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TRASH TALK AT THE SUPREME COURT:  
REFLECTIONS ON DAVID POZEN'S  
CONSTITUTIONAL GOOD FAITH

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In his remarkably rich essay on the notion of “bad faith,” Professor David Pozen offers two quite different notions of the term. The first involves what might well be viewed as knowing deception — even lying — about matters one is ostensibly warranting, especially in contexts where the recipient has placed some measure of trust in the integrity of the speaker. “[I]ts core meanings,” Pozen tells us early on, involve “dishonesty, disloyalty, and lack of fair dealing.”<sup>1</sup> Such bad faith can be distinguished from honest errors; “to err is human,” after all, and we cannot reasonably expect that even those we trust will always “get it right” (whatever that might mean in specific contexts). But “bad faith” in the first sense does not involve honest mistakes. That fact is why, as Pozen notes, contract and commercial law are replete with doctrines and cases attempting to discipline “bad faith,” as its presence is corrosive of the trust necessary to sustain any relational enterprise.<sup>2</sup>

The second category is much more subtle, for it really involves self-deception; the errors involved are honest, at least from one perspective, but they are also the products of a refusal, it might be said, to pierce the veil of comforting illusions. Bad faith for Jean-Paul Sartre “is a lie to oneself”<sup>3</sup> that, presumably, is actually believed and incorporated into one’s self-understanding. Although Pozen understandably relies on Sartre, one can also think of Friedrich Engels and the notion of “false consciousness” that is so important within the Marxist tradition; the central role of ideology is to inculcate in people misleading subjective understandings of their “objective situation” in ways that leave them feeling that their lot in life, whether for good (for example,

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<sup>1</sup> David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 888 (2016). As he notes, the very first entry offered in *Black’s Law Dictionary* defines “bad faith” as “[d]ishonesty of belief or purpose.” *Id.* at 892 (alteration in original) (quoting *Bad Faith*, BLACK’S LAW DICTIONARY (9th ed. 2009)).

<sup>2</sup> *Id.* at 890–94.

<sup>3</sup> *Id.* at 895 (quoting JEAN-PAUL SARTRE, BEING AND NOTHINGNESS 87 (Hazel E. Barnes trans., Washington Square Press 1992) (1943)).

the top one percent) or for ill (lower orders), is justified.<sup>4</sup> The cure for the first kind of bad faith is really quite obvious: it is to tell the truth even when it is hurtful to one's own cause or preferences. To cure the second is far more complicated. It may require intensive therapy or other modes of self-examination, including analysis of the overall social conditions that led one to accept as true accounts that one now realizes are false.

Both of these modes of bad faith are important, even as they are different. On the one hand, many of the architects of the financial crisis of 2008 are surely scoundrels, having engaged in deceptive manipulation of various securities markets; we should lament that so few of them have been prosecuted or sent to jail. On the other hand, it may well be that the serene and undoubtedly sincere self-confidence of former Chair of the Federal Reserve Alan Greenspan in near-unregulated "free markets," a form of "bad faith" of its own, contributed more to the catastrophe than did the more deceitful criminals.<sup>5</sup> In any event, I can travel down only one of these roads in this brief comment, and I prefer to emphasize the first kind of bad faith by exploring some recent accusations directed by and at Justices of the Supreme Court. A more extensive essay, though, would surely explore the second as well.

Today's public dialogue is increasingly marked by a particular kind of vituperation directed at one's opponents. One does not hear the reassurance that "reasonable people can disagree" that, almost by definition, leaves little room for acrimonious allegations of bad faith.<sup>6</sup> Instead, allegations of deliberate bad faith abound.<sup>7</sup> It is worth noting,

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<sup>4</sup> "Ideology is a process accomplished by the so-called thinker consciously, indeed, but with a false consciousness. The real motives impelling him remain unknown to him, otherwise it would not be an ideological process at all. Hence he imagines false or apparent motives." Letter from Friedrich Engels to Franz Mehring (July 14, 1893), [https://www.marxists.org/archive/marx/works/1893/letters/93\\_07\\_14.htm](https://www.marxists.org/archive/marx/works/1893/letters/93_07_14.htm) [<https://perma.cc/SKT8-HWFT>].

