

Racial Equality Compromises

Yuvraj Joshi*

Can political compromise harm democracy? Black advocates have answered this question for centuries, even as most academics have ignored their wisdom about the perils of compromise. This Article argues that America's racial equality compromises have systematically restricted the rights of Black people and have generated inequality and distrust, rather than justice and unity. In so doing, these compromises have impeded the achievement of a multiracial democracy.

DOI: <https://doi.org/10.15779/Z38901ZH1V>

Copyright © 2023 Yuvraj Joshi.

* Fellow, Harvard Carr Center for Human Rights; Faculty Affiliate, UCLA School of Law Promise Institute for Human Rights; Assistant Professor, University of British Columbia Allard School of Law; J.S.D., Yale Law School. This Article benefited from conversations with Kathryn Abrams, Lisa Alexander, Rebecca Aviel, Mario Barnes, Paulo Barrozo, Genevieve Bates, Mary Sarah Bilder, Michael Bronstein, Bennett Capers, Kent Greenfield, Emilia Jocelyn-Holt Correa, Raff Donelson, Robin Effron, Daniel Farber, Jonathan Feingold, Roderick Ferguson, Catherine Fisk, Cary Franklin, Sara Ghebremusse, Daniel Harawa, Luke Herrine, Alexis Hoag-Fordjour, Darren Hutchinson, Osamudia James, Lucas Janes, Asha Kaushal, Gail Lewis, James Macleod, Carrie Menkel-Meadow, Martha Minow, Thomas Mitchell, Jamelia Morgan, Samuel Moyn, Colleen Murphy, Colm O'Conneide, Ngozi Okidegbe, Danieli Evans Peterman, Ximena Benavides Reverditto, Diane Ring, Mathias Risse, Jesús Rodríguez, Reva Siegel, and Katherine Young, and from presentations at the Association for American Law Schools, Boston College Law School, Boston University School of Law, Brooklyn Law School, Harvard University, Law and Society Association, National Conference of Constitutional Law Scholars at Arizona Law, Public Law Conference at University College Dublin, Texas A&M School of Law, University of British Columbia Allard School of Law and Green College, University of California, Irvine School of Law, University of Southern California Gould School of Law, Washington University at St. Louis, and Yale Law School. Special thanks to Merran Hergert, Thea Udawadia, and Liana Wang for excellent research and editorial assistance and to the editors of the *California Law Review*, especially Arni Daroy, for their exceptional efforts.

Using unpublished archival documents, the Article examines how Black advocates throughout history approached compromises on equal rights. It examines how figures like Booker T. Washington, W. E. B. Du Bois, Martin Luther King, Jr., Bayard Rustin, and Fannie Lou Hamer conceived of historic compromises, what kinds of compromises they were willing and unwilling to make, and when they were prepared to sacrifice more ambitious goals for modest gains. This historical account shows that even “compromising” figures distinguished between principled and unprincipled compromises, and how pressures from “uncompromising” Black activists sometimes facilitated more just and effective outcomes—findings that prove useful for modern-day equality debates.

The Article then examines court decisions that have been central to making and breaking America’s racial equality compromises. This legal analysis reveals that American society is currently constrained by previous judicial compromises that have both failed to secure equality and curtailed society’s ability to battle inequality. Competing forces—from a Black Lives Matter movement demanding racial justice to a Roberts Court ready to unravel longstanding equality precedent—are now driving the United States to reconsider these earlier compromises. Unfortunately, the problematic features from the racial equality compromises of the past are recurring in those proposed for the present.

Ultimately, this Article investigates how past compromises might help us approach present and future ones. It describes common democracy-constraining features of compromises, including their disregard for fundamental humanity, drawing of false equivalences, exclusion of subordinated groups, emboldening of dominant groups, and endangerment of long-term change. The Article applies this framework to current debates over policing, voting rights, the Senate filibuster, and Supreme Court reform, and, using lessons from history, cautions against accepting democracy-constraining features in these contexts. This Article thus reconsiders the value of compromise by learning from Black advocates who lived through the consequences of past equality compromises.

Introduction	531
I. The Nature of Compromise	538
A. Compromise and Law	538
B. Compromise and Democracy	541
C. Compromising vs. Uncompromising Mindsets	542
D. Principled vs. Unprincipled Compromises	544
II. Compromise in Black History and Political Thought	545
A. Foundational Compromises from the Constitution to Reconstruction	546

B.	The 1895 Atlanta Compromise Speech	550
C.	The 1964 Democratic National Convention	553
D.	Civil Rights Movement and Aftermath.....	558
E.	Summary and Some Reflections.....	566
III.	Compromise in Equality Jurisprudence	568
A.	<i>Brown’s</i> Compromise on School Integration.....	569
B.	<i>Bakke’s</i> Compromise on Affirmative Action.....	574
C.	<i>Shelby County</i> and <i>Brnovich’s</i> Unraveling of Voting Rights	578
IV.	Democracy-Constraining Features of Compromises	585
V.	The Perils of Compromise in Present Debates.....	592
A.	Policing	594
B.	Voting Rights.....	598
C.	Senate Filibuster	600
D.	Supreme Court Reform.....	602
	Conclusion	604

INTRODUCTION

Democracy will not come
 Today, this year
 Nor ever
 Through compromise and fear.

—“Democracy” by Langston Hughes (1949)¹

Throughout American history, Black peoples’ struggles for racial equality have been met with reactionary compromises. The Constitution’s framers handed slaveholding states structural advantages in the name of national unity.²

1. LANGSTON HUGHES, *Democracy*, in THE COLLECTED WORKS OF LANGSTON HUGHES 415–16 (Arnold Rampersad ed., 2001).

2. See generally DAVID WALDSTREICHER, *SLAVERY’S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* (2009) (examining the role of slavery in the creation of the U.S. Constitution); PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* (3rd ed., 2014) (examining the Founding Fathers’ perspectives toward slavery). See also text accompanying *infra* notes 78–89 (discussing the slavery compromises the United States made in the name of national unity). While this Article focuses on compromises of Black equality, the United States was likewise founded on compromises of Indigenous power and sovereignty. The Founders’ compromises over colonialism and slavery required the denial of Indigenous people’s rights. See Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1801 (2019); AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 22–23 (2010) (noting that the American Revolution was “precondition[ed]” on “the expropriation of indigenous groups” and that the Anglo colonists carried “a set of ideological presumptions and imperial practices about indigenous dispossession”). Compromises were also enacted to harm other racialized minorities. For example, the distinction between “persons” in the Fourteenth Amendment and “citizens” in the Fifteenth Amendment was a compromise “between

The Reconstruction era promised racial equality but ended prematurely with the Hayes-Tilden Compromise of 1877.³ Even *Brown v. Board of Education* made concessions of Black rights to appease white supremacists.⁴ These recurring compromises have systematically restricted the rights of Black people. They have often generated inequality and distrust, rather than justice and unity. And they further threaten the current pursuit of a multiracial democracy—one in which Black people have “full equal standing” as “members of the polity.”⁵

The American political system was designed around compromise,⁶ and many Americans claim to want compromise in policymaking.⁷ Both Democratic and Republican administrations extol the value of compromise. For example, President Barack Obama urged both Republican politicians and Black student

a vision of universal racial equality and the hatred for Chinese immigrants.” Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 1935 (2000). See also Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 678 n.170 (2001) (noting the many studies that explore the “racialization of diverse groups of new Americans”) (internal quotations omitted).

3. See generally ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019) (examining the emergence and significance of the Reconstruction Amendments); C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* (1991) (examining the history of the Compromise of 1877); *THE WORLD THE CIVIL WAR MADE* (Gregory P. Downs & Kate Masur eds., 2015) (describing the post-Civil War United States). See also text accompanying *infra* notes 90–102 (discussing the Reconstruction Era’s “hopes for an uncompromised equality” before the Compromise of 1877’s “return to traditional ways of expediency and concession”).

4. See *infra* notes 211–244 (discussing *Brown v. Board of Education*, 347 U.S. 483 (1954), as a compromise).

5. K. Sabeel Rahman, *Democracy Reform Symposium*, 109 CALIF. L. REV. 979, 981 (2021). On this conception of democracy, “the fight for democracy is fundamentally, centrally, also a fight about racial equity” that “isn’t just in the courts . . . [or] even just in the legislatures, it’s this interplay between grassroots organizing, movement building, protest in the streets, and policy change.” *Id.* at 982.

6. The American valorization of compromise has deep historical roots. As Thomas Jefferson wrote to Edward Livingston on April 4, 1824: “A government held together by the bands of reason only, requires much compromise of opinion,” and “a great deal of indulgence is necessary to strengthen habits of harmony and fraternity.” JON MEACHAM, *IN THE HANDS OF THE PEOPLE: THOMAS JEFFERSON ON EQUALITY, FAITH, FREEDOM, COMPROMISE, AND THE ART OF CITIZENSHIP* 53–54 (2020). Likewise, James Madison wrote to Edward Everett on August 28, 1830: “Free constitutions will rarely if ever be formed without reciprocal concessions; without articles conditioned on and balancing each other.” Letter from James Madison to Edward Everett (Aug. 28, 1830), in *FEDERALISM* 100, 104 (Anthony J. Bellia, Jr. ed., 2nd ed., 2011).

7. Research reveals that voters reward politicians for “asserted bipartisanship” without evidence of “actual bipartisanship”: “[T]hrough bipartisan assertions, representatives can obtain the advantages of appearing moderate without the risks associated with actual cross-aisle compromise.” Sean J. Westwood, *The Partisanship of Bipartisanship: How Representatives Use Bipartisan Assertions to Cultivate Support*, 44 POL. BEHAV. 1411, 1427, 1431 (2021). See also Phillip M. Bailey & Sarah Elbeshbishi, *Hidden Common Ground Poll: Americans Want Compromise but Think Political Gridlock Will Worsen, USA TODAY* (Apr. 27, 2021), <https://www.usatoday.com/story/news/politics/elections/hiddencommonground/2021/04/27/americans-want-compromise-but-think-divides-worsen-poll-finds/7201888002/> [<https://perma.cc/6SG7-YG3P>] (reporting that many Americans want but do not anticipate political compromise).

activists to compromise for democratic change.⁸ Meanwhile, President Donald Trump's 1776 Advisory Commission condemned liberal "identity politics" for impeding "prudential compromise."⁹

But not all compromises have the same value. For example, Black people themselves making strategic concessions to advance their causes is different from White people finding common ground by sacrificing Black equality.¹⁰ Likewise, making concessions to advance racial justice and to play into longer-term strategies toward progress is different from endlessly delaying racial justice or trading short-term advances for longer-term drawbacks. Given America's racial history, American society must learn to differentiate between compromises that serve democratic aims and those that reproduce unequal and undemocratic power relations.¹¹

This Article therefore makes two main contributions. First, it identifies key democracy-constraining features¹² of compromise gleaned from the racial equality compromises of the past and the voices of Black advocates. Second, it cautions against accepting such democracy-constraining features in the racial equality compromises proposed for the present.

8. WHITE HOUSE OFF. PRESS SEC'Y, *Weekly Address: President Obama Calls for Compromise and Explains His Priorities on Taxes* (Nov. 6, 2010), <https://obamawhitehouse.archives.gov/the-press-office/2010/11/06/weekly-address-president-obama-calls-compromise-and-explains-his-priorit> [<https://perma.cc/K637-YD2R>]; Michael D. Shear, *Obama Says Thought and Compromise Are Key to Bringing Change*, N.Y. TIMES (May 7, 2016), <https://www.nytimes.com/2016/05/08/us/obama-says-thought-and-compromise-are-key-to-bringing-change.html> [<https://perma.cc/DQP6-RB7X>] (citing President Obama urging Howard University graduates to move from "righteous anger" to "organizing" and compromise).

9. THE PRESIDENT'S ADVISORY 1776 COMM'N, THE 1776 REPORT 31 (Jan. 2021), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf> [<https://perma.cc/5TPU-4LF6>].

10. The latter is the paradigmatic "racial compromise" that critical race scholar Derrick Bell studied. See generally DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004). This Article builds upon Bell's work by foregrounding Black advocates who contemplated compromises on equal rights and developing some normative and practical guidance based on their experiences of compromise.

11. In relation to the criminal legal system, Jocelyn Simonson argues that analysis through a "power lens" asks "whether the governance or reform arrangements at issue change the balance of actual power in decisions," and it "promotes a particular view of *contestatory democracy*, one in which democratic governance has as an objective the facilitation of countervailing power for those subject to the domination of the state." Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 787, 803 (2021).

12. Defined as features that can impose significant democratic costs, perhaps so significant that avoiding compromise altogether becomes more democratically advantageous in the long term. See *infra* Part IV.

Given that compromises are pervasive in law¹³ and frequently considered a democratic necessity,¹⁴ this Article provides guidance to legal and political actors on when and how *not* to compromise on racial equality. By learning from Black history and political thought, this Article offers a corrective to the standard American valorization of compromise.¹⁵

The Article begins by integrating the insights of academic fields that have studied compromise extensively. Part I discusses previous legal scholarship that has studied compromises¹⁶ and especially “racial compromise.”¹⁷ Looking

13. Many would say that the law as such, and constitutions especially, are the products of compromise. *See, e.g.*, John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2037–52 (2009) (exploring “Constitutional Compromise” and the “Lines of Compromise in the [Constitution]”); Sanford Levinson, *Compromise and Constitutionalism*, 38 PEPP. L. REV. 821, 822–31 (2011). Yet, an appeal to the necessity of compromise does not negate the possibility that the compromises necessary to enact certain laws render those laws not worth having.

14. *See generally* AMY GUTMANN & DENNIS THOMPSON, *THE SPIRIT OF COMPROMISE: WHY GOVERNING DEMANDS IT AND CAMPAIGNING UNDERMINES IT* (rev. ed., 2014). Especially when compromise is rationalized in the interest of democracy, we should consider whether that particular compromise, and the practice of making similar compromises, is democracy enhancing or constraining.

15. Some scholarship is concerned about the *undervaluing* of compromise in American society and thus highlights the benefits of compromise. *See, e.g.*, Carrie Menkel-Meadow, *The Ethics of Compromise*, in GLOBAL ENCYCLOPEDIA OF PUBLIC ADMINISTRATION, PUBLIC POLICY AND GOVERNANCE (Ali Farazmand ed., 2016). While fully accepting that compromise may have benefits, this Article is concerned about the *valorization* of compromise in American society and it thus has an asymmetrical focus on the costs of compromise. Future work should recognize these costs when generalizing about the value of compromise and the drawbacks of being uncompromising.

16. For legal scholarship concerning civil rights compromises, see, for example, Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1, 61–82 (1993); Gabriel J. Chin, *Private: Compromise and the Civil Rights Act of 1964*, AM. CONST. SOC. (July 18, 2014), https://www.acslaw.org/?post_type=acsblog&p=10353 [<https://perma.cc/FL4M-PY48>]. On abortion compromises, see, for example, Frances Olsen, Comment, *Unraveling Compromise*, 103 HARV. L. REV. 105, 133 (1989); Sylvia A. Law, *Abortion Compromise—Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 932–33 (1992); Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and Roe v. Wade*, 71 WASH. & LEE L. REV. 969, 1005–13 (2014). On LGBTQ+ compromises, see Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 840–41 (2014). *See also* LINDA C. MCCLAIN, *A Diversity Approach to Parenthood in Family Life and Family Law*, in WHAT IS PARENTHOOD?: CONTEMPORARY DEBATES ABOUT THE FAMILY 41, 45 (Linda C. McClain & Daniele Cere eds., 2013) (describing how civil unions for same-sex couples were proposed as a “principled compromise” in the marriage equality debate); Jennifer Wilson, *Horizontal Versus Vertical Compromise in Securing LGBT Civil Rights*, 18 TEX. J. WOMEN & L. 125, 127–30 (2008) (arguing that LGBT rights in the United States have been secured through incremental compromises).

17. On “racial compromise,” see generally especially BELL, *supra* note 10 (describing “racial compromise” as White people finding common ground by sacrificing Black equality).

beyond the law, it also synthesizes transitional justice¹⁸ and political science¹⁹ scholarship that addresses the relationship between compromise and democracy.²⁰ This literature offers analytical tools for classifying and understanding compromises that this Article then uses to examine American history and law.

With these tools in hand, Part II highlights patterns of racial equality compromise throughout American history. Doing so permits observation of how an American ideology of compromise is routinely deployed to accept and entrench racial injustice, and how patterns of racial equality compromise impede the achievement of a multiracial democracy, while situating the compromises proposed for the current moment in a much longer history.

Generations of Black advocates have operated in the shadow of legislative and judicial compromises.²¹ These experiences have given advocates a political literacy around compromise that is largely unacknowledged in legal scholarship. Using archival and other primary sources, Part II examines how Black advocates approached historic compromises on equality with a range of mindsets: from

18. Transitional justice scholars examine the need for compromises as societies attempt to overcome oppressive pasts. *See, e.g.*, CHANDRA LEKHA SRIRAM, CONFRONTING PAST HUMAN RIGHTS VIOLATIONS: JUSTICE VS PEACE IN TIMES OF TRANSITION 212 (2004); Bronwyn Anne Leebaw, *The Irreconcilable Goals of Transitional Justice*, 30 HUM. RTS. Q. 95, 101–02 (2008); Colleen Murphy, *III—On Principled Compromise: When Does a Process of Transitional Justice Qualify as Just?*, 120 PROC. ARISTOTELIAN SOC'Y 47, 56–57 (2020); Jonathan Allen, *Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 315, 318–26 (1999).

19. Political scientists study the benefits and limitations of compromises and the differences between principled and unprincipled ones. *See, e.g.*, AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES 1–19 (2010); Amy Gutmann & Dennis Thompson, *Valuing Compromise for the Common Good*, 142 DAEDALUS 185, 185 (2013) [hereinafter *Valuing Compromise for the Common Good*]; Amy Gutmann & Dennis Thompson, *The Mindsets of Political Compromise*, 4 PERSPS. ON POL. 1125, 1126–28 (2010) [hereinafter *The Mindsets of Political Compromise*]; Christian F. Rostbøll, *Democratic Respect and Compromise*, 20 CRIT. REV. INT'L SOC. & POL. PHIL. 1, 2, 14 (2017); Timothy J. Ryan, *No Compromise: Political Consequences of Moralized Attitudes*, 61 AM. J. POL. SCI. 409, 419 (2017); Lena Zuckerwise, “*There Can Be No Loser*”: *White Supremacy and the Cruelty of Compromise*, 5 AM. POL. THOUGHT 467, 474–78 (2016); Simon Căbulea May, *Moral Compromise, Civic Friendship, and Political Reconciliation*, 14 CRIT. REV. INT'L SOC. & POL. PHIL. 581, 585–87 (2011); Daniel Weinstock, *On the Possibility of Principled Moral Compromise*, 16 CRIT. REV. INT'L SOC. & POL. PHIL. 537, 538 (2013); Michele M. Moody-Adams, *Democratic Conflict and the Political Morality of Compromise*, 59 NOMOS: COMPROMISE 186, 190 (2018).

20. While this Article draws upon the two literatures that most directly address the relationship between compromise and democracy, other literatures, such as negotiation and game theory, might also shed light on the racialized dynamics of compromises.

21. “Judicial compromise” has at least two distinct meanings in American legal literature. In this Article, it refers primarily to the trade-offs that a judge or set of judges makes between different values and interests (one of those values being Black equality), rather than the process whereby members of a court make concessions to one another in order to reach particular outcomes. On the latter understanding of judicial compromise, see, for example, Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271 (2020); Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEG. ANALYSIS 101, 109 (2011).

“principled compromising”²² to “principled uncompromising”²³ to “fully uncompromising.”²⁴ Even “compromising” figures had ways of distinguishing between principled and unprincipled compromises, and pressures from “uncompromising” Black activists sometimes facilitated more just and effective outcomes. As discussed below, the compromising and uncompromising positions of Black activists constituted an “ecosystem” of social movement strategies, each position relying on the other to shape politics and law. This account attempts not only to contribute to the historical record, but also to elucidate modern-day equality debates and their relationship to compromise.

Part III explores how Supreme Court decisions have been central to making and breaking America’s racial equality compromises. Although *Brown v. Board of Education*²⁵ and *Regents of the University of California v. Bakke*²⁶ are widely recognized as products of compromise, this Article delves further to assess whether these compromises hampered the development of a multiracial democracy. Part III reveals that American society is currently constrained by previous judicial compromises that have both failed to secure equality and curtailed society’s ability to battle inequality. Making matters worse, the Roberts Court has reversed the equality gains from earlier legislative compromises in cases like *Shelby County v. Holder*²⁷ as well as in the more recent *Brnovich v. Democratic National Committee*.²⁸ The *Brnovich* majority and dissent offered

22. Characterized by a willingness to accept compromises considered to improve the status quo and pave the way for fuller equality.

23. Characterized by an unwillingness to accept compromises on moral and pragmatic grounds.

24. Characterized by an unwillingness to consider compromises on racial justice issues.

25. 347 U.S. 483 (1954). For scholarship describing *Brown* as a compromise, see, for example, BELL, *supra* note 10, at 39; CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 37–38 (2004); Jack M. Balkin, *Jack M. Balkin (Judgment of the Court)*, in WHAT “*BROWN V. BOARD OF EDUCATION*”: SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION 77, 80–81 (Jack M. Balkin ed., 2001) (creating an alternate majority opinion for *Brown* that reflects what a less compromising opinion might have looked like); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 313 (2004); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION* A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 65, 184 (2001); MARTHA MINOW, IN *BROWN’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK* 20 (2010).

26. 438 U.S. 265 (1978). For scholarship describing *Bakke* as a compromise, see, for example, JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 484 (1994); Robert Post, *Introduction: After Bakke*, 55 REPRESENTATIONS 1 (1996); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1532 (2004); Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CALIF. L. REV. 2241, 2253, 2253 n.51 (2000).

27. 570 U.S. 529 (2013). See *infra* Part III.C (discussing *Shelby Cnty v. Holder*’s and *Brnovich v. Democratic National Committee*’s unraveling of voting rights).

28. 141 S. Ct. 2321 (2021). Even beyond racial equality cases, the Roberts Court has demonstrated a willingness to unravel legal compromises. For example, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010), ended the campaign finance compromise established in *Buckley v. Valeo*, 424 U.S. 1 (1976). Likewise, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), ended the compromise on

competing interpretations of a compromise that led to the 1982 Voting Rights Act. This disagreement over compromise was a central feature of the case that has been underemphasized in the extensive early commentary.²⁹

This Article’s attention to the drawbacks of historical compromises is timely as the United States faces the prospect of new equality compromises. Competing forces are currently driving U.S. legal and political institutions to reconsider the wisdom of earlier compromises, and the U.S. government now has an opportunity to advance a democracy that protects Black people’s rights. Yet, democratic progress on issues such as policing and voting rights has been stymied by an *uncompromising* Republican Party³⁰ as well as an *unduly compromising* Democratic Party.³¹ And if its precedents are any indicator, the Roberts Court stands ready to unravel prior compromises such as the Voting Rights Act and obstruct prospective compromises such as the John Lewis Voting Rights Advancement Act.

union participation forged in *Abood v. Detroit Bd of Educ.*, 431 U.S. 209 (1977). Most recently, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022), ended the abortion compromise that had endured since *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

29. See Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Court’s Voting-Rights Decision Was Worse than People Think*, ATL. (July 8, 2021), <https://www.theatlantic.com/ideas/archive/2021/07/brnovich-vra-scotus-decision-arizona-voting-right/619330/> [https://perma.cc/T6FM-DAMU].

30. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 921 (2018) (documenting an unwillingness to compromise within the contemporary Republican Party). According to Pew Research, a significant subset of Republicans—“Faith and Flag Conservatives”—believe that anti-racism is bad for American society, with sixty-three percent of them opposing “increased public attention to the history of slavery and racism in America.” 3. *Faith and Flag Conservatives*, PEW RSCH. CTR. (Nov. 9, 2021), <https://www.pewresearch.org/politics/2021/11/09/faith-and-flag-conservatives/> [https://perma.cc/DX2S-56SE]. They also “voted at very high rates in 2020 – 85% of those eligible to vote did so,” and they are “highly skeptical of political compromise,” with fifty-three percent saying that “compromise is really just selling out on what you believe in.” *Id.* Most recently, in January 2023, Pew Research found that more than six-in-ten Republicans and Republican-leaning independents were “[l]eery of compromise” with President Biden. *Republicans Leery of Compromise with Biden; Majority Want GOP to Focus on Investigations*, PEW RSCH. CTR. (Jan. 31, 2023), <https://www.pewresearch.org/politics/2023/01/31/republicans-leery-of-compromise-with-biden-majority-want-gop-to-focus-on-investigations/> [https://perma.cc/MM8S-TXS7].

31. While Democratic politicians like Senator Joe Manchin have insisted on bipartisan compromise, research suggests that Democrats themselves are deeply divided over the value of political compromise. See Giovanni Russonello, *Manchin’s Bipartisan Ultimatum Becomes a Democratic Stumbling Block*, N.Y. TIMES (June 7, 2021), <https://www.nytimes.com/2021/06/07/us/politics/manchin-democratic-bills.html> [https://perma.cc/N96S-VCBT]; Bill Barrow & Emily Swanson, *AP-NORC Poll: Democrats Optimistic but Divided on Compromise*, ASSOCIATED PRESS (July 30, 2021), <http://apne.ws/E2jB5vg> [https://perma.cc/M6CL-3YWK]. As Pew Research described in November 2021: “Establishment Liberals are the typology group most likely to see value in political compromise and tend to be more inclined toward more measured approaches to societal change than their Progressive Left counterparts.” 10. *Establishment Liberals*, PEW RSCH. CTR. (Nov. 9, 2021), <https://www.pewresearch.org/politics/2021/11/09/establishment-liberals/> [https://perma.cc/SE78-47XE]. Despite supporting racial equality, “[n]early nine-in-ten Establishment Liberals (89%) say that compromise is how things get done in politics.” *Id.*

This Article investigates how lessons from past compromises might help us approach present and future ones. Part IV describes common democracy-constraining features of past racial equality compromises to avoid for future compromises. Applying this analytical framework to present debates over policing, voting rights, the Senate filibuster, and Supreme Court reform, Part V cautions against enacting compromises that give us the illusion of democratic progress yet ultimately impede a multiracial democracy.

I.

THE NATURE OF COMPROMISE

Compromises permeate a series of current racial equality debates in the United States. But legal scholarship alone lacks the conceptual and analytical tools to fully grapple with these compromises. This Part thus identifies the work of critical race scholars who recommend more systematic analyses of compromise than those typically featured in legal scholarship. It then introduces two distinctions from transitional justice and political science scholarship—between compromising and uncompromising mindsets, and principled and unprincipled compromises. This Part also offers a novel distinction—between different *types* of uncompromising mindsets—which is both a corrective to previous scholarship and necessary for distinguishing white supremacist and anti-racist action in the United States. Ultimately, this multidisciplinary analysis aims to enrich our understanding of racial equality compromises throughout American history³² and law.³³

A. *Compromise and Law*

Legal scholars have used compromise to describe several cases and statutes: for example, Frances Olsen and Sylvia Law (among others) call *Roe v. Wade* a compromise;³⁴ Jack Chin and Reginald Govan characterize the Civil Rights Acts of 1964 and 1991 in this way, respectively.³⁵ Other scholars have theorized about the broader significance of constitutional compromises.³⁶

32. See *infra* Part II (discussing racial equality compromises in Black history and political thought).

33. See *infra* Part III (discussing racial equality compromises in the Court's equality jurisprudence).

34. Olsen, *supra* note 16, at 107. See Law, *supra* note 16, at 932 n.65 (noting that proposals for "compromise" sound "very much like *Roe v. Wade*").

35. Chin, *supra* note 16; Govan, *supra* note 16, at 61–82.

36. On the topic of American constitutional compromises, Sanford Levinson argues that "'compromise' is ubiquitous to constitutionalism" and queries "whether the United States Constitution was purchased through a truly 'rotten compromise'" of slavery. Levinson, *supra* note 13, at 843, 826. Maggie Blackhawk traces "a compromise between those who aimed to constitutionalize colonialism and those who saw colonialism as an abomination and incompatible with constitutional democracy." Blackhawk, *supra* note 2, at 1801.

Alexander Bickel, for example, predicted that racial equality “must proceed through phases of compromise and expedient muddling-through, or else fail of an effective and peaceable outcome.”³⁷

A number of scholars have addressed the status of constitutional compromises in legal interpretation. For example, Vicki Jackson proposes that “whether a [constitutional] proposition is seen as a matter of principle, or as a more narrow compromise, may influence the degree to which the proposition is extended to new situations.” Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 955, 998 (2000). John Manning contends that the Supreme Court’s interpretive approach to the Constitution should proceed from the premise that constitution-making entails compromise and the Constitution itself “represents ‘a bundle of compromises.’” Manning, *supra* note 13, at 2004. Gillian Metzger does not reject Manning’s argument in its entirety but suggests that the “fact of constitutional compromise simply cannot shoulder the analytic work that Manning assigns to it.” Gillian E. Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. 98, 99 (2009). Bruce Ackerman and Brian Galle (among others) consider how we ought to interpret constitutional clauses concerning taxation given that they are the product of unprincipled compromise. *See generally* Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1 (1999); Brian Galle, *The Taxing Power, the Affordable Care Act, and the Limits of Constitutional Compromise*, 121 YALE L.J. ONLINE 407 (2011).

