
4-20-2011

Compromise and Constitutionalism

Sanford Levinson

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Constitutional Law Commons](#), [Dispute Resolution and Arbitration Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Sanford Levinson *Compromise and Constitutionalism*, 38 Pepp. L. Rev. Iss. 5 (2011)
Available at: <https://digitalcommons.pepperdine.edu/plr/vol38/iss5/2>

This Lecture is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Compromise and Constitutionalism

Sanford Levinson*

- I. INTRODUCTION
- II. CONSTITUTIONAL DESIGN AND COMPROMISE
- III. PRESERVING INSTITUTIONAL POWER AT THE COST OF LITIGANTS' RIGHTS
- IV. INTRA-COURT COMPROMISE
- V. CONCLUSION

I. INTRODUCTION

I am extremely pleased—and honored—to be here today at Pepperdine to deliver this Brandeis Lecture. Both the particular venue (and I'm not referring to Malibu!) and the person for whom this lecture is named have encouraged me to offer some reflections about a subject that increasingly interests me: "compromise." As someone interested in both constitutional design and constitutional interpretation, not to mention the institutional history of the United States Supreme Court, I find the presence of "compromise" both ubiquitous and, at least at times, highly problematic. I want to share with you today three particular examples of the problem. The first involves the kinds of questions that arise when one is *designing* a constitution. One is obviously seeking agreement, often among quite bitterly contending groups; as in any such situation, one is inevitably faced with the need to determine priorities and to decide what interests—even those one might deem "fundamental"—are open to being traded away in return for other goods that one might prefer. Assume, though, that the initial bargaining process is successful, at least as defined by the achievement of an agreement that is signed and ratified by the various parties.

At that point a second issue often arises, which involves the kinds of compromises that one might feel it necessary to make in order to protect given institutional interests. As Madison famously suggested in *Federalist 51*, the ambitions of political officials are often connected to the institutional

* W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas at Austin.

flourishing of their particular places, and one might well believe that such flourishing may sometimes require the making of significant compromises, not least because the strong assertion of what may well be constitutional prerogatives would lead to unacceptable backlash that would leave one's "home institution"—or even one personally—more vulnerable than is thought desirable. Not surprisingly, I will offer some brief looks at the United States Supreme Court in this context and ask whether members of the Court (and, beyond that, of *all* courts in similar situations) can properly sacrifice what is legally due a particular litigant in order to preserve its overall position and power within the constitutional order. Madisonian "ambition" may, paradoxically or not, require knowing when to withdraw as well as when to be gloriously assertive.

But should we explain and justify such sacrifices as "statespersonlike" balancing of institutional interest against, say, the individual rights possessed by a litigant seeking "justice" or, on the contrary, are we justified in condemning this as a betrayal of the promise, required by the Constitution itself, to enforce constitutional norms? Finally, I shall look at members of a multi-member judiciary, again drawing on the Supreme Court for my examples, and ask whether it is legitimate for members of the Court to sign opinions with which they disagree, in order to construct a majority or, in some instances, present the united front of a unanimous Court. At the extreme, presumably, is self-consciously keeping secret a dissent that, by definition, would confess to the public that the judge in question believes that the majority is committing an important legal error. This might be contrasted with holding back on writing a concurring opinion, where, by definition, one is satisfied with the legal result even if not with the particularities of the legal reasoning offered to justify it. But, at least, there is no question that the winner of the case "deserved" to prevail, even if for different reasons. Inasmuch as such suppression of one's "honest views"—or is this too tendentious a way of phrasing it?—is done for institutional reasons, is that more acceptable than, say, the straightforward trading of votes analogous to what occurs all the time in legislatures, that is, "logrolling" by which support for one's favorite goal is purchased by trading one's vote with regard to another legislator's favorite piece of legislation? One way of defining my topic, I suppose, is as asking whether all compromises are created equal.

II. CONSTITUTIONAL DESIGN AND COMPROMISE

"All government—indeed every human benefit and enjoyment, every virtue and every prudent act—is founded on compromise and barter."¹ So

1. AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES 12 (2009) (quoting Edmund Burke, Speech on Conciliation with the Colonies (Mar. 22, 1775)).

wrote Edmund Burke in 1775 in the course of his great speech criticizing the policies of King George III and his ministers vis-à-vis the American colonies just weeks before the outbreak of revolutionary violence at Concord and Lexington and more than a year before the American Declaration of Independence. As Jack Rakove reminds us in a splendid book on the American Revolution and its immediate aftermath, there was nothing at all inevitable about the secession of the American colonies from the British Empire, and a willingness on the part of King George III and Lord North to “compromise and barter” might have fundamentally transformed subsequent world history. The events of 1775–1783 are exemplary of what can happen when officialdom refuses to compromise and instead stands on ostensible principle, in that case the continued sovereign authority of Parliament over British colonies.

Similarly, one can view the events of 1787–1790 as equal exemplars of the importance (and presumptive goods) attached to a willingness to compromise. There simply would never have been a Constitution without two especially important compromises, one involving slavery, the other the Senate. The addition of the Bill of Rights itself can be viewed more as a compromise by such supporters of the Constitution as Madison than as a reflection of any deep conviction that the Constitution would truly be enhanced by the addition of so many “parchment barriers” that were likely to make little difference to the actual governance of the new political system created by the Constitution. (Indeed, Hamilton notably declared that it might be “dangerous” to add a Bill of Rights, inasmuch as that might suggest that the national government was plenary save where expressly limited.² That one might doubt Hamilton’s sincerity does not entitle us to discount the importance of his argument.)

Moreover, as Rakove also emphasizes, 1790 included an all-important dinner, arranged by Thomas Jefferson. “I thought it impossible,” Jefferson wrote, “that reasonable men, consulting together coolly, could fail, by some mutual sacrifices of opinion, to form a compromise which was to save the union.”³ The Compromise of 1790, as Rakove labels it,⁴ accomplished this goal by trading Jefferson’s support for national assumption of state war debts—a windfall for financial speculators—in return for Hamilton’s support for establishing the new nation’s capital along the Potomac River in

2. THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

3. Thomas Jefferson, *Anas*, in 1 THE WRITINGS OF THOMAS JEFFERSON 275 (Albert Ellery Bergh ed., library ed. 1818), available at <http://etext.lib.virginia.edu/toc/modeng/public/JefBv012.html>.

4. JACK RAKOVE, *REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA* 427 (2010).

what would come to be called, of course, Washington, D.C.

