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Principled Compromise in Theorizing about Justice

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Principled Compromise in Theorizing about Justice


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An abstract of
a dissertation submitted to the Faculty of the
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Abstract


Principled Compromise in Theorizing about Justice
By
Katharine Schweitzer


Moral disagreement is a challenge to the common project of constructing shared terms of social and political cooperation. In this dissertation, I recommend compromise as a strategy for resolving disagreements about the political principles that we wish to guide our pluralist constitutional democracy. Many philosophers in the liberal political tradition, most notably John Rawls, have failed to consider compromise as a response to controversies that we cannot adjudicate conclusively through the use of reason. The dominant view is that making concessions is a morally deficient strategy for reaching agreement on the meaning and the requirements of justice. Philosophers wrongly overlook the moral dimensions of compromise and the transformation of political claims that can occur when partners in deliberation make concessions as a matter of principle.

In Chapter One, I offer an account of principled compromise and distinguish it from strategies of conflict resolution that are not motivated by moral reasons. In Chapter Two, I identify the values that motivate people to pursue principled compromise and the values that they come to appreciate through constructing the compromise. In Chapter Three, I critically examine the claim that deliberation and negotiation are distinct ways of making joint decisions and that deliberation is a normatively superior form of political interaction. In Chapter Four, through an analysis of Betty Friedan's efforts to intervene productively in the debate over the ratification of the Equal Rights Amendment to the U.S. Constitution, I reconstruct the moral character of compromise in disagreements about principles of justice. Friedan encouraged feminists and anti-feminists to set aside their desire to impose their partisan views on fellow citizens and to modify their competing conceptions of justice. In Chapter Five, I defend the claim that it is desirable that citizens of pluralist democracies accept for moral reasons their constitutional order. This commitment informs my argument that we should strive to reach mutually acceptable agreements on the terms of our shared political life. In Chapter Six, I distinguish compromise and toleration and contend that compromise and not toleration is a strategy through which to reach agreement on principles of justice among people who disagree deeply.

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# Table of Contents

## Introduction

We live in a world with people whom we perceive as different and strange. Other people hold moral beliefs and values that are at odds with our moral beliefs and values. These people shop at our grocery store, sit next to us at sporting events, show up on the news updates of our social media, and stand in line with us at the voting booth. I am a feminist; you do not apply this label to yourself. You deny that God exists; I am a religious believer. He defends socialist forms of government; she defends policies of limited state intervention. She believes that animals have intrinsic moral value; he believes that it is morally acceptable to use animals for human purposes. Our religious, moral, philosophical, and political convictions diverge. We do not share each other's visions of the good life or the good polity.

Yet there are some people whom we recognize as sharing our moral beliefs and values. We choose some of our friends because they derive pleasure from similar activities and pursuits. If we are religious, often we participate in faith communities and join together to practice our religion. We may organize a neighborhood association and work together to keep our parks and other public spaces clean and safe. We may devote time, energy, and money to special interest groups to advance particular political claims. Our shared convictions motivate us to act jointly to formulate and to pursue common projects that rely on and further our shared moral beliefs and values. We are likely to be hesitant about engaging in a joint undertaking with people who hold moral beliefs and values that we oppose, especially if we have reservations about the desirability of the goals pursued through the common project.

Robert Adams describes a common project, a term that I understand as synonymous with "joint undertaking," as a group of people "who are associated for a specific purpose, or a limited range of purposes."[1] In this dissertation, I focus on the common project of living together in a democracy. I follow John Rawls in arguing that citizens of constitutional democracies ought to understand themselves as striving toward a common purpose: the pursuit of political justice. Rawls contends that citizens of a "well-ordered society […] share one very basic political end, and one that has high priority: namely, the end of supporting just institutions and of giving one another justice accordingly."[2] The project of democratic political life differs from the joint undertakings of groups of friends, religious believers, neighbors, and partisan advocacy groups in an important respect. Our social world is diverse and pluralistic. Members of contemporary pluralist political communities such as the United States hold different and sometimes opposing moral beliefs and values. If we wish to understand our political order as something that we share and that we can endorse together, we must resolve at least some of our disagreements in a manner that is consonant with our convictions about what it means to share a common project with fellows. In this dissertation, I describe and recommend the practice of principled compromise as a strategy for resolving conflicts about how to understand the meaning and the requirements of justice.

My inquiry begins with the postulate that it is desirable to understand democratic political association as a shared undertaking. I interpret this understanding of democratic to be implicit in the foundational document of the American political order. The framers

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[1] Robert Adams, *A Theory of Virtue: Excellence in Being for the Good* (Oxford: Oxford University Press, 2006), p. 85. His claims in this monograph both draw on and depart from his claims in "Common Projects and Moral Virtue," *Midwest Studies in Philosophy* 13 (1988), pp. 297-307.

[2] John Rawls, *Political Liberalism*, expanded edition (New York: Columbia University Press, 1996), p. 202.

of the U.S. Constitution established our constitutional democracy in the name of "[w]e

the people of the United States."[3]  Both the text of the Constitution and the manner

through which it came to be authoritative draw attention to the value of collective action

in determining the terms of political cooperation.  The framers and ratifiers of the

Constitution created jointly our constitutional order.  Bruce Ackerman notes correctly

that the white men who served as Constitutional framers "talked the talk of We the

People," but that "they barely managed to walk the walk."[4]  Over the course of our

nation's history, however, we have widened our understanding of who is permitted to

participate in the activity of deliberating together about what our constitution does mean

and what it should mean.  At times citizens and government officials may understand

ourselves to be working for a specific common purpose.  At other times it may be

accurate to describe us as engaging in the preliminary work of conversing in common

about what we should understand to be the purpose of our democratic political order.

Although we pursue by ourselves and with like-minded people a wide range of

projects, we also have the ability to contribute to creating and to sustaining a basic social

and political structure that makes possible our personal pursuits.  I also take as a fact that

willing and sincere participants in this project disagree about how our common life

should be structured.  For example, we disagree about whether and how officials should

use government power to influence the market.  We are deeply divided on whether and

how the polity should regulate the controversial activities of abortion, genetic

modification, gun ownership, recreational drug use, and physician-assisted suicide.  We

do not agree on how to practice democracy properly, to which public debate about the

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[3] U.S. Constitution, Preamble.
[4] Bruce Ackerman, *We the People, Volume 3: The Civil Rights Revolution* (Cambridge, MA: Harvard University Press), p. 17.

practices of congressional filibuster and the financing of electoral campaigns attest.  We even disagree about the meaning of the fundamental democratic values of liberty and equality.  We agree nevertheless that the answers to these questions are matters of common concern.