<sup>5</sup> See Edmund L. Andrews, *Greenspan Concedes Error on Regulation*, N.Y. TIMES (Oct. 23, 2008), <http://www.nytimes.com/2008/10/24/business/economy/24panel.html> (discussing Greenspan's previous faith in the free markets, and how he recognized his role in supporting the deregulation that contributed to the crash).

<sup>6</sup> The major exception, perhaps, is when we believe that an arguable (albeit mistaken) position has been adopted for illegitimate reasons (thereby making the asserted professions "insincere" because the speaker cannot genuinely believe his or her own argument).

<sup>7</sup> For many of us, the *locus classicus* of such bad faith is the reliance by the majority in *Bush v. Gore*, 531 U.S. 98 (2000), on Warren Court precedents dealing with protecting equal voting rights, see *id.* at 104–05 (per curiam) (citing *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). One might, in this context, ponder the fascinating debate between Professor Geoffrey Stone, former Dean of the University of Chicago Law School, and Judge Richard Posner, a distinguished member (and former Chief Judge) of the United States Court of Appeals for the Seventh Circuit. Stone described the ruling as "a partisan political decision, not a decision about the meaning of the United States Constitution," basing his allegation, at least in part, on the near certainty, given the general tenor of their constitutional jurisprudence, that three of the Justices (Chief Justice Rehnquist and Justices Scalia and Thomas) could not truly have agreed with the equal protection analysis set out in the per curiam opinion

incidentally, that we do *not* criticize practicing lawyers for making arguments they do not personally believe, so long, at least, as they are not “frivolous.”<sup>8</sup> But, presumably, we have a different notion of what counts as professional integrity for adjudicators. These differing notions, of course, hint at a broader problem, which is that the existence of “bad faith” depends on the specific circumstances of the individual whose behavior is being analyzed.

One way of understanding the special vituperation attached to arguments about the United States Constitution is by recognizing the extent to which it functions as an object of “veneration”<sup>9</sup> within an American civil religion built around a sacralized document; indeed, our tendency toward Constitution worship may be part of “American exceptionalism,”<sup>10</sup> especially after World War II, when criticism of the Constitution basically disappeared from respectable American discourse. In my own work analyzing such worship and its implications, I found it easiest, given the realities of American culture, to analogize stances toward the Constitution to some basic cleavages within Christianity, the dominant religion historically within the United States, though I believe that the analogies hold with regard to all text-based religions.<sup>11</sup> I discerned “Catholic” and “Protestant” approaches to the Constitution, along two dimensions. The first involved what might be

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that they signed. As it happened, Judge Posner, who supported the decision on prudential grounds, agreed with Stone regarding the bad faith of the majority of the majority. The three Justices in question “don’t believe in that equal protection stuff.” See Sanford Levinson, *Bush v. Gore and the French Revolution: A Tentative List of Some Early Lessons*, 65 LAW & CONTEMP. PROBS., Summer 2002, at 7, 14–15 (quoting Patricia Manson, *Provost Stone and Judge Posner Discuss Judicial Decisionmaking*, CHI. DAILY L. BULL. (May 24, 2001), <https://web.archive.org/web/20051029074010/http://www.law.uchicago.edu/news/posner-stone-debate.html> (archived Oct. 29, 2005)). See TAN 33–37 *infra* for further comments about the propriety of signing opinions one does not agree with.

<sup>8</sup> See FED. R. CIV. P. 11(b)(2).

<sup>9</sup> See, e.g., Sanford Levinson, “Veneration” and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment, 21 TEX. TECH L. REV. 2443 (1990).

