applicable to State and Federal Governments. Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.

Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.⁵⁸

Here was reasoning as subtle and succinct as Chief Justice Marshall's anticipation in *McCulloch v. Maryland* of the public-choice explanation of why a state may not tax the instrumentalities of the national government.⁵⁹ And yet Jackson found the regulation valid.⁶⁰

Jackson's personal need to go beyond a simple and jejune statement that would decide a case so that he might solve a puzzle the case represented and present that solution in concise, compelling, and lapidary terms is most famously illustrated by his concurrence in *Youngstown Sheet & Tube Co. v.*

⁵⁸ *Id.* at 111–13 (Jackson, J., concurring) (citations omitted).

⁵⁹ 17 U.S. (4 Wheat.) 316, 428–29 (1819).

⁶⁰ *Railway Express Agency*, 336 U.S. at 117 (Jackson, J., concurring).

Sawyer.⁶¹ *Youngstown* did present a challenge: the nation faced a threat to steel production in wartime,⁶² and precedents of presidential action were cited that Jackson had personally endorsed as Attorney General.⁶³ Before coming to his tripartite scheme that has—because of its simplicity, originality, and once stated, self-evidence—since become canonical, he starts with a winning touch of self-deprecation and proceeds to a phrase that demolishes for all time the pretension that the intent of the Framers can offer a solution:

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.⁶⁴

What is most striking is the cadence of the passage. There is standard legal terminology at the beginning of the sentence, although even this is put in the least hackneyed and bureaucratic form. He speaks not of “officers” or “officials” but of “executive advisors,” not of a “court” but of a “judge”—this is more personal, less official. His first sentence states a puzzle. The second sentence begins with words of interrogation—“just what”—and leads to the startling biblical allusion, ending with the wonderful sounding word “Pharaoh,” which a Lexis search confirms has never before or since appeared in a Supreme Court opinion. The effect is heightened by the touch—surely unplanned, but instinctively knowing—of leaving the word “Pharaoh” standing alone as in the King James Bible,⁶⁵ unmodified by a definite article.

As I have previously written of Justice Jackson’s discussion of his tripartite scheme:

⁶¹ 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring). The opinion is so famous, indeed, that the failure adequately to consider it by Assistant Attorney General Jay Bybee and his deputy John Yoo in their opinion regarding the authority of President George W. Bush was held by the Department of Justice’s Office of Professional Responsibility to be an example of professional misconduct. See OFFICE OF INSPECTOR GEN., DEP’T OF DEF. ET AL., REPORT NO. 2009-0013-AS, UNCLASSIFIED REPORT ON THE PRESIDENT’S SURVEILLANCE PROGRAM 13, 30 (2009).

⁶² FELDMAN, *supra* note 20, at 356.

⁶³ See *id.* at 363.

⁶⁴ *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring).

⁶⁵ See, e.g., *Ezekiel* 32:31 (King James) (“Pharaoh shall see them, and shall be comforted over all his multitude, even Pharaoh and all his army slain by the sword, saith the Lord God.”).

This sense of cadence shows up in a different way later in the opinion in Justice Jackson's ranking of types of executive authority:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . .

The first paragraph says flatly when the power is “at a maximum”—note the precision and focus of the two balanced terms: “all that he possesses in his own right plus all that Congress can delegate.” Compare this to the last phrase of the last paragraph, where the same structure is reversed and the word “minus” appears.

The second degree of power is a “zone of twilight”—note here that this is quite a familiar metaphor and therefore risks degenerating into cliché. Jackson rescues it, however, by the high degree to which it is apt and by syntactically reviving its literal meaning: He does not use the cliché “twilight zone,” but speaks instead of a zone of twilight.

The third state is where the President's power is “at its lowest ebb.” Again, this teeters on the edge of cliché but is saved because its presence as the third term in a cadence—maximum, twilight, lowest ebb—brings to mind the literal image of a sea shore where the tide has receded and left exposed the widest expanse of beach.

Finally, there is what I would call the music of reason: where a logical point is put with such magical conciseness that it attains elegance in that way alone. This happens in the phrase in which Justice Jackson dismisses Chief Justice Vinson's contention that the President, even in the absence of legislative authorization, has an inherent power to take action in a national emergency. “Such power,” Justice Jackson replied, “either has no beginning or it has no end.”⁶⁶

⁶⁶ Charles Fried, *Manners Makyth Man: The Prose Style of Justice Scalia*, 16 HARV. J.L. & PUB. POL'Y 529, 530–31 (1993) (alterations in original) (footnote omitted) (quoting *Youngstown*, 343 U.S. at 635–37, 653 (Jackson, J., concurring)). The figure is antithesis.