Sometimes differences between members are a challenge to the pursuit of common projects.  When differences become sources of disagreements, participants may question their commitment to working together and to adhering to terms of cooperation. Disagreements manifest themselves as problems to people who contend that members of a political community who are subject to coercive power should be able to offer good reasons in defense of the exercise of this power.  If the constitution of the polity includes and appeals to moral beliefs and values that some citizens reject, then the political order will not have the support of these citizens.  Understanding and assessing the reasons that citizens may have for rejecting proposed or existing constitutional essentials are important preliminary tasks before we decide whether and how to respond to this rejection.  Throughout the dissertation I aim to state clearly my reasons for classifying some contributions to the debate about how to organize our life in common as unreasonable.  I propose that we regard citizens as reasonable if they are willing to justify their claims and actions to others and if they are open to modifying their claims and undergoing transformation as a result of listening to others' responses.  I find helpful the suggestion of understanding reasonableness as a property of a contribution to a reasoned exchange, the features of which cannot be determined "ahead of time by theoretical reflection alone."[5]  I offer my normative recommendations in this dissertation as a

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[5] Anthony Simon Laden, "Public Reason," in *The International Encyclopedia of Ethics*, ed. Hugh LaFollette (Oxford: Wiley-Blackwell, 2013), p. 4237.  See also James Bohman and Henry S. Richardson,

participant in the debate about how members of pluralist democracies should resolve

moral disagreements and not as a philosophical expert.[6]

When Amy Gutmann and Dennis Thompson speak of "the problem of moral

conflict in pluralist society," they refer to the question, how should disagreements about

constitutional essentials be adjudicated such that citizens can accept as legitimate the

authority of the state?[7]  Theorists of deliberative democracy, including Rawls, Gutmann

and Thompson, argue that citizens should reason together about important political

decisions.  They share a vision of the polity in which citizens desire to cooperate and act

in accordance with norms of inclusion and of fairness. Yet people who listen to each

other and who give reasons that they think their fellows will be able to comprehend and

accept may not reach a unanimous judgment.  Some philosophers who work in the

deliberative tradition have turned their attention to theorizing about strategies of conflict

resolution.[8]  This dissertation contributes to this field of inquiry within political

philosophy as well as to the liberal political tradition.

I find John Rawls's theory of political liberalism a helpful framework within

which to develop claims about how members of a pluralist society can work together to

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"Liberalism, Deliberative Democracy, and 'Reasons that All Can Accept'," *Journal of Political Philosophy* 17, no. 4 (2009), pp. 253-74.

[6] I strive to offer my normative recommendations without claiming to have established objectively my claims about principled compromise.  For a helpful caution against claiming the alleged objectivity of a philosophical expert, see Cynthia Willett, "False Consciousness and Moral Objectivity in Kansas," *Journal of Speculative Philosophy* 22, no. 4 (2008), pp. 290-9.

[7] Amy Gutmann and Dennis Thomspon, "Moral Conflict and Political Consensus," *Ethics* 101, no. 1 (1990), p. 64.

[8] See, for example, Richard Bellamy, *Liberalism and Pluralism: Towards a Politics of Compromise* (London: Routledge, 1999); James Bohman, *Public Deliberation: Pluralism, Complexity and Democracy* (Cambridge, MA: MIT Press, 1996); Robert Goodin, *Innovating Democracy: Democratic Theory and Practice after the Deliberative Turn* (New York: Oxford University Press, 2008); Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton, NJ: Princeton University Press, 2004); Jane Mansbridge et al., "The Place of Self-Interest and the Role of Power in Deliberative Democracy," *Journal of Political Philosophy* 18, no. 1 (2010), pp. 64-100, and Henry S. Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (Oxford: Oxford University Press, 2003).

reach agreement about the fundamental moral beliefs and values that guide common political life. Rawls refers to these moral beliefs and values as "principles of justice." These principles inform the answers to "fundamental political questions" such as "constitutional essentials and matters of basic justice."[9] One reason that I take up Rawls's framework is that he identified cooperation on fair terms as a key value of his philosophy and developed a methodology for achieving this value that is cooperative in nature. His initial articulation of this methodology in *A Theory of Justice* reflected a belief that reasons for cooperation with others were primarily self-interested. In his later work, Rawls recognized the existence of motivational grounds beyond one's personal interest in a just and fair system of governance and theorized about how these grounds were generated and sustained over time. Although I criticize aspects of Rawls's political project, in my view he identified an important goal of normative political philosophy: an understanding of how and why to create just institutional structures.

Throughout the dissertation I refer to compromises that concern principles of justice as "moral compromises" because the content of these principles is moral in nature. When people engage in a compromise, regardless of whether the object of disagreement is moral or non-moral, they are involved in the process of making a collective decision. The parties disagree on which course of action they should pursue jointly. If neither party convinces the other to modify its initial proposal of what they should do, they might decide to make mutual concessions in order to reach a decision that the opposed parties are both willing to accept. The construction of a compromise settlement entails that each participant has accepted voluntarily a less desirable outcome than the outcome that he or she preferred initially. When people who disagree compromise with each other, they

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[9] Rawls, *Political Liberalism,* p. xxi.

place a higher value on reaching a mutually acceptable joint decision than on continuing to argue and deferring the decision.  I agree with David Archard that a moral compromise is "an agreement in the face of moral disagreement but where there is agreement on the importance of consensus."[10]

Although citizens who construct a compromise on the principles of justice value reaching an agreement, they judge the content of the agreement to be inferior to their initial proposals.  All parties to the compromise experience discomfort at having accepted an inferior outcome.  Although Amy Gutmann and Dennis Thompson have produced considerable philosophical scholarship on compromise, they minimize the costs of the sacrifices that people make when they compromise.[11]  The effort required "to appreciate the moral force of the positions of people with whom we disagree" is more substantial than they admit.[12]  They do not appreciate fully the harm that some people allege occurs when moral beliefs and values are revised to accommodate opposing moral beliefs and values.  Gutmann and Thompson avoid considering that accommodation might involve personal sacrifice.  Because concerns about moral loss are central to many philosophers' arguments against compromise, I improve upon Gutmann's and Thompson's work by taking seriously this fact in my conceptual and normative analysis of compromise.

The general claim that I defend in the dissertation is that compromise deserves serious consideration by professional philosophers and by citizens who theorize about

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[10] David Archard, "Moral Compromise," *Philosophy* 87, no. 3 (2012), p. 404.
[11] To be sure, Gutmann and Thompson note in *The Spirit of Compromise: Why Governing Demands It and Campaigning Undermines It* (Princeton, NJ: Princeton University Press, 2012) that compromises require parties "to give up something of value" and that such sacrifice "typically involves trimming your principles" (pp. 10, 16).  In *Democracy and Disagreement*, however, they write, "In deliberative disagreement (for example, about legalizing abortion), citizens should try to accommodate the moral convictions of their opponents to the greatest extent possible, without compromising their own moral convictions" (Cambridge, MA: Harvard University Press, 1996), p. 3.
[12] Gutmann and Thomspon, "Moral Conflict and Political Consensus," p. 85.

political life.  In political life the activity of compromise is both praised and vilified.  The philosophical project of articulating the features of compromise that are desirable and the features that are problematic and of understanding how both of these sets of features can be attributed to the activity helps to illuminate our everyday experience of making judgments about compromise.  I maintain that some common judgments about compromise need to be revised in light of philosophical reflection.  I defend a specific claim about compromise, namely, that the activity of compromise has a moral dimension.