<sup>10</sup> It is important to distinguish the United States Constitution from the other fifty constitutions that structure politics in the United States. Many Americans are simply ignorant of the fact that their states have constitutions of their own, and even those who are aware of their state constitutions rarely tear up and display any special feelings about them. This fact may help to explain why there have been nearly 150 state constitutions over our 225-year history. A few states, such as Massachusetts, may be governed by their “original” constitution, but far more common is, say, New York, which, depending on the way one counts, is now on its fourth or fifth constitution. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 237–74 (Sanford Levinson ed., 1995); Nicholas O. Stephanopoulos & Mila Versteeg, *The Contours of Constitutional Approval* (Va. Pub. Law & Legal Theory Research Paper No. 43, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2646773](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2646773). Similarly, in looking abroad, one finds no analogue to the display of the sacred constitutional text in the shrine-like setting of the National Archives in Washington, D.C. Nor, it should go without saying, does one find similar “cults of the Founders.”

<sup>11</sup> SANFORD LEVINSON, CONSTITUTIONAL FAITH 27–30 (2d ed. 2011).

called “Constitution identity,” in particular whether “the Constitution” was viewed *exclusively* as a text (“*sola scriptura*,” as Protestant reformers put it) or, instead, as a complex mixture, as within Catholicism, of texts and traditional teachings — or doctrines — developed over time that take on an authority of their own. The second dimension has to do with institutional authority: is there a particular body or person who claims to be the “ultimate interpreter” and thus resolver of any controversies, or, in contrast, is interpretive authority far more pluralistic, perhaps even extending to the equivalent of what Protestants termed “the priesthood of all believers”?<sup>12</sup> This two-by-two matrix generates four possibilities: there are “Catholic-Catholics,” who both define the Constitution as a mixture of the initial text and traditions developed in its light and accept the Supreme Court as the final authority, even if with a bit of irony;<sup>13</sup> “Catholic-Protestants” who combine a complex notion of constitutional identity with the rejection of any truly definitive role for the Supreme Court; “Protestant-Catholics,” who both focus exclusively (they claim, plausibly or not) on the text of the Constitution and grant to the Court supreme authority to determine its meaning; and, finally, “Protestant-Protestants,” who combine textualism with what one or another version of what has come to be called “the Constitution outside the courts” or, on occasion, “popular constitutionalism.”<sup>14</sup> Given the history of Christian sectarianism — amply replicated, of course, within Judaism and Islam, to name only the three “Abrahamic” religions — it is not surprising that the emotions and languages attached to controversies and controversialists would often lead to self-descriptions of adherence to the one true faith and accusations that one’s opponents are engaging in the equivalent of heresy, worthy of Inquisitorial denunciation and, at least in olden times, an *auto-da-fé*. Such physical burnings have been replaced, perhaps, by fiery speech and accusations of “bad faith” rather than acceptance of the brute fact that all of the four possibilities define our actual practices, even if it is the case that any given individual is likely to adhere to only one of them. “Interfaith” amity ought never to be taken for granted when people really do believe in exclusive methods of ascertaining the meaning of sacred texts and view their adversaries as heretics basically serving the forces of evil.

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<sup>12</sup> *Id.* at 24.

<sup>13</sup> Think of Justice Jackson’s reminder that “[w]e are not final because we are infallible, but we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

<sup>14</sup> See, e.g., LEVINSON, *supra* note 11, at 29–30. Professor Larry Kramer has described a form of the “Protestant-Protestant” approach. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

Pozen quotes Justice Scalia's comment that he and his colleagues "are not in agreement on the basic question of what we think we're doing when we interpret the Constitution."<sup>15</sup> The central question is what follows from this undoubtedly accurate observation. One possibility is a tolerant acceptance of methodological pluralism. *E pluribus unum*, after all. Another, though, is to rail against those who disagree with one's own preferred position, calling into question their basic good faith. Justice Scalia seems generally, over his now 30-year career on the Court, to have preferred the second course, and one must assume, incidentally, that he is in entire "good faith" in doing so.