Other scholars have studied the role of compromise (or lack thereof) in shaping constitutional rights and processes. Pamela Smith and Derek Black examine the role of constitutional compromise in restricting or enabling the right to education. *See generally* Pamela J. Smith, *Our Children’s Burden: The Many-Headed Hydra of the Educational Disenfranchisement of Black Children*, 42 HOWARD L.J. 133 (1999); Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735 (2018). Joseph Fishkin and David Pozen describe how “the use of ‘forceful uncompromising methods’ by government actors can qualify as constitutional hardball.” Fishkin & Pozen, *supra* note 30, at 921. Andrew Coan contends that judicial resolution of heated constitutional debates “shrinks considerably . . . the opportunity for compromise and democratic reconciliation.” Andrew B. Coan, *Well, Should They? A Response to If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 213, 229 (2007). Richard Re reflects that “few doctrinal compromises are perfectly ‘principled’ in their own right” and instead “represent the best option presently available.” Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1886 (2014).

However, relatively few legal scholars have theorized about compromising itself. Martha Minow argues that “compromis[ing] can seem undesirable for three reasons: (1) it can seem to sacrifice important ideals for the sake of avoiding conflict; (2) it can seem to involve middle positions that are more incoherent or less defensible than the rejected alternatives; or (3) it can require ‘dealing with the devil’ who uses illicit tactics that should not be rewarded.” Martha Minow, *Principles or Compromises Accommodating Gender Equality and Religious Freedom in Multicultural Societies*, in GENDER, RELIGION & FAMILY LAW: THEORIZING CONFLICTS BETWEEN WOMEN’S RIGHTS AND CULTURAL TRADITIONS 3, 12 (Lisa Fishbayn Joffe & Sylvia Neil eds., 2012). Carrie Menkel-Meadow contends that “[a]ll compromises have temporal, social, and political, effects” and “must be judged by the greater context in which they are situated.” Carrie Menkel-Meadow, *The Variable Morality of Constitutional (and Other) Compromises: A Comment on Sanford Levinson’s Compromise and Constitutionalism*, 38 PEPP. L. REV. 903, 905 (2010) (emphasis omitted).

37. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 64–65 (1986). Bickel maintained that resolving “the racial problem” would require both “guiding principle and expedient compromise,” for “[n]o society, certainly not a large and heterogeneous one, can fail in time to explode if it is deprived of the arts of compromise.” *Id.* at 64. *See also* John Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U. L. REV. 363, 410 (1966) (lamenting that “[w]e are constantly forced to compromise the strong moral claims of the Negro”).

Though most legal scholarship lacks thematic links joining decades and centuries of compromises, critical race scholars like Derrick Bell have situated contemporary inequalities within a history of compromise. Bell described a type of compromise that “depends on the involuntary sacrifice of [B]lack rights or interests” in order to “settle potentially costly differences between two opposing groups of [W]hites.”³⁸ Such “racial compromise,” according to Bell, is “a seldom recognized phenomenon” that “has occurred throughout American racial history.”³⁹ By way of examples, he pointed to “the slavery understandings, the Constitution, universal white male suffrage, the *Dred Scott v. Sandford* case, the Hayes-Tilden compromise, and the southern disenfranchisement compromise.”⁴⁰

While Bell raised the idea of racial compromise decades ago, it has received surprisingly little attention in mainstream legal scholarship.⁴¹ Bell’s work urgently invites observers to recognize racial compromise patterns in the United States. Accepting this invitation here yields two propositions. First, in a country where compromise is said to be necessary for making democratic progress,⁴² normative and practical guidance emerges from engaging with contemporary and historical discourse around compromise. Second, this discourse around compromise was not limited to understandings of how dominant White groups traded in Black freedoms. Rather, there is a rich tradition of Black thinkers and activists who have contemplated different varieties of compromise as a means of obtaining more substantive equality rights.

38. BELL, *supra* note 10, at 38.

39. *Id.*

40. *Id.* For Bell’s further writings on racial compromise, see, for example, Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 16 (1976); Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 5 (1985); Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 VILL. L. REV. 767, 768 (1988); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 372 (1992); DERRICK BELL, *THE SPACE TRADERS* (1992).

41. A WestLaw search conducted in December 2021 revealed only 27 secondary sources mentioning “racial compromise,” compared to 1,145 sources mentioning Bell’s famous “interest-convergence dilemma.” See Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 19 B.C. THIRD WORLD L.J. 73, 123 n.254 (1998); see generally Robert S. Chang, *Dreaming in Black and White: Racial-Sexual Policing in The Birth of a Nation, The Cheat, and Who Killed Vincent Chin?*, 5 ASIAN L.J. 41 (1998) (theorizing that United States national identity was born of a racial compromise); Pantea Javidan, *Legal Post-Racialism as an Instrument of Racial Compromise in Shelby County v. Holder*, 16 BERKELEY J. AFR.-AM. L. & POL’Y 127 (2015) (examining *Shelby Cnty.* as a racial compromise). Some scholars have made similar claims about compromise without invoking Bell. See, e.g., Jack M. Balkin, Plessy, Brown, and Grutter: *A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1691 (2005).

42. See Samuel Moyn, *The Ethics of Coalition-Building*, DISSENT (Summer 2021), <https://www.dissentmagazine.org/article/the-ethics-of-coalition-building> [https://perma.cc/6RZ7-Q2AN].

B. *Compromise and Democracy*

Transitional justice scholarship⁴³ suggests that “emerging” democracies need to balance political stability with the pursuit of social justice, what is internationally known as the “peace versus justice dilemma.”⁴⁴ Pragmatic compromises between these two values are considered essential to establishing a human rights-respecting democratic regime.⁴⁵ As the United States has attempted to transition from racial apartheid to inclusive democracy,⁴⁶ it has also had to balance pursuing racial equality with ensuring political stability.⁴⁷ When American people have disagreed about how that balance should be struck, some have called upon the courts to settle versions of the peace versus justice dilemma.

A critical strand of transitional justice scholarship cautions that such compromises do not *necessarily* contribute to democracy. Bronwyn Anne Leebaw, for example, challenges the assumption that pragmatic compromises will contribute to both early political stability and eventual political community.⁴⁸ Instead, she writes, “short term compromises associated with stability are in tension with the long term aspirations [of] reconciliation.”⁴⁹ Leebaw’s insights resonate with American history: while slavery compromises sought to consolidate the United States into a unified nation, they could not avert a bloody civil war.⁵⁰ These compromises ultimately laid the foundation for some of the racial stratification and strife that plague the country to this day.

While compromise is often seen as an end instead of an “interim” means to more just ends, transitional justice theory also teaches that compromises made at the outset need not “endure permanently.”⁵¹ Chandra Lekha Sriram observes that because transitional circumstances change, compromises made in moments of transition serve “interim purposes” rather than long-term goals.⁵² This insight should lead us to consider the limits of existing compromises on racial equality

43. Transitional justice is a field of study and practice that aims to help societies overcome conflict and oppression. See Yuvraj Joshi, *Racial Transitional Justice in the United States*, in RACE & NATIONAL SECURITY (Matiangai Sirleaf ed., forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4088738 [<https://perma.cc/23MN-98ZY>].

44. Yuvraj Joshi, *Racial Justice and Peace*, 110 GEO. L.J. 1325, 1330 (2022) [hereinafter *Racial Justice and Peace*]; Yuvraj Joshi, *Weaponizing Peace*, 123 COLUM. L. REV. (forthcoming 2023) [hereinafter *Weaponizing Peace*].

45. Yuvraj Joshi, *Racial Transition*, 98 WASH. U.L. REV. 1181, 1197 (2021) [hereinafter *Racial Transition*].

46. See generally *Racial Justice and Peace*, *supra* note 44 (exploring the history of the U.S. civil rights movement through a transitional justice lens).

47. *Id.*

48. Leebaw, *supra* note 18, at 118.

49. *Id.*

50. See *infra* notes 78–89 and accompanying text (discussing the United States’ founding on slavery compromises that only “postponed” the Civil War).

51. SRIRAM, *supra* note 18, at 212.

52. *Id.* See also Melissa S. Williams & Rosemary Nagy, *Introduction*, 51 NOMOS: TRANSITIONAL JUSTICE 1, 21 (2012) (noting that “it would be a moral mistake to ‘normalize’ such [transitional] compromises” that sacrifice justice for the sake of stability).

and the possibility of better compromises or less compromising approaches as a means of advancing democracy.⁵³

Political scientists and theorists of “established” democracies contend that political compromises are essential to democratic governance. For example, Amy Gutmann and Dennis Thompson argue for the inherent desirability of the “classic compromise”—“where all sides gain on balance but also sacrifice something valuable to their opponents”—especially in a polarized political environment.⁵⁴ Racial equality compromises throughout American history have departed from this idealized classic compromise.⁵⁵ These compromises have tended to disproportionately sacrifice Black people’s freedoms and equality without a substantial concern for their democratic rights. Shaped by power imbalances—a consideration often overlooked by proponents of the “classic compromise”—the conditions of these compromises have not been conducive to achieving the democratic benefits commonly associated with political compromise.⁵⁶

C. *Compromising vs. Uncompromising Mindsets*

Gutmann and Thompson’s scholarship on compromise distinguishes between two mindsets: the “compromising mindset” of “principled prudence” and “mutual respect,” and the “uncompromising mindset,” characterized by “principled tenacity” and “mutual mistrust.”⁵⁷ However, not all “uncompromising” mindsets are alike, and a further distinction is needed: between “dominant” and “subordinated” uncompromising mindsets.

In a racially stratified society such as the United States, both dominant and subordinated racial groups can be uncompromising for different reasons. The uncompromising mindset of *dominant* groups stems from an unwillingness to

53. Structural and institutional changes that build the power of marginalized communities may be necessary for better compromises or less compromising approaches. For one such proposal focused on increasing “community control” of the police and local economic development, see, for example, K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 699–715 (2020).

54. *Valuing Compromise for the Common Good*, *supra* note 19, at 186. Likewise, Christian Rostbøll argues that political compromise can be considered a “good in itself” beyond simply serving a pragmatic, instrumental good. Rostbøll, *supra* note 19, at 2. However, Rostbøll warns against compromising with opponents who do not accept the norm of “democratic respect.” Such a limit implies that compromise “has non-instrumental but conditional value,” rendering it different in standing than the right to vote or participate in democratic deliberation. *Id.* at 14.

55. *Valuing Compromise for the Common Good*, *supra* note 19, at 185–86. For a similar argument within political science, see, for example, Zuckerwise, *supra* note 19.

56. In contrast, Jocelyn Simonson’s “power lens” approach aims to shift power towards populations historically denied political power and to promote anti-subordination based on the fact that it is wrong for the state to enforce the “inferior social status of historically oppressed groups.” See Simonson, *supra* note 11, at 787.

57. *The Mindsets of Political Compromise*, *supra* note 19, at 1129, 1134, 1130.

give up power and status that they have long assumed to be legitimate.⁵⁸ In contrast, the uncompromising mindset of *subordinated* groups stems from an unwillingness to suffer continued disempowerment and second-class status.⁵⁹ The former uncompromising mindset defends the entrenchment of privilege and an unequal status quo, while the latter challenges long-suffered oppression to advance a more equal society. The two can therefore be understood as having different democratic value. Distinguishing amongst uncompromising mindsets in this way helps us discern those that are democratically disadvantageous, which we should discourage, from those that are potentially advantageous to building a multiracial democracy, which we should enable.

An uncompromising mindset among subordinated groups is generally more democratically advantageous because it is capable of securing justice and improvements on the status quo in ways that the uncompromising mindset of dominant groups is not.⁶⁰ For example, a group of grassroots racial justice activists from Mississippi discussed below rejected a compromise at the 1964 Democratic Convention in an effort to “bring morality to our politics.”⁶¹ Meanwhile, Mississippi’s segregationist governor Ross Barnett fomented deadly riots at the University of Mississippi in 1962 to resist an integration order.⁶² Even if compromise is viewed as a democratic virtue, the uncompromising stances of

58. See *infra* notes 227–231 and accompanying text (discussing Southern politician John C. Calhoun’s refusal to concede or compromise on slavery and Southern segregationists’ staunch public stances against integration).

59. See *infra* notes 130–160 and accompanying text (discussing the Mississippi Freedom Democratic Party (MFDP) delegates who saw compromise as “a façade of civil empowerment” because such compromises meant “condoning the injustice of the status quo”).

While reflecting an aversion to compromise, the uncompromising mindset of subordinated groups is not monolithic, reflecting different views on the value of compromise. For example, some members of subordinated groups might be highly critical of compromise on moral grounds but willing to consider it for pragmatic reasons, while others may be guided solely or predominantly by a moral aversion to compromise. Likewise, some might be uncompromising to secure advancement within the current liberal order, while others might want to demonstrate the fundamental wrongness of that order and might consider engagement with the law itself to be an unacceptable compromise.

It is worth noting that the uncompromising stances of *affected subordinated groups* are not the same as the uncompromising stances of *proponents of equality generally*. For example, some proponents of racial equality may adopt highly uncompromising stances in favor of racial equality, perhaps from a position of relative privilege and without recognizing why those less privileged and more directly impacted than them may choose compromise. Such an uncompromising approach is different from the uncompromising approach of subordinated people who have something to lose by not compromising and still resist compromise.

60. See *infra* notes 170–174 and accompanying text (discussing how the Student Nonviolent Coordinating Committee’s approach to compromise could be “principled and pragmatic”). That a subordinated uncompromising mindset is *capable* of advancing democratic goals does not mean that it *always does so*. For example, an uncompromising mindset that obstructs principled democratic compromises and enables anti-democratic forces to take hold would be democratically disadvantageous.

61. See *infra* notes 126–163 and accompanying text (discussing the MFDP’s challenge at the 1964 Democratic National Convention).

62. HISTORY, *Riots over Desegregation of Ole Miss* (Sept. 28, 2021), <https://www.history.com/this-day-in-history/riots-over-desegregation-of-ole-miss> [<https://perma.cc/TYH3-LFBH>].

subordinated and dominant groups should not be treated as equally obstructive, for the former uncompromising stances can produce democratic goods.⁶³

D. Principled vs. Unprincipled Compromises

Transitional justice and political science scholars draw a further distinction: between principled and unprincipled compromises.⁶⁴ Such a distinction is needed because although transitioning to democracy frequently requires compromise, compromises risk “selling victims short” and “entrenching the status quo” by prioritizing political feasibility over necessary transformation.⁶⁵ Michele Moody-Adams views principled compromise as a critical component of democratic governance and democratic culture more broadly.⁶⁶ For Moody-Adams, principled compromise emerges from transparent processes, involves sacrifices in favor of mutual respect, and seeks improvement on the status quo that promotes cooperation.⁶⁷ It requires robust tolerance and meaningful respect for individual opinions, aside from those too hostile to democratically legitimate purposes.⁶⁸ This latter condition suggests that some convictions are outside the bounds of respect in a democratic society and not worth compromising with; according to Moody-Adams, these should be actively rejected as unprincipled.⁶⁹

The approaches used by transitional justice and political theorists to distinguish between principled and unprincipled compromises resonate with those used by some civil rights activists. As Dr. King said in 1959: “While compromise is an absolute necessity in any moment of social transition, it must be the creative, honest compromise of a policy, not the negative and cowardly compromise of a principle.”⁷⁰ The ultimate principle that King and many others sought to defend was a genuine multiracial democracy in the United States. Black advocates faced recurring compromises in the pursuit of that principle and arrived at different understandings of the value of compromise—pertinent to present debates.

63. See *infra* notes 342–347 and accompanying text (discussing how compromise draws false equivalences between dominant and subordinated people).

64. Although some political theorists like Simon May argue that compromise cannot be principled because it is fundamentally strategic, others like Daniel Weinstock argue that compromising can often be key to preserving principles or acting in a principled way. Compare May, *supra* note 19, at 581 with Weinstock, *supra* note 19, at 545–53.

65. Murphy, *supra* note 18, at 56–57.

66. Moody-Adams, *supra* note 19, at 187–88.

67. *Id.* at 190.

68. *Id.* at 189.

69. *Id.* at 190.

70. Martin Luther King, Jr., *Address at the Fourth Annual Institute on Nonviolence and Social Change at Bethel Baptist Church*, MARTIN LUTHER KING, JR. RSCH. & EDUC. INST. (Dec. 3, 1959), <https://kinginstitute.stanford.edu/king-papers/documents/address-fourth-annual-institute-nonviolence-and-social-change-bethel-baptist> [https://perma.cc/QAN7-SHQA].

II.

COMPROMISE IN BLACK HISTORY AND POLITICAL THOUGHT

Ongoing struggles for racial equality are inextricable from the compromises forged throughout American history, and thus it is worth tracing the longer trajectory of racial equality compromises, from those concerning slavery to civil rights.⁷¹ This historical overview is supplemented by closer examination of two moments that crystallized contemporary equality debates: the Atlanta Compromise Speech of 1895 and the Democratic National Convention of 1964. In contrast to the standard American valorization of compromise,⁷² exploring this history demonstrates that an accumulation of compromises has sustained white supremacy and stifled racial justice in the United States.

In tracing this history, this Part examines how Black activists deliberated the value of compromise amid white supremacy, anti-Black racism, and racial terror violence. While figures like Malcolm X rejected compromise altogether,⁷³

71. Two caveats: first, this historical account is intended to be illustrative rather than exhaustive. For additional historical accounts grappling with racial compromises, see, for example, BELL, *supra* note 10 (highlighting racial compromises throughout American history and law); IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 486 (2013) (tracing the compromises made with segregationists during the New Deal era); KEISHA N. BLAIN, *SET THE WORLD ON FIRE: BLACK NATIONALIST WOMEN AND THE GLOBAL STRUGGLE FOR FREEDOM* 106 (2018) (discussing compromises made to advance Black nationalist and internationalist politics); TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* 71 (2011) (identifying tensions between national and local activist approaches to compromise); FREDERICK J. BLUE, *NO TAINT OF COMPROMISE: CRUSADERS IN ANTISLAVERY POLITICS* (2005) (documenting resistance to compromise among slavery abolitionists). Second, this account prioritizes civil rights examples in order to extend the scholarly discussion beyond whether the Constitution was itself a compromise.

72. See *supra* note 6 (discussing the deep historical roots of American valorization of compromise).

73. Malcolm X often insisted on revolution rather than compromise as the path to racial justice. In his 1963 speech, “Message to the Grassroots,” he declared: “Revolution is hostile. Revolution knows no compromise. Revolution overturns and destroys everything that gets in its way.” (1963) *Malcolm X, “Message to the Grassroots”*, BLACKPAST (Aug. 16, 2010), <https://www.blackpast.org/african-american-history/speeches-african-american-history/1963-malcolm-x-message-grassroots/> [https://perma.cc/4SF5-K2ST]. A year later, in “The Ballot or the Bullet,” Malcolm X declared, “Black people are fed up with the dillydallying, pussyfooting, compromising approach that we’ve been using toward getting our freedom,” warning that “we don’t intend to let them pussyfoot and dillydally and compromise any longer.” Malcolm X, *The Ballot or the Bullet*, EDCHANGE MULTICULTURAL PAVILION (Apr. 3, 1964), http://www.edchange.org/multicultural/speeches/malcolm_x_ballot.html [https://perma.cc/ZWN4-VQJ4] [hereinafter *The Ballot or the Bullet*]. Although his views on race relations evolved, he remained skeptical of compromise until the time of his assassination in February 1965, saying during his final public appearance that his children would rather have a father “who will take a stand in the face of any kind of reaction from narrow-minded people rather than to compromise and later on have to grow up in shame and in disgrace.” (1965) *Malcolm X, “Speech at the Ford Auditorium”*, BLACKPAST (July 26, 2010), <https://www.blackpast.org/african-american-history/speeches-african-american-history/1965-malcolm-x-speech-ford-auditorium/> [https://perma.cc/E5JN-2FE3].

others contemplated its promises and pitfalls.⁷⁴ These reflections are important because they capture the cumulative effects of recurring compromises that Black communities have had to live through. They offer rich insights about the value of compromise that are largely missing from legal discourse and scholarship. In this Article, these insights serve as a basis for analyzing legal cases,⁷⁵ generating normative and practical guidance on compromising,⁷⁶ and applying that guidance to modern-day compromises.⁷⁷

A. Foundational Compromises from the Constitution to Reconstruction

The United States was founded on slavery compromises that sacrificed Black freedom in the name of national unity.⁷⁸ A series of compromises between slave and free states postponed a reckoning with the institution of slavery⁷⁹ until the country could no longer resolve the contradictions between its egalitarian ideals and racist practices without resorting to a bloody war. Even following the resultant Civil War, compromises continued to characterize the Reconstruction era and ultimately spelled its end.

74. This Article thus includes citizen mobilization “from below” (including the activism of the Student Nonviolent Coordinating Committee) in civil rights accounts. Tomiko Brown-Nagin, *The Civil Rights Canon: Above and Below*, 123 YALE L.J. 2698, 2698 (2014).

75. See *infra* Part III (discussing racial equality compromises in the Court’s equality jurisprudence).

76. See *infra* Part IV (discussing the democracy-constraining features of compromises).

77. See *infra* Part V (discussing the perils of compromise in present debates).

78. Jurists and scholars have long debated whether the Constitution was a proslavery compromise, whether it was a compromise worth having, and how constitutional compromise should inform legal interpretation. On whether the Constitution was a proslavery compromise, see, for example, Thurgood Marshall, *Commentary: Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2–4 (1987); Noah Feldman, *This Is the Story of How Lincoln Broke the U.S. Constitution*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2021/11/02/opinion/constitution-slavery-lincoln.html> [<https://perma.cc/KEC2-EQTS>]; Sean Wilentz, *Was the Constitution Pro-Slavery? Jefferson Davis Thought So. Abraham Lincoln Didn’t*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2021/11/02/books/review/noah-feldman-the-broken-constitution.html> [<https://perma.cc/CQ6F-YL36>]. On whether the Constitution was a worthwhile compromise, see, for example, Paul Finkelman, Henry L. Chambers, Jr., Leslie M. Harris, Sanford Levinson & Raymond T. Diamon, *The Constitution’s Immoral Compromise*, N.Y. TIMES (Feb. 26, 2013), <https://www.nytimes.com/roomfordebate/2013/02/26/the-constitutions-immoral-compromise> [<https://perma.cc/EL9F-RJRQ>]. For scholarship discussing the relationship between constitutional compromise and legal interpretation, see *supra* note 36. Importantly, historian Mary Sarah Bilder argues that although the compromise frame is ubiquitous in contemporary discussions of the Constitution, “[o]ver the years and decades, words, concepts, compromises shifted focus and took on new political meanings.” MARY SARAH BILDER, *MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION* 240 (2015).

79. The mother of Black feminism, sociologist Anna Julia Cooper, explained in her 1892 book: Every statesman from 1830 to 1860 exhausted his genius in persuasion and compromises to smooth out her ruffled temper and gratify her petulant demands. But like a sullen younger sister, the South has pouted and sulked and cried: “I won’t play with you now; so there!” and the big brother at the North has coaxed and compromised and given in, and—ended by letting her have her way.

ANNA JULIA COOPER, *A VOICE FROM THE SOUTH: BY A BLACK WOMAN OF THE SOUTH* 104 (1892).

One of the earliest examples of such compromises was the 1787 Constitution, which gave slaveholding states enduring political advantages that enabled proslavery Presidents, Congresses, and Supreme Courts. Most infamously, the Three-Fifths Compromise of the 1787 Constitution included three-fifths of a state's enslaved people in the state's population count. Abolitionist Wendell Phillips argued that compromise rendered a true union "impracticable," replacing it with "the absolute reign of the slaveholding power over the whole country."⁸⁰ "Not for the last time," sociologist Paul Starr writes, "the interests of [B]lack people were sacrificed in the name of compromise and national unity."⁸¹

These sacrifices continued with the Missouri Compromise of 1820 and the Compromise of 1850. The Missouri Compromise of 1820 sought to preserve the balance of power between slave and free states by admitting Missouri into the Union as a slave state and Maine as a free state.⁸² By tinkering with the boundaries of slavery, the Missouri Compromise allowed Americans not to have to "grapple so openly with the meaning of slavery for their nation."⁸³ The Compromise of 1850⁸⁴ proposed to mollify abolitionists by banning slave trade in Washington D.C. and satisfy enslavers by enacting the Fugitive Slave Act, which required the capture and return of runaway enslaved people.⁸⁵ One of its architects, Henry Clay, predicted that it would bring "permanent" peace by entrenching slavery in a manner acceptable to both the North and South.⁸⁶ But this compromise, historian Paul Finkelman writes, "turned out to be more one-

80. WENDELL PHILLIPS, *THE CONSTITUTION A PRO-SLAVERY COMPACT, OR, EXTRACTS FROM THE MADISON PAPERS, ETC.* 149 (FB&c Ltd. 2018) (1856). *See also* *Hylton v. United States*, 3 U.S. 171, 177–78 (1796) ("The Constitution . . . was the work of compromise."); Blackhawk, *supra* note 2, at 1806 ("The U.S. Constitution contained more than one compromise and more than one original sin at the Founding."). *See generally* WALDSTREICHER, *supra* note 2 (examining the role of slavery in the creation of the U.S. Constitution).

81. PAUL STARR, *ENTRENCHMENT: WEALTH, POWER, AND THE CONSTITUTION OF DEMOCRATIC SOCIETIES* 72 (2019).

82. ROBERT PIERCE FORBES, *THE MISSOURI COMPROMISE AND ITS AFTERMATH: SLAVERY AND THE MEANING OF AMERICA* 5 (2007). It also prohibited slavery in the Louisiana Territory north of the 36th parallel, thereby limiting slavery's expansion while nevertheless preserving it. *Id.*

83. *Id.*

84. When the Mexican-American War reopened the question of slavery in the territories, the Compromise of 1850 admitted California as a free state and allowed New Mexico and Utah to decide for themselves whether or not to permit slavery. *See* HOLMAN HAMILTON, *PROLOGUE TO CONFLICT: THE CRISIS AND COMPROMISE OF 1850* xii (2005). *See generally* STEPHEN E. MAIZLISH, *A STRIFE OF TONGUES: THE COMPROMISE OF 1850 AND THE IDEOLOGICAL FOUNDATIONS OF THE AMERICAN CIVIL WAR* (2018) (describing the history of the Compromise of 1850 and its significance for to the Civil War).

85. HAMILTON, *supra* note 84, at xii; Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1893 (2019) (detailing the justification of and resistance to the 1850 Fugitive Slave Act as a necessary compromise).

86. Henry Clay, 10 *THE PAPERS OF HENRY CLAY* 815 (Melba Porter Hay & Carol Reardon eds., 1991).

sided than any other compromises over slavery⁸⁷ and even “emboldened southern nationalists to push for more concessions from freedom.”⁸⁸ Ultimately, compromises over slavery merely postponed the Civil War by evading the fundamental question of emancipation.⁸⁹

The Civil War and the period of Reconstruction that followed brought hope for a new kind of politics. As Frederick Douglass reflected during the war: “We had been drugged nearly to death by proslavery compromises. A radical change was needed in our whole system.”⁹⁰ He worried that “as long as slavery has any life in it anywhere in the country, we are in danger of [a slaveholding] compromise.”⁹¹ During Reconstruction, John Mercer Langston, the founding dean of Howard University’s law school, said in an address at Oberlin College: “‘Compromises between right and wrong, under pretense of expediency,’ should disappear forever; our house should be no longer divided against itself”⁹²

87. Paul Finkelman, *The Cost of Compromise and the Covenant with Death*, 38 PEPP. L. REV. 845, 848 (2011). Justice Joseph Story wrote in *Prigg v. Pennsylvania* that the Fugitive Slave Act was a “compromise of opposing interests and opinions” that was “vital to the preservation of [slaveholding states’] domestic interests and institutions.” 41 U.S. 539, 540 (1842).

88. Finkelman, *supra* note 87, at 850. Additionally, whereas Mark Graber argues that *Dred Scott v. Sandford* in 1858 offered a proslavery “compromise” acceptable to many Northerners, David Blight calls *Dred Scott* “the point of no return” because it “confirmed for antislavery Northerners that the proslavery South would stop at nothing, constitutional or otherwise, to preserve and spread slavery,” leaving “few paths to compromise.” Compare MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 13 (2006) with David W. Blight, *Was the Civil War Inevitable?*, N.Y. TIMES (Dec. 21, 2022), <https://www.nytimes.com/2022/12/21/magazine/civil-war-jan-6.html> [<https://perma.cc/J7NL-7ZV9>].

89. Following the election of Abraham Lincoln a decade later, the Crittenden Compromise of 1860 attempted to resolve the Southern secession crisis by restoring the Missouri Compromise line and extending it to the California border. Farrell Evans, *The 1860 Compromise That Would Have Preserved Slavery in the US Constitution*, HISTORY (Nov. 8, 2022), <https://www.history.com/news/crittenden-compromise-slavery-civil-war> [<https://perma.cc/BEK4-ZHKT>]. Lincoln and Congress rejected this compromise and its proposals also failed to gain traction at the Peace Conference of 1861, which was soon followed by the American Civil War. *Id.* See generally 3 JAMES F. RHODES, HISTORY OF THE UNITED STATES: FROM THE COMPROMISE OF 1850 TO THE MCKINLEY-BRYAN CAMPAIGN OF 1896 (New York, Macmillan Co., 1904) (1893) (surveying the history of the post-Civil War era).