So is this a set of stories designed to vindicate Burke and underscore the necessity of compromise and, concomitantly, the undesirability of admiring those “stiff-necked” persons who are resistant to compromise? I think this is an especially suitable question to ask as part of this Brandeis Lecture at Pepperdine Law School. Pepperdine is, of course, a distinctive law school. I make a habit of reading schools’ mission statements, and I was not disappointed in turning to Pepperdine’s statement:

The school’s Christian emphasis leads to a special concern for imbuing students with the highest principles of professional, ethical, and moral responsibility. . . . Therefore, the school tries to convey to its students not only the knowledge of how to employ the law, but also an awareness of the responsibilities to society that accompany the power inherent in that knowledge.⁵

Louis Brandeis would not, obviously, share Pepperdine’s particular “Christian emphasis,” but one suspects that he would be honored to have a lecture named after him in a school that emphasizes “ethical and moral responsibility” along with the more limited domain of “professional responsibility.” It was, after all, Justice Brandeis who wrote, in his famous dissent in *Duplex Printing Press Co. v. Deering*, that “above all rights rises duty to the community.”⁶ It is, I think, relevant to note that the common nickname for Brandeis, among those who knew him, was “Isaiah” because of his prophetic mien. Indeed, a recent article on Justice Brandeis and his law clerks is titled *Isaiah and His Young Disciples*,⁷ and it is clear that not all of these “disciples” were admirers of the prophetic aspects of Brandeis’s persona, which often took a quite unyielding posture. One of his most eminent law clerks, David Riesman, notes that Brandeis was not only dismayed by Reisman’s decision to go into private practice, but also “contemptuous of me because I wanted to go back to Boston to a law firm.”⁸ Brandeis was described as “vehement” in his belief that Riesman must become “a missionary” devoted to benefitting the less fortunate within the community.⁹ Indeed, said Riesman, “[t]he fact that I had friends in Boston and had season tickets to the Boston Symphony was totally frivolous and unworthy of consideration. Friendship was not a category in his life.”¹⁰ I am tempted to quote the famous, and decidedly uncompromising, passage

5. *Mission Statement*, PEPPERDINE UNIVERSITY SCHOOL OF LAW, <http://law.pepperdine.edu/about/mission/> (last visited Feb. 24, 2011).

6. 254 U.S. 443, 488 (1921).

7. Todd C. Peppers, *Isaiah and His Young Disciples: Justice Brandeis and His Law Clerks*, 34 J. SUP. CT. HIST. 75 (2009).

8. *Id.* at 87.

9. *Id.*

10. *Id.*

from the *Gospel of Luke* 14:26: “If any man come to me, and hate not his father, and mother, and wife, and children, and brethren, and sisters, yea, and his own life also, he cannot be my disciple.” If “friendship” or “family loyalty” means a willingness to tolerate a variety of human foibles, then Brandeis seems far closer to at least one reading of Saint Luke than to the persona revealed in, say, his ostensibly good friend Justice Oliver Wendell Holmes. There is, I am quite confident, no book on the “wit” or “humor” of Louis Brandeis, and I can testify that to read his opinions or his letters is often a trial inasmuch as they are without such leavening.

So “compromising” is not the first word that comes to mind when thinking of Justice Brandeis, nor, even more certainly, of the Jewish prophet whom his friends identified with Brandeis. As we shall see presently, it is not that compromise was absent from Brandeis’s judicial career, but rather that no one has ever thought to give the label applied to Henry Clay—“The Great Compromiser”—to Louis Brandeis. It is telling, I believe, that many of Brandeis’s greatest opinions are dissents rather than majority opinions (or, as in the case of his monumental opinion in *Whitney v. California*,¹¹ a technical “concurrence” that functions as a dissent to the majority’s wooden view of the meaning of freedom of speech). Dissent, almost by definition, reflects an aversion toward compromise and a concomitant appeal to principles that should be enforced even, or especially, when they are unpopular. (One might think of Justice Scalia’s eloquent dissent in *Hamdi*¹² in this context.) As lawyers, we are trained to take principles seriously and, often, to commend those who stand up for them, perhaps at great personal cost. It is no coincidence that John Adams’s courageous defense of British soldiers implicated in the “Boston Massacre” has been evoked recently as a response to the scurrilous and truly disgraceful attacks by Elizabeth Cheney and William Kristol on contemporary lawyers who believed that alleged terrorists held for years at Guantanamo might be entitled to a legal defense (and who, indeed, have won several of their cases before the United States Supreme Court).

So consider in this context the following statement made by the Israeli Minister of Welfare in 1950 during a debate about what form a constitution for *that* new state should take. “The Jewish people are willing to resign themselves to many things,” said Yitzhak Meir Levi, “but the moment the issue touches upon the foundations of their faith, they are unable to compromise. If you wish to foist upon us this type of life or a constitution

11. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

12. *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting).

that will be contrary to the laws of the Torah, we will not accept it!”¹³ As Hanna Lerner points out in her valuable forthcoming book, *We the Divided People*, about constitutional formation in Israel, India, and Ireland, three fundamentally divided peoples, Israel decided to forego agreement on a constitution, not least because of the cautionary comment of yet another member of the Knesset at the time:

I would like to warn: the experience of drafting a constitution would necessarily entail a severe, vigorous uncompromising war of opinions. A war of spirit, which is defined by the gruesome concept of *Kulturkampf*. . . . Is this a convenient time for a thorough and penetrating examination of our essence and purpose? It is clear that there is no room for any compromises, any concessions or mutual agreements, since no man can compromise and concede on issues upon which his belief and soul depend.¹⁴

Perhaps Americans are tempted to view this as simply an example of sectarian intransigence that we in this country were blessedly spared in our own halcyon days of 1787 and the drafting of our own Constitution. After all, as already suggested, we *did* get a Constitution, purchased through two central compromises and a host of smaller ones. But here is where things become difficult. For I discovered, as it were, the topic of my lecture when reading a recently published book by another Israeli, philosopher Avishai Margalit, *On Compromise and Rotten Compromises*.¹⁵ As the title suggests, he sharply distinguishes between acceptable compromises and those that should be condemned as “rotten” and therefore indefensible except, perhaps, in the most exceptional of conditions. He defines a “rotten political compromise” as one that agrees “to establish or maintain an inhuman regime, a regime of cruelty and humiliation, that is, a regime that does not treat humans as humans.”¹⁶

It takes no great feat of imagination to think of slavery in this context, and, therefore, to ask whether the United States Constitution was purchased through a truly “rotten compromise,” what the abolitionist William Lloyd Garrison so memorably called, quoting Isaiah, “a covenant with death and an agreement with hell”¹⁷ that, indeed, led to further “compromises” to preserve the Union—think only of the strengthening of the Fugitive Slave Act in the interests of slaveowners as part of the Compromise of 1850. Margalit quotes Garrison’s statement that “with the North, the preservation

13. Minister of Welfare Rabbi Yitzhak Meir Levi, 4 *Knesset Record* 812 (1950) (in Hebrew).

14. Meir-David Levonstein (Agudat Israel), in *Knesset Record*, *supra* note 13, at 744.

15. MARGALIT, *supra* note 1.

16. *Id.* at 2.