One need only consider his recent dissent in *Obergefell v. Hodges*,<sup>16</sup> which Pozen briefly adverts to in his article.<sup>17</sup> Rather remarkably, Justice Scalia accuses his five colleagues in the majority of engaging in a completely illegitimate "Putsch,"<sup>18</sup> bringing shame to the Court. Justice Kennedy and those who agreed with his opinion are failing, Justice Scalia asserts, to "function[] as *judges*."<sup>19</sup> Similar in its hostility is the conclusion to Chief Justice Roberts's own dissenting opinion, where he cautions those who are celebrating the constitutional protection now accorded same-sex marriage: "[D]o not celebrate the Constitution. It had nothing to do with it."<sup>20</sup> Indeed, Chief Justice Roberts had earlier written that "[t]he majority's decision is an act of will, not legal judgment. The right it announces has *no basis* in the Constitution or this Court's precedent."<sup>21</sup> What are we to make of such assertions?

One possibility is to dismiss such rhetoric as the equivalent of the kind of "trash talk" that professional athletes direct at one another, a source of entertainment for the fans who know that it's not to be taken too seriously — unless, of course, when it is because somebody has too thin a skin and does not recognize the degree to which such language should be treated as part of a rhetorical performance. This seems to be the latitudinarian approach adopted by Justice Breyer, speaking recently to an audience at the Harvard Kennedy School. He declared

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<sup>15</sup> Pozen, *supra* note 1, at 916 n.154 (quoting Jennifer Senior, *In Conversation: Antonin Scalia*, NEW YORK, Oct. 14, 2013, at 22, 24).

<sup>16</sup> 135 S. Ct. 2584 (2015).

<sup>17</sup> See Pozen, *supra* note 1, at 920 n.180, 948–49 & nn.314–15.

<sup>18</sup> *Obergefell*, 135 S. Ct. at 2629 (Scalia, J., dissenting). There is, of course, nothing rhetorically innocent about the use of such a word in the context of a Supreme Court decision. Most readers, I am confident, will associate the word with the Beer Hall Putsch by Hitler and his associates in Munich in 1923. See, e.g., *Beer Hall Putsch*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Beer\\_Hall\\_Putsch](https://en.wikipedia.org/wiki/Beer_Hall_Putsch) [<https://perma.cc/HWA5-7UFB>]. It is, shall we say, an especially incendiary word to use even in ordinary punditry, let alone a published opinion of the Supreme Court of the United States. Are we to believe that Justice Scalia is ignorant of its most likely association? And what does our answer tell us about the good or bad faith of his choice of language?

<sup>19</sup> *Obergefell*, 135 S. Ct. at 2629 (Scalia, J., dissenting).

<sup>20</sup> *Id.* at 2627 (Roberts, C.J., dissenting).

<sup>21</sup> *Id.* at 2612 (emphasis added).

that in their interpersonal relations, “I’ve never heard one judge . . . say something really mean, even in a joking way, about another.”<sup>22</sup> When asked about Justice Scalia’s rhetoric in some of his dissents, Justice Breyer brushed it off: “We don’t mind. . . . That’s not a good reason to get angry at somebody personally if you’re sitting in my seat.”<sup>23</sup> Perhaps tellingly, the *Harvard Gazette* article reporting on Breyer’s talk was titled “Agreeing to disagree: Supreme Court Justice Breyer says rulings are strong but discourse thoughtful.”

One might wonder about Justice Breyer’s own good faith in offering his sanguine description, even if I am confident that he was not knowingly lying to his audience. (So perhaps Sartre is more relevant.) But I know that if someone reviewing one of my books, especially in a visible and highly respectable venue, suggested that my ideas were not only without merit (which, after all, might be true), but also failed to meet basic scholarly standards of evidence or argument, I would “mind” it intensely. And, frankly, I would be furious if someone told me to brush off such criticism on the ground that the reviewer had a proclivity for such trash talk. But perhaps I’m simply too thin-skinned.