90. (1864) Frederick Douglass “*The Mission of the War*”, BLACKPAST (Jan. 28, 2007), <https://www.blackpast.org/african-american-history/1864-frederick-douglass-mission-war/> [<https://perma.cc/3ES2-WETN>] [hereinafter *The Mission of the War*].

91. *Id.* Douglass was previously associated with Garrisonian abolitionists, who repudiated constitutionalism grounded in a proslavery document. See William Lloyd Garrison, No Compromise with Slavery, Address Delivered in the Broadway Tabernacle, New York (Feb. 14, 1854). However, Douglass’ approach shifted in the late 1840s from “anti-constitutionalism” to “practical constitutionalism.” Paul Finkelman, *Frederick Douglass’s Constitution: From Garrisonian Abolitionist to Lincoln Republican*, 81 MO. L. REV. 1, 13 (2016). In his second autobiography published in 1855, Douglass noted that his “uncompromising anti-slavery friends” regarded the payment made for his emancipation as “a violation of anti-slavery principles.” FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 173 (Penguin Books, 2003) (1855). Even as Douglass remained an abolitionist, he reconsidered the wisdom of an uncompromising approach that would have maintained his slave status in the interest of anti-slavery principles. Finkelman, *supra*, at 49–51.

92. (1874) John Mercer Langston, “*Equality Before the Law*”, BLACKPAST (Apr. 21, 2011), <https://www.blackpast.org/african-american-history/1874-john-mercator-langston-equality-law/> [<https://perma.cc/9F5H-T6HR>] [hereinafter *John Mercer Langston*].

Despite these hopes for an uncompromised equality, the Reconstruction constitutional amendments themselves were “not the creation . . . of the predetermined logic of emancipation, but arose from debate, negotiation, and compromise.”⁹³ In his closing speech about the Fourteenth Amendment, Republican Representative Thaddeus Stevens noted its disappointments but nevertheless voted for the amendment because “I live among men and not among angels.”⁹⁴ When anti-slavery Republicans resisted the Fifteenth Amendment for not being emancipatory enough, even abolitionist Wendell Phillips urged them to be “a little less reformers” and “a little more politicians.”⁹⁵

As products of compromise, the Reconstruction amendments also sacrificed normative clarity, thus leaving themselves open to multiple interpretations, both restrictive and liberatory.⁹⁶ As Eric Foner notes, the Thirteenth Amendment would grant “seemingly unlimited authority” and enforcement power to Congress to “prevent actions by states, localities, businesses, and private individuals that sought to maintain or restore slavery.”⁹⁷ However, ensuing Supreme Court decisions gave those amendments regressive interpretations, stifling the emancipatory and democratizing potential they might have possessed.⁹⁸

Reconstruction was dealt a fatal blow by the Compromise of 1877. By the 1876 election, Reconstruction had already suffered from political compromises between the North and South and regressive court rulings.⁹⁹ Adding insult to injury, Republican Rutherford B. Hayes gained the presidency in 1877 by agreeing to a compromise with the Democrats to withdraw federal troops from

93. FONER, *supra* note 3, at 55–56. For example, instead of enfranchising Black people, Section 2 of the Fourteenth Amendment reflected a compromise that states disenfranchising Black men would lose a proportionate share of representatives in the House. Even in this compromised form, Section 2 was not enforced. Dorothy Roberts aptly describes the Reconstruction amendments as “a compromised embodiment of the unfinished revolution for which abolitionists today continue to fight.” Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 108 (2019).

94. Eric Foner, *Thaddeus Stevens and the Imperfect Republic*, 60 PENN. HIST. 140, 152 (1993).

95. Wendell Phillips, *The Senate and the Proposed Amendment*, National Anti-Slavery Standard (New York, NY), in 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 532, 532 (Kurt T. Lash ed., 2021) (emphasis omitted). Ultimately, the Fifteenth Amendment passed without explicitly prohibiting literacy tests and poll taxes.

96. FONER, *supra* note 3, at 31.

97. *Id.*

98. See, e.g., *Slaughter-House Cases*, 83 U.S. 36 (1872) (interpreting the Privileges and Immunities Clause of the Fourteenth Amendment narrowly); *Civil Rights Cases*, 109 U.S. 3 (1883) (holding that Congress exceeded its authority under the Fourteenth Amendment in enacting the Civil Rights Act of 1875 and that the Thirteenth and Fourteenth Amendments do not reach purely private discrimination); *United States v. Cruikshank*, 92 U.S. 542 (1876) (holding that the Fourteenth Amendment applies only to state action).

99. Historian Kate Masur argues that “[t]he [1876] election was as close as it was because Northerners had already compromised on the 15th amendment If there hadn’t been voter suppression in the South from the outset of Reconstruction through the 1876 election itself, Hayes might well have won the presidency decisively.” Jennifer Schuessler, *A Refusal to Compromise? Civil War Historians Beg to Differ*, N.Y. TIMES (Oct. 31, 2017), <https://www.nytimes.com/2017/10/31/arts/a-refusal-to-compromise-civil-war-historians-beg-to-differ.html> [https://perma.cc/8Y2Z-QUZT].

the South, bringing Reconstruction to a close.¹⁰⁰ As historian Comer Vann Woodward wrote: “The Compromise of 1877 marked the abandonment of principles and of force and a return to the traditional ways of expediency and concession.”¹⁰¹ Like pre-Civil-War compromises, the Compromise of 1877 disregarded Black people’s humanity by leaving Black Southerners vulnerable to racist violence in the service of political goals. Ultimately, Reconstruction left emancipated people with very limited rights, the pain of unfulfilled promises, and the prospect of further unprincipled compromises.¹⁰²

Compromises from the Founding to Reconstruction eras set the stage for the next century of Jim Crow. By denying Black people’s fundamental humanity, emboldening white supremacists, and endlessly delaying racial justice, compromises forged during this period epitomized many of the democracy-constraining features that plague modern-day compromises.

B. *The 1895 Atlanta Compromise Speech*

Before what became known as the “Atlanta Compromise Speech,” there was Isaiah Thornton Montgomery. In the throes of rising Jim Crow violence, Montgomery cofounded Mound Bayou, a colony of Black farmers in Northwest Mississippi that operated in cooperation with white supremacists.¹⁰³ As the sole Black delegate to the Mississippi Constitutional Convention in 1890, Montgomery endorsed disenfranchising 123,000 Black voters, sacrificing their democratic rights in the hopes of securing protection from white terrorism.¹⁰⁴ While some of his contemporaries criticized Montgomery’s compromising stance, it inspired someone who would become a leading Black political figure of the era: Booker T. Washington.¹⁰⁵

In September 1895, Washington delivered his “Atlanta Compromise Speech” to the Atlanta Cotton States and International Exposition.¹⁰⁶ In this address, Washington urged the pursuit of racial progress through vocational training, rather than by challenging Jim Crow laws, warning that “the agitation of questions of social equality is the extremest folly.”¹⁰⁷

At the heart of Washington’s racial advancement vision was a compromise. In return for being kept socially and politically insulated from Black Americans

100. VANN WOODWARD, *supra* note 3, at 7–8.

101. *Id.* at 3.

102. Derrick Bell called it “[p]ossibly the definitive example of [B]lack rights becoming grist in the mill of [W]hite interests.” BELL, *supra* note 10, at 39.

103. Herbert G. Ruffin, *Isaiah T. Montgomery (1847-1924)*, BLACKPAST (Jan. 17, 2007), <https://www.blackpast.org/african-american-history/montgomery-isaiah-1847-1924> [<https://perma.cc/67JQ-C68R>].

104. *Id.*

105. *Id.*

106. (1895) Booker T. Washington, “*The Atlanta Compromise Speech*”, BLACKPAST (Jan. 28, 2007), <https://www.blackpast.org/african-american-history/1895-booker-t-washington-atlanta-compromise-speech/> [<https://perma.cc/D9LX-F5HG>].

107. *Id.*

through segregation, discrimination, and disenfranchisement, White Americans would share in the responsibility for improving the socioeconomic conditions of all Americans.¹⁰⁸ Washington reasoned that sacrificing the demand for complete equality now and instead improving Black Americans' socio-economic conditions would pave the path for eventual equality.¹⁰⁹ Washington's accommodation of Jim Crow propelled him into a national figure, and made him an advisor to presidents including Roosevelt and Taft and a friend to businessmen such as Carnegie and Rockefeller.¹¹⁰

Nevertheless, Washington's compromise drew criticism from civil rights activists,¹¹¹ notably W. E. B. Du Bois.¹¹² While Du Bois initially saw the Atlanta speech as "the basis of honorable compromise with the South,"¹¹³ he later changed his mind because he believed that asking Black people to give up political power, civil rights, and higher education had only accelerated their disenfranchisement, subordination, and exclusion.¹¹⁴ Looking forward, Du Bois doubted that Black people "[could] make effective progress in economic lines if they [were] deprived of political rights, made a servile caste, and allowed only the most meagre chance for developing their exceptional men[.]"¹¹⁵

108. *Id.*

109. *Id.* In an important dissertation, political scientist Desmond Jgmoan challenges "the dominant reading of Washington as merely a capitalist and a compromiser" by emphasizing "the unavoidable constraints imposed by white supremacy in the post-Reconstruction South." Desmond Jgmoan, *Making Bricks Without Straw: Booker T. Washington and the Politics of the Disenfranchised* (Jan. 2015) (Ph.D. dissertation, Cornell University) (on file with author), at 384.

110. Nana Lawson Bush, *Booker T. Washington (1856-1915)*, BLACKPAST (Jan. 17, 2007), <https://www.blackpast.org/african-american-history/washington-booker-t-1856-1915-2/> [<https://perma.cc/67A9-TE25>]; *Booker T. Washington: An Appreciation of the Man and His Times*, NAT'L PARK SERV. (Feb. 20, 2009), <http://npshistory.com/handbooks/historical/bowa/sec2.htm> [<https://perma.cc/W9DS-QAZV>] ("[D]uring the Roosevelt and Taft administrations, he played an important role as unofficial adviser on racial matters and Negro political appointments throughout the Nation" and "Tuskegee's more prominent benefactors included Andrew Carnegie, John D. Rockefeller . . . Carnegie's gifts included a life income for Washington and his family.").

111. For example, John Hope immediately repudiated Washington's disavowal of political or social equality, which he felt perpetuated falsehoods: "If we are not striving for equality, in heaven's name for what are we living? I regard it as cowardly and dishonest for any of our colored men to tell [W]hite people that we are not struggling for equality." (1896) *John Hope*, "We Are Struggling for Equality", BLACKPAST (Jan. 29, 2007), <https://www.blackpast.org/african-american-history/1896-john-hope-we-are-struggling-equality/> [<https://perma.cc/NG78-SCXS>] [hereinafter *John Hope*].

112. W. E. B. Du Bois, *Of Mr. Booker T. Washington and Others*, in *THE SOULS OF BLACK FOLK* 41 (1903) [hereinafter *Of Mr. Booker T. Washington*].

113. Desmond Jgmoan, *Booker T. Washington and the Politics of Deception*, in *AFRICAN AMERICAN POLITICAL THOUGHT: A COLLECTED HISTORY* 167, 183 (Melvin L. Rogers & Jack Turner eds., 2021).

114. *Of Mr. Booker T. Washington*, *supra* note 112, at 50.

115. *Id.* at 51. Du Bois described Washington as "the leader not of one race but of two—a compromiser between the South, the North, and the Negro," and attributed his popularity to a Jim Crow-era mix of racial exhaustion and opportunism. *Id.* at 49. Whereas "the Negroes resented, at first bitterly, signs of compromise which surrendered their civil and political rights," the North "was not only weary of the race problem, but was investing largely in Southern enterprises, and welcomed any method of

In transitional justice terms, Du Bois thought Washington mistaken in resolving that era's "peace versus justice dilemma" by accepting a hollow justice in return for an illusory peace.¹¹⁶ Although Du Bois welcomed "[t]he growing spirit of kindness and reconciliation between the North and South," he considered it problematic "if that reconciliation is to be marked by the industrial slavery and civic death of those same [B]lack men."¹¹⁷ Reconciliation meant "permanent . . . inferiority."¹¹⁸ Ultimately for Du Bois, the Atlanta Compromise encouraged an antiquated "attitude of adjustment and submission" that "practically accepts the alleged inferiority of the Negro races."¹¹⁹ Rather than "straightforward honesty," it offered "indiscriminate flattery" to White Southerners.¹²⁰ In his view, such a compromise based on appeasement exacted profound costs that far exceeded any marginal equality benefits.

As an alternative to Washington's compromise, Du Bois and his colleagues led the Niagara Movement demanding full equality in 1905, which gave rise to the founding of the National Association for the Advancement of Colored People (NAACP) in 1909.¹²¹ At the dawn of the Harlem Renaissance a decade later, a young A. Philip Randolph wrote about a "New Negro" movement that distinguished itself from leaders like Washington, which he called the "Old Crowd of Negro leaders": "[T]he New Crowd must be composed of young men who are educated, radical, and fearless [It] is uncompromising."¹²²

The Atlanta Compromise debate highlights how Black political leaders could disagree intensely about the value of compromise. That Washington's stance might have seemed unavoidable in the post-Reconstruction South reflects

peaceful cooperation." *Id.* at 49–50. Meanwhile, the South "could and did put an interpretation on the speech which came seriously to alarm me and all Colored people," he wrote. Jagmohan, *supra* note 113, at 183. "The Negro, it said, has come to his senses. He is willing to surrender political and civil rights; he is going uncomplainingly to work and going to give up agitation for impossible things." *Id.*

116. *Racial Justice and Peace*, *supra* note 44, at 1330.

117. *Of Mr. Booker T. Washington*, *supra* note 112, at 55.

118. *Id.*

119. *Id.* at 50.

120. *Id.* at 54.

121. ANGELA JONES, AFRICAN AMERICAN CIVIL RIGHTS: EARLY ACTIVISM AND THE NIAGARA MOVEMENT 19, 21–22 (2011).

122. Michael McCann, *A. Philip Randolph: Radicalizing Rights at the Intersection of Class and Race*, in AFRICAN AMERICAN POLITICAL THOUGHT: A COLLECTED HISTORY 290, 294 (Melvin L. Rogers & Jack Turner eds., 2021). In 1924, Harlem Renaissance figure Marita Bonner's play, *The Purple Flower*, rejected Booker T. Washington's compromising stance. Esther Beth Sullivan, *Marita Bonner, 1899–1971*, in FRYE STREET & ENVIRONS: THE COLLECTED WORKS OF MARITA BONNER 363, 367 (1987) (describing how Bonner used "political images and metaphors" in *The Purple Flower*, specifically "White Devils, the Leader (with reference to Booker T. Washington), and the New Man (with reference to the 'New Negro')," how *The Purple Flower* "questions the words of the Leader, and speaks on behalf of the New Man," and how "[t]he allegory is bald-faced in purpose, 'arguing' that nothing less than blood will give birth to new possibilities").

“the complex forms moral agency takes in conditions of extreme oppression.”¹²³ That it brought him into favor with White powerbrokers points to the incentives that Black leaders face to be compromising.¹²⁴ Whereas Washington purported to make change from within the structures of power by advising and negotiating with political leaders, his compromising stance was accused of further entrenching segregation, discrimination, and disenfranchisement. Meanwhile, Du Bois’ uncompromising stance, alongside that of Black women leaders like Ida B. Wells-Barnett, hoped for more meaningful democratic progress through grassroots social movement organizing.¹²⁵

C. *The 1964 Democratic National Convention*

Just as disagreement over the Atlanta Compromise crystallized competing political visions amongst Black leaders during the post-Reconstruction era, controversy over the 1964 Democratic National Convention had a similar effect during the Civil Rights era.

In the wake of the Freedom Summer of 1964,¹²⁶ the Mississippi Freedom Democratic Party (MFDP) challenged the right of an all-White Mississippi Democratic Party (MDP) to represent Mississippi at the Democratic National Convention.¹²⁷ In response to the MFDP’s criticisms, Walter Mondale

123. Desmond Jagmohan, UC BERK. POL. SCI., <https://polisci.berkeley.edu/people/person/desmond-jagmohan> [<https://perma.cc/Q9US-CHJZ>] (last visited Apr. 6, 2023) (describing a book project called *Dark Virtues: Booker T. Washington’s Tragic Realism* (under contract with Princeton University Press)).

124. Historian John Hope Franklin described “Booker Washington Syndrome in which [W]hites would deal with one Negro leader and having brought that leader under their control had no further worries or concerns.” JOHN HOPE FRANKLIN, *RACIAL EQUALITY IN AMERICA* 97 (1976). For a different view that situates Washington’s compromising stance in conditions of extreme oppression, see Jagmohan, *supra* 109.

125. It is important to note, however, that Du Bois’ NAACP itself came of age in the Jim Crow world and could not avoid the forces of compromise. Megan Ming Francis argues that NAACP leaders in the 1930s accepted funding and prioritized causes such as education over racial violence with an understanding of “their place in the racial hierarchy and the importance of compromise—even if it was an unbalanced compromise.” Megan Ming Francis, *The Price of Civil Rights: Black Lives, White Funding, and Movement Capture*, 53 L. & SOC’Y REV. 275, 297 (2019). Joy James observes that although both Du Bois and Wells-Barnett started off as anti-lynching activists within the NAACP, Du Bois sought to appear “moderate” while Wells-Barnett was more “militant.” Joy James, *The Profeminist Politics of W.E.B. Du Bois: With Respects to Anna Julia Cooper and Ida B. Wells Barnett*, in W.E.B. DU BOIS ON RACE AND CULTURE 141, 153 (Bernard W. Bell, Emily R. Grosholz & James B. Stewart eds., 2014). James highlights the intersection of racism and sexism as a reason why Wells-Barnett was sidelined and targeted for her uncompromising politics in ways that Du Bois was not. *Id.* at 147–55.

126. Freedom Summer was a 1964 voter registration drive in Mississippi organized by the Congress on Racial Equality and the Student Non-Violent Coordinating Committee (SNCC), among other civil rights groups. JOHN DITTMER, JEFF KOLNICK & LESLIE-BURL MCLEMORE, *FREEDOM SUMMER: A BRIEF HISTORY WITH DOCUMENTS* 1–2, 4 (2017).

127. The MDP systematically excluded Black people so the MFDP “held parallel rallies, voter registration drives, and delegate elections” in an effort to replace the MDP. Ashley Farmer, *Fighting Like Fannie Lou: On Bernie Sanders, Black Lives Matter, and the Democratic Process*, BLACK PERSPS. (Aug. 17, 2015), <https://www.aaihs.org/fighting-like-fannie-lou-on-bernie-sanders-black-lives-matter-and-the-democratic-process/> [<https://perma.cc/B8Y8-TN3M>].

engineered an “integrated” compromise to seat Black activist Aaron Henry and White activist Edwin King as the MFDP’s two at-large (nonvoting) delegates.¹²⁸ Mondale anticipated that this compromise “may not satisfy everybody, the extremes on the right or the extremes on the left,” but he called it “a just compromise,” partly because “it clearly recognize[d] . . . the basic devotion of this party to human rights.”¹²⁹

However, MFDP delegates saw the compromise as a façade of civil empowerment and voted overwhelmingly to reject it. As MFDP cofounder Fannie Lou Hamer said at the time: “[W]e didn’t come all the way up here to compromise for no more than we’d gotten here We didn’t come all this way for no two seats.”¹³⁰ Calling the two seats “just nothing,”¹³¹ Hamer explained that “if there’s something supposed to be mine three hundred years ago . . . I’m not going to take it by just a taste now and a taste another hundred years.”¹³² She felt that accepting facile compromises in the name of progress would only further delay the goal of attaining justice.¹³³

Hamer’s positionality informed her uncompromising mindset. Not only did Hamer associate compromise with the socioeconomically privileged,¹³⁴ but as a Black woman, Hamer refused compromises that would exclude her.¹³⁵ With the

128. *Eyes on the Prize: America’s Civil Rights Movement 1945-1985*, PBS (Apr. 4, 2021), https://www-tc.pbs.org/wgbh/americanexperience/media/filer_public/b9/02/b902b327-70e0-4a4c-80d4-db9ca54941ab/eyes_on_the_prize_transcript.pdf [https://perma.cc/9ZFA-WYCZ] [hereinafter *Eyes on the Prize*].

129. *Id.* While continuing to support the compromise, Mondale reportedly said decades later that “if he had been one of the civil rights delegates from Mississippi, . . . he would have probably walked out, too.” Randy Furst, *Mondale Stands by Contentious Civil Rights Deal from ‘64*, STAR TRIB. (Aug. 31, 2014), <https://www.startribune.com/50-years-later-walter-mondale-stands-by-his-deal/273330911/> [https://perma.cc/G2P8-M5FM].

130. JOHN DITTMER, GEORGE C. WRIGHT & W. MARVIN DULANEY, 26 ESSAYS ON THE AMERICAN CIVIL RIGHTS MOVEMENT 20 (W. Marvin Dulaney & Kathleen Underwood eds., 1993). *See also* Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1413 (1991) (describing the context for this quote of Hamer’s); KEISHA N. BLAIN, UNTIL I AM FREE: FANNIE LOU HAMER’S ENDURING MESSAGE TO AMERICA 58 (2021) (describing Hamer’s legacy as an activist).

131. *Interview with Fannie Lou Hamer by Dr. Neil McMillen, April 14, 1972, and January 25, 1973, Ruleville, Mississippi; Oral History Program, University of Southern Mississippi*, in THE SPEECHES OF FANNIE LOU HAMER: TO TELL IT LIKE IT IS 147, 164 (Maegan Parker Brooks & Davis W. Houck eds., 2011) [hereinafter *Interview with Fannie Lou Hamer*].

132. “*What Have We to Hail?*,” *Speech Delivered in Kentucky, Summer 1968*, in THE SPEECHES OF FANNIE LOU HAMER: TO TELL IT LIKE IT IS 74, 78 (Maegan Parker Brooks & Davis W. Houck eds., 2011) [hereinafter *What Have We to Hail?*].

133. BLAIN, *supra* note 130, at 58.

134. “Everybody that would compromise in five minutes was the people with a real good education.” DITTMER, WRIGHT & DULANEY, *supra* note 130, at 20 (quoting Fannie Lou Hamer).

135. In adopting an uncompromising stance, Hamer—like Ella Baker, Annie Devine, and Victoria Gray—followed in the footsteps of Sojourner Truth and other Black women leaders in refusing compromises that excluded them. *See, e.g.*, Lolita Buckner Inniss, *While the Water Is Stirring: Sojourner Truth as Proto-Agonist in the Fight for (Black) Women’s Rights*, 100 B.U. L. REV. 1637, 1642 (2020) (“Truth brooked no compromise that would disenfranchise [B]lack women in favor of [B]lack men.”); MARTHA S. JONES, VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND

support of other Black women in the MFDP, including Annie Devine and Victoria Gray, Hamer convinced MFDP delegates to reject the compromise.¹³⁶

Dr. Martin Luther King Jr. initially supported the MFDP and understood why they were justified in rejecting the compromise: “[B]eing a Negro leader, I want you to take this, but if I were a Mississippi Negro, I would vote against it,” he said.¹³⁷ But King eventually encouraged MFDP delegates to accept the compromise. King’s advisor Bayard Rustin likewise appreciated why MFDP activists were against the compromise, but Rustin thought them wrong: “Those kids, who had been shot at, beaten up, brutalized, seen their buddies murdered, could scarcely have been prepared to accept compromise . . . but to understand is not to say they are right.”¹³⁸ The MFDP’s own lawyer, Joseph Rauh, believed that the MFDP had “made a terrific gain.”¹³⁹

According to these national leaders, a short-term compromise was worthwhile because it would set the stage for civil rights legislation and other progress once the Democratic Party was in power. But to grassroots activists seeking a participatory democracy, accepting such a compromise would be worse than having nothing.

Thus, MFDP delegate Bob Moses felt that the two seats were no compromise at all: “What is the compromise? We are here for the people and the people want to represent themselves. They don’t want symbolic token votes.

INSISTED ON EQUALITY FOR ALL 52 (2020) (discussing how leaders of the 1838 women’s convention in Philadelphia rejected “a compromise in which the women would continue to meet, but without Black women in attendance”).

136. LYNNE OLSON, *FREEDOM’S DAUGHTERS: THE UNSUNG HEROINES OF THE CIVIL RIGHTS MOVEMENT FROM 1830 TO 1970*, 322–23 (2001). Ella Baker, director of the MFDP’s Washington office, also repudiated the compromise. BARBARA RANSBY, *ELLA BAKER & THE BLACK FREEDOM MOVEMENT: A RADICAL DEMOCRATIC VISION* 351–54 (2003). The broader women’s movement did not always share a sense of solidarity with Black women, however. For example, historian Martha Jones observes how the National American Woman Suffrage Association, founded in 1890 to advance women’s suffrage, “long worked by way of a dirty compromise with white supremacy that put the interests of Southern [W]hite women above those of Black women, no matter where in the country they were from.” JONES, *supra* note 135, at 164. In 1914, Mississippi Senator J. K. Vardaman sought to exploit this lack of solidarity by proposing a “compromise” that would repeal Black voting rights in exchange for women’s suffrage. *Id.* at 168. This history points to the necessity of stronger intersectional coalitions. See generally Catherine Powell & Camille Gear Rich, *The “Welfare Queen” Goes to the Polls: Race-Based Fractures in Gender Politics and Opportunities for Intersectional Coalitions*, 108 *GEO. L.J.* 105 (2020).

137. TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963–65*, 473–74 (1998).

138. George Shulman, *Bayard Rustin: Between Democratic Theory and Black Political Thought*, in *AFRICAN AMERICAN POLITICAL THOUGHT: A COLLECTED HISTORY* 439, 446 (Melvin L. Rogers & Jack Turner eds., 2021).

139. *Eyes on the Prize*, *supra* note 128. Accustomed to the wheeling and dealing of D.C., Rauh said: “You always talk ‘no compromise’ in a Convention until you get the best you can then you quit.” See Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 *YALE L.J.* 2740, 2770 (2014) (citing to *Eyes on the Prize*, *supra* note 128).

They want to vote themselves.”¹⁴⁰ The two-seat option was unacceptable because it circumvented the changes required to make the United States truly democratic. According to Moses: “The whole point of the MFDP is to teach the lowest sharecropper that he knows better than the biggest leader exactly what is required to make a decent life for himself.”¹⁴¹ Rejecting the political pressure to compromise, Moses concluded. “We’re not here to bring politics to our morality but to bring morality to our politics.”¹⁴²

In the months following the Convention, the Student Nonviolent Coordinating Committee (SNCC), which had backed the MFDP, further detailed reasons for rejecting the compromise in its mailings.¹⁴³ These mailings powerfully demonstrate the kinds of compromises that a grassroots racial justice group deemed unacceptable.

SNCC’s November 1964 article “M.F.D.P. Gives Live Lesson in Democracy” delineated seven features that rendered the two-seat compromise unacceptable to Hamer and other delegates.¹⁴⁴ First, the compromise traded in genuine voting participation for narrow “token” representation.¹⁴⁵ Second, the compromise did not address the MFDP’s core demands: “The [MFDP] came to unseat the regulars because they don’t represent the people of Mississippi.”¹⁴⁶ Third, there was a disjuncture between the rhetoric and reality of compromise: although “[t]he compromise made pretense at setting up means of challenging delegations,” in reality the administration “would not guarantee a single registered voter added to the lists in the next four years.”¹⁴⁷ Fourth, the idea that Black people in other states would find two at-large seats meaningful was not a

140. JOHN DITTMER, *LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI* 299 (1994).

141. Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961–1966*, 34 *LAW & SOC’Y REV.* 367, 395 (2000).

142. BRANCH, *supra* note 137, at 474. Unita Blackwell, who would later become the first Black woman elected mayor in Mississippi, similarly saw compromise as a moral rather than political question: “[T]he whole issue around the compromise . . . was what was right and what was wrong.” The fact that Black Mississippians “had been done wrong . . . was a moral situation that had to be righted” and “not just a political something to get away with . . . that we sit in rooms and negotiate,” she said. “[W]e went after what was right, and it was wrong, the way we had been treated for hundreds and hundreds of years . . .” *Eyes on the Prize*, *supra* note 128.

143. M.F.D.P. Explains Its Stand (Oct. 1964) (Student Nonviolent Coordinating Committee Papers, 1959–1972, Reel 33, Frame 1, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/252253/252253_033_0001/252253_033_0001_0011_From_501_to_550.pdf [<https://perma.cc/NQ35-REKX>].

144. M.F.D.P. Gives Lesson in Democracy (Nov. 1964) (Student Nonviolent Coordinating Committee Papers, 1959–1972, Reel 33, Frame 1, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/252253/252253_033_0001/252253_033_0001_0011_From_501_to_550.pdf [<https://perma.cc/NQ35-REKX>] [hereinafter *M.F.D.P. Gives Lesson in Democracy*].