17. 1 *CYCLOPEDIA OF AMERICAN GOVERNMENT* 420 (Andrew C. McLaughlin & Albert Bushnell Hart, eds. 1914) (quoting *Isaiah* 28:18 (King James)).

of the Union is placed above all other things—above honor, justice, freedom, integrity of soul.”¹⁸ There is, of course, more than a trace of similarity between Garrison and Rabbi Levi quoted above, but does that automatically lead us to condemn one or the other?

Are there times to reject compromise in the name of higher values? Should one accord some validity to the dictum *fiat justitia ruat caelum*, usually translated as, “May justice be done though the heavens fall,” or on the contrary, should *everything* be subject to sacrifice in order to prevent such a dire outcome? (On another occasion, one could discuss Abraham’s willingness to sacrifice Isaac or, for those with a typological understanding of the Hebrew Bible, the sacrifice by God of Jesus.) I dare say that few are willing to follow this basically Kantian logic to its conclusion, but at the very least, might we not need truly compelling evidence that the heavens really *would* fall, rather than, for example, simply generate an inconvenient snowstorm (or, given Malibu, wildfire)?

Would the heavens have fallen, for example, if the Philadelphia convention had failed, with the likely consequence of at least two, possibly three, separate countries taking form, distinguished, among other ways, by their stance toward chattel slavery? Was it worth entrenching slavery into the Constitution through, most importantly, the Three-Fifths Clause, which gave slave states a huge bonus of representation not only in the House of Representatives but also in the Electoral College? The Three-Fifths Compromise, for example, helps to explain why almost all of our early presidents were slaveowners and, given nomination of Supreme Court Justices by the President, why the Supreme Court, until Abraham Lincoln’s presidency, remained resolutely committed to preserving the rights of slaveowners against any claims by slaves or, indeed, as in *Prigg v. Pennsylvania*,¹⁹ ostensible “fugitives” who were snatched and taken to a slave state by slavecatchers. It was, after all, the self-styled anti-slavery Justice Joseph Story who held in that case that the Constitution had to be interpreted just as Garrison suggested, in a way that would preserve the Union and, therefore, that slaveowners indeed had a right of what we would today call “self-help repossession” that could not be limited by so-called “liberty laws” passed by Pennsylvania and other anti-slavery states. (It has always seemed to me that if one can tolerate *Prigg*, then *Dred Scott*²⁰ is relatively easy to swallow as well.)

There are very good reasons to believe that our collective history would

18. MARGALIT, *supra* note 1, at 56.

19. 41 U.S. (16 Pet.) 539 (1842).

20. 60 U.S. (19 How.) 393 (1857).

have been very different had the Convention not succeeded. As political scientist David Hendrickson has well argued, the Philadelphians were consumed by the fear that multiple countries in what we today think of as the United States would no more be able to remain at peace than was the case in a Europe with multiple countries sharing that continent.²¹ Thus the overwhelming necessity for a “peace pact,” which, as we all know, almost inevitably require compromises. (Truly “imposed” peace settlements, like that at Versailles, rarely prove stable and, indeed, may provoke such a backlash on the part of the ostensibly “victimized” state that they end up triggering yet another war.)

But one of Margalit’s most powerful questions is whether the abstract devotion to “peace” is enough, in effect, to overcome *all* demands of “justice.” Thus he offers a fascinating discussion of the deals that were made in the 1945 Yalta Conference, which, among other things, doomed hundreds of thousands of captured Soviet soldiers to forced repatriation (and almost certain death), as well, of course, as placing almost all of Eastern Europe within the Stalinist sphere of influence. He is not inclined to defend the concessions made by Roosevelt and Churchill, not least because, he argues, the war had basically been won against Germany, and it was simply unnecessary to appease Stalin to such an extent (even if, by stipulation, such “pacts with the devil” would be justifiable if truly necessary to defeat Hitler’s Germany).

The compromise over slavery was not, of course, the only “Great Compromise” deemed necessary to purchase acquiescence to the Constitution that was signed on September 17, 1787. There is also the decision to accept the extortionate demand of Delaware and other small states to equal voting power in the Senate. As a matter of fact, as Rakove noted, Madison correctly viewed this as a “defeat, not [a] compromise”²² for a very simple reason: American bicameralism, unlike many bicameral systems around the world, gives each house a death-lock over any legislation passed by the other. We have a constitution filled with “veto points,” and, as we see literally almost every single day, among the most important of these is the ability of an indefensibly structured Senate to kill any and all legislation it finds unacceptable. A “compromise” might have allowed, say, the House, with the support of the President, to override a senatorial “veto” with an attainable supermajority, as is the case in some European bicameral systems. We pay the costs every day for *both* of the Great Compromises that procured the 1787 Constitution.

However loathsome I personally find the Senate created by the Constitution—the best that Madison could do was to describe equal voting power in the Senate as a “lesser evil” (to having no Constitution at all)—

21. See, e.g., DAVID HENDRICKSON, *PEACE PACT* (2003).

22. RAKOVE, *supra* note 4, at 372.

even I am reluctant to describe it as a “rotten compromise” similar in its moral offensiveness to slavery. Politics is indeed the art of accepting all sorts of “lesser evils,” and one might well agree with Madison that equal voting power in the Senate was a price worth paying in 1787. This, of course, does not in the least entail that we should in 2011 not wish to have a far better Constitution than the one we have, but that is a different topic. Perhaps the correct analogy is the price paid in 1945 to gain assent to the creation of the United Nations, which involved not only the “great power” veto system in the Security Council, but also the granting of *de facto* extra representation to the USSR by giving seats to Ukraine and Belarus. That the particularities of the veto system may make little sense in 2011 does little to demonstrate that it was a mistake in 1945. Rather, the mistake is feeling ourselves indelibly wedded to such institutional structures long after their rationales have ceased to make much sense.