The audience to whom I address this claim are the philosophers who have rejected the suggestion that compromise is a morally acceptable strategy for resolving disagreements about what fundamental principles should inform the basic structure of the polity.  For example, Rawls rejects compromise on a polity's constitutional essentials and on matters of basic justice as a "mere modus vivendi."[13]  Extending Rawls's claims, Anthony Simon Laden draws a sharp distinction between negotiation and deliberation, and he claims that a strength of his account of deliberation about collective political decisions is that it "makes it possible for people whose ends conflict to nevertheless come to an agreement that is more than a mere compromise."[14]  Laden laments, "It is common […] to think that the only fair alternative to violent conflict in the face of disagreement is a kind of bargaining, where each side tries to get as much as it can and give as little as possible on the way to a compromise."[15]  On Laden's account, negotiated agreements are compromises, and "[n]egotiation involves seeing others as obstacles and thus the need to

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[13] Rawls, *Political Liberalism,* pp. 126, 147, 208, 249.
[14] Anthony Simon Laden, *Reasonably Radical: Deliberative Liberalism and the Politics of Identity* (Ithaca, NY: Cornell University Press, 2001), p. 84.
[15] Anthony Simon Laden, *Reasoning: A Social Picture* (Oxford: Oxford University Press, 2012), p. 10.

deal with them as an unfortunate fact."[16]  Only deliberation is an activity by which "people who regard themselves as partners wor[k] out a shared solution to a shared problem."[17]  As against Rawls and Laden, I argue that not all compromises are truces modeled on bargaining and bartering, which are accepted because they further the interests of the participants or of other members of the political community.  Some parties compromise on moral matters for reasons that are grounded in respect for a moral principle that is not utilitarian in nature.  I follow Simon Căbulea May in calling this kind of compromise "principled compromise."[18]

I present my account of principled compromise and my recommendation that we should practice it more often in political life as following from the working hypothesis that understanding democratic life as a shared undertaking is a desirable way for citizens to view their relation to their fellows and to the foundational rules that they author together and to which they are all subject.  If one thinks that citizens of a pluralist constitutional democracy ought to decide together how their common life should be structured and that each citizen ought to have a certain kind of reason for accepting the content of this decision, then only certain kinds of decisions will be morally appropriate. The reason that the decision is mutually acceptable is not because each party considers it the best deal that it can get.  Such a compromise would be instrumental or strategic in nature.  I argue that political actors are sometimes motivated by principled reasons to

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[16] Anthony Simon Laden, "Negotiation, Deliberation, and the Claims of Politics," in *Multiculturalism and Political Theory*, eds. Anthony Simon Laden and David Owen (Cambridge: Cambridge University Press, 2007), p. 205.
[17] Laden, "Negotiation, Deliberation, and the Claims of Politics," p. 210.
[18] Simon Căbulea May, "Principled Compromise and the Abortion Controversy," *Philosophy & Public Affairs* 33, no. 4 (2005), pp. 317-48.

accommodate competing moral beliefs and values of others in the constitutional order even though they might have the political power to realize fully their will.

In some places in the dissertation I assume that my interlocutors already share my desire to articulate a constitutional order that a diverse group of people could affirm for the right kind of reasons. In these places I focus on what conclusions can be defended from this starting point. In other places in the dissertation, however, I defend explicitly that the project of striving toward agreement on the basic structures of the polity is worth pursuing. In these places I aim to persuade readers to understand democratic political association as I do and to convey the relations and the experiences that this understanding could make possible if we were to take up this project.

Rawls's and Laden's dismissal of compromise as a topic of philosophical interest is problematic for the project of theorizing how collective decision-making about justice can take place within a pluralistic society. The fact of persistent disagreement about the nature and requirements of justice is a cause for worry that we do not share moral beliefs and values that could ground the common project of democratic self-government. The absence of such beliefs and values is a predicament for philosophers who maintain that citizens ought to be able to justify to themselves and to their fellows the political order.[19] As Jeremy Waldron notes, "The liberal strategy has been to search for underlying interests and beliefs shared in common which may be appealed to in the justification of our institutional arrangements."[20] Rawls perceived correctly that many people hold moral beliefs and values that appear to be at odds with the moral beliefs and values that

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[19] See Simone Chambers, "Theories of Political Justification," *Philosophy Compass* 5, no. 11 (2010), pp. 893-903 for a thorough examination of the concept of justification in contemporary political philosophy.
[20] Jeremy Waldron, "Theoretical Foundations of Liberalism," *The Philosophical Quarterly* 37, no. 147 (1987), p. 145.

underlie a polity in which members show respect to their fellows and cooperate with them on fair terms. He describes his theory of political liberalism as an attempt to answer "a torturing question in the contemporary world, namely: can democracy and comprehensive doctrines, religious and non-religious, be compatible? And if so, how?"[21] Rawls worried that society was too deeply divided on moral questions to sustain a shared form of democratic political association. Whether under these conditions a constitutional liberal democratic society can exist remains a live question despite Rawls's contributions to this inquiry.

Although Rawls failed to articulate an uncontroversial strategy for resolving disputes about constitutional essentials and matters of basic justice, he contributed theoretical resources that I find useful in theorizing about how people ought to organize their political communities. Rawls's theory of political liberalism offers a valuable statement of the principle of mutual respect. The idea that citizens owe a certain kind of respect to each other informs his claim that the terms of social cooperation ought to be fair. I follow Rawls in defending an understanding of citizenship in which citizens ought to set aside interests, moral beliefs, and values that conflict with fair terms of social cooperation.[22] Throughout the dissertation, I clarify how citizens who compromise in order to reach agreement on constitutional essentials show each other the respect that Rawls maintains ought to be present in a political community that is just.

One might question the merits of an understanding of citizenship in which sometimes members of the polity are encouraged to moderate their advocacy for their moral beliefs and values or to trim their principles. Many people believe that there are

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[21] John Rawls, "The Idea of Public Reason Revisited," in *Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), p. 611.
[22] Rawls, *Political Liberalism*, p. xlii.

objectively right and wrong positions on controversial moral questions and that they

know the answers to these questions.  Throughout the dissertation I take care to consider

the concerns of people who hold moral beliefs and values that they wish to see realized

fully in the polity.  They may argue that accepting a compromise would violate their

personal integrity and the integrity of their convictions and commitments.[23]  For

example, Simon Căbulea May claims that people who hold "a position that is, in actual

fact, the best balancing of values and interests on an issue" do not have principled

reasons, that is, reasons that are informed by moral values and principles, to make

concessions to people who hold rival positions.[24]  Chiara Lepora highlights that people

who make concessions experience moral loss and may be complicit in wrongdoing.

Lepora argues that people who engage in compromise ought to experience moral

discomfort because each party "reach[ed] an agreement with somebody holding wrong

principles" and "promis[ed] to pursue principles that are wrong from one's

perspective."[25]  She maintains that her analysis of compromise explains why compromise

is a hard sell for citizens who hold strong convictions about the nature of justice.

Although the wrongs incurred in resolving a conflict between competing principles might

be justified on pragmatic grounds, Lepora stresses that compromise remains a morally

objectionable activity.

Members of historically oppressed social groups also may approach with

skepticism my argument in defense of the moral dimensions of compromise and the

existence of principled reasons for compromising on matters of justice.  Citizens whose

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[23] See Samantha Besson, "Four Arguments Against Compromising Justice Internally," *Oxford Journal of Legal Studies* 23, no. 2 (2003), pp. 211-41.

[24] May, "Principled Compromise and the Abortion Controversy," p. 319.

[25] Chiara Lepora, "On Compromise and Being Compromised," *The Journal of Political Philosophy* 20, no. 1 (2012), p. 13.

rights have been denied or who were excluded previously from the political community may not wish to respect people who hold opposing views about what principles of justice should inform the structure of the polity.  Attending to the history of compromise in the construction of constitutional norms reminds theorists of instances in which parties to the disagreement consented to a settlement in which their values and principles were not realized fully.[26]  For example, justification of the "three-fifths compromise" that preserved in the United States Constitution of 1787 the rights of slaveholders continues to be controversial.[27]  I attend to the concerns of members of social groups who have not always been recognized by their fellows as deserving to participate as equals in political deliberation in an effort to persuade people who have a prima facie stake in being uncompromising that even they ought to recognize the merits of principled compromise in theorizing about justice.