145. *Id.*

146. *Id.*

147. *Id.*

reason for Black Mississippians to accept the compromise.¹⁴⁸ Fifth, the compromise offered the MFDP a fleeting rather than sustained benefit, extending “nothing in the way of permanent recognition, patronage, official status or a guarantee of participation in the 1968 convention.”¹⁴⁹ Sixth, even the possibility of future benefit for MFDP members was on precarious ground, since there was no committee set up with official power to review such matters.¹⁵⁰ Finally, the MFDP had come “to raise the issue of racism, not simply to demand recognition.”¹⁵¹ MFDP delegates could not accept a decision whose goal was “avoiding . . . the question of racism.”¹⁵²

Rejecting the idea that the MFDP delegation was uncompromising, the article insisted that MFDP “would have accepted any honorable compromise between reasonable men.”¹⁵³ Shifting critical attention back to party leaders, it said that the “test was not whether the [MFDP] could accept ‘political realism,’ but rather whether the Convention and the National Democratic Party could accept the challenge presented by the [MFDP]. The Convention and the National Democratic Party failed that test.”¹⁵⁴

Georgia activist Charles Sherrod later described the two-seat compromise as another instance of America’s “white-washing, buck-passing tactics.”¹⁵⁵ According to him, the compromise was only “made to pacify the [B]lacks in this country” and “made to look like something [when] it was nothing.”¹⁵⁶ Accepting the compromise “would have been a lie” because it would have “said to [B]lacks across the nation and the world that we share the power” when in fact “we are . . . hungry, beaten, unvictorious, jobless, homeless.”¹⁵⁷ It would have depicted the United States as egalitarian, when truthfully “[w]e are a country of racists with a racist heritage, a racist economy, a racist language, a racist religion, a racist philos[o]phy of living.”¹⁵⁸ Sherrod refused to compromise on this “honesty.”¹⁵⁹

148. *Id.* (“[T]he 68 persons came to Atlantic City to represent the Negroes of Mississippi and not the country as a whole.”).

149. *Id.*

150. *M.F.D.P. Gives Lesson in Democracy*, *supra* note 144.

151. *Id.*

152. *Id.*

153. *Id.* According to activist Charles Sherrod, a compromise Congressman Edith Green proposed might have been acceptable to MFDP delegates, but it was never officially adopted. Student Nonviolent Coordinating Committee Papers, 1959–1972, Reel 62, Frame 560, on file with the Manuscript Division, Library of Congress, https://hv.proquest.com/pdfs/252253/252253_062_0560/252253_062_0560_0003_From_101_to_150.pdf [<https://perma.cc/DWZ4-33HY>] [hereinafter *Charles M. Sherrod*]; RANSBY, *supra* note 135, at 350 (noting Edith Green’s proposal).

154. *M.F.D.P. Gives Lesson in Democracy*, *supra* note 144.

155. *Charles M. Sherrod*, *supra* note 153.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

The MFDP's actions at the 1964 Democratic National Convention showed that the material deprivation and political disempowerment of Black Mississippians shaped their uncompromising stance. To them, compromising would have meant condoning the injustice of the status quo. Although the MFDP failed to unseat the MDP in 1964, it succeeded in foregrounding the moral commitments and political demands of its community.¹⁶⁰ “Hamer had managed the unthinkable,” historian Martha Jones wrote.¹⁶¹ “She had elevated her person, her story, and the politics she embodied—that of a Black woman sharecropper turned handbag-toting political operative—to national consequence.”¹⁶² In doing so, the MFDP also attained long-term equality gains as their challenge “forced the Democratic Party to adopt a nondiscrimination clause in state delegation selection” and, more importantly, “propelled public support for the Voting Rights Act in 1964.”¹⁶³ The MFDP's principled reasons for rejecting the two-seat compromise shed important light on how present racial justice movements might approach the compromises of today.¹⁶⁴

D. Civil Rights Movement and Aftermath

Civil Rights Movement advocates routinely grappled with the place of compromise in the struggle for racial equality. Representing the SNCC at the 1963 March on Washington, a young John Lewis rebuked “cheap political leaders who build their careers on immoral compromises” predicated on

160. See Guinier & Torres, *supra* note 139, at 2768.

161. JONES, *supra* note 135, at 261.

162. *Id.* Hamer's uncompromising resistance would continue to inspire the racial justice strategies of the Black Lives Matter movement. Farmer, *supra* note 127 (Like Hamer, “[t]he Black Lives Matters women stood before audiences to indict the structural racism that the presidency, law enforcement, and voting processes have and continue to represent . . . risk[ing] their lives and livelihoods [by] thrust[ing] themselves into the national spotlight to force presidential hopefuls to take [B]lack demands seriously.”).

163. *Id.*

164. See *infra* Parts IV and V (discussing democracy-constraining features of compromises and the perils of compromise in present debates).

“political, economic and social exploitation.”¹⁶⁵ Lewis welcomed “a serious revolution” to undo such compromises.¹⁶⁶

But not every SNCC member was convinced. Months before the 1964 Goldwater–Johnson presidential election, SNCC supporter Eric Cox urged DC director Jim Monsonis to “use [his] influence to curb civil rights demonstrations until after the election” to avoid hurting Johnson’s campaign.¹⁶⁷ Cox called this “a compromise well worth making” given the civil rights threat of a Goldwater presidency.¹⁶⁸ Monsonis responded that civil rights demonstrations must continue for both moral and strategic reasons: morally, “[w]hen a community has a major grievance and wants to demonstrate against it, there is no leader who can prevent them or would want to”; and strategically, “a pledge of commitment to Johnson destroys any potential leve[[]rage to [a]ffect[] the Democratic Party which we might have.”¹⁶⁹

Monsonis’ response illustrated that, far from being politically naive, SNCC activists could both be principled and pragmatic in contemplating compromise—with others and among themselves. In a similarly pragmatic vein, the SNCC’s Courtland Cox counseled Black Alabamians not to accept every political

165. John Lewis, Chairman, Student Nonviolent Coordinating Committee (SNCC), March on Washington (Aug. 28, 1963) (Student Nonviolent Coordinating Committee Papers, 1959–1972, Reel 2, Frame 1, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/252253/252253_002_0001/252253_002_0001_0001_From_1_to_50.pdf [<https://perma.cc/C24A-QWZZ>] [hereinafter *John Lewis*]. While calling out “immoral compromises,” Lewis “toned down” his final speech—including by removing the phrase “cheap political leaders”—on King and Randolph’s nudging. See Angus Johnston, *John Lewis’s Censored Speech to the 1963 March on Washington, Before and After*, STUDENT ACTIVISM (Aug. 28, 2011), <https://studentactivism.net/2011/08/28/john-lewis/> [<https://perma.cc/69B9-XJCG>]; Adia Robinson, *The Two Versions of John Lewis’ March on Washington Speech Reveal the Complexity of a Young Leader*, ABC NEWS (July 23, 2020), <https://abcnews.go.com/Politics/versions-john-lewis-march-washington-speech-reveal-complexity/story?id=71880462> [<https://perma.cc/ZMV9-QHP9>].

166. *John Lewis*, *supra* note 165. Lewis’ colleague James Forman captured the spirit of the SNCC when he declared: “Civil rights is not the art of compromise.” Roy Reed, *Rights Group Widely Criticized for Attacking Vietnam Policy*, N.Y. TIMES (Jan. 16, 1966), <https://www.nytimes.com/1966/01/16/archives/rights-group-widely-criticized-for-attacking-vietnam-policy.html> [<https://perma.cc/2CYT-3K3M>]. See also Student Nonviolent Coordinating Committee Papers, 1959–1972, Reel 20, Frame 1271, on file with the Manuscript Division, Library of Congress, https://hv.proquest.com/pdfs/252253/252253_020_1271/252253_020_1271_0003_From_101_to_136.pdf [<https://perma.cc/9T5E-HLWU>] (discussing Georgia representatives’ refusal to allow SNCC member Julian Bond to be seated in the representative role to which he was elected due to his endorsement of burning Vietnam draft cards).

167. Letter from Eric Cox to Jim Monsonis (July 30, 1964) (Student Nonviolent Coordinating Committee Papers, 1959–1972, Reel 53, Frame 1154, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/252253/252253_053_1154/252253_053_1154_0002_From_51_to_100.pdf [<https://perma.cc/G2CG-8XBS>].

168. *Id.*

169. Letter from Jim Monsonis to Eric Cox (Aug. 3, 1964) (Student Nonviolent Coordinating Committee Papers, 1959–1972, Reel 53, Frame 1154, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/252253/252253_053_1154/252253_053_1154_0002_From_51_to_100.pdf [<https://perma.cc/G2CG-8XBS>].

compromise.¹⁷⁰ Instead, he argued that “where it’s possible for Negroes to organize independently because of their numerical strength on a county level, they should do so.”¹⁷¹

Commentators at the time recognized the significance of the SNCC’s more uncompromising approach. In August 1964, sociologist Christopher Jencks observed a shift in Mississippi from a “conversion strategy,” predicated on changing Southern hearts and minds, to a “coercion strategy,” whereby “the hope was no longer to win over the white supremacists to brotherly love; it was to make life so unpleasant for them that they would find compromise easier than massive resistance.”¹⁷² Investigative journalist I. F. Stone argued in April 1965 that the mainstream civil rights movement needed groups like the SNCC: “[E]very movement of liberation requires its fringe of zealots and wilder men; otherwise the moderates would have no way to scare the other side into compromise.”¹⁷³ In a March 1965 article in the *Los Angeles Times*, journalist Don Irwin observed that an agreement between King and the city of Montgomery would be “improbable” without pressure from the SNCC.¹⁷⁴

As these accounts suggested, uncompromising anti-racist groups such as the SNCC had the potential to facilitate more just and effective outcomes. Uncompromising anti-racists served as a countervailing force to uncompromising white supremacists, pressured leaders to avoid premature compromise and pursue more justice-seeking positions, and made moral considerations visible in an otherwise political calculus of compromise.¹⁷⁵

170. Bill Mahoney, “*Snick*” in *Alabama* (Student Nonviolent Coordinating Committee Papers, 1959–1972, Reel 18, Frame 928, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/252253/252253_018_0928/252253_018_0928_0003_From_101_to_150.pdf [<https://perma.cc/2CT6-CRBC>] (“From the viewpoint of a tent city resident sleeping with a gun in a freezing tent there can be no middle ground.”).

171. *Id.*

172. Christopher Jencks, *Mississippi: From Conversion to Coercion*, NEW REPUB. (Aug. 22, 1964) (Student Nonviolent Coordinating Committee Papers, 1959–1972, Reel 20, Frame 259, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/252253/252253_020_0259/252253_020_0259_0002_From_51_to_100.pdf [<https://perma.cc/28QM-N3EK>].

173. *On the Klan, the Reds and the Un-Americans*, I.F. STONE’S WEEKLY (Apr. 5, 1965) (Student Nonviolent Coordinating Committee Papers, 1959–1972, Reel 22, Frame 1032, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/252253/252253_022_1032/252253_022_1032_0004_From_151_to_200.pdf [<https://perma.cc/7WSE-NKUC>].

174. Don Irwin, *Alabama Racial Fires Fanned by SNCC Group*, L.A. TIMES (Mar. 21, 1965) (Student Nonviolent Coordinating Committee Papers, 1959–1972, Reel 18, Frame 928, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/252253/252253_018_0928/252253_018_0928_0001_From_1_to_50.pdf [<https://perma.cc/5V7A-Z9FZ>].

175. See also Franita Tolson, *Practical Equality and the Limits of Second Best Strategies for Justice*, 34 CONST. COMMENT. 477, 477 (2019) (noting “circumstances in which the demand for equality must be overt, express, and uncompromising” and that “[e]quality must be both practical and radical”).

While the SNCC's moralism¹⁷⁶ might appear different from King's pragmatism, there were important similarities between their approaches. Like SNCC leaders, King was unwilling to accept compromises he deemed unprincipled, which for him included compromises that did not take the imperative of equality seriously and did not contribute to a larger strategy toward progress.¹⁷⁷

King warned of "the danger" of "a compromise [being] firmly implanted in which the real goals are merely token integration for a long period to come."¹⁷⁸ He reminded others of America's history of oppressive equality compromises, recalling that "[t]he Negro was the tragic victim of another compromise in 1878, when his full equality was bargained away by the Federal Government and a condition somewhat above slave status but short of genuine citizenship bec[a]me his social and political existence for nearly a century."¹⁷⁹ He predicted that "the Negro of 1959 will not accept supinely any such compromises in the contemporary struggle for integration."¹⁸⁰

King believed that compromise's role in the process of social change "should serve to further the objective and not become a substitute for pressing on toward the goal."¹⁸¹ He acted on this philosophy by turning down certain proposed compromises on integration.

Amid the Montgomery Bus Boycott in January 1956, King and other leaders of the Montgomery Improvement Association met to discuss a bus seating compromise that fell short of their demands.¹⁸² According to the meeting

176. See Emily Stoper, *The Student Nonviolent Coordinating Committee: Rise and Fall of a Redemptive Organization*, 8 J. BLACK STUD. 13, 16 (1977).

177. In a June 1958 statement, King, Lester B. Granger, A. Philip Randolph, and Roy Wilkins advised President Eisenhower that "tension is an inherent element of basic social change." Thus, the choice facing the nation was not between "an unjust status quo with social peace" and "integration with tension." Rather, the real choice was between "a bold program which moves through tension to a democratic solution" and "evasion and compromise which purport to avoid tension, but which in reality lead the entire society toward economic, social and moral frustration." NAACP, A Statement to the President of the United States (June 23, 1958) (Papers of A. Philip Randolph, Reel 26, Frame 0000, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/001608/001608_026_0000/001608_026_0000_0001_From_1_to_50.pdf [<https://perma.cc/W59K-7UMM>].

178. Martin Luther King, Jr., "The Social Organization of Nonviolence", MARTIN LUTHER KING, JR. RSCH. & EDUC. INST. (Oct. 1959), <https://kinginstitute.stanford.edu/king-papers/documents/social-organization-nonviolence> [<https://perma.cc/WE6B-F76B>] [hereinafter *The Social Organization of Nonviolence*].

179. *Id.*

180. *Id.*

181. Martin Luther King, Jr., "For All . . . A Non-Segregated Society," *A Message for Race Relations Sunday*, MARTIN LUTHER KING, JR. RSCH. & EDUC. INST. (Feb. 10, 1957), <https://kinginstitute.stanford.edu/king-papers/documents/all-non-segregated-society-message-race-relations-sunday> [<https://perma.cc/AL8S-L8LE>].

182. Donald T. Ferron, *Notes on MIA Executive Board Meeting*, by Donald T. Ferron, MARTIN LUTHER KING, JR. RSCH. & EDUC. INST. (Jan. 30, 1956), <https://kinginstitute.stanford.edu/king-papers/documents/notes-mia-executive-board-meeting-donald-t-ferron-0> [<https://perma.cc/2XQ8-RMMB>] [hereinafter *MIA Meeting*].

minutes, Reverend W. F. Alford supported the compromise, reasoning that “[t]here’s a time in the life of any crisis when you . . . ought to be reasonable; [t]he parties concerned ought to ‘give and take.’”¹⁸³ But King anticipated the reaction of less compromising constituencies—warning that “if we went tonight and asked the people to get back on the bus, we would be ostracized.”¹⁸⁴ Wanting to avert premature compromise, King advised that Black people were willing to walk rather than take the bus and that “victory [could] be won.”¹⁸⁵ In this instance, King’s awareness of more uncompromising positions pushed him to continue the boycott.¹⁸⁶ Given the racial terror of Jim Crow, this stance came with significant costs, as segregationists bombed King’s home and targeted boycott leaders.¹⁸⁷ Yet, these leaders’ refusal to compromise kept the issue alive and their resistance was ultimately vindicated when legal victories led to Montgomery’s buses being officially desegregated in December 1956.¹⁸⁸

In addition to the Montgomery Bus Boycott, King took an uncompromising stance in March 1965 after state troopers brutalized marchers during what is now known as “Bloody Sunday.” President Johnson tried to dissuade King from marching again,¹⁸⁹ but King insisted that the march proceed as planned: “I would rather die on the highway in Alabama than make a butchery of my conscience by compromising with evil.”¹⁹⁰

And according to his philosophy, King was also willing to compromise when he believed it paved the way for fuller equality. In the Birmingham Campaign, which put pressure on White merchants through the collective boycotting of their products around Easter 1963, King entertained a compromise to halt the demonstrations in return for partial fulfillment of their demands.¹⁹¹ In ill health and left out of the negotiation, Birmingham leader Reverend Fred Shuttlesworth was livid with King and promised to “lead them back into the street.”¹⁹² But once this compromise culminated in the Birmingham Truce

183. *Id.*

184. *Id.*

185. *Id.*

186. Randall Kennedy observes that King was further “radicalized” by the “white power structure,” exemplified by Montgomery’s lawyer Jack Crenshaw’s uncompromising stance. Randall Kennedy, *Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott*, 98 *YALE L.J.* 999, 1003 (1989).

187. *Id.* at 1028.

188. *Id.* at 1053–54.

189. See Martin Luther King, Jr., *Behind the Selma March*, *SAT. REV.* (Apr. 3, 1965) (Student Nonviolent Coordinating Committee Papers, 1959–1972, Reel 33, Frame 1, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/252253/252253_033_0001/252253_033_0001_0004_From_151_to_200.pdf [<https://perma.cc/6ECS-7CA2>].

190. *Id.*

191. *Birmingham Campaign*, *MARTIN LUTHER KING, JR., RSCH. & EDUC. INST.*, <https://kinginstitute.stanford.edu/encyclopedia/birmingham-campaign> [<https://perma.cc/SXN9-ACU2>] (last visited Sept. 27, 2022).

192. *Id.*

Agreement—bringing down “Whites Only” and “Blacks Only” signs on restrooms and drinking fountains, among other concrete steps—Shuttlesworth joined King in making the announcement.¹⁹³ Birmingham segregationists responded to this Agreement with violent attacks, including two bombings.¹⁹⁴

As these examples reveal, King drew the line at compromises he felt impeded, rather than facilitated, the pursuit of a multiracial democracy. Compromises poised to entrench oppressive systems or endanger long-term change would not meet his threshold of a principled compromise. That the SNCC’s uncompromising stance pressured political and civil rights leaders to negotiate more just outcomes provides important lessons for political advocacy groups today. It suggests that, in at least some circumstances, uncompromising approaches are valuable not only for moral but also for strategic reasons.

Following the Civil Rights era, King’s advisor Bayard Rustin dismissed the uncompromising approaches of SNCC activists and insisted on principled compromises. Rustin believed that the political climate mattered to the pursuit of racial justice: his advice was to be suitably confrontational or compromising given the political moment.¹⁹⁵

To Rustin, hardline uncompromising stances had lost their usefulness with the emergence of civil rights.¹⁹⁶ He chided “The Spontaneous Left,” whose uncompromising nature and “rejection of all possible allies” showed, from his perspective, that they did not appreciate “the necessities and complexities of the struggle.”¹⁹⁷ In a January 1970 letter to *Harper’s Magazine*, Burrill L. Crohn criticized Rustin for engaging in “the politics of compromise and deals, devoid of principles and contemptuous of moral values,” and implored Rustin to leave space for more radical demands.¹⁹⁸ In his response, Rustin criticized Crohn’s

193. *Id.*

194. *Id.* See also text accompanying *infra* note 281 (describing King’s willingness to compromise on the Voting Rights Act of 1965).

195. See Bayard Rustin, *The Legacy of the Civil Rights Movement*, A. PHILIP RANDOLPH INST. (July 22, 1976) (Student Nonviolent Coordinating Committee Papers, 1959–1972, Reel 19, Frame 662, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/001581/001581_019_0662/001581_019_0662_From_1_to_273.pdf [<https://perma.cc/H464-DVWS>] [hereinafter *The Legacy of the Civil Rights Movement*].

196. Alan Brinkley, *One Was a Multitude*, N.Y. TIMES (Mar. 2, 1997), <https://archive.nytimes.com/www.nytimes.com/books/97/03/02/reviews/970302.02brinklt.html> [<https://perma.cc/L33Y-RLDE>].

197. Bayard Rustin, *Influence of the Right and Left in the Civil Rights Movement* (Bayard Rustin Papers, Reel 17, Frame 1211, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/001581/001581_017_1211/001581_017_1211_0004_From_151_to_200.pdf [<https://perma.cc/8W9P-YMBW>].

198. Letter from Burrill L. Crohn to Harper’s Magazine (Jan. 10, 1970) (Bayard Rustin Papers, Reel 22, Frame 403, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/001581/001581_022_0403/001581_022_0403_From_1_to_206.pdf [<https://perma.cc/99W6-K3CC>].

“moral totalism” for leaving “no possibility of compromise” and brushed off Crohn as “not serious.”¹⁹⁹

Rustin celebrated Black leaders like Congressman Andrew Jackson Young, Jr., who had “made the shift from protest to politics, from confrontation to compromise.”²⁰⁰ He understood this shift as “not the result of selling out, but of finding new strategies for a new political period.”²⁰¹ To Rustin, compromise was a strategic necessity because “Negroes by themselves cannot carry out [necessary] programs.”²⁰² Moving forward, Rustin sought “a strong, progressive coalition of heterogeneous elements” that “requires that one enter with a spirit of compromise, professionalism and militant commitment to ultimate objectives.”²⁰³

Not every compromise fulfilled these objectives. “Necessarily there will be compromise,” Rustin maintained, “[b]ut the difference between expediency and morality in politics is the difference between selling out a principle and making

199. Bayard Rustin to Harper’s Magazine (1970) (Bayard Rustin Papers, Reel 19, Frame 913, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/001581/001581_017_0913/001581_017_0913_0001_From_1_to_50.pdf [<https://perma.cc/G4PT-FJLX>].

200. *The Legacy of the Civil Rights Movement*, *supra* note 195.

201. *Id.*

202. Student Nonviolent Coordinating Committee Papers, 1959–1972, Reel 18, Frame 228, on file with the Manuscript Division, Library of Congress, https://hv.proquest.com/pdfs/001581/001581_018_0228/001581_018_0228_0002_From_51_to_100.pdf [<https://perma.cc/BJ6N-QUWW>].

203. Bayard Rustin, *Black America at Crossroads*, Commencement Address Tuskegee Institute (May 31, 1970) (Bayard Rustin Papers, Reel 18, Frame 228, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/001581/001581_018_0228/001581_018_0228_0001_From_1_to_50.pdf [<https://perma.cc/N32N-8NX2>] [hereinafter *Black America at Crossroads*]. Keeanga-Yamahtta Taylor observes: “By the mid- to late 1980s, Black elected officials were no longer political neophytes: they were experienced executives and operatives in the American political system of constant compromise and negotiation.” However, according to Taylor, this did not automatically translate to progressive politics: for example, the Congressional Black Caucus supported law and order policies in Black communities. KEEANGA-YAMAHTTA TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION 100 (2016).

smaller concessions to win larger ones.”²⁰⁴

204. Bayard Rustin, *From Protest to Politics: The Future of the Civil Rights Movement*, Commentary (Feb. 1966) (Bayard Rustin Papers, Reel 17, Frame 1211, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/001581/001581_017_1211/001581_017_1211_0003_From_101_to_150.pdf [<https://perma.cc/A8BF-R2FW>].

While planning the March on Washington alongside King and Randolph, Rustin decried politicians who sold out on the principle of racial equality: “Compromises with the Southerners may be convenient for some politicians, but they only further jeopardize the lives of our people by encouraging the animal insanity of deluded minds.” *March Leaders Demand President Act in Birmingham—Call for National Day of Mourning* (Sept. 16, 1963) (Bayard Rustin Papers, Reel 8, Frame 563, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/001581/001581_008_0563/001581_008_0563_0001_From_1_to_50.pdf [<https://perma.cc/6S38-TYHV>] [hereinafter *Birmingham Press Release*].

In 1966, with the looming prospect of a Nixon presidency, Rustin’s writings on compromise became cautionary, warning that “1968 holds the threat of repeating the fateful election of 1876 and the infamous Compromise of the following year,” referring to the Hayes-Tilden Compromise. Bayard Rustin Presentation to the AFL-CIO Committee on Political Equality (Nov. 1966) (Bayard Rustin Papers, Reel 18, Frame 721, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/001581/001581_018_0721/001581_018_0721_0001_From_1_to_50.pdf [<https://perma.cc/GW4J-U763>]. See also *Black America at Crossroads*, *supra* note 203 (comparing the Nixon presidency to the Hayes-Tilden compromise).

Throughout the Nixon presidency, Rustin condemned the administration’s “efforts to compromise with discrimination,” criticizing a Justice Department that was “on the side of southern segregationists” and that “tried, and nearly succeeded, in destroying the Voting Rights Act.” Bayard Rustin, *Watergate and Civil Rights* (Aug. 9, 1973) (Bayard Rustin Papers, Reel 19, Frame 379, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/001581/001581_019_0379/001581_019_0379_0004_From_151_to_200.pdf [<https://perma.cc/6FQV-LAVT>].

When the Senate passed an amendment instructing the Department of Health, Education and Welfare to apply the same standards to Northern de facto and Southern de jure segregation, Rustin labeled it “the Compromise of 1970” akin to the Compromise of 1877, “when the principle of equality was sacrificed to the economic advantage of the wealthy and the racial fears of the bigoted.” Bayard Rustin, *The Compromise of 1970*, A. PHILIP RANDOLPH INST. (Feb. 26, 1970) (Bayard Rustin Papers, Reel 19, Frame 149, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/001581/001581_019_0149/001581_019_0149_0004_From_151_to_200.pdf [<https://perma.cc/DF4U-AYDE>] [hereinafter *The Compromise of 1970*].

Even dealing with the more progressive Carter administration required continuous, albeit different, strategizing around compromise. Rustin explained that “[t]he task before us is not to find fault with the Carter administration, but to help it ‘escape from the evils of premature political compromise, narrow fiscal conservatism, and indefinite delays in implementing reforms.’” Bayard Rustin, *A Message to Carter: Performance Not Promises*, A. PHILIP RANDOLPH INST. (Aug. 3, 1977) (Bayard Rustin Papers, Reel 19, Frame 662, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/001581/001581_019_0662/001581_019_0662_From_1_to_273.pdf [<https://perma.cc/JT6M-TZXM>] [hereinafter *A Message to Carter*].

Rustin had called for “a bold social and economic program” to address racial stratification and strife. Telegram from Bayard Rustin to Robert F. Wagner, Mayor, N.Y.C. (May 19, 1965) (Bayard Rustin Papers, Reel 18, Frame 1251, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/001581/001581_018_1251/001581_018_1251_0001_From_1_to_50.pdf [<https://perma.cc/VK4B-UND6>]. When President Carter promised to announce a national health insurance program in 1976, Rustin worried that he would fall short by making bad compromises with corporate and medical interests. Bayard Rustin, *Health Care: Illusion or Reform*, A. PHILIP RANDOLPH

To more radical activists like Malcolm X, the Civil Rights era itself embodied an exclusionary racial compromise.²⁰⁵ On such a view, the mainstreaming of civil rights in America entailed an excessive embrace of compromise and a false equivalence between uncompromising white supremacists and uncompromising anti-racists, which marginalized more revolutionary approaches to racial justice.²⁰⁶

E. Summary and Some Reflections

The virtuous label of “compromise” obscures how concessions to white supremacists throughout history have damaged the pursuit of racial equality.²⁰⁷ Such compromises have sought to maintain peace and unity by appeasing racists, delaying or denying a reckoning with racism, or adjusting the magnitude of racism to preserve a white supremacist order.

Power structures mediate how these compromises unfold. In a racially stratified United States, white supremacists can often afford to be uncompromising because the status quo tends to protect their interests: if they refuse to compromise, white supremacy persists. In contrast, anti-racists often face a lose-lose situation. They lose if they are uncompromising because white supremacists hold power and would determine the outcome anyhow while

INST. (Dec. 8, 1977) (Bayard Rustin Papers, Reel 19, Frame 662, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/001581/001581_019_0662/001581_019_0662_From_1_to_273.pdf [https://perma.cc/JT6M-TZXJ] [hereinafter *Health Care: Illusion or Reform*]. Rustin said that a weak bill would be “doubly tragic” because meaningful reform was politically viable in that moment, and because “a ‘compromise’ measure would do little to solve the problem,” creating only “the illusion that something meaningful is being done, while perpetuating an inadequate and inefficient system and delaying the task of real reform.” *Id.*

Around the same time in 1976, Congress was considering the Humphrey–Hawkins Full Employment Act, which sought to create public jobs to reduce unemployment. In this case, Rustin conceded that he “would have preferred more ambitious and socially-conscious goals.” Bayard Rustin, *The Promise of Humphrey-Hawkins*, A. PHILIP RANDOLPH INST. (Nov. 23, 1977) (Bayard Rustin Papers, Reel 19, Frame 662, on file with the Manuscript Division, Library of Congress), https://hv.proquest.com/pdfs/001581/001581_019_0662/001581_019_0662_From_1_to_273.pdf [https://perma.cc/JT6M-TZXJ]. Nevertheless, Rustin supported the bill, as its “shortcomings” were “clearly outweighed by its promise,” because it provided “clear goals and framework for policy-making” without which “substantial progress in reducing unemployment [would] only happen accidentally and with extremely good fortune.” *Id.* With the prospect of a recession, this was a compromise Rustin was willing to accept. *Id.*

205. See MALCOLM X SPEAKS: SELECTED SPEECHES AND STATEMENTS 31 (George Breitman ed., 1965) (“[W]e don’t intend to let them pussyfoot and dillydally and compromise any longer.”).