One of the differences between the two “Great Compromises” is that one might well argue that those who made the compromise with regard to voting power in the Senate bore the costs. That is, states such as Virginia were the big losers of the decision to give equal voting power to Delaware and Rhode Island. Bargaining, by definition, involves a willingness to bear direct personal costs in order to attain a desired goal, and Madison, as one of Virginia’s delegates, ultimately decided that it was a cost worth paying by Virginians, as did the Virginia ratifying convention when it decided to grant its own assent to the Constitution. And, of course, Virginia was the big beneficiary of the other Great Compromise, which increased its power in the House and Electoral College (and, therefore, the White House and the Supreme Court, whose members are appointed by presidents). But the parallel does not really work, for the obvious point is that those who paid the primary costs of the Great Compromise involving slavery, the slaves themselves, were in no way represented in Philadelphia or beneficiaries of the successful founding of a new political order. Slavery *did* ultimately end, but only as the result of a catastrophic war, itself fundamentally caused by various aspects of the Constitution, that killed a full two percent of the total American population. (One may make, incidentally, the same point about the lack of representation of women; it did not take a war to overcome the results of that missing voice, but, of course, it did take a full 130 years before women were guaranteed the right to vote, and many more years before women genuinely became integrated into the American political order.)

So every American, particularly those who can be described as “constitutional lawyers,” including those of us charged, whether at Pepperdine or the University of Texas, with teaching the young and even

helping to instruct our students in what it might mean to lead a morally worthy life, must ask whether the Constitution was worth it. Though “it” could refer to the egregious Senate, for most of us the proper antecedent is slavery. Does *that* compromise merit the general praise that Burke assigned to compromise? Does it bring honor to the Framers? Or, rather, do we share Margalit’s view that it was a “rotten settlement” that is literally morally indefensible? Recall his definition of “rotten compromise”: “an agreement to establish or maintain an inhuman regime, a regime of cruelty and humiliation, that is, a regime that does not treat humans as humans.”²³ Given that chattel slavery must surely come within this description, does its entrenchment in the Constitution serve to discredit the document itself or, at the very least, place an irremediable taint upon the Founders whom we are otherwise—and properly—tempted to celebrate as great men?

It is often argued, altogether accurately, that one cannot make an omelet without breaking some eggs. And, to revert to Burke, we properly honor those who make significant concessions, even regarding their most precious values at times, in order to achieve or preserve peace. Indeed, it is no coincidence at all that Margalit is a long-time critic of many Israeli policies vis-à-vis Palestinians and laments the “uncompromising” rigidity of many Israeli positions, just as he is critical of similar rigidity on the part of Palestinian leadership. Thus, he describes the aim of his own book as “provid[ing] strong advocacy for compromises in general, and compromises for the sake of peace in particular.”²⁴ But, of course, there are limits, and his notion of “rotten compromise” is just that limit. Ultimately, better no peace than a “rotten compromise” that preserves the peace by the ruthless subjugation of others. This is the basis of his critique of Yalta.

The conceptual problem posed by slavery as a “rotten compromise” is, alas, not absent today. How important, for example, is it that Iraq or Afghanistan, to take only two non-random examples, achieve some kind of “national unity” in the form of a constitution that would gain sufficient support from those charged with ratification, whether political elites or the general citizenry (however defined)? A constant at any contemporary “constitutional convention” around the world is the presence of numerous NGOs devoted to a variety of causes that I assume most of us would support, including, for starters, safeguarding religious freedom and protecting women against the oppression generated by what Chief Justice Waite long ago called the “patriarchal principle.”²⁵ But, as we have learned, it may be impossible to get sufficient support for constitutions without sacrificing both of these values (among many others). If one has no trouble defending the 1787 Constitution, should one be any more hesitant to defend, on same

23. MARGALIT, *supra* note 1, at 2.

24. *Id.* at 3.

25. *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

realpolitik grounds, the oppression of religious minorities (including, obviously, Christians) and women in countries that constitutionalize, as it were, oppressive forms of sectarian religion?

III. PRESERVING INSTITUTIONAL POWER AT THE COST OF LITIGANTS' RIGHTS

So the first question involves the extent to which the Constitution itself is a “compromised” document. I turn now, though, to a second issue, which presumes that the Constitution is indeed ratified and the institutions it establishes are actually functioning. Every public official must, of course, take a solemn vow “to support this Constitution,” and the President takes an even more solemn vow to “faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.” Many lectures no doubt have been, and will in the future continue to be, given about how we tell whether any given President has in fact complied with his oath. The most vigorous debates no doubt turn on whether a President is entitled to “compromise” important constitutional norms in order to achieve other political goals, including, most obviously, the defense of the nation itself. That is not my topic today.

Rather, I want to talk about the role of those we often view as having a special commitment to constitutional fidelity and who are given a significant measure of “independence” from ordinary political constraints in order to do so. The only federal court required by the Constitution is, of course, the Supreme Court, and law schools, for better and, distinctly, for worse, are obsessed with that institution. So I want now to discuss whether we view justices as entitled to engage in what might be called Burkean compromise—or perhaps even a “rotten compromise”—in at least certain circumstances.

In a recent article on Chief Justice John Roberts that, among other things, criticizes him as being “less amenable to compromise” than is desirable,²⁶ Jeffrey Rosen describes Roberts as telling him, in a 2006 interview, that “he has strong views that he, like his hero John Marshall is not willing to bargain away. Marshall, Roberts said, ‘was not going to compromise his principles, and I don’t think there’s any example of his doing that in his jurisprudence.’”²⁷ One might challenge this description of

26. Jeffrey Rosen, *Roberts versus Roberts*, THE NEW REPUBLIC, Mar. 11, 2010, at 17–18.

27. *Id.* at 18.

Marshall himself. Consider only *Marbury v. Madison*,²⁸ for example, especially when combined with the almost unknown and in many ways more important case decided a week later, *Stuart v. Laird*,²⁹ one of the few major decisions that Marshall was seemingly delighted to let someone else write (in this instance Justice Paterson). My own view is that *Marbury* is intellectually scandalous inasmuch as Marshall plays fast and loose with the very quotation, and then the interpretation, first of Section 13 of the Judiciary Act of 1789 and then of Article III of the Constitution.³⁰ And there is good evidence that several of the Justices, including Marshall, believed that the Judiciary Act of 1802, which in effect purged the federal judiciary of Federalist Party judges who had been nominated and confirmed to serve on the new array of federal appellate courts created by the Judiciary Act of 1801 in the waning days of the Adams Administration, was unconstitutional, as was the reassignment of Supreme Court judges to the hated duty of “riding circuit.”

Yet, of course, in both cases the Court acquiesced to the desires of their Jeffersonian political masters. For all of the harrumphing in *Marbury*, William Marbury was denied his commission because of a truly debatable reading of the law that applied. Federal appellate courts would not become part of our institutional structure until 1891, and, of course, circuit riding continued throughout the 19th century. My mentor, Robert McCloskey, praises Marshall as a “master of indirection,” i.e., of a demonstrated willingness to compromise some basic principles in order to save judicial power to be useful, presumably, in another and, from Marshall’s perspective, happier day. Marshall was truly “attached” to the Supreme Court, but this attachment might, at least on occasion, generate a more uncertain attachment to legal fidelity itself.