The plan of the dissertation is as follows.  I begin my philosophical investigation of compromise by discussing its place in recent efforts to theorize about justice.  One response to disagreement about matters of basic justice is to restrict the scope of the debate to issues about which citizens can agree.  In Chapter One, I examine John Rawls's articulation of this strategy in his 1993 book *Political Liberalism.*  I begin with Rawls because he is the foremost contemporary philosopher of consensus in liberal democratic societies.  His goal was to explain how members of a democratic society who disagree about many significant matters could nevertheless agree on principles of justice.  He

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[26] See Sanford Levinson, "Compromise and Constitutionalism," *Pepperdine Law Review* 38, no. 5 (2011), pp. 821-43.
[27] See "Room for Debate: The Constitution's Immoral Compromise," *The New York Times,* February 6, 2013.  http://www.nytimes.com/roomfordebate/2013/02/26/the-constitutions-immoral-compromise (last accessed January 1, 2014).

described this agreement as an "overlapping consensus" on a conception of justice, and he insisted that this agreement is not the outcome of a compromise.

When commentators discuss Rawls's treatment of compromise, they generally accept without challenge his characterization of the activity as well as his arguments against it. My aim in the first chapter is to explain why scholars should not accept as definitive Rawls's descriptive and normative claims about compromise. His description of compromise is too narrow. Not all compromises about the meaning and requirements of justice fit the model of "modus vivendi," Rawls's term for a compromise that parties to a disagreement endorse for only self-regarding reasons. Rawls overlooked principled compromise as a species of compromise. To establish the division of compromises into two general types, I present descriptive accounts of modus vivendi and principled compromise. I also argue that theorists who find appealing Rawls's ideal of political justification can benefit from moving beyond his description of modus vivendi. This chapter supports my claim that compromise is a more conceptually and morally nuanced activity than Rawls's discussion implies.

In Chapter Two I examine the idea of a "constitutional consensus," a third kind of agreement that Rawls introduced in *Political Liberalism*. Rawls's suggestion that a modus vivendi agreement could be transformed into an overlapping consensus through the intermediate stage of a constitutional consensus. Because Rawls's presentation of constitutional consensus is brief, dense, and replete with jargon, this concept warrants a careful interpretation. I then identify two key points of difference between constitutional consensus and principled compromise. Although the property of mutual acceptability is present in both constitutional consensus and principled compromise, only principled

compromise is concerned that both the procedure and the outcome produced through the procedure are mutually acceptable.  Moreover, the moral beliefs and values that motivate people to construct a constitutional consensus differ from the moral beliefs and values that motivate people to construct a principled compromise.  Participants can construct a constitutional consensus without being committed to the value of reciprocity.  I conclude the chapter by discussing an important point of similarity between constitutional consensus and principled compromise. Rawls argued that parties to a constitutional consensus are transformed through their constructing and abiding by its terms.  I explain that parties to a principled compromise experience a similar transformation.

In Chapter Three, I discuss the understanding of negotiation that underlies the normative judgments that some political philosophers make about compromise.  I critically examine Anthony Simon Laden's claims that deliberation and negotiation are distinct ways of resolving political disagreements and that deliberation is a normatively superior form of political interaction.  According to Laden, negotiation involves trading and bargaining in order to reach an outcome that satisfies each party's initial demands such that each party prefers the compromise to the status quo.  Negotiators are motivated to accept a compromise solely because they judge it to be in their rational interest.  In contrast, deliberators view the disagreement as an opportunity to reach a decision that all parties can endorse rather than as an opportunity to secure as much as possible their partisan interests and demands.

I defend two claims against Laden.  First, his stipulative descriptive account of negotiation is too narrow.  Negotiation can involve reason-giving and may concern principles as well as interests.  Not all negotiators make concessions for purely self-

interested reasons. Negotiation partners can demonstrate mutual respect in the same way in which deliberators do ideally. Laden follows Rawls in overlooking that concessions-making can have a moral dimension. Moreover, Laden's normative account of deliberation does not offer guidance on how to resolve reasonable disagreements about constitutional essentials and matters of basic justice. This omission is a serious flaw in his theory of deliberative liberalism, which is intended as a guide to "the political project of working out legitimate political principles."[28] I contend that modifying normative theories of deliberation to include a role for negotiation will help philosophers to confront rather than to displace deep disagreement about the terms of their shared political life. Political philosophers need to look beyond existing accounts of deliberation and theorize about other strategies for arriving at a mutually justifiable decision about what political principles constitute fair terms of social cooperation.

In Chapter Four, I argue that Betty Friedan's 1981 book *The Second Stage* is an example of principled compromise in theorizing about the domain of political justice that concerns gender. In this popular book, Friedan attempted to intervene constructively in the long-standing conflict between feminists and anti-feminists on the pressing issue of the ratification of the Equal Rights Amendment (ERA). Although Friedan was a vocal advocate for feminism, she acknowledged the legitimacy of concerns that opponents raised about the women's movement. *The Second Stage* was an outlier in the public debate about the ratification of the ERA because Friedan encouraged the groups to find common ground and to construct a new understanding of the proposed amendment. Instead of viewing the ERA ratification debate as a battle to be won or lost, constitutional amendment advocates on both sides of the issue could view the ERA as an opportunity to

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[28] Laden, *Reasonably Radical*, p. 207.

solve the collective problem of using the law to impose gender norms on citizens.

Examining *The Second Stage* helps me to make more concrete my claim in Chapter Two

that setting aside a self-interested perspective for a perspective that places value on the

members of the political community succeeding in the joint endeavor of self-governance

transforms one's understanding of how to offer and accept concessions. Examination of

a concrete instance of disagreement about justice within a deeply-divided society and of

one activist's attempt to encourage both sides of the conflict to construct a principled

compromise allows me to describe how a principled compromise can be theoretically

coherent, grounded in moral principle, and desirable in political life.

In Chapter Five, I examine Simon Căbulea May's argument that democratic

citizens can offer only pragmatic reasons for compromise in political deliberation about

matters that bear on moral principles.[29] May contrasts pragmatic or non-moral reasons

with principled or moral reasons. He maintains that only people who share responsibility

for the realization of particular ends have moral reasons to engage in compromise.[30] May

claims that citizens have not entered into a social relationship with one another in which

they take on responsibility for the success of the ends that others choose. I argue that the

reason that principled compromise between spouses is justified applies to principled

compromise between citizens who desire that their shared political life be structured

justly.

In defending that citizens share responsibilities for ends, I argue against May's

understanding of democratic community and examine the strengths of a rival conception.

On this conception, citizens share responsibility for the end of constructing basic

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[29] May, "Principled Compromise and the Abortion Controversy," p. 319.
[30] Simon Căbulea May, "Moral Compromise, Civic Friendship, and Political Reconciliation," *Critical Review of International Social and Political Philosophy* 14, no. 5 (2011), p. 585.

principles that will inform the structure of the social and political order that are

acceptable to all of the people who must submit to the polity's governance. To be sure,

the account of democratic community that I defend is an ideal.[31] Although May's

description of democratic community may describe accurately how many people

understand currently their relation to fellow citizens, I explain that alternative

understanding is likely to prevent an undesirable consequence that is highly plausible on

May's account, namely the alienation of citizens from the political order and from the

citizens with whom they ought to be co-authoring the terms of their common life.