206. Gary Peller credits Malcolm X with identifying “the basic racial compromise that the incorporation of ‘the civil rights struggle’ into mainstream American culture would eventually embody . . . that black nationalists be equated with white supremacists, and that race consciousness on the part of either [W]hites or [B]lacks be marginalized as beyond the good sense of enlightened American culture.” Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 760 (1990).

207. “Compromise is a respectable word,” Wendell Phillips said. “We have elevated a *swindle* into a compromise and dignified it with the name.” *Speech of Wendell Phillips on the Fourteenth Amendment, Cooper Institute (Oct. 25, 1866)*, in 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 277, 278 (Kurt T. Lash ed., 2021).

potentially retaliating with greater violence. And they also lose if they compromise but fall short of their values and of achieving necessary changes.²⁰⁸

The American ideology of compromise in turn shores up power. Compromise is often used by members of dominant groups to justify decisions that harm and control members of subordinated groups. Calling something a “compromise” can disguise acts of racial power. Compromise is also used to dilute and discredit the justice-seeking demands of subordinated groups. Once compromise is considered the ultimate democratic virtue, uncompromising demands for justice can be cast aside as irrational, unconstructive, and even anti-democratic.

Against this backdrop of power, Black leaders have long grappled with the value of compromise. Some, like King and Rustin, accepted *principled compromising* as a practical necessity: they felt that oppressed people may lack the power to realize their political visions without making strategic concessions along the way and that partial gains may alleviate intense suffering. To them, principled compromises involved good-faith efforts to advance Black people’s interests and played into longer-term strategies towards progress in ways that unprincipled ones did not. These leaders were unwilling to sacrifice long-term justice or a genuine racial reckoning for temporary peace. Others, like Hamer and Moses, were *principled and uncompromising*: while willing to consider compromise, they were inclined to reject compromises for both moral and pragmatic reasons. To them, compromises tended to perpetuate lies about Black Americans and about America itself, to legitimize racist structures instead of reckoning with them, to unduly concede moral claims and political opportunities, and to trade in the necessary enduring changes for fleeting gains. Finally, revolutionary activists like Malcolm were often *fully uncompromising*, seeing any compromise with white supremacy as the antithesis of Black liberation.

Despite their differences, there were often important dialectical relationships between “compromising” and “uncompromising” Black activists. For example, although Shuttlesworth denounced King for pausing the Birmingham Campaign, they ultimately came together to support the Birmingham Truce Agreement. Conversely, King adhered to the more uncompromising stances of community members in persisting with the Montgomery Bus Boycott. And when King and Hamer disagreed about the two-seat compromise at the 1964 Democratic National Convention, King nevertheless appreciated why Hamer would reject the compromise even as he would accept it. In an “ecosystem” of social movement strategies, the

208. Making matters worse, uncompromising white supremacists are historically more willing and able to wield state power than uncompromising anti-racists. For example, between 1789 and 1852, “[n]o strong opponents of slavery ever served in presidential cabinets, but uncompromising supporters of slavery, like Abel P. Upshur, John C. Calhoun, and Jefferson Davis, held such positions.” Finkelman, *supra* note 91, at 36 n.291.

compromising and uncompromising positions of Black activists responded to and relied on each other to shape politics and law.

At times, the coexistence of both positions within a movement could advance democratic and egalitarian goals, as when MFD and SNCC activists empowered mainstream civil rights leaders to take more uncompromising positions and avert premature compromises. Yet, this polyvocality did not ensure equal clout, as activists were differently positioned relative to power structures. Black leaders faced powerful pressures and incentives to be compromising, and those who were willing to compromise were more likely to find themselves proximate to dominant power. There were further gendered dimensions to this dynamic: whereas compromising Black men like Washington had stature with political and business leaders and uncompromising Black men like Du Bois wielded influence with NAACP leaders, uncompromising Black women like Wells-Barnett were isolated from both.²⁰⁹

Understanding America's history of compromises can shape and shed light on modern-day compromises. Many Black activists approached and continue to approach compromise with historical patterns in mind. We should therefore recognize how the past informs present perspectives on compromise. Once situated in a longer history of compromises, present compromises can appear unappealing. We should also pay attention to the interplay between different compromising and uncompromising constituencies to better understand and predict the dynamics of compromise. Game theory scholars²¹⁰ may understand this as a game involving compromising and uncompromising segments of both dominant and subordinated groups and state actors such as courts and legislatures, in which each actor has to make strategic choices by anticipating the responses of the other actors. We should also draw upon Black history and political thought to better understand and critique the compromises reflected in American equality law, to which we now turn.

III.

COMPROMISE IN EQUALITY JURISPRUDENCE

The Supreme Court has routinely made and broken America's racial equality compromises. Part III examines landmark decisions concerning school integration, affirmative action, and voting rights, and critiques their approaches to compromise. It demonstrates how the Court has forged compromises that have proved inadequate to resolve the racial equality problems they were intended to address. Previous judicial compromises have sacrificed accountability and a true

209. James, *supra* note 125, at 153. A pattern of disrespect for Black women's perspectives on compromise continues to this day. See *infra* note 427 (discussing the dismissal of Stacey Abrams' view on a voting rights compromise).

210. "Game theory is the study of how people behave in strategic situations," that is, "a situation in which each person, when deciding what actions to take, must consider how others might respond to that action." N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS* 358 (3rd ed., 2004).

reckoning with America's structural racism to appease racial equality opponents, thereby limiting the emancipatory potential of equality decisions. These compromises have underestimated these opponents' uncompromising nature and vindicated their opposition. Increasingly, the Court has invalidated even modestly ameliorative compromises embedded in civil rights laws on the premise that legislative compromises are unduly protective of minority rights. These recent decisions have constrained other democratic institutions' and the broader public's ability to pursue more transformative moves towards equality.

A. *Brown's Compromise on School Integration*

Brown v. Board of Education is one such decision forged in compromise. In 1954, *Brown* declared racial segregation in public education unconstitutional.²¹¹ In light of the opposition to *Brown* and school integration, a year later *Brown II* added that "the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."²¹² As a matter of principle, the Supreme Court thus affirmed racial integration as the law of the land and rejected hostility to integration as a legitimate basis for constitutional decisionmaking. Yet, as a practical matter, the Court appeased Southern segregationists by offering them a gradual and guilt-free integration. According to Alexander Bickel, a leading constitutional scholar of the era, after announcing a principle of racial integration, the Court could make quiet concessions to Southern segregationists without undermining the substantive and symbolic significance of affirming racial integration.²¹³ However, *Brown's* compromise on integration bequeathed a more problematic legacy than perhaps Bickel anticipated.²¹⁴

To appease segregationists and certain Justices, *Brown* embraced a gradual integration process as a "compromise between immediate desegregation and reaffirmation of [*Plessy v. Ferguson*]."²¹⁵ When *Brown II* announced that *Brown* should be implemented "with all deliberate speed," this ambiguous phrasing

211. 347 U.S. 489, 495 (1954).

212. *Brown v. Bd. of Educ. of Topeka (Brown II)*, 349 U.S. 294, 300 (1955).

213. Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 78–79 (1961). Bickel theorized that the Court could not allow segregation to stand as part of "a mere compromise or accommodation," as doing so would have entailed "the fundamental negation of an emergent [principle of racial integration]." *Id.* However, "[o]nce the principle was announced and activated as a governing goal, the Court [could] . . . yield to claims of necessity by allowing, though not legitimating, compromises." *Id.* at 79. In contrast, transitional justice scholar Bronwyn Anne Leebaw argues that "pragmatic compromises that narrow the scope and efficacy of transitional justice [can] serve to undermine the intended symbolic message of [] principled judgments." Leebaw, *supra* note 18, at 110.

214. In so arguing, this analysis joins earlier progressive critiques of *Brown*. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 430 n.25 (1960); Randall L. Kennedy, *Ackerman's Brown*, 123 YALE L.J. 3064, 3068 (2014); Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How Brown v. Board of Education Helped to Further White Supremacy*, 105 VA. L. REV. 343, 355 (2019).

215. KLARMAN, *supra* note 25, at 313.

empowered resisters to end segregation on their own schedule, as slowly as they thought appropriate.²¹⁶

While some gradualism may well have been necessary,²¹⁷ the Court more problematically offered segregationists irreproachability. Chief Justice Warren instructed his colleagues that the *Brown* opinion should be “above all, non-accusatory.”²¹⁸ Accordingly, *Brown* did not acknowledge White people’s humiliating and harmful treatment of Black children or segregation’s white supremacist aims, thereby placing a lack of accountability at the heart of the compromise. Making such an acknowledgment explicit may have contributed to the forms of “social learning” that are “necessary to reconciliation and sustainable peace in divided societies.”²¹⁹ Moreover, had *Brown* advanced accountability for white supremacy, subsequent legal decisions limiting integration (such as *Parents Involved in Community Schools v. Seattle School District No. 1*, discussed below) would have been harder to justify.²²⁰ Despite these concessions, segregationists launched a campaign of “massive resistance” to *Brown* that culminated in the “Southern Manifesto,” a document Southern Senators and Representatives signed opposing the decision.²²¹

Some scholars have suggested that *Brown* was a necessary compromise. According to a standard account, the Warren Court made a doctrinal commitment to racial integration but recognized that its enforcement powers were limited.²²² Given the threat of massive resistance to integration, the justices decided to make strategic concessions to segregationists and felt they could not act more firmly until they had the support of the legislative and executive branches.²²³ On the other hand, more critical voices have suggested that *Brown* was a *bad* compromise. For example, Angela Onwuachi-Willig argues that “*Brown* completely failed to even name, much less recognize, the material

216. *Brown II*, 349 U.S. at 301.

217. See *Racial Justice and Peace*, *supra* note 44, at 1356 (noting that the NAACP’s John A. Morsell did not deny that some delay in integrating may be “absolutely necessary”).

218. Memorandum from Chief Justice Earl Warren to the Members of the U. S. Supreme Court (May 7, 1954), <https://www.loc.gov/exhibits/brown/brown-brown.html#obj80> [<https://perma.cc/J624-88RL>].

219. Nevin T. Aiken, *Rethinking Reconciliation in Divided Societies: A Social Learning Theory of Transitional Justice*, in *TRANSITIONAL JUSTICE THEORIES* 40, 43 (Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun & Friederike Mieth eds., 2014). On the Supreme Court’s capacity to teach public lessons, see generally Justin Driver, *The Supreme Court as Bad Teacher*, 169 U. PA. L. REV. 1365 (2021) (examining the educational impact of Supreme Court opinions and using three judicial opinions to demonstrate where the Court has engaged in “bad teaching”).

220. See *infra* notes 238–244 and accompanying text (discussing the limits *Parents Involved v. Seattle* placed on integration).

221. See *Racial Justice and Peace*, *supra* note 44, at 1349–50 (discussing the Southern Manifesto). This Manifesto “declared the intention to resist forced integration by any lawful means.” 102 CONG. REC. 4516 (1956) (statement of Rep. Smith).

222. See KLARMAN, *supra* note 25, at 326 (noting that “[t]he political branches of the national government had done virtually nothing to support *Brown*” and accordingly “the [J]ustices may have calculated that further intervention on their part would prove harmful”).

223. *Id.* at 324.

benefits that had come to Whites, even poor Whites, as a result of Jim Crow racism.”²²⁴ This failure to hold White people accountable left intact “the unchallenged notions about black inferiority and white superiority that . . . had become deeply embedded within every aspect of our society.”²²⁵ On such a view, sacrificing an overdue racial reckoning to appease racists was a flawed strategy in the long term, however necessary it may have seemed in the short term.²²⁶

This Article extends the latter accounts by critiquing *Brown* for compromising *badly* by underestimating white supremacists’ uncompromising mindsets. The Warren Court posited that Southern segregationists would integrate willingly if only they were offered a reasonable compromise. Had the Court paid closer attention to history, it might have recognized this as a misguided strategy that had failed historically, that would backfire in the present, and that would jeopardize the future.

Going as far back as South Carolina politician John C. Calhoun, white supremacists had shown themselves unamenable to fundamentally equality-promoting compromises. In his famous 1837 speech defending slavery as a “positive good,” Calhoun described “concession or compromise” on slavery as “fatal”: “If we concede an inch, concession would follow concession—compromise would follow compromise, until our ranks would be so broken that effectual resistance would be impossible.”²²⁷ Calhoun thus saw compromises limiting slavery as an existential threat to white supremacy; he would not allow white power to be compromised in the way Black freedom had been since the country’s founding.

The Warren Court failed to grasp the similar mindsets of Southern segregationists who were staunchly committed to racial hierarchy.²²⁸ Segregationists saw *Brown*’s attempts at compromise as a retreat from full equality and thus an opportunity for further resistance. As NAACP’s John

224. Onwuachi-Willig, *supra* note 214, at 355.

225. *Id.*

226. See also Cho, *supra* note 41, at 168 (critiquing *Brown*’s “betrayal of racial equality”); Black, Jr., *supra* note 214, at 430 n.25 (critiquing *Brown* for ignoring that segregation “is perceptibly a means of ghettoizing the imputedly inferior race” because of the Court’s “reluctance to go into the distasteful details of the southern caste system”); Kennedy, *supra* note 214, at 3068 (“Missing from the most honored race relations decision in American constitutional law is any express reckoning with racism.”) (emphasis omitted).

227. John C. Calhoun, *Slavery a Positive Good* (Feb. 6, 1837) (on file with TEACHING AM. HIST.), <https://teachingamericanhistory.org/document/slavery-a-positive-good/> [<https://perma.cc/LKE7-N29Y>].

228. See, e.g., Statement by J. Strom Thurmond, Gov. of S. C., Upon Issuing a Proclamation Setting Aside March 18, 1949, as “John C. Calhoun Day” in South Carolina (Feb. 7, 1949), <https://tigerprints.clemson.edu/cgi/viewcontent.cgi?article=1619&context=strom> [<https://perma.cc/SSR5-WND9>] (“[Calhoun] knew that power can be overcome by power alone, and that only when the people are united and organized can they exercise the sovereignty that is rightfully theirs.”).

Morsell observed contemporaneously, “such people do not respond to conciliation which they interpret as a confession of weakness and error.”²²⁹

The Southern political class was undergirded by a longstanding political, economic, social, and cultural interest in maintaining racial hierarchy, and it was buoyed by an electorate that would reward uncompromising leaders promising to protect this hierarchy.²³⁰ Southerners like George Wallace and Orval Faubus won elections by adopting staunch public stances against integration.²³¹

Following the *Brown* decision, Virginia state senator Mills Godwin claimed, “Integration, however slight, anywhere in Virginia, would be a cancer eating at the very life blood of our public school system.”²³² Godwin declared that “we should never accept [*Brown*] at all” because “[m]en of conscience and principle do not compromise with either right or wrong.”²³³ Likewise, Virginia congressman William Tuck announced, “There is no middle ground, no compromise. We’re either for integration or against it and I’m against it.”²³⁴

Given that *Brown* was designed to steer the United States from racial apartheid to multiracial democracy, its birth from compromise is no surprise.²³⁵ Transitional justice theory teaches that a transition to democracy often requires compromise with people who have no interest in advancing democracy and every intention of obstructing it. However, critical transitional justice scholars would caution against assuming that such compromises *necessarily* contribute to democracy and reconciliation.²³⁶ Regrettably, *Brown* did not grapple with the oppressive racial dynamics that had sustained white supremacy throughout America’s history. Rather, it repeated some of the problematic dynamics of the

229. Letter from John A. Morsell, Assistant to Exec. Sec’y, NAACP, to M. M. Martin (Sept. 11, 1958) (on file with the Library of Congress), https://hv.proquest.com/pdfs/001516/001516_002_0001/001516_002_0001_From_1_to_242.pdf [<https://perma.cc/YWL6-SGP6>].

230. In states like Georgia, Mississippi, and South Carolina, White citizens’ councils mobilized to “kill off hopes of gradual, evolutionary change by hammering Southern opinion into an embattled, unified state of feeling which will brook no compromise.” SAMUEL LUBELL, *REVOLT OF THE MODERATES* 197 (1956).

231. Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 118 (1994). To unravel the *Brown* compromise, segregationists instated so-called pupil placement laws, which allowed school boards to assign students to schools ostensibly on nonracial grounds. In *Shuttlesworth v. Board of Education*, 358 U.S. 101 (1958), the Supreme Court rejected a challenge to Alabama’s pupil placement law, paving the way for school boards in and beyond Alabama to further defy *Brown*. King later reflected that “this decision fundamentally weakened the historic 1954 ruling of the Court” and was “imperceptibly becoming the basis of a *de facto* compromise between the powerful contending forces.” *The Social Organization of Nonviolence*, *supra* note 178.

232. J. Harvie Wilkinson III, *Supreme Court and Southern School Desegregation, 1955–1970: A History and Analysis*, 64 VA. L. REV. 485, 498 (1978).

233. *Id.*

234. *Id.* at 499.

235. See generally *Racial Transition*, *supra* note 45 (detailing the transitional features of American racial equality jurisprudence).

236. See, e.g., Leebaw, *supra* note 18, at 102 (explaining how some human rights advocates opposed compromises that were deemed “necessary to stabilizing new democratizing governments”).

past by abandoning accountability for racial wrongdoing and by absolving White people of *their* responsibility in advancing a multiracial democracy.²³⁷

The concessions in *Brown* rendered school integration more difficult in the long term.²³⁸ Decades later, in the 2007 case *Parents Involved in Community Schools v. Seattle School District No. 1*, the Roberts Court invalidated student assignment plans in Louisville and Seattle, which promoted integration by taking explicit account of a student's race.²³⁹ Chief Justice Roberts wrote that “[b]efore *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin.”²⁴⁰ This suggested that the problem *Brown* addressed was race-based student assignments rather than centuries of racial subordination—a “preposterous” argument, according to a lawyer who argued *Brown*.²⁴¹ Today, affirmative action opponents in *Students for Fair Admissions v. Harvard College* invoke *Brown* to demand “colorblind” admissions policies at Harvard²⁴² that would decrease the enrollment of Black and Latinx applicants—and increase the enrollment of White applicants—more than any other group.²⁴³

While cases such as *Parents Involved* and *Students for Fair Admissions* can be understood as frustrating *Brown*'s promise of equality, they can also be understood as the enactment of *Brown*'s compromised version of equality.²⁴⁴

237. See Lewis M. Steel, *A Critic's View of the Warren Court—Nine Men in Black Who Think White*, N.Y. TIMES (Oct. 13, 1968), <https://www.nytimes.com/1968/10/13/archives/a-critics-view-of-the-warren-court-nine-men-in-black-who-think.html> [<https://perma.cc/98NF-HJ4X>] (describing the Warren Court as a “practical political performer . . . which would protect the interests of white America in the maintenance of stable institutions”).

238. Thus, the controversial debates over busing during the 1970s were also debates over compromise: “How much must white America compromise its own interests for its mistreated minority? And who should make the compromise: North or South, rural or urban areas, working class neighborhoods or the more affluent suburbs?” J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1945-1978 131–32 (1981). As in prior decades, questions of whether and how to compromise on integration divided racial justice advocates. For example, in 1973, the Atlanta school board and the local NAACP agreed on a larger role for Black school administrators in return for busing fewer White pupils. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 485–87 (1976). However, national racial justice advocates accused them of abandoning integration through “expedient compromise.” *Id.* at 485 n.47.

239. 551 U.S. 701, 701 (2007).

240. *Id.* at 747.

241. Adam Liptak, *In Clash Over Affirmative Action, Both Sides Invoke Brown v. Board of Education*, N.Y. TIMES (Oct. 30, 2022), <https://www.nytimes.com/2022/10/30/us/supreme-court-affirmative-action-brown-board-education.html> [<https://perma.cc/B6WY-MT3M>].

242. *Id.*

243. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 180 (1st Cir. 2020) (“[E]liminating race as a factor in admissions, without taking any remedial measures, would reduce African American representation at Harvard from 14% to 6% and Hispanic representation from 14% to 9%.”).

244. As subsequent decisions have further eroded *Brown*'s promise of equal opportunity in education, they have necessitated different paths to (and compromises on) equality. The rise of “school-choice” options, such as charter and magnet schools, is one example. In the 1980s, as the Reagan

Had the *Brown* opinion done less to appease white supremacists and more to hold anti-Blackness and white supremacy to account, it might have been less susceptible to colorblind capture and legal discourse around race might have followed a different trajectory. Before we conclude that *Brown*'s concessions were worth having, we must first situate them in a longer history of compromise and the uncompromising resistance to racial equality that both preceded and followed *Brown*. *Brown* demonstrates the perils of abandoning accountability in favor of appeasement and cautions us against making similar concessions on demanding accountability today. As evidenced by *Students for Fair Admissions*, such tradeoffs between accountability and appeasement, which threaten racial equality in the long-term, have also been central to affirmative action.

B. Bakke's Compromise on Affirmative Action

For over four decades, affirmative action jurisprudence has embodied a "diversity" compromise. In 1978, *Regents of the University of California v. Bakke* declared UC Davis Medical School's use of a racial quota unconstitutional.²⁴⁵ But *Bakke* stopped short of prohibiting all consideration of race in admissions decisions. To mitigate the "deep resentment" that non-beneficiaries of affirmative action would likely feel, Justice Powell approved the pursuit of "diversity" as a less conspicuous means of racial inclusion than the racial quota.²⁴⁶ In what became known as its "diversity compromise," *Bakke* downplayed race and racial justice concerns to mitigate resentment among White applicants but allowed "indirect" reliance on race to facilitate racial inclusion.²⁴⁷

administration stymied integration efforts and appointed judges who would limit *Brown*'s reach, the Reagan Department of Education presented magnet schools as "a compromise between extreme segregation and full racial equality." JAMES H. LOWRY & ASSOCS. & ABT ASSOCS., INC., U.S. DEP'T OF EDUC., SURVEY OF MAGNET SCHOOLS: ANALYZING A MODEL FOR QUALITY INTEGRATED EDUCATION 76 (Sept. 1983), <https://files.eric.ed.gov/fulltext/ED236304.pdf> [<https://perma.cc/43RA-HG5W>]. However, such school-choice compromises can harm the public education system by diverting resources from it and can consequently harm poor and minority children (and their families) by blaming them for the poor educational outcomes they suffer as a result of these under-funded schools. See generally Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083 (2014).

245. 438 U.S. 265, 266–67 (1978).

246. *Id.* at 294 n.34, 311–12.

247. Yuvraj Joshi, *Racial Indirection*, 52 U.C. DAVIS L. REV. 2495, 2514–15 (2019) [hereinafter *Racial Indirection*].

Justice Powell described judgments about equality as "rough compromise[s]" between competing groups and interests. *Bakke*, 438 U.S. at 299. Here, the competing groups were those who supported implementing race-sensitive policies to redress racial inequalities, versus those who sought to repeal race-based remedies like affirmative action in favor of "colorblind" policies. See *Racial Indirection*, *supra* at 2513–15 (setting out competing arguments in *Bakke*). In purporting to find a middle ground between them, Powell drew false equivalencies between these two groups, proceeding as if "[B]lack and other minorities faced the same social conditions as [W]hite ethnics, none more or less the victims of group discrimination." Ian F. Haney-López, "A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 1063 (2007).

As Justice Powell inscribed this new racial equality compromise into law, Justice Marshall reflected on the unprincipled racial equality compromises of the past.²⁴⁸ In his dissent, Marshall observed that “the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised [the] principle of equality with its antithesis: slavery.”²⁴⁹ He argued that Black people’s subordinate social position today was “the tragic but inevitable consequence” of this compromise.²⁵⁰ Addressing America’s racist legacies, Marshall insisted, required expanding rather than limiting racial remediation.²⁵¹

Justice Powell’s approach ultimately prevailed in 2003 with *Grutter v. Bollinger*, which upheld the University of Michigan Law School’s diversity-based admissions program.²⁵² Whereas the admissions program in *Bakke* relied on race directly to redress racial inequalities and was thus found unconstitutional, the admissions program in *Grutter* relied on race indirectly to achieve “diversity” and was thus considered constitutional.²⁵³ Powell’s approach was most recently affirmed by *Fisher v. University of Texas* in 2016.²⁵⁴ *Fisher* reached the Court during a period marked by intense racial tensions across America’s universities, with minority students speaking out about experiences of racism and isolation and calling for race-sensitive responses to these problems.²⁵⁵ Justice Kennedy seemed unwilling to fuel racial tensions further by ending all consideration of race in admissions.²⁵⁶ Despite his dissent in *Grutter*, Kennedy’s majority opinion in *Fisher* maintained Powell’s diversity compromise.²⁵⁷

John Jeffries, who served as law clerk to Powell, later wrote in his biography of the Justice that “diversity was not the ultimate objective but merely a convenient way to broach a compromise” between these two sides. JEFFRIES, JR., *supra* note 26, at 500. Yet, Powell’s use of diversity was not only a way to broach a compromise but also a means to limit racial remedies. *Bakke*, 438 U.S. at 306–11. *Bakke*’s constraints made it difficult for institutions and minorities to pursue proportional representation in the future. *Racial Indirection*, *supra* at 2542.

248. *Bakke*, 438 U.S. at 326 (Marshall, J., concurring in part and dissenting in part).

249. *Id.*

250. *Id.* at 395.

251. *Id.* at 401 (“It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America.”).

252. *Grutter v. Bollinger*, 539 U.S. 306, 307 (2003).

253. See *Racial Indirection*, *supra* note 247, at 2518.

254. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2202 (2016).

255. Anemona Hartocollis & Jess Bidgood, *Racial Discrimination Protests Ignite at Colleges Across the U.S.*, N.Y. TIMES (Nov. 11, 2015), <https://www.nytimes.com/2015/11/12/us/racial-discrimination-protests-ignite-at-colleges-across-the-us.html> [https://perma.cc/5XZM-VHDP]; Katherine Long, *What It’s Like to Be Black on Campus: Isolated, Exhausted, Calling for Change*, SEATTLE TIMES (Apr. 9, 2016), <http://www.seattletimes.com/seattle-news/education/what-its-like-to-be-black-on-campus-isolating-exhausting-calling-for-change> [https://perma.cc/32JG-PJ65]. See also Chrystal A. George Mwangi, Barbara Thelamour, Ijeoma Ezeofor & Ashley Carpenter, “Black Elephant in the Room”: *Black Students Contextualizing Campus Racial Climate Within US Racial Climate*, 59 J. COLL. STUDENT DEV. 456, 456–57 (2018) (discussing the interplay between racial tensions in society and racial tensions on campus).

256. See Yuvraj Joshi, *Bakke to the Future: Affirmative Action After Fisher*, 69 STAN. L. REV. ONLINE 17, 23–26 (2016).

257. *Fisher II*, 136 S. Ct. at 2210.

The diversity compromise was elevated by “moderate” Justices who sought a middle ground between competing interests and principles.²⁵⁸ But a more reactionary Roberts Court²⁵⁹ will decide this Term’s affirmative action cases: the aforementioned *Students for Fair Admissions v. Harvard College* and *Students for Fair Admissions v. University of North Carolina*.²⁶⁰ At this critical juncture, it is important to reevaluate the diversity compromise and to reimagine paths to inclusion.

Supporters of the diversity compromise in *Bakke* argue that it found a middle ground where none appeared to exist and allowed some affirmative action where none might have otherwise survived.²⁶¹ Although we should assess the diversity compromise with this political context in mind,²⁶² there are at least three reasons to doubt that that compromise was worthwhile.

First, *Bakke* played into dominant groups’ uncompromising mindsets. Whereas *Brown* had been “non-accusatory” of White Southerners, *Bakke* actively advanced narratives of white innocence and victimhood.²⁶³ Powell’s opinion not only refused to recognize White Americans as the perpetrators and beneficiaries of centuries-long racial subordination, it also presented White Americans as being similarly disfavored to Black Americans.²⁶⁴ In so doing, *Bakke* paved the way for White students who considered themselves the victims of ‘reverse racism’ to join forces with racial justice opponents like Edward Blum to relentlessly challenge affirmative action.²⁶⁵ Today’s white protectionism

258. See *Racial Indirection*, *supra* note 247, at 2533.

259. See *infra* notes 449–451 and accompanying text (discussing recent decisions of the Robert’s Court).

260. Amy Howe, *Court Will Hear Challenges to Affirmative Action at Harvard and University of North Carolina*, SCOTUSBLOG (Jan. 24, 2022), <https://www.scotusblog.com/2022/01/court-will-hear-challenges-to-affirmative-action-at-harvard-and-university-of-north-carolina/> [<https://perma.cc/4RXZ-JY9X>].

261. *Racial Indirection*, *supra* note 247, at 2534–35.

262. *Id.* at 2535.

263. Memorandum from Chief Justice Earl Warren to the Members of the United States Supreme Court, *supra* note 218; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 n.34, 298, 308 (1978).