The point is that neither Justice Scalia nor Chief Justice Roberts appears willing to admit that there might be “good faith” disagreement over how a properly “functioning” judge, loyal to his or her oath of office, might interpret a complicated Constitution in which precedent is thought to play a role. Even if one wishes to argue that *Loving v. Virginia*<sup>24</sup> should be interpreted more narrowly than the majority interprets it, the sheer availability of *Loving* would appear to provide evidence for the proposition that *Obergefell* has *some* “basis in the Constitution,” that is, that good-faith disagreement is in fact possible. Instead, both Justice Scalia and Chief Justice Roberts are implicitly suggesting that the Justices in the majority have simply traduced their commitments to the Constitution and have betrayed their “constitutional faith” signified, say, by their oath of office. But I take it that when Chief Justice Roberts castigates an alleged “act of will, not legal judgment,”<sup>25</sup> he is implying — and we are entitled to infer — that those in the majority really know better and, at the end of the day, just don’t care about legal fidelity. If these are not accusations of “bad faith,” perhaps even meriting impeachment, it is hard to imagine what would be.

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<sup>22</sup> Christina Pazzanese, *Agreeing to Disagree*, HARV. GAZETTE (Nov. 12, 2015), <http://news.harvard.edu/gazette/story/2015/11/agreeing-to-disagree> [<https://perma.cc/X2KL-U6NP>] (quoting Justice Breyer).

<sup>23</sup> *Id.* (omission in original) (quoting Justice Breyer).

<sup>24</sup> 388 U.S. 1 (1967).

<sup>25</sup> *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

Justice Scalia's argument depends on a firm consensus of belief — should we call it “faith” — that we know exactly what it means to “function[] as judges” and that the members of the majority violated that consensus. All of us know that a judge who accepts bribes to come out a certain way is not “functioning” as a genuine judge, even if we can find examples of “judges” who have done so. But what beyond bribery is a clear case of “dysfunctionality” with regard to judging? And, most importantly, is writing a decision with which one vehemently disagrees such a case? Similarly, with regard to Chief Justice Roberts's fulminations, we must equally know exactly what it means to remain within the boundaries of “the Constitution” as against betraying it by leaving it behind while engaging in one's own version of the triumph of the will. “Functioning as judges” — or, for that matter, “the Constitution” — exemplifies what political theorists call “essentially contested concepts.”<sup>26</sup> Even as Justice Scalia recognizes that there is no genuine consensus these days — or perhaps ever — on such questions, he seems angry that this is the case and lashes out at those who disagree with his own favored definitions.

“Essentially contested concepts” have two basic properties: First, there is in fact no agreement on exactly what the term in question means; second, it has a highly positive valence within public — and not merely narrowly professional — discourse. Whether the United States Constitution, or the American system of government founded on it, is “democratic,” in an age that privileges “democracy,” is not of interest only to political or constitutional theorists.<sup>27</sup> One wants to capture it for his or her side of ongoing debates; there is special temptation to engage in what might be termed less than a “good faith” exploration of the complexities attached to the terms in question. “Proper judging” is similarly a politically, as well as theoretically, loaded term. Imagine a nominee for the Supreme Court saying, at a Senate confirmation hearing, “I know what the ‘function of judging’ is: it is to remain within the constraints imposed by the Constitution, but the Constitution itself informs us, in the Preamble, that decisions should be made, if at all possible, by reference to the overwhelming purpose of ‘establish[ing] justice,’ which is, after all, the point of this whole enterprise. I will make my own decisions under the aegis of the Preamble.” That is roughly what I teach my students, in “good faith,” in introducing them to what it means to think seriously about constitutional fidelity. I confess, though, that I would at least be wary before declaiming this to a Senate committee, at least if I were eager to be

<sup>26</sup> See generally W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167 (1956); WILLIAM E. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* (2d ed. 1983).