I present my understanding of the relation of compromise to toleration in Chapter

Six. Some philosophers endorse toleration, understood as a form of self-restraint, as a

response to the political problem of pluralism.[32] Rawls's endorsement of what he calls

"the principle of toleration" is a prominent feature of his later work.[33] The conceptual

structures of toleration and compromise bear similarities that have been overlooked in the

philosophical literature. Yet toleration and compromise are responses to different kinds

of disagreements, produce different outcomes, and involve different sacrifices and kinds

of moral loss. I disagree with Rawls that toleration is the appropriate strategy by which

to reach agreement on principles of justice among people who disagree deeply. While

forbearance may be a morally desirable course of action, it does not contribute to the joint

resolution of a disagreement. My analysis establishes that compromise, not toleration, is

the activity in which members of a political community can resolve disagreements about

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[31] I share the belief that "idealizing democracy is the first step in the task of realizing democracy." See John J. Stuhr, "Democracy as a Way of Life," in *Philosophy and the Reconstruction of Culture: Pragmatic Essays after Dewey*, ed. John J. Stuhr (Albany, NY: State University of New York Press, 1993), p. 47.
[32] See, for example, James Bohman, "Deliberative Toleration," *Political Theory* 31, no. 6 (2003), pp. 757-79; Peter Jones, "Toleration, Value-pluralism, and the Fact of Pluralism," *Critical Review of International Social and Political Philosophy* 9, no. 2 (2006), pp. 189-210; David M. Rasmussen, "Conflicted Morality: Toleration as a Principle of Justice," *Philosophy & Social Criticism* 36, nos. 3-4 (2010), pp. 339-52.
[33] Rawls, *Political Liberalism*, pp. 10, 148, 154, 159.

how to undertake the common project of living together in a political community. To be sure, toleration may be the content of a compromise. But not all instances of toleration are the result of collective decision-making about what course of action citizens ought to pursue jointly.

Unwillingness to engage in compromise on matters that concern moral beliefs and values creates hostility and distrust that frustrate the common project of living together in a pluralist democracy. Careful analysis of the different kinds of compromise reveals that many negative judgments about its moral value are too broad in scope. If my thesis that compromise is worthy of philosophical attention prevails, it should prompt members of democratic political community to reconsider both their understanding of what compromise is and their moral hesitations against engaging in compromise on matters of basic justice. Coming to a new appreciation of compromise and its moral basis can help citizens respond to co-citizens who hold divergent views about justice in a manner that respects their status as equal members of the political community. Rawls appears to endorse this claim when he lists "a spirit of compromise and a readiness to meet others halfway" in a list of "the cooperative virtues of political life" in *Political Liberalism*.[34] This dissertation elucidates why compromise should be considered a practice that can facilitate a form of democratic community and shared political life that is worth striving toward.

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[34] Rawls, *Political Liberalism*, p. 163.

**Chapter One:**
**Moving Beyond Modus Vivendi**

In his 1993 book *Political Liberalism*, John Rawls set out to explain how

members of a democratic society who disagree about moral, religious, and philosophical

matters could nevertheless agree on a conception of justice that will inform the basic

structure of their polity. According to Rawls, a conception of justice consists of

principles that concern the nature and the distribution of political power and the rights

and responsibilities of citizens. These principles serve as the philosophical foundation of

the "constitutional essentials" of the polity, and they answer "questions of basic

justice."[35] Beginning with the 1985 article "Justice as Fairness: Political not

Metaphysical," he argued that agreement on the terms of political life would take the

form of an "overlapping consensus" in a democratic society that was just.[36] To clarify

this original phrase, Rawls contrasted it with the everyday concept of compromise, which

he referred to as a "modus vivendi."[37]

Rawls's contributions to political philosophy have shaped in significant ways the

conceptual framework within which contemporary scholars theorize about justice. As

will become clear throughout the dissertation, I defend many aspects of Rawls's theory of

political liberalism. Yet I am dissatisfied by his treatment of compromise, an aspect of

his philosophical project that has been largely ignored in contemporary discussions of his

work. Rawls's presentation of compromise and his argument against it pose a theoretical

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[35] John Rawls, *Political Liberalism*, expanded edition (New York: Columbia University Press, 1996), p. 227.

[36] John Rawls, "Justice as Fairness: Political not Metaphysical," *Philosophy & Public Affairs* 14, no. 3 (1985), pp. 225, 246-51.

[37] Rawls, "Justice as Fairness," pp. 247, 250. For other pre-*Political Liberalism* discussions of the concept, see John Rawls, "The Idea of an Overlapping Consensus," *Oxford Journal of Legal Studies* 7, no. 1 (1987), pp. 1, 9-11, 12, 15, 18-19, 22-23. Rawls did not discuss modus vivendi in "The Domain of the Political and Overlapping Consensus," *New York University Law Review* 64, no. 2 (1989), pp. 233-55.

obstacle to the thesis of this dissertation, namely, that philosophers ought to reconsider the judgment that resolving disagreements about justice through compromise is morally unacceptable.

When commentators discuss Rawls's treatment of compromise, they generally accept without challenge his characterization of the activity as well as his arguments against it. They focus instead on overlapping consensus.[38] Rawls's description and assessment of compromise have not been subjected to critical examination. My aim in this chapter is to explain why citizens of a pluralist democracy should not accept Rawls's descriptive and normative claims about compromise as definitive. I agree with Rawls that modus vivendi is a morally problematic strategy for resolving disagreements about the fundamental terms of political life because participants who construct a modus vivendi are motivated only by non-moral reasons such as self-regarding considerations. Yet I disagree that all compromises about the meaning and requirements of justice fit the model of modus vivendi. Rawls overlooked "principled compromise" as a species of compromise that participants construct because they are motivated by other-regarding considerations.[39] These other-regarding considerations have motivational force for the participants only after they have mutually conceded their desire for a political order that reflects their views on controversial issues. Although participants to a principled compromise wish to cooperate with their fellows on fair terms, they regard as second-best

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[38] For critical analyses of the idea of overlapping consensus, see Bruce Ackerman, "Political Liberalisms," *The Journal of Philosophy* 91, no. 7 (1994), pp. 364-386; Samuel Scheffler, "The Appeal of Political Liberalism," *Ethics* 105, no. 1 (1994), pp. 4-22; Leif Wenar, "*Political Liberalism*: An Internal Critique," *Ethics* 106, no. 1 (1995), pp. 32-62; George Klosko, *Democratic Procedures and Liberal Consensus* (Oxford: Oxford University Press, 2000), pp. 188, 192; Michael G. Barnhart, "An Overlapping Consensus: A Critique of Two Approaches," *Review of Politics* 66, no. 2 (2004), pp. 257-84, and Samuel Freeman, *Justice and the Social Contract: Essays on Rawlsian Political Philosophy* (Oxford: Oxford University Press, 2006), p. 102.

[39] As I noted in the introduction, Simon Căbulea May uses this term in "Principled Compromise and the Abortion Controversy," *Philosophy & Public Affairs* 33 (2005), pp. 317-48.

this strategy of engagement.  I argue that this form of agreement meets Rawls's criteria for moral acceptability even though the participants accept as a concession the moral claim that everyone who is subject to the terms of political association ought to be able to accept these terms.