Now do a fast forward to 1956 for what is, for most lawyers, an even clearer example of a Supreme Court decision that can be explained only in terms of preferring its own institutional interests—and, if one wishes to be generous, a reading of the national political interest—against the vindication of legal rights enjoyed by the litigants in front of it. One does not have to be a full partisan of Ronald Dworkin’s notion of what it means to “take rights seriously” in order to believe that the magnificent promise of “Equal Justice Under Law” means that the justices will not “throw the case” because of the fear of popular response. I refer to the infamous case of *Naim v. Naim*, where the Supreme Court dismissed a case before it on its appellate docket challenging Virginia’s law banning inter-racial marriage, as being “devoid

28. 5 U.S. 137 (1803).

29. 5 U.S. 299 (1803).

30. I elaborate upon these arguments in Sanford Levinson, *Why I Don’t Teach Marbury (Except to Eastern Europeans) and Why You Shouldn’t Either*, 38 WAKE FOREST L. REV. 553, 553–78 (2003).

of a properly presented federal question.”³¹ This was, of course, well before the days when the Supreme Court was, in effect, granted total control over its docket, so that it can dodge potentially embarrassing cases simply by denying a writ of certiorari.³² Though, to be sure, there is a vigorous debate as to the criteria by which the Court exercises this basically plenary power and whether there is any genuine principle underlying its sometimes almost whimsical decisions to take or reject a given case.³³

But, at least in theory, the Court had far less discretion with regard to decisions that were part of its appellate docket, and it was surely plausible to believe that the Court’s decision in *Brown v. Board of Education*,³⁴ however ambiguous, would have doomed Virginia’s bar to interracial marriages. Of course, it is also plausible to believe that the Court would have created far more trouble for itself had it corroborated Southern racists’ deepest fear that *Brown* would ultimately reach into the bedroom and undo what had become the “traditional” law of marriage. The Court, of course, unanimously invalidated the Virginia law just eleven years later in the aptly named *Loving v. Virginia*,³⁵ when American mores had presumably changed sufficiently to make *Naim* noteworthy primarily to academics.³⁶ But 1955 was the era of “massive resistance” and uncertainty about the willingness of the White South to accept the Court’s decision, thus the counsel of prudent compromise. As Felix Frankfurter wrote his colleagues in private, there were “moral considerations” compelling dismissal of the appeal “far outweigh[ing] the technical considerations in noting jurisdiction.”³⁷

Alexander Bickel, in his famous defense of the “passive virtues,”

31. 350 U.S. 985, 985 (1956). For prior history, see 350 U.S. 891 (1955) (per curiam) and 87 S.E.2d 749 (Va. 1955).

32. In this context, one might compare *Naim* with *Jackson v. State*, 72 So. 2d 114 (Ala. Ct. App.), cert. denied, 72 So. 2d 116 (Ala. 1954), cert. denied, 348 U.S. 888 (1954), in which “Linnie Jackson, a black woman, was sentenced to five years in the state penitentiary for marrying a white man. The U.S. Supreme Court, fearing that a decision striking down the Alabama statute would cause irreparable harm to its efforts to enforce *Brown*, dismissed Jackson’s handwritten petition for certiorari without comment, leaving her to serve out her term.” THE SUPREME COURT IN CONFERENCE 695 n.146 (Del Dickson ed., 2001).

33. See, e.g., Sanford, Levinson, *Assessing the Supreme Court’s Current Caseload: A Question of Law or Politics?*, 119 YALE L.J. ONLINE 99–111 (2010), <http://yalelawjournal.org/2010/02/01/levinson.html>.

34. 347 U.S. 483 (1954).

35. 388 U.S. 1 (1967).

36. My University of Texas colleague Justin Driver has recently suggested in conversation that public opinion polls from the time suggest that there was less support for interracial marriage than some analysts of *Loving* have asserted was the case. See, e.g., the polls collected at <http://www.marriageequality.org/polls-and-studies>, which suggest that a majority of Americans did not approve of interracial marriage until 1991, more than two decades after *Loving*.

37. See MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 322 (2004).

defended the Court's decision as exemplifying "techniques that allow leeway to expediency without abandoning principle"; "the Court found no insuperable difficulty in leaving open the question of the constitutionality of anti-miscegenation statutes, though it would surely seem to be governed by the principle of the *Segregation Cases*."³⁸ "Leaving open" is a bit of a euphemism, because the consequence of *Naim* was to leave in place an absolutely egregious decision of the Virginia court that literally criminalized the marriage at issue in that case. Perhaps one can say that compromises do not fully "abandon principle," but they often leave ostensible principles hanging by the weakest of threads.

Thus, Gerald Gunther, in his equally famous review of *The Least Dangerous Branch*, excoriated Bickel. Gunther obviously agreed with Herbert Wechsler's comment that "[t]he procedural grounds cited by the Court in dismissing the miscegenation case were . . . 'wholly without basis in the law.'"³⁹ Gunther concedes that "[n]o doubt there were strong considerations of expediency against considering the constitutionality of anti-miscegenation statutes in 1956,"⁴⁰ but presumably, we hire our justices to avoid such claims of expediency and uncompromisingly to enforce the Constitution. Unless, of course, we do not, so that, regardless of our politics, we expect justices to display a form of prudence in their exercise of legal authority that involves the sacrifice of clear legal rights in the service of higher goals, even though it is a feature of such decisions that the presumptively higher goals, including preservation of the Court's own authority, go completely unmentioned. As Gunther famously put it, Bickel's view translated into a view that the Court should be 100% principled 20% of the time, with the actions devoid of legal principle being sufficiently "passive" to remain hidden save from the cognoscenti, who would presumably share the Justice's "attachment" to preserving judicial power and tolerate the compromises made in its name.⁴¹

Let me offer one final example of such "compromise," the (in)famous *Newdow* case involving the legitimacy of "under God" in the Pledge of Allegiance.⁴² I personally found the Ninth Circuit decision invalidating the words clearly correct as an interpretation of the Establishment Clause and what I believe is its requirement that the State take no position on any theological issue.⁴³ That being said, I must also say that I was delighted by

38. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 71 (1962).

39. Gerald Gunther, *The Subtle Vices of the 'Passive Virtues'—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 12 (1964) (quoting Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, in *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 3, 47 (D. W. Bowett ed., 1961)).