I cannot leave this marvelous opinion without recalling one other touch, in which he refutes the claim that the Article II Commander-in-Chief designation supplies the authority Jackson requires in the third category: “There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants.”⁶⁷

* * *

I come now to two opinions that have confounded and disappointed Jackson’s admirers: his dissent in *Korematsu v. United States*⁶⁸ and concurrence in *Dennis v. United States*.⁶⁹ Jackson’s opinions in these cases and in *Youngstown* display his awareness of the extreme pressure that powerful, external military threats place on fidelity to fundamental principles of liberty and decency. It has been said that the Jackson who wrote the *Barnette* decision is not the same man who wrote the concurrence in *Dennis*, and that his 1945 experience as Chief Prosecutor at the Nuremberg trials “spooked him out,” so that he abandoned the character in the latter that he had displayed in the former. This is wrong. In the *Youngstown* case, Jackson denied the Commander in Chief an authority that Truman claimed to prosecute a war against the North Koreans and the Communist Chinese.⁷⁰ National morale and national security could not have been more salient considerations than they were during World War II, and yet Jackson cast the balance in favor of individual liberty in the *Barnette* and *Korematsu* cases. No, one must look at what Jackson actually said in *Korematsu* and *Dennis* and ask whether what he said might after all not have been right and whether *that* was why he said it. And when you do look, you see that neither is *Korematsu* so harsh in its judgment of government power in its pursuit of national security, nor *Dennis* so indulgent toward it. My colleague Noah Feldman’s parsing of Jackson’s opinion in *Korematsu* cannot be improved on,⁷¹ so I adopt it. Justice Black for the Court had approved the exclusion and internment of West Coast Japanese-Americans on the lame explanation that the military order was based on loyalty, not race—against which he inveighed in terms by now canonical but

⁶⁷ *Youngstown*, 343 U.S. at 643–44 (Jackson, J., concurring).

⁶⁸ 323 U.S. 214, 242–48 (1944) (Jackson, J., dissenting).

⁶⁹ 341 U.S. 494, 561–79 (1951) (Jackson, J., concurring).

⁷⁰ See *Youngstown*, 343 U.S. at 655 (Jackson, J., concurring).

⁷¹ FELDMAN, *supra* note 20, at 243–53.

then quite new, at least in an opinion for the Court.⁷² Jackson's opinion displays first his rejection of this bogus reasoning:

A citizen's presence in the locality, however, was made a crime only if his parents were of Japanese birth. Had Korematsu been one of four—the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole—only Korematsu's presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.

Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. . . .

. . . .

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. . . .⁷³

But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. . . .⁷⁴

. . . .

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. . . . A military

⁷² *Korematsu*, 323 U.S. at 223–24. I think of the first Justice Harlan's dissent in *Plessy v. Ferguson*. See 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1953).

⁷³ The figure is antithesis.

⁷⁴ This is chiasmus.

commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution.⁷⁵

And yet Jackson wrote, “I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task.”⁷⁶ It is worth recalling that Lincoln refused to comply with Chief Justice Taney’s order releasing Merryman from unconstitutional custody, and his soldiers even blocked entry to the base where Merryman was confined to the marshal who sought to serve Taney’s order on its commandant.⁷⁷ One might say this was an “incident,” but not a “precedent.” In other words, Jackson was willing to tolerate the tension between law and felt necessity, and he would not distort either to solve a riddle that had no resolution.

Jackson’s concurrence in *Dennis*, the Smith Act prosecution of the leaders of the Communist Party of the United States, is more logical, more resolved, but to civil libertarians, far less satisfactory. The Court majority frankly departed from the by-then-canonical “clear and present danger” test as glossed by Justice Brandeis in *Whitney v. California*,⁷⁸ explaining that “[t]he situation with which Justices Holmes and Brandeis were concerned . . . was a comparatively isolated event, bearing little relation in their minds to any substantial threat to the safety of the community.”⁷⁹ Instead, the plurality opinion endorsed the far less categorical rule formulated in the court below by Judge Learned Hand: “In each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”⁸⁰

⁷⁵ *Korematsu*, 323 U.S. at 243–46 (Jackson, J., dissenting).

⁷⁶ *Id.* at 248.

⁷⁷ See John Yoo, Merryman and Milligan (and McCordle), 34 J. SUPREME CT. HIST. 243, 243–44 (2009) (discussing *Ex parte Merryman*, 17 F. Cas. 144, 146–47 (C.C.D. Md. 1861) (No. 9487)). Jackson concluded that he would reverse the judgment and discharge the prisoner. *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting). He would have squared the circle by discharging *Korematsu* from custody pursuant to his criminal conviction, *id.*, and by that time, the internment order would have been lifted so that there was no other basis for holding him.

⁷⁸ 274 U.S. 357, 374 (1927) (Brandeis, J., concurring), *overruled per curiam* by *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁷⁹ *Dennis v. United States*, 341 U.S. 494, 510 (1951) (plurality opinion).

⁸⁰ *Id.* (alteration in original) (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff’d*, 341 U.S. 494 (1951)) (internal quotation marks omitted).