The chapter is structured as follows.  I first present descriptive accounts of overlapping consensus and modus vivendi.  Second, I reconstruct Rawls's argument that only an overlapping consensus, and not a modus vivendi, is a morally acceptable strategy for determining the meaning and the requirements of justice.  In this section I clarify the two criteria that Rawls maintained an agreement must meet in order to be morally acceptable.  Third, I offer a descriptive account of principled compromise and argue that it meets Rawls's two criteria for moral acceptability.  Finally, I defend the need to move beyond Rawls's description of modus vivendi.  I maintain that many citizens are willing to construct terms of political cooperation that all members of the polity can accept only after they have conceded that matters of basic justice admit of reasonable disagreement and that it is morally unacceptable to advocate the whole truth as one sees it when determining the terms of shared political life.  These concessions differ significantly from the kind of concessions that participants to a modus vivendi make as they construct terms of political cooperation.  Because Rawls's claims about agreements that are constructed through concessions-making do not help us theorize about conflict resolution in the context of disagreement about justice, philosophers ought to move beyond his description of modus vivendi and reconsider the nature and potential merits of compromise.

**Rawls's Account of Overlapping Consensus:**

Rawls's discussion of compromise takes place in the context of his defense of the idea of "overlapping consensus." As some scholars have noted, Rawls modified his account of overlapping consensus between the original publication of *Political Liberalism* and the introduction to the paperback edition of the text in 1996.[40] Although overlapping consensus is a complex idea about which scholars disagree about how to interpret, it is nevertheless possible to state general features of the idea that are consistent throughout his presentations of political liberalism.

Rawls acknowledged that people will hold a plurality of beliefs about moral, religious, and philosophical matters, and that it is likely that some of these beliefs will be at odds. He maintained that although citizens may be able to resolve some disagreements by gathering additional evidence or by constructing strong arguments, some disagreements are "reasonable," by which he means that the parties will remain at odds even after they assess without bias or prejudice the opposed claims.[41] Rawls identified six circumstances that prevent people who are reasoning in good faith from converging on one view and termed these circumstances "the burdens of judgment."[42] One of the burdens of judgment concerns the influence of a person's social location on their moral beliefs and values:

> To some extent (how great we cannot tell) the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole course of

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[40] Burton Dreben, "On Rawls and Political Liberalism," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge: Cambridge University Press, 2002), p. 320; Andrew Koppelman, "The Limits of Constructivism: Can Rawls Condemn Female Genital Mutilation?" *The Review of Politics* 71, no. 3 (2009), p. 477; Martha Nussbaum, "Rawls's Political Liberalism: A Reassessment," *Ratio Juris* 24, no. 1 (2011); Gerald Gaus, "A Tale of Two Sets: Public Reason in Equilibrium," *Public Affairs Quarterly* 25 (2011), pp. 309-312; Jon Garthoff, "The Idea of an Overlapping Consensus Revisited," *Journal of Value Inquiry* 46, no. 2 (2012), pp. 186-7.
[41] Rawls introduces what he terms "the fact of reasonable pluralism" in *Political Liberalism*, pp. 36-7.
[42] Rawls, *Political Liberalism*, pp. 54-8.

life up to now; and our total experiences must always differ. Thus, in a modern society with its numerous offices and positions, its various divisions of labor, its many social groups and their ethnic variety, citizens' total experiences are disparate enough for their judgments to diverge, at least to some degree, on many if not most cases of significant complexity.[43]

People who recognize the burdens of judgment maintain that no claim about a disputed matter is rationally superior to its rivals.

According to Rawls, the burdens of judgment do not foreclose the possibility of agreeing on just terms of political association. He argued that citizens who are reasonable, that is, who respect each other as equals and are willing to cooperate with each other on terms that everyone can endorse, recognize what controversial issues admit reasonable disagreement and are willing to set aside these disagreements. They can construct terms of political cooperation by exercising their "common human reason" and articulating principles of justice that are based only on the moral beliefs and values that they share.[44]

Initially the joint decision to determine the terms of political association in this way may seem implausible because the question how human beings should live is a matter about which citizens can reasonably disagree. Moreover, it seems likely that one's views about what human beings should pursue and what human beings should avoid would influence one's beliefs about how political communities should be organized. I discuss this criticism in detail in the final section of the chapter. Rawls maintained, however, that people could differentiate whether a controversial issue should be the subject of political regulation or whether it was a matter each person should be free to

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[43] Rawls, *Political Liberalism*, p. 57. Charles Larmore argues in *The Morals of Modernity* (Cambridge: Cambridge University Press, 1996) that this burden of judgment is the greatest cause of reasonable disagreement of the six burdens of judgment that Rawls articulated (p. 170). Marc Ramsay concurs in "The Burdens of Judgment and Fallibilism," *Contemporary Political Theory* 6, no. 2 (2007), pp. 158-9.
[44] Rawls, *Political Liberalism*, p. 55. See also pp. 115, 137, 140, 220.

decide according to their conscience. He argued that the burdens of judgment applied primarily to disagreements about what he called "nonpolitical" matters. A disagreement that is nonpolitical is "an epistemological or metaphysical problem," whereas articulating and justifying "a conception of justice is a practical social task."[45]

Rawls emphasized that citizens of democracies can "leave aside philosophical controversies" and construct terms of association that are based on the moral beliefs and values that they share. Respect for one's fellows as equals and a willingness to cooperate with fellows on fair terms are two moral beliefs and values that he claimed are latent in the "public political culture" of democratic societies.[46] Although many people may not be aware that the project of living together in a democracy presupposes a commitment to certain moral beliefs and values, Rawls maintained that political philosophers could give an account that this is the case. Once citizens who desire to live in a democratic political community realize that they endorse this "fund of implicitly shared ideas and principles," they can construct an overlapping consensus on these grounds.[47] They may continue to disagree about many matters, but they nevertheless converge on how to organize the basic structure of their polity.

The question of justification is central to Rawls's theory of political liberalism. On his account, respecting one's fellows as equals entails endorsing only exercises of political power that all people who are subject to this power have the right kind of reasons to accept. He understood "fair terms of cooperation" as "terms that each

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[45] Rawls, "Justice as Fairness," p. 224. See also p. 230.
[46] Rawls first appeals to democratic public political culture as the ground for his revised theory of justice in the 1989 article "The Domain of the Political and Overlapping Consensus," p. 235. See also *Political Liberalism*, pp. 9, 13, 20, 34, 43, 46, 97, 100, 141, 156, 175, 192, 223, 227.
[47] Rawls, *Political Liberalism*, p. 14.

participant may reasonably accept, provided that everyone else likewise accepts them."[48]

Rawls followed the social contract theorists of the 17th and 18th centuries in contending

that political authority ought to be grounded in the consent of the governed.  He

maintained that people have an equal right to participate in political decision-making and

everyone's interest in not being coerced to act against his or her will should be given

equal weight.  Members of a political community should be motivated by their interests

and commitments to accept the terms of their political association with others and not by

the threat of force.  Rawls described the content of an overlapping consensus as

"freestanding" because citizens can justify their acceptance of its content without

appealing to controversial moral beliefs and values that some people reject having force

for them.[49]  Since Rawls's proposed terms of political cooperation can be derived using

the uncontroversial exercise of human reason from "the shared fund of implicitly

recognized basic ideas and principles," citizens can defend that these terms and not others

should guide their life in common.[50]

Thus it is no matter that some people hold many moral beliefs and values that are

opposed.  For example, some people maintain that the beliefs and the values of a

religious denomination are exclusively true.  Other people reject this claim as false or see

it as fallible.  Rawls argued that citizens who respect each other as equals will not

advocate principles of justice that appeal to moral beliefs and values that their fellows

cannot be expected to share as fellow members of a pluralist democracy.  They will

"deliberately sta[y] on the surface, philosophically speaking," and refrain from

attempting to realize fully their religious commitments because they recognize that these

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[48] Rawls, *Political Liberalism*, p. 16.  See also pp. 49, 51, 98, 124, 163, 393.
[49] Rawls, *Political Liberalism*, pp. xlii, xlv, xlvi, 10, 12, 40, 133, 140, 144-5, 155, 377, 387, 389, 394.
[50] Rawls, *Political Liberalism*, p. 8.  See also pp. 13-5, 34, 43, 46, 78, 100, 192, 223, 339, and 369.

moral beliefs and values ought not to bear on constitutional essentials that are binding on all members of the polity.[51] With these assumptions and arguments in place, Rawls concluded that principles of justice that are established through overlapping consensus will be "congruent with, or at least not in conflict with" the other values that cooperative citizens hold.[52] That people are at odds with each other on a wide range of non-political matters poses no problem for his project of explaining how people might arrive at principles of justice that are mutually justifiable.