<sup>27</sup> See, e.g., SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006).

confirmed.<sup>28</sup> It would, of course, be embarrassing if anyone brought up my published work, but, as we know, scholars can always proclaim that they were writing “thought experiments” not really intended to be taken all that seriously.

One might doubt that Professor Mark Tushnet was ever a likely candidate for the federal judiciary, but any hopes were presumably permanently stilled by his exuberant comment in the pages of the *Ohio State Law Journal* that, as a judge, he would always ask what decision in a case was “likely to advance the cause of socialism.”<sup>29</sup> During her own confirmation hearings to join the Supreme Court, former Harvard Law School Dean Elena Kagan was asked by then-Senator Tom Coburn of Oklahoma about Tushnet’s statement, given that Tushnet had joined the Harvard faculty on her watch and, presumably, with her approval. “If Professor Tushnet meant that a judge should decide cases based on her own policy views about the best result,” Kagan responded, “then I would characterize that approach as contrary to the rule of law. . . . Judges should decide cases based on legal sources, not on policy or political views.”<sup>30</sup> Judge Richard Posner, among others, has ridiculed the repetition of such completely apolitical views of law, most notably, perhaps, in a Foreword written for this *Review*.<sup>31</sup> It is hard to imagine that we would ever expect a candidate for the bench, as against a tenured professor, to be so completely candid as Tushnet was or, indeed, as the life-tenured Judge Posner so consistently (and admirably) is.<sup>32</sup> I find it hard to imagine that Pozen would disagree.

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<sup>28</sup> Is it fair, therefore, to question the “good faith” of recent nominees to the Court, who have assured the Senate Judiciary Committee that they conceive themselves as restricted to the role of neutral “umpires” or otherwise selfless servants of “the rule of law”? Or are such assertions merely the price we exact in the peculiar degradation ceremony of Senate confirmation hearings, that very smart and capable (and ambitious) people must utter banalities that they (and at least sophisticated members of their audiences) know to be, at best, misleading or, at worst, simply untruthful. One suspects that all of them can identify with Galileo, who, legend has it, said, after his forced recantation of Copernican heliocentrism, “*e pur, si muove*” — “even so, it does move,” referring to the Earth. Alan Cowell, *After 350 Years, Vatican Says Galileo Was Right: It Moves*, N.Y. TIMES (Oct. 31, 1992), <http://www.nytimes.com/1992/10/31/world/after-350-years-vatican-says-galileo-was-right-it-moves.html>.

<sup>29</sup> Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981).

<sup>30</sup> *Kagan on Mark Tushnet and Harold Koh: Post Confirmation Hearing Responses to Senators Questions*, CONST. L. PROF. BLOG (July 10, 2010), <http://lawprofessors.typepad.com/conlaw/2010/07/kagan-on-mark-tushnet-and-harold-koh-post-confirmation-hearing-responses-to-senators-questions.html> [https://perma.cc/XS4Y-WFNY].

<sup>31</sup> See Richard A. Posner, *The Supreme Court, 2004 Term — Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005).

<sup>32</sup> Can one imagine the Senate confirming a nominee who had written a book entitled *Overcoming Law* that, among other things, subjects the views of such a legal process denizen as Herbert Wechsler to ridicule? See RICHARD A. POSNER, *OVERCOMING LAW* 70–80 (1995).