264. *Id.* at 292–94. See also Haney-López, *supra* note 247, at 1063 (critiquing *Bakke*’s premise that “[B]lack and other minorities faced the same social conditions as [W]hite ethnics, none more or less the victims of group discrimination.”).

265. Edward Blum’s organization, Students for Fair Admissions, has targeted affirmative action policies at Harvard College, the University of North Carolina at Chapel Hill, the University of Texas at Austin, the University of Wisconsin at Madison, and Yale University. See Yuvraj Joshi, *Why the Affirmative Action Case Against Harvard Isn’t Actually About Fair Treatment for Minority Students*, TEEN VOGUE (Oct. 16, 2018), <https://www.teenvogue.com/story/why-harvard-affirmative-action-lawsuit-isnt-about-fair-treatment-for-minorities> [<https://perma.cc/69XN-BWXR>]. Although Blum’s organization uses the college admission of Asian Americans as a wedge issue where convenient, research shows that “the majority of Asian American registered voters . . . continue to support affirmative action in university admissions.” Jennifer Lee, Janelle Wong, Karthick Ramakrishnan & Ryan Vinh, *69% of Asian American Registered Voters Support Affirmative Action*, AAPI DATA (Aug. 2, 2022), <http://aapidata.com/blog/affirmative-action-aavs-2022/> [<https://perma.cc/VLU4-KS4D>]. Further, while this section focuses on the complaints of White litigants who have traditionally brought

claims—that White people deserve special consideration because they are unjustly discriminated against²⁶⁶—were legitimized and incentivized by Supreme Court jurisprudence.

Second, *Bakke* put affirmative action advocates into a straitjacket by placing certain racial justice arguments outside the bounds of permissible discussion.²⁶⁷ To prevent provoking White litigants, these advocates would have to make their legal claims using the conciliatory language of diversity rather than the emancipatory language of justice.²⁶⁸ It is a legacy of Powell’s opinion that many institutional conversations concerning racism proceed primarily in terms of diversity.²⁶⁹

Third, the diversity compromise erected new barriers to remedying structural inequality. For Derrick Bell, diversity was “a serious distraction in the ongoing efforts to achieve racial justice”—one that avoids directly addressing structural barriers, fuels further litigation, privileges mainly well-off, White applicants by legitimizing traditional indexes of merit, and diverts concerns and resources from addressing poverty.²⁷⁰ Bell doubted that embracing the diversity compromise simply to preserve affirmative action was worthwhile, fearing that this illusion of a “civil rights victory” will be “hard to distinguish from defeat.”²⁷¹ *Bakke* and its progeny fostered narrow understandings of racial injustice and justice, which were transported to other legal contexts to similarly deleterious

anti-affirmative-action lawsuits, non-Black communities of color may also be implicated in anti-Black ideologies and practices. See Claire Jean Kim, *Are Asians the New Blacks?: Affirmative Action, Anti-Blackness, and the ‘Sociometry’ of Race*, 15 DU BOIS REV. 217, 238 (2018) (identifying an “Asian spoilers narrative” that is “zealously taken up by White and Asian conservatives alike” to “despecify[] Black subjection and disavow[] racial positionality in U.S. society”).

266. See Rogers M. Smith & Desmond King, *White Protectionism in America*, 19 PERSPS. ON POL. 460 (2021).

267. Lee C. Bollinger, *What Once Was Lost Must Now Be Found: Rediscovering an Affirmative Action Jurisprudence Informed by the Reality of Race in America*, 129 HARV. L. REV. F. 281, 283 (2015).

268. *Id.* (“[A]dvocates for an integrated America have to content themselves with talking about the utility of ‘diversity’ and allowable ways to achieve it. In court briefs and oral arguments, America’s historical racism is off limits.”).

269. See *id.* at 289 (“But because *Bakke* forced a decoupling of the value of diversity from the realities of race past and present, we are consigned to hollow and banal discussions of its educational benefits in every speech, publication, convocation, and commencement ceremony.”). See also Jonathan Feingold, *Ambivalent Advocates: Why Elite Universities Compromised the Case for Affirmative Action*, 57 HARV. C.R.-C.L. L. REV. (forthcoming 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4138470 [<https://perma.cc/4LCN-BL29>] (studying dynamics of compromise in advocacy for and against race-conscious affirmative action).

270. Derrick A. Bell, Jr., *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003).

271. *Id.* See also Stephen M. Rich, *What Diversity Contributes to Equal Opportunity*, 89 S. CAL. L. REV. 1011, 1078–89 (2015) (describing how the diversity rationale underserves equal opportunity). Meanwhile, for students, the diversity rationale perhaps tokenized minority students, while fueling White students’ sense of entitlement and victimhood. See Mario L. Barnes, Erwin Chemerinsky & Angela Onwuachi-Willig, *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After Fisher v. University of Texas*, 62 UCLA L. REV. 272, 288–89 (2015); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 453 (2014).

effects. For example, *Parents Involved* drew upon *Bakke*'s discussion of race to invalidate race-sensitive integration policies in Louisville and Seattle.²⁷²

With the Court widely expected to depart from *Bakke* this Term, the current moment presents both the prospect of losing the diversity compromise altogether and the possibility of overcoming some of its constraints. For example, Justice Powell set up an additional path to affirmative action when he proposed allowing the use of race to off-set “established inaccuracies” in standardized testing.²⁷³ The rise of test-optional admissions and disruptions to standardized testing practices due to COVID-19 present fresh opportunities for challenging testing—known to have the disparate effect of gatekeeping Black students out of higher education—and reevaluating its place in institutions with the purported goal of inclusivity.²⁷⁴

Bakke also left open other pathways for supplementing or supplanting the diversity compromise. For example, Justice Powell wrote that, with sufficient supporting evidence, the government’s “interest in facilitating the health care of its citizens” may justify the use of race-based admissions in medical schools.²⁷⁵ Even before the racialized impact of COVID-19, research showed that minority doctors are important for attending to the needs of minority communities and improving their health outcomes.²⁷⁶ In the wake of *Students for Fair Admissions*, racial justice advocates should use alternate arguments and strategies to pursue racial inclusion beyond the diversity compromise.

C. Shelby County and Brnovich’s *Unraveling of Voting Rights*

Like the Civil Rights Act of the previous year,²⁷⁷ the Voting Rights Act of 1965²⁷⁸ was a product of compromise. The House version of the bill sought to ban poll taxes outright, whereas the Senate version only allowed the federal

272. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 703 (2007).

273. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 n.43 (1978).

274. Lindsay Schnell, *College Applications Pour in Because of Optional ACT, SAT Test Scores Amid COVID-19*, USA TODAY (June 25, 2021), <https://www.usatoday.com/story/news/education/2021/06/25/common-app-hbcu-college-application-test-score-optional/5310479001/> [<https://perma.cc/92EA-KWLR>].

275. *Bakke*, 438 U.S. at 310.

276. See, e.g., Marcella Alsan, Owen Garrick & Grant Graziani, *Does Diversity Matter for Health? Experimental Evidence from Oakland*, 109 AM. ECON. REV. 4071, 4071 (2019) (finding that Black doctors could reduce the Black-White male gap in cardiovascular mortality by 19 percent).

277. See Chin, *supra* note 16 (describing the compromises in the Civil Rights Act of 1964, including its “forward-looking, non-remedial nature”).

278. The Voting Rights Act of 1965 sought to remove racial barriers to the right to vote. In the Act’s immediate aftermath, the Supreme Court upheld its constitutionality and ruled particular forms of voting discrimination unconstitutional. In *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 663 (1966), a 6-3 majority struck down Virginia’s poll tax of \$1.50 for violating the Equal Protection Clause. Overruling its 1937 decision in *Breedlove v. Suttles*, 302 U.S. 277 (1937), Justice Douglas said that “the Equal Protection Clause is not shackled to the political theory of a particular era,” and so previous rulings reflecting compromised visions of equality did not now protect poll taxes from being declared unconstitutional. *Id.* at 669.

government to sue states that used poll taxes to discriminate.²⁷⁹ Attorney General Nicholas Katzenbach crafted the compromise: without banning poll taxes outright, he drafted language explicitly stating that poll taxes are illegal and instructing the Justice Department to sue states for using them.²⁸⁰

Katzenbach enlisted King to endorse this compromise, who said: “While I would have preferred that the bill eliminate the poll tax . . . once and for all, . . . I am confident that the poll tax provision . . . will operate finally to bury this iniquitous device.”²⁸¹ Thus, King endorsed the compromise to institutionalize his political demands, believing that it represented a step forward on racial equality that advocates could harness for their cause. Katzenbach acted swiftly, and federal courts struck down poll taxes in Alabama, Mississippi, Texas, and Virginia in 1966.²⁸² Katzenbach’s actions demonstrated the value of political actors taking immediate action post-compromise to maximize its emancipatory potential and counteract its limitations.

Only five years after its enactment, the Nixon administration tried to end the Voting Rights Act. It ultimately reauthorized a “compromise” Act with weakened protections in the hopes of further undermining the Act by appointing segregationist Judge G. Harrold Carswell to the Supreme Court.²⁸³ While Carswell’s nomination failed, Nixon made four appointments to the Court that helped restrict voting rights.

In 1980, a 6-3 majority in *Mobile v. Bolden* upheld the legitimacy of at-large city commissioner elections in Mobile, Alabama, even though that system diluted the voting strength of Black citizens.²⁸⁴ Absent established purposeful discrimination, these elections were held not to violate the right to vote under the Fifteenth Amendment.²⁸⁵ Whereas Justice Marshall’s dissent insisted on an “unfettered right to vote” as a precondition for principled democratic compromises,²⁸⁶ the plurality opinion dismissed Marshall’s opinion as political theory, not law.²⁸⁷

279. Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 97–108 (2009).

280. *Id.* at 105–08.

281. ROBERT A. PRATT, *SELMA’S BLOODY SUNDAY: PROTEST, VOTING RIGHTS, AND THE STRUGGLE FOR RACIAL EQUALITY* 108 (2017).

282. BERNARD GROFMAN & CHANDLER DAVIDSON, *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 20 (1992).

283. John W. Finney, *Senate Rebuffs Southern Attack on ‘65 Voting Act*, N.Y. TIMES (Mar. 7, 1970), <https://www.nytimes.com/1970/03/07/archives/senate-rebuffs-southern-attack-on-65-voting-act-way-opened-for.html> [<https://perma.cc/258R-Q4Q9>].

284. 446 U.S. 55, 55 (1980).

285. *Id.* at 65.

286. *Id.* at 104, 140–41 (Marshall, J., dissenting). Justice Marshall would have found such discriminatory impact sufficient as a violation of the right to vote.

287. *Id.* at 75–76 (plurality opinion of Stewart, J.).

Rejecting *Mobile*, Congress enacted a stronger Voting Rights Act in 1982.²⁸⁸ This Act was once again forged through compromise. Many Republicans were willing to extend the Voting Rights Act only if it required proof of intentional discrimination and only if it foreclosed the possibility that it would be interpreted to require proportional representation of Black and Latinx Americans via districting.²⁸⁹ When the House and the Senate diverged on this issue, Republican Bob Dole and Democrat Ted Kennedy engineered a compromise (commonly known as the Dole compromise) wherein Republicans would forego their desired proof of intent in exchange for the concession that minorities would have the right to equal access of the political process but not proportional representation.²⁹⁰

Given the damage that *Mobile* had done to voting rights, the Dole compromise was a democracy-enhancing improvement over the status quo. The legislation passed in 1982 included both Section 2's results test—which prohibits any law that has the purpose *or effect* of abridging racial minorities' right to vote—and Section 5's preclearance requirement—which requires particular state and local governments with a history of discriminatory voter suppression to secure federal approval before changing election laws.

The reauthorization of the Voting Right Act dismayed a young lawyer in the Reagan Justice Department: John G. Roberts, Jr.²⁹¹ He had written around twenty-five memos opposing Section 2's results test and had strategized for months to derail its adoption.²⁹² While the Act survived despite Roberts' best efforts and was reauthorized by Congress in 1992 and 2006, it would be gutted by the Supreme Court during Roberts' tenure as Chief Justice a few decades later.

In 2010, Shelby County, Alabama asked the Supreme Court to repeal the compromises reflected in the Voting Rights Act's Section 5—which featured the

288. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, *as recognized in* *Thornburg v. Gingles*, 478 U.S. 30 (1986).

289. Robert Pear, *Compromise Likely on Voting Rights*, N.Y. TIMES (May 1, 1982), <https://www.nytimes.com/1982/05/01/us/compromise-likely-on-voting-rights.html> [<https://perma.cc/N334-UKHB>].

290. *Id.* Whereas Dole presented this proposal as “an honest effort to try to compromise differences,” one of his aides said that he was trying “to save the Republican Party” from alienating Black voters. U.S. CONGRESS, HEARINGS BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, NINETY-SEVENTH CONGRESS, SECOND SESSION 57 (1983); Pear, *supra* note 289. Then-Senator Joe Biden said he had anticipated “a need for a compromise” and co-sponsored the Dole compromise “to allay the fears” of Republicans. U.S. CONGRESS, U.S. CONGRESS, HEARINGS BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, NINETY-SEVENTH CONGRESS, SECOND SESSION, *supra* at 68. By contrast, Republican Senator Orrin Hatch called it “not a compromise at all” because it did not require the proof of intent. *Id.* at 70.

291. See Mark Joseph Stern, *The Supreme Court May Soon Deal a Final, Fatal Blow to the Voting Rights Act*, SLATE (Oct. 10, 2019), <https://slate.com/news-and-politics/2019/10/supreme-court-voting-rights-act-obliteration.html> [<https://perma.cc/QU73-AQLA>].

292. *Id.*

preclearance requirement allowing limited federal oversight over racial discrimination—and Section 4(b)—which contained a coverage formula to determine which states would be subject to this preclearance requirement.²⁹³ Effectively, Shelby County sought to repeal federal oversight over racial discrimination in the name of maintaining states’ rights.

In a powerful amicus brief, Alabama’s Legislative Black Caucus and Association of Black County Officials urged the Supreme Court to uphold the 2006 Voting Rights Act *because of* the compromises it reflected.²⁹⁴ This Act was the result of compromises that Black lawmakers from all nine Section 4(b) covered states in the South had—for once—helped forge: “[T]heir direct role in the Act’s passage arguably came as close to inclusion of African Americans in an agreement of constitutional stature as has yet to occur in our history.”²⁹⁵ It was not the place of the Court to unravel such inclusive and hard-fought political compromises: “For a nation founded on the institution of slavery,” the brief argued, “this grand compromise between the descendants of slaves and all other Americans is entitled to the greatest respect.”²⁹⁶

The conservative wing of the Roberts Court disagreed. In oral arguments, Justice Scalia indicated that the voting rights compact should end but doubted that political leaders would ever end it: “Even the name of it is wonderful: The Voting Rights Act,” he said sarcastically.²⁹⁷ “Who is going to vote against that in the future?”²⁹⁸ By asserting Congress’ unwillingness to undo its own compromise, Scalia established the Court’s power to do so: “I am fairly confident it will be re-enacted in perpetuity — unless a court can say it does not comport with the Constitution.”²⁹⁹

Ultimately, *Shelby County v. Holder* struck down the coverage formula under Section 4(b).³⁰⁰ While the Court did not strike down the preclearance requirement under Section 5, it effectively nullified the law pending new Congressional coverage legislation. Even as Chief Justice Roberts openly conceded that “voting discrimination still exists,”³⁰¹ he was willing to sacrifice federal oversight over racial discrimination in the name of states’ rights. Pantea

293. *Shelby Cnty. v. Holder*, 570 U.S. 529, 540 (2013).

294. Brief of Alabama Legislative Black Caucus and Alabama Association of Black County Officials, as Amici Curiae in Support of Respondents at 2, *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (No. 12-96), 2013 WL 432969 [hereinafter *Brief of Alabama Lawmakers*].

295. *Id.*

296. *Id.*

297. Transcript of Oral Argument at 48, *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (No. 12-96) (US argued Feb. 27, 2013).

298. *Id.*

299. *Id.* at 47.

300. *Shelby Cnty. v. Holder*, 570 U.S. 529, 530–32 (2013).

301. *Id.* at 536.

Javidan compared Chief Justice Roberts' stance to the Compromise of 1877, as each delivered "home rule" to White Southerners.³⁰²

Brnovich v. Democratic National Committee hinged even more on judicial interpretation of compromise.³⁰³ The Supreme Court held that two Arizona laws—each eliminating procedures disproportionately used by minorities to exercise their right to vote—did not violate Section 2 of the Voting Rights Act.³⁰⁴ While the Court did not strike down the results test under Section 2, it made that test exceedingly difficult to satisfy.³⁰⁵

While scholars have given much attention to *Brnovich's* interpretation of the Voting Rights Act, they have paid far less attention to its discussion of the *compromise* embodied in that Act.³⁰⁶ During oral arguments, Justice Kavanaugh asserted that the Dole compromise of 1982 had "created murkiness" in Section 2's language and made it "elusive,"³⁰⁷ even though the terms of that compromise are well-known and extensively documented.³⁰⁸ Ultimately, both Justice Alito's majority opinion and Justice Kagan's dissent specifically referred to the Dole compromise, disagreeing vehemently about its meaning and salience in this case.³⁰⁹

Justice Alito declared that the Dole compromise, which addressed the issue of *proportional representation* not relevant in this case,³¹⁰ also extended to the issue of *vote denial*,³¹¹ which was relevant here. According to him, the Dole compromise not only denied minorities a guarantee of proportional

302. Javidan, *supra* note 41, at 131 ("In exchange for support in electing President Hayes, Republicans agreed to give Democrats 'home rule' under the auspices of 'equal sovereignty of the states,' the same limiting principle invoked by the majority opinion in *Shelby County*.").

303. 141 S. Ct. 2321 (2021).

304. *Id.* at 2326. Previously, an en banc panel of the Ninth Circuit had struck down these two Arizona laws. *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 998, 1011 (9th Cir. 2020) (en banc).

305. See Madeleine Carlisle & Sanya Mansoor, *Department of Justice Steps into Voting Rights Fight, Filing High-Stakes Lawsuit Against Georgia*, TIME (June 28, 2021), <https://time.com/6075977/georgia-voting-justice-department/> [<https://perma.cc/M7LP-MYXL>]. It also made the Biden Justice Department's voting rights lawsuit against Georgia's discriminatory practices difficult to win. *Id.*

306. See, e.g., Charles & Fuentes-Rohwer, *supra* note 29 (describing the *Brnovich* decision as "troubling" and "potentially destructive" to the compromises envisioned in the Voting Rights Act); Richard L. Hasen, *The Supreme Court Is Putting Democracy at Risk*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html> [<https://perma.cc/HXP4-2MZ9>].

307. Transcript of Oral Argument at 111, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) (No. 19-1257) (US argued Mar. 2, 2021).

308. See *supra* notes 289–290 and accompanying text (discussing the legislative history of the Voting Rights Act of 1982).

309. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2332 (2021); *id.* at 2360 n.6 (Kagan, J., dissenting).

310. *Id.* at 2341 n.14 (conceding that "proportional representation may not apply as directly in this suit").

311. See *id.* Vote denial occurs where a state makes it more difficult for minority voters to register and vote. See Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691–92 (2006) (describing historic and new forms of vote denial).

representation but limited their ability to claim disproportionate burdens to ballot access.³¹² This reinterpretation of the Dole compromise meant that plaintiffs would have to show much more to satisfy Section 2’s results test. By offering this revisionist account, Justice Alito presented *his* own opinion as vindicating—and Justice Kagan’s dissent as violating—the political compromise embedded in the Voting Rights Act.

While Alito charged Kagan with “undo[ing] as much as possible the compromise that was reached between the House and Senate,”³¹³ Kagan corrected him, responding that the Dole compromise was concerned with proportional representation via districting rather than with vote denial.³¹⁴ Kagan added that “the majority . . . wants to transform that compromise to support a view of Section 2 held in neither the House nor the Senate.”³¹⁵

For nearly four decades, the voter-protection features of the Dole compromise had rendered it democracy-enhancing, until the Roberts Court gave that compromise a revisionist, democracy-constraining reading.³¹⁶ The Court could soon further erode Section 2’s protections in *Merrill v. Milligan*, a challenge to Alabama’s racial gerrymandering.³¹⁷ The Supreme Court’s assault on the Voting Rights Act is troubling both because the Act itself was a democracy-affirming compromise and because effective enfranchisement of Black Americans is a precondition for other principled democratic compromises. With the Court dismantling key provisions of the Voting Rights Act, Congress must forge new paths through legislation, such as the John Lewis Voting Rights Advancement Act, and must reform the Court itself, which are both ideas discussed in Part V below.

* * *

312. *Brnovich*, 141 S. Ct. at 2341–42. On the problems with such limitation on voting rights, see generally Jamelia N. Morgan, *Disparate Impact and Voting Rights: How Objections to Impact-Based Claims Prevent Plaintiffs from Prevailing in Cases Challenging New Forms of Disenfranchisement*, 9 ALA. C.R. & C.L.L. REV. 93 (2018).

313. *Brnovich*, 141 S. Ct. at 2341.

314. *Id.* at 2361 n.6 (Kagan, J., dissenting).

315. *Id.* Kagan said: “Nothing—literally nothing—suggests that the Senate wanted to water down the equal-access right that everyone agreed the House’s language covered.” *Id.* Historical accounts of the Dole compromise support Kagan’s claim. See generally Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1356–425 (1983) (discussing the legislative history and compromises reached in passing the 1982 amendments); Richard Johnson, *The 1982 Voting Rights Act Extension as a “Critical Juncture”*: Ronald Reagan, Bob Dole, and Republican Party-Building, 35 STUD. AM. POL. DEV. 1 (2021) (identifying a range of views and reasons behind the Republican support for the 1982 Voting Rights Act amendments).

316. On *Brnovich*’s threat to a multiracial democracy, see generally *Brnovich v. Democratic National Committee*, 135 HARV. L. REV. 481 (2021); Hasen, *supra* note 306 (noting that *Brnovich* “weakened the last remaining legal tool for protecting minority votes in federal courts from a new wave of legislation seeking to suppress the vote”).

317. Adam Liptak, *Supreme Court Leans Toward Alabama in Voting Rights Dispute*, N.Y. TIMES (Oct. 4, 2022), <https://www.nytimes.com/2022/10/04/us/alabama-supreme-court-voting-rights-act.html> [<https://perma.cc/QYM4-6K98>].

In 1968, NAACP lawyer Lewis M. Steel wrote a *New York Times* op-ed criticizing the Warren Court.³¹⁸ Steel complained that the Court had “never . . . indicated that it is committed to a society based upon principles of absolute equality.”³¹⁹ Instead, it had “taken the position that racial equality should be subordinated—or at least balanced against—white America’s fear of rapid change.”³²⁰ The critical note Steel struck was far removed from the liberal narrative of the Warren Court, which celebrated decisions like *Brown v. Board of Education*. Steel criticized the liberal narrative for defending these decisions’ unsatisfactory aspects and viewing them as the very essence of progress. He instead alerted Americans to the costs of that Court’s compromised version of equality, and the NAACP Board fired him for writing the article.³²¹

Today, Steel’s words ring all the truer as we are forced to face the costs of a compromised equality jurisprudence. *Brown*’s compromise on school integration stifled discussions of accountability, steering America’s racial transition process towards reconciliation without reckoning.³²² Meanwhile, *Bakke* required affirmative action advocates to make arguments about racial diversity instead of directly addressing racial justice.³²³ And the desecration of voting rights enacted by *Shelby County*³²⁴ and *Brnovich*³²⁵ demonstrates the fragility of democracy-affirming compromises, which can be terminated or transformed into democracy-constraining ones by judicial decree.

The Roberts Court has proven an untrustworthy arbiter of compromise; democracy-affirming compromises are vulnerable to a later rejection and recasting by this Court.³²⁶ Even Ronald Reagan’s Solicitor General, Charles Fried, has labeled this Court “[n]ot [c]onservative” because it has “undermined or overturned precedents that embodied longstanding and difficult compromise settlements of sharply opposed interests and principles.”³²⁷ If democracy requires compromise, and the Supreme Court is hostile to democratic

318. Steel, *supra* note 237.

319. *Id.*

320. *Id.*

321. Kimberlé Williams Crenshaw, *Race Liberalism and the Deradicalization of Racial Reform*, 130 HARV. L. REV. 2298, 2302 (2017).

322. See text accompanying *supra* notes 211–244 (discussing the aftermath of *Brown* and continued long-term difficulty of achieving school integration).

323. See text accompanying *supra* notes 245–276 (discussing how *Bakke* has made it so advocates making legal claims must use the conciliatory language of diversity).

324. See text accompanying *supra* notes 293–302 (discussing *Shelby Cnty.* and how its striking down of the coverage formula effectively nullified the Voting Rights Act’s preclearance requirement and thus federal oversight over racial discrimination).

325. See text accompanying *supra* notes 303–315 (discussing how *Brnovich* has made it exceedingly difficult to satisfy the Voting Rights Act’s results test).

326. See *supra* note 28 (addressing the Roberts Court’s willingness to unravel legal compromises even beyond racial equality cases).

327. Charles Fried, *Not Conservative*, HARV. L. REV. BLOG (July 3, 2018), <https://blog.harvardlawreview.org/not-conservative/> [<https://perma.cc/WGZ4-X8RV>].

compromises, then the Court itself needs reform to maintain a functioning democracy.³²⁸

As the Roberts Court unravels America's civil rights laws, the prospect of fresh compromises arises. Americans committed to achieving a multiracial democracy must consider when (and to what extent) to compromise on racial equality. Investigating where past compromises on equality failed might shed light on how to approach present and future ones. Gleaned from the lessons of Parts II and III, Part IV provides an analytical framework to evaluate the value of specific compromises, which may guide the path forward.

IV.

DEMOCRACY-CONSTRAINING FEATURES OF COMPROMISES

By ignoring the legacies of past compromises, American society denies itself the opportunity to learn from historical trends and thereby arrive at more democratically advantageous solutions to current legal and political problems. Drawing on past racial equality compromises and the voices of Black political advocates, this Part outlines ten democracy-constraining features of compromises. These features not only impede the democratic benefits associated with compromise, but they can also impose significant democratic costs—perhaps so significant that avoiding compromise altogether becomes more democratically advantageous in the long term.

Compromises disregard fundamental humanity—America's foundational compromises around colonialism and slavery legitimated a dehumanizing belief that threatens its democracy to this day: that marginalized people's freedom and equality can be easily disregarded or disposed in the pursuit of political goals.³²⁹ Generations of Black political leaders have rejected "immoral compromises" predicated on the "political, economic and social exploitation" of Black Americans.³³⁰ Such exploitation denies respect for their fundamental humanity and their place as a democratic partner, sacrificing "unalienable" rights that ought not to be compromised according to American mythology.³³¹ Reflecting on contemporary equality debates, Deborah Archer, the ACLU's first Black president, reflects that "there is no compromise . . . if you don't believe in my

328. See *infra* Part V.D (discussing present debates on Supreme Court reform).

329. Avishai Margalit distinguishes between compromises that advance justice and "rotten compromises" that "establish or maintain an inhuman regime." MARGALIT, *supra* note 19, at 1. Whereas Margalit rejects "rotten compromise" predicated on "inhuman" treatment, this Article does not limit analysis to "extreme manifestations of not treating humans as humans," because a disregard for humanity that falls short of "cruel, savage, and barbarous behavior" can still be democracy impeding. See MARGALIT, *supra* note 19, at 2 (emphasis added).

330. John Lewis, *supra* note 165.

331. See The Declaration of Independence para. 2 (U.S. 1776).

fundamental humanity, if you don't believe in my right to live, exist, and thrive in the same way that you do."³³²

Compromises entrench oppressive systems—Compromise can be a strategic necessity if subordinated groups cannot achieve change alone. Compromise can also obstruct necessary long-term changes, however, if they contribute to entrenching fundamentally racist institutions. Assessing whether a compromise contributes to entrenching such systems may have no clear litmus test. Nevertheless, racial subordination is so integral to the functioning of certain American institutions (such as slavery and Jim Crow in the past and the criminal legal system today³³³) that compromises that appear to reduce harms, while leaving such institutions intact, may be ultimately futile and even harmful, as they give the illusion of progress and potentially reduce incentives for liberals to do more. Recognizing this, Frederick Douglass pointed to the deficiency of slavery compromises when “[a] radical change was needed in our whole system.”³³⁴ Some compromises may be so superficial that they barely ameliorate harms while distracting from more structural solutions. Recall that at the 1964 Democratic National Convention, MFDP delegates rejected the two-seat option because they felt that it circumvented the structural changes required to make the United States more democratic, i.e., the full participation of Black Mississippians in the voting process.³³⁵ Compromises aimed at reducing harms should not serve to legitimize and entrench the very systems inflicting these harms.³³⁶

Compromises endanger long-term change—Even compromises that ameliorate inequality can make transformative visions of equality seem radical and unattainable when they are in fact worth pursuing.³³⁷ Compromises in this vein may settle prematurely for “progress” when the political moment holds the possibility of a greater transformation. For example, King averted a premature compromise amid the Montgomery Bus Boycott because he recognized that

332. In *Jacob K. Javits Professorship Lecture, Deborah Archer and Melissa Murray Consider Democracy, Inequality, and Civil Unrest*, N.Y.U. L. NEWS (Apr. 21, 2021), <https://www.law.nyu.edu/news/deborah-archer-melissa-murray-javits-professorship-lecture-democracy-inequality> [https://perma.cc/TPS5-6HZ5].

333. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (discussing the pervasive racism in the criminal legal system); Paul Butler, *The System is Working the Way it is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2015) (discussing police violence against African Americans as an integral feature of policing and punishment in the United States).

334. *The Mission of the War*, *supra* note 90.

335. *M.F.D.P. Gives Lesson in Democracy*, *supra* note 144.

336. On the importance of harm reduction, see Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 763–64 (2020).

337. In this vein, political sociologist Nicos Poulantzas cautions against “compromise” that “corresponds to a hegemonic class domination” and “could be contrary to the short-term economic interests of the dominant classes, without this affecting the configuration of political interests.” NICOS POULANTZAS, *POLITICAL POWER AND SOCIAL CLASSES* 192 (Timothy O’Hagan trans., Verso ed. 1978) (1973).

“victory [could] be won” with further agitation.³³⁸ Likewise, Rustin cautioned against “the evils of premature political compromise” during the Carter administration.³³⁹ Compromises can also fall into this category when they enable modest changes while sacrificing transformative demands, such as when “diversity” supplanted “justice” as the rationale for affirmative action.³⁴⁰ Compromises may also provide reforms in one area but limit the ultimate emancipatory potential of those reforms by ignoring and impeding changes in adjacent arenas. For example, Du Bois doubted that Black people “can make effective progress in economic lines if they are deprived of political rights, made a servile caste, and allowed only the most meagre chance for developing their exceptional men[.]”³⁴¹

Compromises draw false equivalences—While a classic compromise requires all sides to sacrifice something valuable to their opponents,³⁴² compromise-brokers should avoid treating dominant and subordinated people as equivalent competing groups who simply disagree and who have equally democratically legitimate purposes. Such an approach has led the law astray in the past, for example, when *Bakke* drew equivalencies between the experiences of White and minority Americans.³⁴³ Understanding racial equality compromises as interactions between equals shortchanges the group with less power and discounts those advocating for democracy-improving changes. John Mercer Langston rejected such false equivalences when he insisted that “[c]ompromises between right and wrong, under preten[s]e of expediency, should disappear forever.”³⁴⁴ Likewise, we should reject the false equivalence between uncompromising racism and uncompromising demands for racial justice. Although white nationalist chants of “[y]ou will not replace us”³⁴⁵ and anti-racist chants of “No Justice, No Peace”³⁴⁶ are both uncompromising, they have different democratic value: one is the antithesis of a multiracial democracy, while the other seeks an inclusive democracy that “will not come . . . through compromise and fear.”³⁴⁷

Compromises promote false narratives—Historically, compromises have often been predicated on (and have perpetuated) false narratives about racial

338. See *MIA Meeting*, *supra* note 182.

339. *A Message to Carter*, *supra* note 204.

340. See *supra* Part III.B (discussing *Bakke*’s compromise on affirmative action).

341. *Of Mr. Booker T. Washington*, *supra* note 112, at 51.

342. *The Mindsets of Political Compromise*, *supra* note 19, at 1127.

343. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 292–93 (1978). See also Haney-López, *supra* note 247, at 1063 (critiquing *Bakke*’s premise that “[B]lack and other minorities faced the same social conditions as [W]hite ethnics, none more or less the victims of group discrimination.”).

344. *John Mercer Langston*, *supra* note 92.

345. Farah Peterson, *Foreword*, 104 VA. L. REV. ONLINE 1, 4 (2018) (discussing the white supremacist rally in Charlottesville, Virginia, in August 2017).

346. *Racial Justice and Peace*, *supra* note 44, at 1327 (discussing anti-racist chants of “no justice, no peace”).

347. HUGHES, *supra* note 1, at 415.

justice and injustice in the United States. Du Bois criticized the Atlanta Compromise partly because it offered “indiscriminate flattery” instead of “straightforward honesty” to White Southerners and failed to “criticize] uncompromisingly those who do ill.”³⁴⁸ Likewise, John Hope called it “dishonest for any of our colored men to tell [W]hite people that we are not struggling for equality.”³⁴⁹ Decades later, Charles Sherrod opposed the two-seat compromise offered to the MFDP because “[i]t would have said to [B]lack across the nation and the world that we share the power and that is a lie[.]”³⁵⁰ Rustin cautioned against compromises that “only create the illusion that something meaningful is being done, while perpetuating an inadequate and inefficient system and delaying the task of real reform.”³⁵¹ Compromises have also promoted false narratives by omission (such as when *Brown* failed to address white supremacy in order to appear “non-accusatory”³⁵²) and by drawing false equivalences (such as when *Bakke* compared the experiences of White and minority Americans³⁵³). Promoting false narratives like these can fuel Americans’ misconceptions about racial justice and impede progress by allowing them to believe there is no real need for further equality measures.³⁵⁴

Compromises endlessly delay justice—Compromises can make undue concessions to powerful interests that fail to meet even the basic demands of justice. Fannie Lou Hamer and Charles Sherrod described the two-seat compromise offered to the MFDP as “nothing,”³⁵⁵ refusing to “accept a token decision which had as its goal the avoidance of the question of racism.”³⁵⁶ Compromises that continuously delay or deny justice are liable to entrench inequality and deepen distrust over the long term. Accordingly, an “uncompromising mindset” among some racial justice movements reflects frustration with the slow pace of change, brought on by compromises that either sacrifice equality altogether or offer only symbolic gestures and the hollow

348. *Of Mr. Booker T. Washington*, *supra* note 112, at 54.

349. *John Hope*, *supra* note 111.

350. Charles M. Sherrod, Student Nonviolent Coordinating Committee Papers, *supra* note 153, at 6.

351. *Health Care: Illusion or Reform*, *supra* note 204, at 2.

352. Memorandum from Chief Justice Earl Warren to the Members of the United States Supreme Court, *supra* note 218; *see supra* Part III.A (discussing *Brown*’s compromise on school integration).

353. *See supra* Part III.B (discussing *Bakke*’s compromise on affirmative action).

354. For instance, recent studies found that, relative to Black Americans, White Americans perceived less racism in both isolated and systemic forms and demonstrated less historical knowledge of racism and less ability to differentiate historical fact from fiction. *See* Jessica C. Nelson, Glenn Adams & Phia S. Salter, *The Marley Hypothesis: Denial of Racism Reflects Ignorance of History*, 24 PSYCH. SCI. 213, 213 (2013). Americans also overestimated past and present racial economic equality. Michael W. Kraus, Julian M. Rucker & Jennifer A. Richeson, *Americans Misperceive Racial Economic Equality*, 114 PROC. NAT’L ACAD. SCI. 10324, 10324–25 (2017).

355. *Interview with Fannie Lou Hamer*, *supra* note 131; Charles M. Sherrod, Student Nonviolent Coordinating Committee Papers, *supra* note 153.

356. *M.F.D.P. Gives Lesson in Democracy*, *supra* note 144.

promise of future change.³⁵⁷ Malcolm X's speeches advocating an uncompromising approach to racial justice anticipated the discontent of future generations.³⁵⁸ King learned from the Compromise of 1877, which had produced "a condition somewhat above slave status but short of genuine citizenship" and suppressed Black "social and political existence for nearly a century," and he repudiated such compromises in his own time.³⁵⁹ Hamer was unwilling to compromise on voting rights a century after Emancipation because "if there's something supposed to be mine three hundred years ago, . . . I'm not going to take it by just a taste now and a taste another hundred years."³⁶⁰

Compromises forsake justice for the sake of peace—In transitional justice theory, the peace versus justice dilemma arises precisely because "in the near term, these two goods may be at odds, even though in the long term a just and stable society requires that they be united."³⁶¹ However, there is a risk of sacrificing too much justice in the name of peace, thereby enabling a "negative peace" based on the suppression of social conflict instead of "positive peace" grounded in the pursuit of social justice.³⁶² Unfortunately, American history is replete with such compromises.³⁶³ Before the Civil War, Wendell Phillips explained how slavery compromises achieved a "union" that sacrificed justice by allowing "the absolute reign of the slaveholding power over the whole country."³⁶⁴ Following Reconstruction, Du Bois found that "[t]he growing spirit of kindness and reconciliation" was predicated on Black people's "permanent legislation into a position of inferiority."³⁶⁵ Even during the Civil Rights era, Supreme Court decisions like *Brown* sacrificed accountability in the name of conciliation, which created impediments to long-term integration.³⁶⁶

357. Harry W. Dolan's 1966 article captures such a subordinated uncompromising mindset:

No, there is no shining, wildly bubbling black kettle about to explode, but there is a horrible coldness towards any attempt at compromise. There is open contempt for the peacemakers, and they are warned, you go [W]hite, [B]lack man, you go first, even before the [W]hite man, because you could have told him, you should have made him understand, but you only nodded and smiled and ate the crumbs he could not hold.

Harry W. Dolan, *Will There Be Another Riot in Watts* (1966) (Student Nonviolent Coordinating Committee Papers, 1959–1972, Reel 56, Frame 433, on file with the Manuscript Division, Library of Congress),

https://hv.proquest.com/pdfs/252253/252253_056_0433/252253_056_0433_0005_From_201_to_250.pdf [https://perma.cc/8RXV-BVFZ].

358. See, e.g., *The Ballot or the Bullet*, *supra* note 73 ("If you don't take this kind of [uncompromising] stand, your little children will grow up and look at you and think 'shame.'").

359. *The Social Organization of Nonviolence*, *supra* note 178.

360. *What Have We to Hail?*, *supra* note 132. On the use of time-based arguments in the struggle for racial justice, see Yuvraj Joshi, *Racial Time*, 90 U. CHI. L. REV. (forthcoming 2023).

361. SRIRAM, *supra* note 18, at 2.

362. *Racial Justice and Peace*, *supra* note 44, at 1326; *Weaponizing Peace*, *supra* note 44.

363. See generally *Racial Justice and Peace*, *supra* note 44, at 1326 (examining the peace-justice dilemma throughout civil rights history); *Weaponizing Peace*, *supra* note 44 (examining the peace-justice dilemma throughout civil rights history).

364. PHILLIPS, *supra* note 80, at 149.

365. *Of Mr. Booker T. Washington*, *supra* note 112, at 55.

366. *Brown v. Bd. of Educ.*, 347 U.S. 483, 483 (1954).

Compromises exclude subordinated groups—Compromises that ignore the justice claims of disenfranchised groups may both undermine longer-term positive peace and endanger short-term negative peace.³⁶⁷ In order to forge more just and effective arrangements, decision-makers must attend to the voices of marginalized people who are frequently the objects of compromise but who traditionally have no say in the process.³⁶⁸ Given America’s exclusionary history, compromises that members of subordinated groups help shape may be more valuable than compromises that members of dominant groups broker exclusively.³⁶⁹ As the MFDP’s actions at the 1964 Democratic National Convention underscored, *uncompromising* members of subordinated groups should be part of these democratic deliberations. Political processes that exclude uncompromising voices for justice may be susceptible to expedient and unprincipled compromises. They may also demonstrate to certain members of subordinated groups that compromise is ultimately aimed at white appeasement rather than racial justice, further alienating them from the political process.³⁷⁰

Compromises embolden dominant groups—Compromises aimed at pacifying the most uncompromising white supremacists may in fact fuel their unwillingness to relinquish power. Rustin repudiated political compromises that gave into “the racial fears of the bigoted”³⁷¹ and “encourage[ed] the animal insanity of deluded minds.”³⁷² There is often a concern that failing to account for the discomfort of dominant groups may end up perpetuating racial animosities and threatening social cohesion.³⁷³ But compromises do not necessarily ameliorate racial animosities and can even embolden dominant groups to defend

367. Excluding the input and interests of minorities from decision-making may result in a false sense of tranquility that ultimately gives way to open conflict. On this view, recurring anti-racism protests in the United States are not disruptive departures from peace, but demands to recognize the illusory nature of the peace that masks the injustice, frustration, and despair minorities feel. *Racial Justice and Peace*, *supra* note 44, at 1346.

368. Murphy, *supra* note 18, at 56–57.

369. *Brief of Alabama Lawmakers*, *supra* note 294, at 2.

370. As John Kamaal Sunjata tweeted: “once you realize that liberalism—as both a mode & a technology—is NOT invested in anti-racism but racism reform, you’ll stop wondering why liberals always seek ‘commonground,’ ‘compromise,’ & ‘bipartisan solutions’ with conservatives instead of you, the target of racial violence.” N.A.S.S. (@nuafrikisupport), TWITTER (Mar. 17, 2021), <https://twitter.com/nuafrikisupport/status/1372345948635078659> [<https://perma.cc/P6G8-UK57>].

371. *The Compromise of 1970*, *supra* note 204.

372. *Birmingham Press Release*, *supra* note 204.

373. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1302 (2011) (“Proponents of antibalkanization recognize that . . . taking race into account means crafting interventions that ameliorate racial wrongs without unduly aggravating racial resentments.”). See also Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL’Y & L. 1, 7 (2015) (“[T]he Supreme Court should not compromise racial justice in order to appease individuals who support the status quo of racial inequality and for whom racial redress causes tension.”).

their racial privilege more aggressively.³⁷⁴ For example, although *Brown* allowed a gradual integration process to appease segregationists, this compromise emboldened them to resist integration.³⁷⁵ America's history of vehement white supremacist resistance to even incremental racial change counsels a different approach. Instead of offering undue concessions in the false hope of mitigating animosities, decision-makers should pursue compacts designed to withstand (as opposed to merely assuage) the animosities of uncompromising opponents of equality.

Compromises outlive their utility—Making democratic progress in America requires constantly seeking and agitating for new horizons of equality and freedom; we should not simply be bound to past goalposts.³⁷⁶ Recent anti-racist protests have demonstrated the deficiencies and inutility of earlier racial equality compromises and have opened up political space for reconsidering them.³⁷⁷ Furthermore, “whitelash”³⁷⁸ in the wake of these protests has reinforced the need for a legal system that can withstand uncompromising white supremacists.³⁷⁹ Historically informed analysis should guide decision-makers and advocates as they contemplate which previous compromises are worth defending and which are worth rethinking in the present.

* * *

The democracy-impeding features of compromises outlined above can be distinguished from potentially democracy-enhancing ones exemplified in the 1963 Birmingham Truce Agreement and the 1965 Voting Rights Act. These latter compromises institutionalized political demands, initiated structural and symbolic changes, provided clear goals for policymaking, worked through the tensions between competing interests, considered and included Black advocates' voices, addressed racism honestly and directly, did not trade short-term advances for longer-term drawbacks, and instead paved the way for achieving fuller equality.³⁸⁰ Because these compromises could lead to more democratic outcomes

374. See *supra* notes 228–234 and accompanying text (discussing how *Brown*'s compromise emboldened Southern segregationists like political candidates to staunchly oppose integration during their election campaigns and a Virginia state Senator likening integration to “cancer”).

375. See *supra* notes 228–234 and accompanying text (discussing Southern segregationists' uncompromising response to *Brown*).

376. See *What Have We to Hail?*, *supra* note 132, at 78.

377. *Racial Justice and Peace*, *supra* note 44.

378. Sheryll Cashin, *There's a Term for What Happened at the Capitol This Week: 'Whitelash'*, POLITICO (Jan. 9, 2021), <https://www.politico.com/news/magazine/2021/01/09/capitol-siege-georgia-elections-whitelash-black-progress-456724> [<https://perma.cc/PML5-SAQL>].

379. Hakeem Jefferson & Victor Ray, *White Backlash Is a Type of Racial Reckoning, Too*, FIVETHIRTYEIGHT (Jan. 6, 2022), <https://fivethirtyeight.com/features/white-backlash-is-a-type-of-racial-reckoning-too/> [<https://perma.cc/NBC4-RN3A>] (describing the January 6 Capitol riots as evidence of white backlash).

380. See text accompanying *supra* notes 191–193 (discussing King's willingness to compromise in the Birmingham Campaign because he believed it would “pave[] the way for fuller equality”); text accompanying *supra* notes 278–282 (discussing the passage of the 1965 Voting Rights Act as a

than inaction, accepting them could be considered better than having no compromise at all.

To be clear, democracy-impeding and democracy-enhancing features of compromises are not mutually exclusive. Large-scale legislation such as the Voting Rights Act likely contain a mixture of both and exist on a continuum of principled to unprincipled compromise. On balance, compromises should reflect good-faith efforts to advance equality and should support longer-term democratic progress. Unfortunately, current debates on policing, voting rights, the Senate filibuster, and Supreme Court reform feature compromises that would impede rather than advance democracy, which this Article explores next.³⁸¹

V.

THE PERILS OF COMPROMISE IN PRESENT DEBATES

Lessons from the compromises of the past and the voices of Black advocates should inform our analysis of contemporary racial equality debates. Not only are the problematic features of past compromises recurring in the present, but America's history of compromises and the experiences of earlier generations are guiding a new generation of racial justice activists. Ignoring this history and these experiences thus results in an inaccurate account of the present.

Lessons from the past are particularly relevant to the issue of policing, an area in which racial justice activists presently fear that policymakers will enact empty compromises without making necessary structural changes.³⁸² On other issues where Republican lawmakers have even less of an appetite for

compromise that political actors took immediate action on to “maximize its emancipatory potential and counteract its limitations”).

381. While some compromises are not explicitly racial in nature, their adverse effects would be deeply and disproportionately felt by racial minorities, which ultimately makes them compromises of racial equality. As Wendell Phillips noticed with respect to the Constitution, compromises that are not explicitly racial can still be compromises of racial equality. See PHILLIPS, *supra* note 80, at 149.

The issues outlined in Part V are but a few justice issues shaped by dynamics of compromise. Sherally Munshi, for example, observes both a “failure to reach compromise” and “uncompromising terms of white nationalism” in the immigration debate. Sherally Munshi, *Unsettling the Border*, 67 UCLA L. REV. 1720, 1722 (2020). Karen Pita Loor examines immigrant resistance to the “Secure Communities” enforcement program against the backdrop of the inability to reach legislative compromise on immigration. Karen J. Pita Loor, *A Study on Immigrant Activism, Secure Communities, and Rawlsian Civil Disobedience*, 100 MARQ. L. REV. 565, 599–605 (2016). Fred Smith critiques the “compromise” in *Younger v. Harris*, 401 U.S. 37 (1971), in light of the “racial dimensions of mass incarceration.” Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2338 (2017). Kristen Carpenter and Angela Riley describe *Johnson v. M'Intosh*, 21 U.S. 543 (1823), as “a compromise position” that both “recognized Indians’ land rights” and “reaffirm[ed] the exclusive power of the U.S. government . . . to engage in land transactions involving Indian lands.” Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation*, 71 STAN. L. REV. 791, 813 (2019). Katharine Silbaugh traces dynamics of compromise in the emergence and application of the Family and Medical Leave Act. Katharine B. Silbaugh, *Is the Work-Family Conflict Pathological or Normal Under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 WASH. U. J.L. & POL'Y 193, 200–03 (2004).

382. See *infra* Part V.A (discussing present debates on policing).

compromise, like voting rights,³⁸³ the Senate filibuster,³⁸⁴ or Supreme Court reform,³⁸⁵ learning from how dominant uncompromising mindsets have worked in the past shows that we should not cave to their uncompromising equivalents today.

Today there are “compromising” Black political leaders (such as U.S. Representative James Clyburn) who are willing to make concessions to Republican lawmakers to achieve reforms³⁸⁶ and “uncompromising” ones (such as U.S. Representative Cori Bush) who demand transformative change and caution against unprincipled compromises entrenching inequality.³⁸⁷ These leaders’ compromise mindsets interact with one another and with dominant political structures, including an uncompromising Republican Party,³⁸⁸ an unduly compromising Democratic Party,³⁸⁹ and a President who prizes his own ability to compromise with white supremacists.³⁹⁰ Understanding these different approaches to compromise and the interplay between them is therefore crucial to the present pursuit of racial equality.³⁹¹

383. See *infra* Part V.B (discussing present debates on voting rights).

384. See *infra* Part V.C (discussing present debates on the Senate filibuster).

385. See *infra* Part V.D (discussing present debates on Supreme Court reform).

386. See text accompanying *infra* notes 406–408 (discussing Clyburn’s urging of Democrats to be open to a police reform bill even if it opposes qualified immunity reform). On Clyburn’s history of supporting racial equality compromises, see Molly Ball, *Jim Clyburn’s Long Quest for Black Political Power*, TIME (July 28, 2022), <https://time.com/6201224/jim-clyburn-interview/> [<https://perma.cc/8VWN-W5NM>].

387. See text accompanying *infra* note 400. On Bush’s resistance to racial equality compromises, see Lauren Gambino, *For Me, It’s About the Mission’: Why Cori Bush is Just Getting Started in Congress*, GUARDIAN (Dec. 30, 2021), <https://www.theguardian.com/us-news/2021/dec/30/cori-bush-congresswoman-missouri> [<https://perma.cc/5LJD-HTT2>]. This once again illustrates that there is no monolithic “Black perspective” on compromise. See also Michael C. Dawson, *The Future of Black Politics*, BOS. REV. (March 22, 2012), <https://www.bostonreview.net/forum/future-black-politics-dawson/> [<https://perma.cc/N9PP-3CR3>] (distinguishing between uncompromising Black activists and “the [B]lack elite, particularly the middle-class [B]lack elite” who may be “prone to compromise and forging alliances with the powers that be.”).

388. See *supra* note 30 (discussing the uncompromising nature of the contemporary Republican Party).

389. See *supra* note 31 (discussing the establishment liberals of the Democratic Party that insist on compromise).

390. See Joseph R. Biden, *Remarks by President Biden on Protecting the Right to Vote*, WHITE HOUSE (Jan. 11, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/01/11/remarks-by-president-biden-on-protecting-the-right-to-vote/> [<https://perma.cc/H7FF-HJ63>] [hereinafter *Remarks by President Biden on Protecting the Right to Vote*] (discussing President Biden touting reaching a compromise with Strom Thurmond, a co-author of the Southern Manifesto). But see Michael D. Shear, *Newly Aggressive Biden Shifts from Compromise to Combat*, N.Y. TIMES (Aug. 31, 2022), <https://www.nytimes.com/2022/08/31/us/politics/biden-trump-republicans.html> [<https://perma.cc/WR6S-3U63>] (observing that President Biden is recently “spending less time hailing the virtues of compromise and more time calling out dangers to democracy”).

391. Beyond political leaders, today’s racial justice advocates and thinkers are contemplating the value of compromise. For example, filmmaker and activist Bree Newsome routinely critiques the Democratic Party’s willingness to compromise on equality with Republicans. Taking a historical view to highlight the *limits* of compromise, Newsome tweets: “[T]he way ppl are discussing ‘compromise’ in

A. Policing

The current system of policing in the United States was made possible by a series of Supreme Court decisions borne from compromise. These decisions sought compromises between government's interest in public safety and individual's interest in personal liberty. As a result of these compromises, Black and Brown communities could be overpoliced and denied accountability for police abuse.

For example, *Terry v. Ohio* in 1968 did not limit policing despite acknowledging “[t]he wholesale harassment” by police of which Black Americans “frequently complain.”³⁹² Instead, *Terry* compromised and held that “stops and frisks” were searches and seizures governed by the Fourth Amendment, but then allowed the police to conduct a stop and frisk based on reasonable suspicion, as opposed to the higher standard of probable cause.³⁹³ It took forty-five years until a federal judge found the consequent pervasive racial profiling and stops that New York City police conducted unconstitutional.³⁹⁴ Meanwhile, *Graham v. Connor* in 1989 ruled that “[police] use of force must be judged from the perspective of a reasonable officer on the scene,” and in 2021, this perspective of a reasonable officer on the scene underpinned Derek Chauvin’s defense in his trial for the murder of George Floyd.³⁹⁵

this moment is wildly disconnected from the reality of how racial, gender & economic inequality is being rapidly re-entrenched for another generation. We’ve already been enormously compromised.” Bree Newsome Bass (@BreeNewsome), TWITTER (June 18, 2021), <https://twitter.com/BreeNewsome/status/1405847142795825155> [<https://perma.cc/ANP9-LMJ6>]. In contrast, a leading legal scholar of racism, Darren Hutchinson, highlights the *value* of compromise in coalition politics. On Hutchinson’s historical view, “progress and compromise aren’t incompatible,” but rather, “[s]ome of [the] greatest historical change resulted from longterm struggle that included [o]mpromise.” Professor Darren Hutchinson (@dissentingj), TWITTER (Apr. 19, 2020), <https://twitter.com/dissentingj/status/1251852056085889029> [<https://perma.cc/E32S-HZXM>]; Professor Darren Hutchinson (@dissentingj), TWITTER (Apr. 19, 2020), <https://twitter.com/dissentingj/status/1251844738174648322> [<https://perma.cc/8HR3-KC8G>]. Hutchinson observes that “[c]oalitions always involve sacrifice and compromise,” and calls on progressives to “minimize the harms, even if it requires compromise.” Professor Darren Hutchinson (@dissentingj), TWITTER (July 14, 2020), <https://twitter.com/dissentingj/status/1283099593954271233> [<https://perma.cc/B4UW-XNQD>]; Professor Darren Hutchinson (@dissentingj), TWITTER (July 15, 2022), <https://twitter.com/dissentingj/status/1548053941404897283> [<https://perma.cc/4ER5-34KZ>].

392. 392 U.S. 1, 14 (1968).

393. Paul Butler, “A Long Step Down the Totalitarian Path”: Justice Douglas’s Great Dissent in *Terry v. Ohio*, 79 MISS. L.J. 9, 24 (2009). See also I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L.L. REV. 1, 32 (2011) (describing *Terry* as a compromise).

394. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013).

395. 490 U.S. 386, 396 (1989); Michael Tarm, *Explainer: How Is ‘Reasonableness’ Key to Chauvin’s Defense?*, AP NEWS (Apr. 17, 2021), <https://apnews.com/article/us-news-trials-death-of-george-floyd-racial-injustice-us-supreme-court-8ee9b9b218e92faa434d241ef55f5488> [<https://perma.cc/CBC5-2A74>]. Additionally, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), created the qualified immunity doctrine protecting police officers from individual liability for abuses. On qualified immunity, see *infra* notes 398–400.

Americans marching in solidarity with Black lives in mid-2020 placed policing atop the legislative agenda, but unproductive dynamics of compromise stalled legislative change. In March 2021, the Democratic House passed the George Floyd Justice in Policing Act to increase police transparency and accountability, with no Republican support.³⁹⁶ When Senate Republicans opposed the bill, three Black legislators—Republican Tim Scott and Democrats Cory Booker and Karen Bass—set out to negotiate a bipartisan compromise.³⁹⁷ But the compromises deemed necessary to secure Republican support would sacrifice key objectives and alienate progressive Democrats. For example, recognizing significant Republican opposition on the issue of qualified immunity, Senator Booker’s draft bill did not alter qualified immunity writ large.³⁹⁸ Instead, it allowed employer liability for government officials and closed a civil rights law loophole that generally prevents federal workers from being sued for constitutional violations.³⁹⁹ Democratic Representative Cori Bush said that she would refuse to vote for a bill that compromises on limiting civil lawsuit protections currently afforded to police officers, saying: “We compromise, we die.”⁴⁰⁰ Her uncompromising stance, reminiscent of Hamer’s in the 1964 Democratic National Convention, had more democratic value than that of her Republican counterparts because it foregrounded Black people’s humanity and refused to sustain a problematic system through facile compromises. In adopting this stance, Bush followed the lineage of Black feminism and Black women leaders throughout history who uncompromisingly demanded justice.⁴⁰¹

These bipartisan negotiations collapsed in September 2021. Senator Booker said that Republicans refused to compromise on reforming national use of force

396. Nicholas Fandos, Catie Edmondson & Karen Zraick, *The House Passes a Policing Overhaul Bill Named for George Floyd, Whose Death Spurred Nationwide Protests.*, N.Y. TIMES (Mar. 4, 2021), <https://www.nytimes.com/2021/03/04/us/george-floyd-act.html> [https://perma.cc/G79F-LHVX].

397. Nicholas Fandos & Catie Edmondson, *Policing Reform Negotiations Sputter in Congress Amid Partisan Bickering*, N.Y. TIMES (June 10, 2021), <https://www.nytimes.com/2021/06/10/us/politics/policing-reform-congress.html> [https://perma.cc/L4BV-XP2T].

398. See Anya Bidwell, Patrick Jaicomo & Nick Sibilla, *Hope for Reforming Qualified Immunity? It May Lie in a Compromise Bill, a Leaked Draft Shows*, USA TODAY (June 24, 2021), <https://www.usatoday.com/story/opinion/2021/06/24/reform-qualified-immunity-hold-federal-officers-accountable/7705663002/> [https://perma.cc/V85X-4GB3].

399. Counsel for José Oliva—a Vietnam War veteran who was brutally attacked by federal officers—argued that these changes, despite amounting to a compromise on qualified immunity, nonetheless would have provided incentive for federal law enforcement agencies to respect people’s constitutional rights. *Id.*

400. *Rep. Bush on Qualified Immunity: ‘We Compromise, We Die’*, CNN (Apr. 25, 2021), <https://www.cnn.com/videos/politics/2021/04/25/rep-cori-bush-police-reform-qualified-immunity-ip-sot-vpx.cnn> [https://perma.cc/LU6U-2BF5].