40. *Id.* at 12.

41. *Id.* at 3.

42. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

43. *See Newdow v. U.S. Congress*, 328 F.3d 466, 487 (9th Cir. 2002).

the fact that the Court, I believe, engaged in an all-out display of Bickelian “passive virtues” by inventing patently specious “standing” arguments that allowed the Court to dump the case. Why was I delighted? Not particularly because I am so concerned that the Court maintain its institutional authority; as a self-described constitutional “protestant,” I am not a member of the “cult of the Court.” Rather, I was convinced that a decision upholding the Ninth Circuit would be a disaster for the political party with which I affiliate.

Nonetheless, I can easily recognize why Dr. Newdow can legitimately believe himself to have been deprived of his basic legal rights because of the cowardice of the Court with regard to adjudicating his claims. One might ask, of course, why the Court granted certiorari in the first place. Presumably, one reason may be the reluctance of at least four members of the Court to leave the Ninth Circuit’s decision in place. One “virtue,” if that is the right word, of the Court’s dismissal on grounds of standing is that it also erased the presumptively distasteful decision below.

But consider the earlier distinction between “rotten” and merely “dreadful” compromises. One might easily say, for example, with regard to the two “great compromises of 1787,” that the one with slavery was truly “rotten,” while the capitulation to Delaware and other small states regarding voting power in the Senate was merely “dreadful.” Might one also apply these same categories of analysis to, say, *Naim* and *Newdow*, assuming, obviously, that one first accepts my critiques of both in terms of their legal integrity? *Naim* might easily be described as “rotten,” given not only the consequences for the family but also for the obvious way that it is linked in important ways with the slavery compromise itself, predicated on the inferiority of Blacks—it would obviously be anachronistic to refer to “African-Americans,” since the very point of *Dred Scott*, for example, is that slaves and their descendants were simply incapable of being part of the American constitutional community. Any justification of *Naim* must be similar to that of the Three-Fifths Compromise itself, that the end was so obviously important, whether gaining a Constitution in the first place or maintaining the uneasy racial peace in the South following *Brown* and the rise of “massive resistance,” as to override the altogether meritorious claims, on both legal and moral grounds, of the Naims.

Newdow, on the other hand, even from the perspective of a radical separationist like myself, who would strip “In God We Trust” from the U.S. currency, involves a *de minimis* violation of constitutional norms, and a decision upholding the Ninth Circuit’s decision would have contributed, in possibly dangerous ways, to the “culture war” taking place between the secular and the religious in the United States. Even if one concedes that Dr. Newdow was denied an important constitutional right, it does not have the

same weight, especially given the more terrible aspects of the American historical and constitutional narrative, as the right at stake in *Naim*. Compromise is indeed called for with regard to navigating the shoals of religious (and non-religious) pluralism in the United States in a way that is perhaps different from what is involved in coming to terms with our history of slavery and systematic racial subordination.

IV. INTRA-COURT COMPROMISE

One of the most interesting features of *Naim* is that it drew no dissent, even though it is rather difficult to believe that none of the Justices shared Wechsler's view of the legal merits of the dismissal. Indeed, fully a half century later, a very distinguished senior professor at Harvard who has devoted his life to the study of federal courts can still summon up a sense of outrage when reminded of *Naim*. So why, we might legitimately ask, was there no dissent?

I do not have firm evidence as to the answer, but I would be astonished if there were not some collective agreement on the part of the Justices to let this sleeping dog lie, at whatever the cost to judicial integrity as defined by law professors. But, obviously, the tactic would work only if no Justice, in effect, blew the whistle and excoriated his colleagues for their questionable behavior. So each and every member of the Court had to compromise, to remain silent in the presumptive interests of the institution at large. Were they right to do so?

Justice Breyer delivered an interesting lecture on *Dred Scott* in Berlin posing just such a question. He noted the expansiveness of Chief Justice Taney's decision not only invalidating the Missouri Compromise, but also declaring that Blacks simply could not be part of the American political community (and thus entitled to access to federal courts). Taney was met with a vigorous dissent written by Justice Benjamin Curtis, which Justice Breyer obviously finds persuasive. But then he asked his audience to consider "a hypothetical question":

Suppose you were Benjamin Curtis. Imagine that Chief Justice Taney comes to your chambers and proposes a narrow ground for deciding the case. He asks if you will agree to a single paragraph unsigned opinion for the entire Court, in which the Court upholds the lower court on the ground that the matter is one of Missouri law in respect to which the Missouri Supreme Court must have the last word. He will agree to this approach provided that there is no dissent.⁴⁴

44. Justice Stephen Breyer, *Guardian of the Constitution: The Counter Example of Dred Scott*, Lloyd Cutler Distinguished Visitorship in Law, The American Academy in Berlin—Hans Amhold

This would, among other things, have left the person Dred Scott and his family high and dry, because the Missouri court rejected their claims to freedom. “Should you agree?” asked Justice Breyer. Acquiescing to Taney’s request would “create no significant new law . . . [would] not diminish its own position in the eyes of much of the Nation . . . [or] issue an opinion that increases the likelihood of civil war.” “Not a bad bargain,” said Justice Breyer.⁴⁵ Referring to a previous audience to which he had directed the same question, Breyer went on to note that:

[A] small voice came from the back of the room. “Say no.” And the audience broke into applause. That applause made clear the moral nature of the judge’s legal obligation in that case. A close examination of the *Dred Scott* opinion, then, can teach us something about rhetoric, reason, politics, constitutional vision, and morality—these lessons still might apply to the work of a Supreme Court judge. These lessons help us understand the role of the judge in a politically sensitive case, including cases involving the protection of individual rights, particularly in instances where the Constitution points one way and public opinion the other.⁴⁶

So what *should* our response be when judges agree to suppress dissents or even concurrences that have the effect of turning an “Opinion of the Court” into a plurality opinion even if the legal result is the same? Judge Posner, for example, has suggested that it is almost inconceivable that Chief Justice Rehnquist and Justices Scalia and Thomas actually agreed with the views expressed in the *per curiam* opinion in *Bush v. Gore*,⁴⁷ given their own general skepticism about capacious readings of the Fourteenth Amendment. Geoffrey Stone in fact agrees: “No one familiar with the jurisprudence of Justices Rehnquist, Scalia and Thomas could possibly have imagined that they would vote to invalidate the Florida recount process on the basis of their own well-developed and oft-invoked approach to the Equal Protection Clause.”⁴⁸ Unlike Posner, though, he is harshly critical of their joining the *per curiam* opinion, rather than relying exclusively on their own Article II interpretation, presumably because that would have led to the

Center (Dec. 15 2008), http://www.supremecourt.gov/publicinfo/speeches/sp_12-15-08.html (last visited Feb. 24, 2011). I am grateful to Adam Liptak for directing me to Justice Breyer’s speech.