**Rawls's Account of Modus Vivendi:**

Rawls's goal in *Political Liberalism* is to explain how democratic citizens might construct an account of justice. In his view, that two parties agree on terms of political association does not imply that those terms constitute justice. Moreover, parties may accept terms of political life without being able to justify their acceptance with reference to a certain type of reason. To highlight the distinctive features of his proposed strategy for reaching agreement on justice, Rawls contrasted overlapping consensus with compromise, a more familiar species of agreement. In some passages in which he articulated the differences between the two forms of resolving disagreement, Rawls did not define the term "compromise."[53] He assumed that his readers understood the ordinary meaning of word. In everyday language, a compromise is an agreement that two or more parties construct through negotiation. In other places, Rawls employed the term "modus vivendi" to describe a compromise.[54] Rawls understood "compromise" and

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[51] Rawls, "Justice as Fairness," p. 230.
[52] Rawls, *Political Liberalism*, p. 11. See also pp. 140 and 169.
[53] Rawls, *Political Liberalism*, pp. xlv, 142, 169-71, 218.
[54] Rawls, *Political Liberalism*, pp. xxxvi, xxxix, xl, xli, lvi, 126, 134, 145-8, 154, 159, 161, 163, 168, 208, 218, 249, 392, 458-9, 489.

"modus vivendi" as synonymous, and he employed the terms interchangeably. He contended on many occasions that an overlapping consensus "is not a mere modus vivendi."[55] That members of a political community coexist peacefully according to terms that all members accept sheds no light on whether their living arrangements are just.

For Rawls, a paradigm case of modus vivendi is the compromise agreement between French Catholics and Protestants in the late 16th century on the policies of the separation of church and state and of religious toleration. He adumbrated an account of the origin of the Edict of Nantes in 1598 in order to elucidate the characteristics of a modus vivendi.[56] His presentation is as follows. Adherents of each religious denomination, especially the powerful Catholic majority, urged the king of France to declare their religion "the true religion."[57] Initially, neither group considered peaceful coexistence a desirable goal. The French Catholics and Protestants engaged in violence with the aims of forcibly converting their fellows and of establishing their denomination as the state religion. Neither group had moral reservations about attempting to use force to compel the political authorities to give official status to its religion. Neither group recognized the principles of toleration and freedom of religion as having normative force. Each religious denomination sought to establish a political structure that realized fully its moral beliefs and values. They neither respected their fellows nor wished to cooperate with them on fair terms.

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[55] Rawls, *Political Liberalism*, pp. 126, 147, 208, 249.

[56] In "Establishing Toleration," Richard H. Dees presents a detailed account of "the experiment of toleration in France in the seventeenth century" (*Political Theory* 27, no. 5 [1999], p. 668). His interpretation of the historical facts differs significantly from Rawls's interpretation. In "Trust and the Rationality of Toleration," Dees also engages historical facts about the creation of the Edict of Nantes and its revocation in 1685 and argues against Rawls's conclusions about what motivates people to tolerate people with whom they disagree (*Noûs* 32, no. 1 [1998], pp. 82-98). Dees argues convincingly that Rawls told a "just so" story about the origin of toleration.

[57] Rawls, *Political Liberalism*, p. 148.

After thirty-six years of civil warfare, both religious denominations determined that it was no longer in their best interest to continue fighting. Although the Catholics comprised a majority, they were not able to subdue the Protestant minority. Each group recognized the other as being equal in might. When King Henry IV issued the Edict of Nantes, which established a policy in which Catholics and Protestants were permitted to practice their denominations, both groups accepted this institutional arrangement. This policy of religious toleration was a compromise agreement. We describe this agreement as a compromise because each party failed to satisfy fully its initial preferences. Each group would have preferred a different outcome, but circumstances prevented either group from achieving its desired end of establishing by force their denomination as the state religion. In light of these circumstances, each group preferred accepting the compromise to continuing the civil war.

Rawls's description of a modus vivendi on toleration fits the ordinary understanding of compromise. Three features of the concept of compromise are salient to this discussion. First, the need for compromise arises when at least two parties disagree on a matter of joint concern. Second, the compromise agreement is constructed through negotiation and the process of making mutual concessions. Third, the content of the compromise agreement falls short of the initial preferences of the participants to the disagreement. The modus vivendi on religious toleration that Rawls describes possesses these three features. The French Catholics and Protestants faced a joint decision, namely how they wished to relate to each other in the polity. Both groups made concessions by ceasing their attempts to impose their religious beliefs and values on the other group. Both religious denominations would have preferred an outcome in which the polity

endorsed its religious beliefs and values. Coexistence was the most politically expedient

outcome that either denomination could hope to achieve given the existing balance of

power.

**Rawls's Argument against Modus Vivendi:**

Rawls contended that two features differentiate overlapping consensus and modus

vivendi: the nature of the terms of political association to which the participants agree

and the reasons that motivate the participant to accept these terms. On his account, a

morally acceptable agreement on terms of cooperation among members of a political

community must contain moral content and be accepted for moral reasons. Because

Rawls defined an overlapping consensus as possessing these two criteria, it is true by

definition that an agreement on how to organize the polity that takes this form is morally

acceptable. His concern that citizens are able to justify the exercise of political power

informs his understanding of what it means for an agreement on the basic structure of the

polity to be morally acceptable. Because Rawls defined a modus vivendi as not

possessing moral content and not being accepted for moral reasons, it is true by definition

that an agreement that takes this form is not morally acceptable.

According to Rawls, the first criterion of a morally acceptable agreement is that

"the object of consensus, the political conception of justice, is itself a moral

conception."[58] When members of a political community construct an overlapping

consensus, they agree on an action-guiding principle that has moral content. For

example, Rawls maintained that people who endorse the principle of toleration as part of

the terms of shared political life will protect "some form of liberty of conscience and

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[58] Rawls, *Political Liberalism*, p. 147.

freedom of thought."[59]  When members of a political community construct a modus

vivendi, they agree on a policy, that is, a rule that states what they may or may not do.

According to Rawls, this policy does not have moral content.  For example, the French

Catholics and Protestants did not accept toleration and freedom of religion as moral

principles.  Although it is possible for citizens to construct rules that establish peaceful

coexistence through a modus vivendi, Rawls maintained that a superior agreement is one

in which the citizens view the terms of political association as binding moral

commitments.  In his view, only terms of political cooperation that are moral in nature

qualify as an account of justice.  Overlapping consensus meets this criterion; modus

vivendi does not.