Things get even more complex if we move beyond the foolish assumption that all adjudicators are splendidly isolated, akin to Ronald Dworkin's famous (or notorious) Hercules, who makes decisions even in "hard cases"<sup>33</sup> secure in the knowledge that no other colleague must in fact be induced to sign on to them; nor is Hercules plagued by having to decide whether to join an opinion. He presumably writes seriatim opinions in every single case. So consider Justice Ginsburg's recent comment that "an opinion of the court very often reflects views that are not 100 percent what the opinion author would do, were she writing for herself."<sup>34</sup> This is equally true, of course, with regard to opinions that a Justice joins in lieu of writing a presumptively more persuasive or elegant concurrence (or, on occasion, even dissent). But perhaps, as Justice Ginsburg suggests, one is interested in getting to five in order to create an "Opinion of the Court" — or even, as in, say, *Brown v. Board of Education*,<sup>35</sup> getting to a politically desirable unanimous nine. Is intellectual compromise, where by definition one might step back from "the best" arguments in favor of merely "acceptable" or even truly "questionable" ones, itself "bad faith"? Were we talking of even an untenured law professor who shades her views in order to curry favor with a tenure committee or some other source of reward, I would be inclined to answer yes. But, as already suggested, the central question may be whether judges and other public figures are so essentially different from professors that it is incumbent on them to engage in a variety of compromises that are deemed, all things considered, to serve the public weal.

Consider in this context the remarkable book that collected a number of Justice Brandeis's unpublished opinions, including dissents.<sup>36</sup> On more than one occasion, he decided to serve the interest of collegiality, given particularly thin-skinned colleagues, or, even more relevantly, to suppress a dissent because of a deeply tactical decision to leave himself free, in a future case, to "interpret" the offending precedent in a palatable way without being embarrassed by having published a dissent offering a decidedly unpalatable reading of the decision in question.<sup>37</sup> Did "Isaiah," his nickname among those who

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<sup>33</sup> See, e.g., Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975), as reprinted in RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81–130 (1977); RONALD DWORKIN, *LAW'S EMPIRE* (1986).

<sup>34</sup> Irin Carmon, Opinion, *Justice Ginsburg's Cautious Radicalism*, N.Y. TIMES (Oct. 24, 2015), <http://www.nytimes.com/2015/10/25/opinion/sunday/justice-ginsburgs-cautious-radicalism.html> (quoting Justice Ginsburg).

<sup>35</sup> 347 U.S. 483 (1954).

<sup>36</sup> THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS (Alexander M. Bickel ed., 1957).

<sup>37</sup> See *id.*; see also Sanford Levinson, *Compromise and Constitutionalism*, 38 PEPP. L. REV. 821 (2011).

especially emphasized his rectitude,<sup>38</sup> not truly function as a judge in such instances?

One might well wonder why there were no concurrences in *Obergefell*. Perhaps all of the signatory Justices thought it was nearly perfect as is. If one is justifiably dubious that is the case, then perhaps a more plausible explanation is simply a decision rule among the four Justices who joined Justice Kennedy's opinion that "whatever Tony wants, Tony gets" for something that could indeed be labeled an "Opinion of the Court" rather than merely a plurality opinion, even if the result, technically speaking, was the same. Justice Scalia was withering in his disdain: "If, even as the price to be paid for a fifth vote," he thundered, "I ever joined an opinion for the Court that began: 'The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,' I would hide my head in a bag."<sup>39</sup>

How we preserve trust in a notably fractious society is perhaps the most important question facing the United States today.<sup>40</sup> Even if one believes, as I do, that we must also turn ourselves to the various "iron cages" that generate the second type of bad faith, including our exaggerated veneration of the Constitution, it would be foolish to deny the corrosive significance of perceptions and accusations of subjective "bad faith" on the part of our highest legal officials. David Pozen is to be congratulated for his efforts to put these issues on the agenda. I can only hope he is successful.

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<sup>38</sup> See Levinson, *supra* note 37, at 824.

<sup>39</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 n.22 (2015) (Scalia, J., dissenting).

<sup>40</sup> See, e.g., STEPHEN M. GRIFFIN, *BROKEN TRUST: DYSFUNCTIONAL GOVERNMENT AND CONSTITUTIONAL REFORM* (2015).