45. *Id.*

46. *Id.*

47. 531 U.S. 98 (2000) (*per curiam*).

48. See Geoffrey R. Stone, *Equal Protection? The Supreme Court’s Decision in Bush v. Gore*, FATHOM ARCHIVE, <http://fathom.lib.uchicago.edu/1/777777122240/> (last visited Feb. 24, 2011).

anomaly that George Bush's trip to the White House would have been attained via two opinions (one written by Justices Rehnquist, Scalia, and Thomas, the other by Justices O'Connor and Kennedy) based on theories that would in fact be rejected by either six or seven of the other Justices. This paradox is always present with multi-member courts, and we usually tolerate it. But *Bush v. Gore* was not just any case, and it was vitally necessary that there be a majority of the Court willing to accept the same opinion.

It is also widely believed that Justice Stanley Reed consciously chose not to dissent in *Brown v. Board of Education*⁴⁹ on the grounds that, whatever the wisdom of the decision, it was institutionally important for the Court to present a united front. He presumably did not want to provide ammunition to those who were likely to resist the decision. It is also possible that his vitally important vote was in effect purchased through the commitment on the part of the other Justices to go slow with regard to the implementation of *Brown*, as in fact occurred in 1955 with so-called *Brown II* and its adoption of an "all deliberate speed" standard that, over the next decade, produced far more deliberation (and non-desegregation) than speed.⁵⁰

It is worth noting that previous Courts often operated under strong norms in favor of unanimity. Imposition of such a norm was perhaps one of Marshall's greatest achievements with regard to his strengthening the role of the Court during his tenure. The 1924 edition of the American Bar Association's Canon of Judicial Ethics stated, "It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision."⁵¹ Chief Justice William Howard Taft, Brandeis's superior during a decade of his service, in particular detested dissenting opinions, writing to one correspondent that "I think it would be better to have none, but the custom has grown so now that it can not be eradicated . . ."⁵² Indeed, he wrote President Harding objecting to the possible appointment of a New York Court of Appeals judge because he:

[H]as a marked trait as a Judge that would make him of very doubtful use on our Bench. He is a great dissenter. He was a professor of Law in Cornell for five or ten years, and he evidently thinks it is more important that he should ventilate his individual

49. 347 U.S. 483 (1954).

50. 349 U.S. 294, 301 (1955).

51. ABA Canons of Judicial Ethics, Canon 19 (1924), in Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal, Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1284 (2001).

52. *Id.* at 1310–11 n.138 (quoting Letter from William Howard Taft to Walter S. Whiton (Apr. 19, 1923) (Taft Papers, Reel 252)).

views than that the Court should be consistent and by team work should give solidarity and punch to what it decides.⁵³

(Perhaps one way of understanding the current Supreme Court is that it has too many former professors!) One can be confident that Taft, with his emphasis on “team work,” believed in the importance of compromise and therefore the non-ventilation of perhaps idiosyncratic views, however sincerely believed.

Perhaps Taft would have been heartened by a memo written to his colleagues by one of his successors as Chief Justice, William Rehnquist. While writing a prospective majority opinion for the Court, Rehnquist circulated the following note:

I prefer the position taken in the most recent circulation of my proposed opinion for the Court, but want very much to avoid a fractionated Court on this point If a majority prefer Nino’s view, I will adopt it; if I can get a majority for the view contained in the present draft, I will adhere to that. If there is some “middle ground” that will attract a majority, I will even adopt that.⁵⁴

If this is not devotion to team work, I am not sure what would be!

Still, as already suggested, it is logically entailed that someone tempted to dissent disagrees with the result in the particular case and believes that the loser should have won (or, at least, that the winner should not have prevailed). And if one has a “prophetic” and “uncompromising” temperament of the kind often ascribed to Brandeis, one might expect a significant degree of ambivalence about the ABA’s and Taft’s solidaristic injunctions to judges. Part of the message of Alexander Bickel’s *The Unpublished Opinions of Mr. Justice Brandeis* is that Brandeis was quite willing to subordinate articulation of his own views with regard to majority opinions with whose results he agreed. But what about dissents, and the particular problems they raise?

One chapter is devoted to what Bickel calls the “Dissenter’s Dilemma,”⁵⁵ about the truly obscure case of *St. Louis, Iron Mountain &*

53. *Id.* at 1311 (quoting Letter from William Howard Taft to Warren G. Harding (Dec. 4, 1922) (Taft Papers, Reel 248)).

54. Frank Cross & Emerson Tiller, *Understanding Collegiality on the Court*, 10 U. PA. J. CONST. L. 257, 259 n.10 (2008) (quoting BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 21 (1996) (internal quotes omitted)).

55. See ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK* (1957).

Southern Railway v. Starbird.⁵⁶ There is truly no reason to set out the legal issues involved. The most important thing about it, from our perspective, is that Brandeis chose not to publish his dissent, which, ironically enough, had begun as a majority opinion that failed to persuade his colleagues. “Why,” Bickel asks, “did Brandeis then silently go along with the majority?”⁵⁷ Bickel notes that “in later years Brandeis at times suppressed his dissenting views on questions which he considered to be of no great consequence,”⁵⁸ save, of course, for the particular litigants. But, according to Bickel, this was not such a case, for it dealt with issues of federal jurisdiction about which Brandeis generally cared deeply.⁵⁹

Bickel suggests that a possible explanation is that Brandeis was new to the Court and had not yet issued a dissent. But Bickel in fact discerns a more significant explanation, “a reason of broader application, equally plausible in this case, and consistent with his practice in later years.”⁶⁰ The “dissenter’s dilemma,” for Bickel is not reducible simply to a decision to remain silent or to speak in protest (or even to indicate, without an accompanying opinion, that one in fact dissents). Rather, it is this: If one remains silent, with regard to “a possibly nascent doctrine which one deems pernicious,”⁶¹ one might hope that if only “nascent” it will in fact die on the vine and generate little future mischief. “Silence under such circumstances is a gamble taken in the hope of a stillbirth.”⁶² But, of course, the gamble might be unsuccessful, so that “silence will handicap one’s future opposition. For one is then chargeable with parenthood”⁶³ or, to use modern parlance, with “flipflopping” if one unexpectedly rejects a doctrine that was indeed “nascent” in an opinion that one signed. So why not dissent and preserve both one’s intellectual honor and the ability to fight another day? The answer is that “dissent may serve only to delineate clearly what the majority was diffident itself to say.”⁶⁴ So consider in this context a note from Brandeis to his fellow “Great Dissenter” Oliver Wendell Holmes, in which Brandeis, after initially noting his intention to dissent from Holmes’s majority opinion, instead writes that “I have concluded that dissent would only aggravate harm. Hence I shall not dissent.”⁶⁵

Melvin Urofsky, in his recent magisterial biography of Justice Brandeis, states that “despite his reputation as a great dissenter, [Brandeis] had from

56. 243 U.S. 592 (1917).