401. See *supra* note 135 (discussing the uncompromising stances of Sojourner Truth, Fannie Lou Hamer, and other Black women leaders); James, *supra* note 125, at 151 (noting the “uncompromising” and “extremely dangerous” anti-lynching activism of Black women like Florida Ruffin Ridley, Mary Church Terrell, and Ida B. Wells-Barnett).

standards and qualified immunity, which would raise professional standards and promote transparency and accountability.⁴⁰² Representative Bass noted that significant Democrat concessions had already diluted the police reform bill to such an extent that any further compromises would no longer represent substantive progress on the issue.⁴⁰³ In contrast, Senator Scott cited uncompromising demands to “defund the police” as the cause of collapse.⁴⁰⁴

Ultimately, Republicans’ uncompromising stances and Democrats’ premature concessions both may have impeded progress on police reform. For example, Hassan Kanu notes that “Democrats hampered their own ability to reach agreement by entering negotiations with moderate proposals — leaving little room to accept concessions.”⁴⁰⁵ Similarly, Akela Lacy argues that moderate Democrats derailed police reform by insisting on compromise.⁴⁰⁶ Lacy notes that Senator Scott’s initial position was receptive to some (albeit compromised) qualified immunity reform.⁴⁰⁷ She then documents Senator Scott’s shift to strong opposition, which followed a comment from Democratic House Majority Whip James Clyburn that Democrats should be open to a bill that left qualified immunity untouched.⁴⁰⁸

The American policing debate searches a middle ground between a Black Lives Matter movement that wants to “defund” or “abolish” policing and a Blue Lives Matter countermovement that wants to maintain or expand policing.⁴⁰⁹

402. Akela Lacy, *How Moderate Democrats Derailed Police Reform*, THE INTERCEPT (Sept. 24, 2021), <https://theintercept.com/2021/09/24/police-reform-bill-democrats/> [https://perma.cc/S229-4GSH].

403. Joan E. Greve, *Sweeping George Floyd Police Reform Bill Stalls as Talks Collapse*, GUARDIAN (Sept. 22, 2021), <https://www.theguardian.com/us-news/2021/sep/22/us-police-reform-bill-congress-bipartisan-talks> [https://perma.cc/4SDC-9MGD].

404. Hassan Kanu, *Congress Fails on Police Reform. Now What?*, REUTERS (Oct. 12, 2021), <https://www.reuters.com/legal/government/congress-fails-police-reform-now-what-2021-10-08/> [https://perma.cc/SD99-Z2LE].

405. *Id.*

406. Lacy, *supra* note 402.

407. *Id.*

408. *Id.* After video footage of Memphis police officers brutally beating Tyre Nichols to his death released in January 2023, Republican Senator Lindsey Graham raised the possibility of a “compromise” on the George Floyd Justice in Policing Act that would maintain qualified immunity for police officers. Other Republicans—who now control the House—remained intransigent on police reform. Nicole Narea & Li Zhou, *Lawmakers Won’t Compromise on Police Reform. Will Tyre Nichols’s Killing Change That?*, VOX (Jan. 30, 2023), <https://www.vox.com/policy-and-politics/2023/1/30/23578339/police-reform-tyre-nichols-congress> [https://perma.cc/UWM6-K8YR].

409. John Verhovek & Molly Nagle, *Joe Biden Rejects Calls to Defund Police, Faces Challenge as Reform Push Grows*, ABC NEWS (June 8, 2020), <https://abcnews.go.com/Politics/joe-biden-rejects-calls-defund-police-faces-challenge/story?id=71135325> [https://perma.cc/D576-WQA9]. Likewise, Ted Rutland identifies a “logic of compromise” in community policing debates of the 1980s that “aimed . . . to find a middle ground between the repressive status quo and activists’ more radical or revolutionary demands.” Ted Rutland, *From Compromise to Counter-insurgency: Variations in the Racial Politics of Community Policing in Montreal*, 118 GEOFORUM 180, 184 (2021). Rutland notes that while “the policy was criticized by some Black and anti-racist organizations, who believed it did not go far enough to combat police racism . . . even this limited policy was resisted by rank-and-file officers and increasingly the police union.” *Id.*

This is a potentially democracy-constraining approach to compromise because it relies on a false equivalence between people who bear the brunt of state-sanctioned violence and those who enact that violence or benefit from it. Police “reform” is discussed because it is a compromise palatable to White moderates.⁴¹⁰ Meanwhile, defunding and abolitionist positions advanced by Black communities are dismissed because they are uncompromising, even as the systemic racism and racial terror of policing warrant a more uncompromising stance.⁴¹¹

In reality, some defunding advocates contend that their position is already a compromise, being short of complete abolition; there is less scope for further concessions as compromise is baked into their position.⁴¹² Furthermore, while some abolitionists uncompromisingly insist on “abolition now,” others work toward “abolitionist futures” involving “non-reformist reforms.”⁴¹³ Non-reformist reforms “exclude neither compromise nor partial objectives, so long as they go in the right direction and as long as that direction is clear.”⁴¹⁴ Ultimately, although some defunding and abolition proponents are truly *against* compromises, many worry that the *wrong* compromises will prolong the harms of racist policing and endanger long-term change. Learning from the past, some compare bad policing compromises to slavery compromises that readjusted the boundaries of racism in order to preserve a fundamentally racist institution.⁴¹⁵

The history of racial justice struggles in the United States demonstrates that democratic change is often the result of the dialectical relationship of compromising and uncompromising actors. Even if abolitionist arguments do not carry the day, they foreground moral issues within the pragmatic politics of compromise and may advance societal understanding of the harms of policing. Protestations from these “radical” constituencies may also drive “moderate”

410. Verhovek & Nagle, *supra* note 409 (noting that “Biden’s positioning [regarding police reform] reflects an acknowledgement that his coalition of liberals, moderate Democrats, Independents who gravitated [away from] the GOP in 2016 and Trump-wary Republicans, is not a simple one to hold together . . . there’s a significant cadre of American public who is actually sympathetic to addressing issues of police brutality, who wouldn’t go as far as to abolish police departments”).

411. See Alexis Hoag, *Abolition as the Solution: Redress for Victims of Excessive Police Force*, 48 *FORDHAM URB. L.J.* 721, 725–26, 735–43 (2020); Howard Henderson & Ben Yisrael, *7 Myths About “Defunding the Police” Debunked*, BROOKINGS INST. (May 19, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/05/19/7-myths-about-defunding-the-police-debunked/> [<https://perma.cc/A7MA-9UTA>].

412. Michael Malaszczyk, “*Defund the Police*” is the Compromise, *REVIEW* (May 17, 2021), <https://udreview.com/opinion-defund-the-police-is-the-compromise/> [<https://perma.cc/743Y-B6BM>].

413. See Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 *HARV. L. REV. F.* 90, 101 nn.66, 68 (2020).

414. Mark Engler & Paul Engler, *André Gorz’s Non-Reformist Reforms Show How We Can Transform the World Today*, *JACOBIN* (July 22, 2021), <https://jacobin.com/2021/07/andre-gorz-non-reformist-reforms-revolution-political-theory> [<https://perma.cc/YPQ9-H9NN>].

415. See, e.g., @AdamantxYves, TWITTER (Nov. 11, 2020), <https://twitter.com/AdamantxYves/status/1326606770345807874> [<https://perma.cc/56WJ-4JS2>]; Bree Newsome Bass (@BreeNewsome), TWITTER (Dec. 10, 2020), <https://twitter.com/BreeNewsome/status/1337118181912174592> [<https://perma.cc/2WAY-S29W>].

police reform toward non-reformist reforms, which are more responsive to deeper structural issues. Ultimately, the moral claims of abolitionists may not only reveal the limits of pragmatic compromises but may also resist democracy-constraining compromises that inhibit structural change and instead push more just and effective solutions to the forefront.

B. Voting Rights

Similar to the George Floyd Justice in Policing Act discussed above, Congress has advanced three voting rights bills that have met uncompromising stances from Republicans. These bills attempt to address *Shelby County* and *Brnovich*'s unraveling of the voting rights compact.

In October 2021, Senate Republicans unanimously voted against the Freedom to Vote Act, which was by then “an already watered-down Democratic voting rights bill.”⁴¹⁶ The proposal had been altered at Democratic Senator Joe Manchin's insistence to create a bill that would “attract the votes of some Republicans in the spirit of compromise and good governance.”⁴¹⁷ Despite reworking the bill to Manchin's specifications, not a single Republican supported it, and the bill did not meet the supermajority threshold required to overcome the filibuster and continue on to open debate.⁴¹⁸

The federal voting rights debate is currently unfolding as Republican states enact legislation to suppress voters: as of October 2021, “19 states have enacted 33 laws that will make it harder for millions of Americans to vote.”⁴¹⁹ Manchin's valorization of bipartisanship—when one party is diluting voter protections and advancing voter suppression laws across the country—reflects a strained false equivalence.⁴²⁰ Quoting Vincent Hutchings, Sanya Mansoor notes that “Democrats' attempt to get Republicans onboard with voting rights legislation [is] counter-productive” because “Republicans have little incentive to expand

416. Michael D. Shear, *Biden the Dealmaker Finds that Compromise Can Have Consequences*, N.Y. TIMES (Oct. 23, 2021), <https://www.nytimes.com/2021/10/23/us/politics/biden-polls-spending-bill.html> [https://perma.cc/E4DM-CNDL].

417. Joshua Douglas, *A Voting Rights Bill that Both Democrats and Republicans Can Support*, WASH. MONTHLY (Oct. 22, 2021), <https://washingtonmonthly.com/2021/10/22/a-voting-rights-bill-that-both-democrats-and-republicans-can-support/> [https://perma.cc/S9EU-GB4D]. Joshua Douglas noted that there is “a lot in the proposal that both sides should like” and that, per Manchin's request, “[the Democrats] have added sweeteners that should attract Republican support, such as standard rules for photo ID requirements and security measures on paper ballots and post-election audits.” *Id.*

418. Carl Hulse, *Senate Republicans Block Voting Rights Bill, Leaving Its Fate in Doubt*, N.Y. TIMES (Oct. 20, 2021), <https://www.nytimes.com/2021/10/20/us/politics/senate-voting-rights-filibuster.html> [https://perma.cc/7N2D-WH4U].

419. Sanya Mansoor, *After Senate Republicans Block Voting Rights Legislation, the Filibuster Is Back in the Crosshairs*, TIME (Oct. 22, 2021), <https://time.com/6109259/senate-republics-block-voting-rights-legislation-filibuster/> [https://perma.cc/F3KN-HGP7].

420. Michael Wines, *As Republicans Take Aim at Voting, Democrats Search for a Response*, N.Y. TIMES (July 12, 2021), <https://www.nytimes.com/2021/07/12/us/republicans-voting-rights-democrats.html> [https://perma.cc/NH9E-BGEY].

voting access and ‘support legislation that will empower people [of color] who will not vote for them.’”⁴²¹

Beyond the Freedom to Vote Act, Democrats also introduced the John Lewis Voting Rights Advancement Act in the Senate in October 2021.⁴²² Senate Republicans blocked the legislation in November 2021.⁴²³ Sherrilyn Ifill, then-President and Director-Counsel of the NAACP Legal Defense and Education Fund, noted her disappointment with the vote and the failure of bipartisan reform efforts. She stated that “[s]upporters of these critical voting rights measures have made repeated attempts to engage with Republicans to produce bipartisan reforms, but efforts to reach an agreement have rarely, if ever, been met with reciprocal good faith.”⁴²⁴ In January 2022, the Democratic House passed the Freedom to Vote: John R. Lewis Act, a combined bill.⁴²⁵ Despite a late push from President Biden,⁴²⁶ Senate Republicans once again filibustered the bill.

Republicans’ voting rights obstruction should lead us to question the value of bipartisan compromise. If a commitment to bipartisanship means sacrificing necessary voter protections (or foregoing efforts to combat voter suppression altogether) to appease the party promoting voter suppression, then this general approach to compromise subverts the interests of democracy. Not only does it deny the humanity of Black Americans, exclude them from the democratic process, and embolden voter obstructionists to redouble their efforts, but it could also promote false narratives about democratic progress being made, when in reality it is not. These are all democracy-constraining features that have negatively impacted racial progress in the past, and ones that we should take seriously in the present.

Ultimately, a Republican Party more interested in suppressing than earning Black Americans’ votes and a reactionary Roberts Court bent on unraveling

421. Mansoor, *supra* note 419. Likewise, Lisa Cylar Barrett, Director of Policy at the NAACP Legal Defense and Educational Fund, argued that “people needed to see that even after a lot of negotiation and compromise, that what we’re really left with is obstruction.” *Id.*

422. Jordain Carney, *Senate Will Vote on John Lewis Voting Bill as Soon as Next Week*, HILL (Oct. 20, 2021), <https://thehill.com/homenews/senate/577643-senate-will-vote-on-john-lewis-voting-bill-as-soon-as-next-week> [<https://perma.cc/8XZX-8T6A>].

423. Carl Hulse, *Republicans Block a Second Voting Rights Bill in the Senate*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2021/11/03/us/politics/senate-republicans-voting-rights-act.html> [<https://perma.cc/44VA-3KEP>].

424. Sherrilyn Ifill, *LDF Issues Statement on U.S. Senate Filibuster of the John Lewis Voting Rights Advancement Act*, NAACP LEGAL DEF. FUND (Nov. 3, 2021), <https://www.naacpldf.org/wp-content/uploads/VRAA-Filibustered-in-Senate-Statement-11.3.21-FINAL.pdf> [<https://perma.cc/9DPV-QU8R>].

425. John H. Glenn, *John Lewis Voting Rights Act Passes in Combined Package with Freedom to Vote Act*, ALA. POL. REP. (Jan. 14, 2022), <https://www.alreporter.com/2022/01/14/john-lewis-voting-rights-act-passes-in-combined-package-with-freedom-to-vote-act/> [<https://perma.cc/ZTA6-M7DB>].

426. See *Remarks by President Biden on Protecting the Right to Vote*, *supra* note 390. Despite previously extolling bipartisan compromise, following the filibuster on the Freedom to Vote Act in 2021, President Biden seemed to acknowledge that filibuster reform may be necessary if he is to fulfill any of his key campaign promises. With electoral consequences at play, failure to deliver in key policy areas may disillusion and fragment the Democratic coalition. Shear, *supra* note 416.

compromises may not allow a principled compromise on voting rights.⁴²⁷ This in turn raises the problems of the Senate filibuster and the Supreme Court, to which we turn next.

C. Senate Filibuster

The filibuster is a principal impediment to policing and voting rights reform, as it has allowed Republican Senators to block reform efforts.⁴²⁸ Maintaining the filibuster enables intransigent, anti-democratic efforts to impede racial equality. Conversely, modifying the filibuster could incentivize meaningful, democracy-enhancing compromise.

Speaking after the Freedom to Vote Act vote, Sherrilyn Ifill noted that “it must be clear that the filibuster is not a workable Senate rule. And no Senate rule can take primacy over the constitutional rights of American citizens to vote.”⁴²⁹ E.J. Dionne highlights an inflection point confronting Democrats on the issue of voting rights: “[T]hey can [either] fight for democracy or they can keep the Senate’s filibuster rule as is. Republicans have made it very clear that they cannot do both.”⁴³⁰ Understanding of the widespread use of the filibuster as undemocratic has also increased. As Catherine Fisk notes, “senators representing

427. Even if we could imagine a principled compromise on voting rights, current legal and political structures make it difficult to achieve. For example, *Shelby Cty. v. Holder* said that it was wrong to subject only *some* states to a preclearance requirement. 570 U.S. 529, 535, 544–45 (2013). Democratic Senator Joe Manchin proposed a compromise whereby *every* state would be subject to a preclearance requirement, which would simultaneously address the *Shelby Cty.* Court’s objection as well as the growing spread of voter suppression practices nationwide. Ian Millhiser, *Joe Manchin’s Surprisingly Bold Proposal to Fix America’s Voting Rights Problem*, VOX (May 13, 2021), <https://www.vox.com/22434054/joe-manchin-voting-rights-act-for-the-people-john-lewis-preclearance-filibuster-senate> [https://perma.cc/LW5Y-HLHU]. Yet, while Democratic leaders supported this compromise, Republican ones rejected it, with Mitch McConnell saying that a “plan endorsed by Stacey Abrams is no compromise.” Sarah Jones, *What Republicans Mean When They Say ‘Stacey Abrams’*, N.Y. MAG. (June 17, 2021), <https://nymag.com/intelligencer/2021/06/why-republicans-say-stacey-abrams-instead-of-joe-manchin.html> [https://perma.cc/RJ6L-B9LN]. As Sarah Jones observes: “The moment Abrams, who is Black, expressed a measure of support for Manchin’s compromise, it became a radical, even dangerous, idea.” *Id.* See also Nichole M. Bauer, Laurel Harbridge Yong & Yanna Krupnikov, *Who Is Punished? Conditions Affecting Voter Evaluations of Legislators Who Do Not Compromise*, 39 POL. BEHAV. 279, 297 (2017) (documenting “an expectation that women will be more willing to compromise” on political matters).

428. Legal scholars have long made the case for filibuster reform. See, e.g., Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1996); Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003 (2011); Gerard N. Magliocca, *Reforming the Filibuster*, 105 NW. U. L. REV. 303 (2011).

429. Sherrilyn Ifill, *LDF Issues Statement in Response to Senate Filibuster of the Freedom to Vote Act*, NAACP LEGAL DEF. FUND (Oct. 20, 2021), <https://www.naacpldf.org/wp-content/uploads/FTVA-Filibuster-Response-FINAL-2.pdf> [https://perma.cc/SSG9-9AUH].

430. E.J. Dionne Jr., *True Conservatives Should Support Filibuster Reform*, WASH. POST (Oct. 24, 2021), <https://www.washingtonpost.com/opinions/2021/10/24/true-conservatives-should-support-filibuster-reform/> [https://perma.cc/XWH9-BKNR].

less than 20% of Americans can—and do—block legislation favored by senators representing the other 80%.”⁴³¹

Impervious to these concerns, Senator Manchin said that he “will not vote to weaken or eliminate the filibuster.”⁴³² He claimed to “seek bipartisan compromise no matter how difficult” in order to “develop the political bonds that end divisions and help unite the country.”⁴³³ In a similar vein, then-Democratic Senator Kyrsten Sinema said that “the solution is for senators to change their behavior” rather than “to erode the [Senate] rules.”⁴³⁴ In January 2022, both senators refused to change the filibuster to pass through voting reform.⁴³⁵ While Manchin and Sinema defend bipartisanship as a formal principle of democracy, they ignore how the filibuster fails to advance democracy both in form and substance.

For over a century, the filibuster has been used to obstruct civil rights measures. Kevin Kruse traces this “racial history” of filibusters: “When Southern Democrats filibustered anti-lynching bills in the 1930s, they walked away with a total victory,” with no compromise measures passed.⁴³⁶ Eric Foner similarly draws a parallel between the present moment and 1890, when voting protections to reinforce the Fifteenth Amendment and combat Southern disenfranchisement were defeated after a filibuster.⁴³⁷

In light of this history, Democratic Representative Mondaire Jones accuses Manchin of “preserv[ing] Jim Crow” based on an “ahistorical understanding” of

431. Edward Lempinen, *The Filibuster: A Tool for Compromise or a Weapon Against Democracy?*, BERKELEY NEWS (June 15, 2021), <https://news.berkeley.edu/2021/06/15/the-filibuster-a-tool-for-compromise-or-a-weapon-against-democracy/> [<https://perma.cc/BN6M-JBLK>]. Fisk also suggests that the frequent use of the filibuster is unconstitutional per the text of the Constitution itself—the document highlights specific instances wherein a supermajority vote is required, meaning the “framers envisioned that majority rule would be the norm, except where otherwise provided.” *Id.*

432. Russonello, *supra* note 31.

433. *Id.*

434. Lexi Lonas, *Sinema Defends Filibuster: The ‘Solution is for Senators to Change Their Behavior’*, HILL (Apr. 6, 2021), <https://thehill.com/homenews/senate/546698-sinema-defends-filibuster-senators-should-change-their-behavior-work-together> [<https://perma.cc/YCY8-3Y2D>].

435. Carl Hulse, *After a Day of Debate, the Voting Rights Bill is Blocked in the Senate.*, N.Y. TIMES (Jan. 27, 2022), <https://www.nytimes.com/2022/01/19/us/politics/senate-voting-rights-filibuster.html> [<https://perma.cc/3XGK-ANDR>]. When Democrats won the Senate majority in the November 2022 midterm elections, Sinema switched her party affiliation to Independent partly in the name of compromise. Kyrsten Sinema, *Sen. Kyrsten Sinema: Why I’m Registering as an Independent*, AZ CENTRAL (Dec. 9, 2022), <https://www.azcentral.com/story/opinion/op-ed/2022/12/09/sen-kyrsten-sinema-of-arizona-why-im-registering-as-an-independent/69712395007/> [<https://perma.cc/2WKQ-GHE9>].

436. Kevin M. Kruse, @KevinMKruse, TWITTER (Mar. 24, 2021), <https://twitter.com/KevinMKruse/status/1374699968561356802> [<https://perma.cc/XA2H-N9T4>].

437. Sam Levine, *After Democrats’ Historic Defeat on Voting Rights, What Happens Next?*, GUARDIAN (Jan. 21, 2022), <https://www.theguardian.com/us-news/2022/jan/20/after-democrats-historic-defeat-on-voting-rights-what-happens-next> [<https://perma.cc/55V6-S8MT>] (noting “the filibuster has been used for one reason: that is to prevent legislation supporting the rights of Black people”).

the filibuster, “dooming our democracy in the name of bipartisanship.”⁴³⁸ Jones’ stance is reminiscent of Rustin resisting modes of compromise that create “the illusion that something meaningful is being done, while perpetuating an inadequate and inefficient system and delaying the task of real reform.”⁴³⁹

The filibuster debate reveals the dangers of prioritizing political compromise over inclusive democracy. Whatever democratic value bipartisan compromise may have, the filibuster has proven a poor means to achieve it. And inasmuch as the pursuit of a multiracial democracy has itself become a partisan project, seeking bipartisanship at all costs is a democracy-constraining move.

D. Supreme Court Reform

Questions of compromise are entangled in discussions about Supreme Court reform. Whereas decisions like *Brown* and *Bakke* sought compromise between competing interests but failed to secure equality and curtailed society’s ability to battle inequality, recent decisions like *Shelby County* and *Brnovich* have eroded democracy-affirming legislative compromises. The reactionary Roberts Court seems uninterested in forging principled compromises and overeager to dismantle compromises it politically disfavors. In light of this, should reform aim for a Supreme Court that forges more and better compromises than the current bench or one that has less power to shape democratic compromises in the first place?

In April 2021, President Biden announced a Commission to consider reforms to the Supreme Court.⁴⁴⁰ Some of the proposals that this Commission considered (such as partisan balancing requirements⁴⁴¹ and term limits⁴⁴²) were explicitly aimed at producing compromise judicial outcomes and limiting sweeping judicial holdings. But in his written submission to the Commission in June 2021, Nikolas Bowie asked the more fundamental question of “whether judicial review serves political equality or whether it compromises it.”⁴⁴³ According to Bowie, “the threat of judicial invalidation has forced our elected

438. Sanjana Karanth, *Mondaire Jones: Manchin ‘Would Rather Preserve Jim Crow’ for Bipartisanship*, HUFFINGTON POST (June 6, 2021), https://www.huffpost.com/entry/mondaire-jones-manchin-jim-crow-bipartisanship-filibuster_n_60bd5793e4b099fb31c93659 [https://perma.cc/29LS-S9P9].

439. *Health Care: Illusion or Reform*, *supra* note 204.

440. WHITE HOUSE, *Presidential Commission on the Supreme Court of the United States*, <https://www.whitehouse.gov/pscotus/> [https://perma.cc/V86T-55PC] (last visited Jan. 17, 2023).

441. Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 194 (2019).

442. Tyler Cooper & Gabe Roth, *We Do Need to Reform the Supreme Court*, JUST SEC. (Apr. 8, 2021), <https://www.justsecurity.org/75692/we-do-need-to-reform-the-supreme-court/> [https://perma.cc/35S4-M7SB].

443. Nikolas Bowie, *The Contemporary Debate over Supreme Court Reform: Origins and Perspectives*, Written Statement to the Presidential Commission on the Supreme Court of the United States (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf> [https://perma.cc/VC7Z-SVFD].

representatives to lower their expectations about how democratic our nation can become,”⁴⁴⁴ which suggests that merely promoting compromise judicial outcomes may not be enough to advance a multiracial democracy.

While the Commission’s final 300-page report highlights public support for imposing term limits but disagreement about expanding the Court,⁴⁴⁵ it ultimately suggests maintaining the status quo over structurally reforming the Supreme Court. Yet, foregoing any reform at all would be another democracy-constraining compromise that sacrifices racial equality in the name of the Supreme Court’s institutional legitimacy.

Charles Fried recommends that Biden should institute court reforms only if the current Supreme Court majority “overplays its hand” by continuing to issue reactionary decisions.⁴⁴⁶ However, Biden has only a short political window to promote democratic reforms; whereas judges with life tenure can delay pursuing their political agendas, presidents cannot. Other commentators suggest that the specter of reform could incentivize the current Justices to compromise amongst themselves when issuing decisions.⁴⁴⁷ Yet, even if the Roberts Court issued “compromise” decisions in the short term, its longer-term jurisprudence, stemming from cases like *Shelby County* and *Brnovich*, would still inhibit the pursuit of a multiracial democracy.⁴⁴⁸

In any case, last Term’s decisions overturning *Roe v. Wade*,⁴⁴⁹ striking down New York’s modest gun regulations,⁴⁵⁰ and curtailing the Environmental Protection Agency’s ability to combat the climate crisis,⁴⁵¹ to name but a few, reveal a reactionary Court uninterested in compromise. Foregoing an opportunity for court reform in the hopes of a few “moderate” court opinions could be another tragic compromise in U.S. racial history.

444. *Id.*

445. Ann E. Marimow, *Biden’s Supreme Court Commission Endorses Final Report Noting Bipartisan Public Support for Term Limits*, WASH. POST (Dec. 7, 2021), https://www.washingtonpost.com/politics/courts_law/supreme-court-commission-term-limits/2021/12/07/eb0ef982-5767-11ec-9a18-a506cf3aa31d_story.html [https://perma.cc/3DR8-DVTR].

446. Charles Fried, *I Was Reagan’s Solicitor General. Here’s What Biden Should Do with the Court*, N.Y. TIMES (Oct. 19, 2020), <https://www.nytimes.com/2020/10/19/opinion/biden-supreme-court.html> [https://perma.cc/WG65-SRJE].

447. Cooper & Roth, *supra* note 442.

448. *Racial Transition*, *supra* note 45, at 1197.

449. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

450. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 ____ (2022).

451. *West Virginia v. EPA*, 142 S. Ct. 2587 ____ (2022).

CONCLUSION

The dominant American ideology of compromise valorizes compromise and reveres “great compromisers.”⁴⁵² Unfortunately, this same ideology is routinely deployed to accept racial injustice in the United States.

Black advocates who lived through past equality compromises have shown us that there is a difference between principled compromises which advance racial justice and unprincipled ones which appease white supremacists. They offer a more nuanced understanding of when accepting compromises is useful, when uncompromising stances have democratic value, and the kinds of racial equality compromises worth pursuing. Had the Supreme Court learned from the insights of Black advocates, it might have chosen a bolder path toward racial equality. Instead of abandoning accountability to mitigate white racial animosities, it might have pursued accountability designed to withstand those animosities.

These Black advocates and past compromises offer key lessons in determining the democratic value of current proposed compromises concerning policing, voting rights, the Senate filibuster, and Supreme Court reform. Despite the widespread belief that bipartisan compromises will save the republic, many of the compromises proposed for our current moment would actually impede rather than advance democracy. A bipartisanship at all costs approach is a harmful basis on which reforms are pursued.

Adopting this perspective should propel us toward a more multiracial democracy by discouraging compromises that endlessly delay racial justice, or trade short-term advances for longer-term drawbacks. But disrupting established inegalitarian patterns of compromise and forging more egalitarian paths will be difficult. American leaders will need sustained pressure (including mass protests and uncompromising demands) for them to prioritize a genuine racial justice agenda over superficial compromises. Ultimately, the mobilization of the American people remains crucial to making the interests of marginalized communities cognizable by law.

452. See, e.g., Adam Serwer, *The Civil War Was Not a Mistake*, ATL. (Oct. 31, 2017), <https://www.theatlantic.com/politics/archive/2017/10/dont-know-much-about-history/544553/> [<https://perma.cc/8CVJ-6FZL>] (describing the notion of an American “genius” of compromise); *Henry Clay Is Rated Greatest U.S. Senator*, N.Y. TIMES (May 5, 1986), <https://www.nytimes.com/1986/05/05/us/henry-clay-is-rated-greatest-us-senator.html> [<https://perma.cc/R3RC-VNPP>] (noting Clay’s reputation as the “Great Compromiser”).