Justice Frankfurter would have gone further, in effect denying the Court the competence even to review this balance once it has been cast by Congress.⁸¹

Jackson's concurrence was far more nuanced. As Noah Feldman has remarked, Jackson's background as a virtually self-educated country lawyer⁸²—this recalls our master rhetorician Abraham Lincoln—left him (unlike Felix Frankfurter) no debt of filial piety to Holmes and Brandeis. He thought the thing through fresh for himself and concluded that the World War I and anarchist cases were inapposite because they had dealt with defendants unlike these, whom he thought had been shown to be part of a tightly organized conspiracy acting under the direction of and as agents of a hostile foreign power.⁸³ The law of conspiracy, as it had been applied to conspiracies to violate the antitrust laws, was broad enough to apply to this one.⁸⁴ As for the doctrinaire application of the clear-and-present-danger test, he—like Learned Hand—swept that aside in this context:

The authors of the clear and present danger test never applied it to a case like this, nor would I. If applied as it is proposed here, it means that the Communist plotting is protected during its period of incubation; its preliminary stages of organization and preparation are immune from the law; the Government can move only after imminent action is manifest, when it would, of course, be too late.⁸⁵

Perhaps this analysis has been repudiated, but I am not sure that it will not revive. Just last Term, in *Holder v. Humanitarian Law Project*,⁸⁶ the Court adopted an analysis that can scarcely comport with Justice Brandeis's concurrence in *Whitney*.

* * *

So, back to balls and strikes. The style, the character, the personality of the umpire matter.⁸⁷ They matter to the judging, and so they matter to the law and

⁸¹ *Id.* at 550–51 (Frankfurter, J., concurring in affirmance of the judgment). This had been the resolution of the majority in *Gilow v. New York*, 268 U.S. 652 (1925), from which Justices Holmes and Brandeis had dissented.

⁸² See FELDMAN, *supra* note 20, at 42–43. But see John Q. Barrett, Tribute, *Albany in the Life Trajectory of Robert H. Jackson*, 68 ALB. L. REV. 513, 515, 517–19 (2005) (discussing Justice Jackson's early childhood adoration of reading, writing, ideas, and public speaking; his education and tutelage under his high school English teacher Mary R. Willard; and his apprenticeship in the office of a local attorney named Frank Mott).

⁸³ *Dennis*, 341 U.S. at 562–64 (Jackson, J., concurring).

⁸⁴ *Id.* at 572.

⁸⁵ *Id.* at 570. Here is another example with a subtle twist of auxesis.

⁸⁶ 130 S. Ct. 2705 (2010).

⁸⁷ This is an example of tricolon.

to the outcomes that affect the people who are judged and who are governed by the law. I am not talking about the biography of the umpire. That Robert Jackson was ambitious, that he was irascible, that he was vain, that his judgment failed him disastrously in his feud with Hugo Black, that he died in the arms of his mistress—I am not talking about these. I am not talking about them because we cannot be sure of them, and in any event, their relevance is more the stuff of biographers and novelists. Biographies of judges are often dull and disappointing, even though the work of the judge may be thrilling. I do not, for instance, envy David Dorsen, who is laboring on a biography of Judge Henry Friendly. Rather, I have tried to display for you the distinctive style and character of one Justice's writing because it is in that writing that his thinking and therefore his judging are embodied. When a judge does his own work and the writing is as pungent as was Jackson's, then the style is not just a veneer brushed onto an otherwise finished product.⁸⁸ It is the product itself. Think of another domain: Newton's Laws of Motion⁸⁹ or Watson and Crick's 900-word article announcing their discernment of the structure of the DNA molecule.⁹⁰ The discoveries are momentous; they are taught to students everywhere and are employed in a myriad of uses and devices. But the actual words in which Newton or Watson and Crick announced them are of only antiquarian interest. They are not the thing itself. But Jackson's decisions in the *Barnette* and *Youngstown* cases, if bowdlerized in a textbook epitome, are deprived of their power to convince and therefore of their practical effect. It would be almost as bad if we sought to give in a phrase the meaning of a Shakespeare sonnet or to explain the elegance of a Bach partita.

And so, it is not the character and personality of the man I celebrate but the character and personality of his work. In this a judge is more like a great athlete, whom we come to watch not only for the runs he scores but for the style and grace with which he accomplishes them and which are inextricably bound up with his ability to score the runs at all. Chief Justice Roberts was right: nobody comes to watch the umpire. In the case of a great judge, one cannot tell the dancer from the dance.

⁸⁸ This figure deliberately uses a cliché (veneer) but recalls its literal meaning.

⁸⁹ ISAAC NEWTON, *THE PRINCIPIA: MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY* (I. Bernard Cohen et al. trans., Univ. of Cal. Press 1999) (1687).

⁹⁰ J.D. Watson & F.H.C. Crick, *Molecular Structure of Nucleic Acids: A Structure for Deoxyribose Nucleic Acid*, 171 *NATURE* 737 (1953).