57. BICKEL, *supra* note 55, at 28.

58. *Id.*

59. *Id.* at 28–29.

60. *Id.* at 29.

61. *Id.* at 30.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 32.

the time he joined the Court believed that justices should refrain from dissenting except where necessary.”⁶⁶ He apparently distinguished between constitutional cases and those involving more mundane matters. “In ordinary cases there is a good deal to be said for not having dissents. You want certainty & definiteness & it doesn’t matter terribly how you decide, so long as it is settled.”⁶⁷ Thus, his famous comment that it is more important “that a rule of law be settled than that it be settled right.”⁶⁸ One wonders, for example, if Ronald Dworkin would agree.

But Brandeis was apparently also well aware of social dynamics. “There is a limit to the frequency with which you can [dissent], without exasperating men.”⁶⁹ Anyone who has been a member of any complex organization knows the truth of this observation. After all, as *Ecclesiastes* reminds us, there is “time to keep silence, and a time to speak.”⁷⁰ Is it fair to paraphrase this as “a time to compromise, and a time to stand on principle”? An example of Brandeisian compromise can be found in the draft of an opinion by Justice Harlan Fiske Stone, described by many analysts of the Court as both able and quite vain. “I think this is woefully wrong,” Brandeis wrote, “but do not expect to dissent.”⁷¹ After all, as Brandeis wrote Felix Frankfurter, “You may have a very important case of your own as to which you do not want to antagonize [other justices] on a less important case.”⁷²

Perhaps it is relevant in this context to note the answer delivered by Justice Antonin Scalia to a question that I asked him during a visit in 2010 to the University of Texas Law School. I mentioned a profile that had just been published in the *New York Times* on Seventh Circuit Court of Appeals Judge Diane Wood, apparently on the “short list” for nomination to the Supreme Court. She was named to the Seventh Circuit by President Clinton in 1995; as Sheryl Gay Stolberg, the author of the *New York Times*’s article, noted, “There were few liberals and just one woman on the federal appeals court” when Wood arrived.⁷³ She was promptly given advice by the chief judge, Richard Posner, who was, of course, also a colleague of Wood’s at the University of Chicago Law School. “The appeals bench, Judge Posner warned, was like ‘a system of arranged marriage with no divorce.’ His

66. MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 579 (2009).

67. *Id.*

68. *Id.*

69. *Id.* (alteration in original).

70. *Ecclesiastes* 3:7 (King James).

71. UROFSKY, *supra* note 66, at 579.

72. *Id.* (alteration in original).

73. Sheryl Gay Stolberg, *Judicial Bouts Reveal Powers of Persuasion*, N.Y. TIMES, Apr. 21, 2010, available at <http://www.nytimes.com/2010/04/22/us/politics/22court.html>.

message to his junior colleague was clear: Pick your battles carefully. Compromise when you can.”⁷⁴

I asked Justice Scalia what he thought of this advice. The answer was, basically, not much. Scalia noted that his colleague (and close friend) Ruth Bader Ginsburg would probably agree with Posner that Ginsburg dissents only when she feels deeply about the matter at issue. Otherwise, she may be more like the “team player” typified by the Rehnquist memorandum quoted earlier. Scalia strongly distanced himself from any such conception of his role. He stated that he had never signed an opinion with which he was not in substantial agreement.⁷⁵ Indeed, he noted that he had written separate opinions in rather minor cases, simply so he would not find himself having to explain an “inconsistency” when he stated a different opinion, presumably truer to his own views, in some future case. It was no surprise, then, to run across an article that Justice Scalia had written on dissenting opinions, in which he wrote, “To be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less differing views of one’s colleagues . . . that is indeed an unparalleled pleasure.”⁷⁶ One doubts that he would relish the comparison, but he was basically articulating a “Dworkinian” notion of the role of the judge, that is, to offer, as best as one can, one’s view as to what the “right answer” is to the legal conundrum posed in a particular case. A willingness to compromise obviously works against this conception.

Still, it should be obvious that Scalia’s sensibility is probably in the minority among justices, past or present, including, as we have seen, even such ostensibly “great dissenters” as Louis Brandeis. But this proclivity to compromise may take us close to out-and-out logrolling, where a judge quite self-consciously “trades” his vote with another justice who might otherwise vote differently in another case more important to the initial justice. My colleague Lucas Powe has uncovered evidence of just such vote-trading between Justices Brennan and Fortas.⁷⁷ Is such behavior, which we accept almost without comment with regard to legislators and presidents, more objectionable when we find it on the Supreme Court? If so, where do we draw the line? Did Brandeis, for example, cross it when he presumably decided not to antagonize Stone in the hope that he would garner Stone’s vote on some future, albeit unnamed, case?

74. *Id.*

75. The occasion did not lend itself to interrogation about the *per curiam* opinion in *Bush v. Gore*, where he provided the decisive fifth vote, though, of course, he also joined the three-Justice concurrence based on a wholly different theory of why the case was rightly decided.

76. Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 42.

77. Lucas A. Powe, Jr., *The Obscenity Bargain: Ralph Ginzburg for Fanny Hill*, 35 J. SUP. CT. HIST. 166, 166–67 (2010) (detailing Fortas’s willingness to join an opinion affirming the unjust conviction of Ralph Ginzburg in return for Brennan switching his vote and overruling a lower court determination that *Fanny Hill* was subject to prohibition as “obscene”).

V. CONCLUSION

I hope that I have adequately demonstrated that “compromise” is ubiquitous to constitutionalism. Whether we focus on the initial stages of constitutional design or the quotidian enforcement of the enacted norms by judges, we find examples of at least the temptation and often the actuality of compromise. Dedicated “constitutionalists” inevitably pay attention to the full context within which they operate and, with some regularity, trim their sails to take account of the prevailing winds of public opinion or simply the ability of other institutions, such as Congress, to retaliate against decisions that are perceived as unacceptable (however legally “required”). Justice Louis Brandeis remains for many of us an inspiring example of integrity in the law. But that only makes all the more significant that even his own behavior on the bench is scarcely devoid of the complexities presented by compromise.