The second feature of a morally acceptable agreement is that the content of the

agreement is "affirmed on moral grounds."[60]  According to Rawls, moral grounds are

reasons that are other-regarding.  When citizens construct an overlapping consensus, they

can give each other reasons for accepting the content of their agreement that they expect

their interlocutor will recognize as having force.[61]  Citizens show respect for their fellows

as equals by considering their voluntary assent as important as their desire not to be

coerced to act against their will.  In contrast, participants to a modus vivendi can identify

only self-regarding reasons for accepting the compromise.  They accept the compromise

outcome because it enables them to satisfy maximally their preferences.  Rawls

understands self-regarding reasons as non-moral reasons because self-regarding reasons

do not have normative force over people who have opposing interests.

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[59] Rawls, *Political Liberalism*, p. 61.
[60] Rawls, *Political Liberalism*, p. 147.
[61] Rawls, *Political Liberalism*, p. 241.

Participants to a modus vivendi, however, are not interested in giving reasons or asking for reasons that they or their fellows accept the negotiated terms. The parties' engagement in the process of conflict resolution and their resulting joint action do not imply that they view their counterpart's interests as worthy of consideration and accommodation. Each party assumes that the others accept the compromise because they judge it as the course of action that maximizes its personal interests. They prefer reaching a second-best agreement to remaining at odds. Most important is that their fellows accept the modus vivendi and not the reasons that motivate their acceptance.

For example, consideration of the interests of their fellows did not motivate the French Catholics and Protestants to reach a settlement in 1598. Neither group was interested in establishing a polity that accommodated religious diversity. They continued to believe that prohibiting the practice of other religions is an acceptable use of governmental power. Mutual justifiability was not a desideratum of their agreement. Both denominations were motivated to accept the settlement established by the Edict of Nantes only because they both placed higher value on coexistence than on attempting to establish their religion in the basic structure of the polity. Both groups viewed the agreement as a temporary policy until they become better able to persuade or force their preferences on their opponents.

Rawls maintained that agreements that have moral content and that are accepted for moral rather than prudential reasons will be stable and long-lasting. Citizens who construct an overlapping consensus have reasons to accept and to abide by the terms of cooperation no matter how the distribution of power and resources changes over time. According to Rawls, participants to an overlapping consensus would continue to abide by

the terms of the agreement, "even at the cost of their own interests in particular situations, provided that others also accept those terms."[62]  In contrast, parties to a modus vivendi will look for opportunities to defect.  Rawls described modus vivendi as an agreement that is unstable because it is grounded only by "happenstance and a balance of relative forces."[63]  As soon as the balance of power and resources shifts in favor of one participant or group of participants, they can attempt to use force to impose different terms of cooperation on their fellows.  Because participants who construct a modus vivendi place highest value on achieving their personal interests, they will pursue this goal when they judge that they are likely to succeed.

**Principled Compromise:**

Rawls presented overlapping consensus and modus vivendi as the two forms of agreement on terms of political association that citizens can construct.  I maintain that this taxonomy is a false dichotomy.  Rawls overlooked a third form of agreement that is moral in its content and that participants accept for moral reasons but that involves mutual concessions-making by the participants.  I term an agreement that possesses these features a "principled compromise."

A principled compromise satisfies the three basic criteria of a compromise: it is a joint decision to accept terms of cooperation that are reached through negotiation and concessions-making and thus fall short of each party's initial preferences.  Each person who participates in the construction of a principled compromise prefers an outcome in which his or her peers are persuaded to reject their opposed beliefs about the meaning and the requirements of justice.  All participants consider it unfortunate that they cannot

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[62] Rawls, *Political Liberalism*, p. xlii.
[63] Rawls, *Political Liberalism*, p. 148.

realize fully their moral beliefs and values in the polity unless they impose these beliefs and values on their fellows. This kind of compromise is principled because the participants acknowledge that their interlocutors are worthy of respect as fellow autonomous beings and that they are involved in a cooperative enterprise. That they are involved in a shared activity provides reasons that are not instrumental in nature for reaching a decision that accommodates the views that each party judges to be wrong and misguided but to be nevertheless reasonable. Because this acknowledgment is moral in content and is motivated by moral reasons, it is true by definition that principled compromise meets Rawls's two criteria for a morally acceptable agreement. Nevertheless, acting on these beliefs by pursuing a strategy of accommodation is a concession made by the participants.

Principled compromise thus shares two features with overlapping consensus: the terms of political association have moral content and the participants who construct the compromise settlement accept the terms for reasons that involve the consideration of others, specifically whether they would also find the terms acceptable. Principled compromise also shares a key feature with modus vivendi: the participants judge the agreement as a second-best outcome because they had to make concessions in order to reach terms to which their fellows are willing to accept.

**Moving Beyond Modus Vivendi:**

The need to theorize about strategies for constructing agreements on terms of political association that admit of concessions arises because Rawls's argument from the burdens of judgment fails. As I discussed earlier, Rawls acknowledged that it is not possible to overcome the burdens of judgment on contested moral matters. He

maintained that these contested moral matters were not relevant to the terms of political association. As Jeremy Waldron notes, "Nowhere does he infer that reasonable people might be expected to disagree fundamentally about the basic terms and principles of their association."[64] On Rawls's account, citizens would agree on what is a "political" issue, that is, something about which he claims people should be able to agree on using their common reason, and what is a "nonpolitical" issue, that is, something to which the burdens of judgment apply. Although he did not deny that the terms of political association have moral content, he was confident that citizens endorsed these moral beliefs and values. Because citizens could agree on a conception of justice without undermining or acting against their "nonpolitical" moral beliefs and values, moral pluralism does not thwart political consensus.

People disagree, however, on which controversial issues ought to be regulated by the political order. Although members of the polity might be willing to permit their fellows to determine for themselves what to believe and how to act with respect to some contested issues, it is likely that some people will consider some beliefs and actions too morally reprehensible to tolerate. In the words of George Sher, "Even the most ardent proponents of tolerance would deny that wife-beating, slavery, or murder are matters of individual conscience."[65] It is not possible to evade controversial moral questions when determining the basic structure of the polity. For example, the question who has political rights, liberties, and immunities depends on whether the political order recognizes those entities as having moral status. As Arthur Kuflik notes, "[S]uch questions such as, 'Who

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[64] Jeremy Waldron, "Disagreements about Justice," *Pacific Philosophical Quarterly* 75, nos. 3-4 (1994), p. 375.
[65] George Sher, "Subsidized Abortion: Moral Rights and Moral Compromise," *Philosophy & Public Affairs* 10, no. 4 (1981), p. 367.

is to count as a living member of political society, entitled to its most basic protections? When does someone's tenure in that status begin? When does it end?' do appear to be matters that cannot simply be 'taken off the political agenda' from the start."[66] Given what we have learnt from Rawls about the persistence of the burdens of judgment, it is not reasonable to expect citizens to reach an agreement on these morally significant questions.

If people cannot be expected to reach agreement on questions of moral significance that bear on matters of basic justice, then overlapping consensus cannot do the work that Rawls intended it to do. Some philosophers who have recognized the flaws in overlapping consensus have turned their attention to defending modus vivendi against Rawls's criticisms.[67] These theorists agree that the basic structure of the polity should be arranged in a way that citizens find acceptable, but they consider Rawls's two criteria for morally acceptable agreements unnecessarily demanding. For example, John Horton does not distinguish between morally acceptable and morally unacceptable reasons for agreement. He rejects Rawls's dichotomy that overlapping consensus concerns only principle and morality, and that modus vivendi agreements concern only power and self-interest. On his account, the reasons that motivate participants to accept a modus vivendi agreement "can be many and various, and do not really matter as regards the legitimacy

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[66] Arthur Kuflik, "Liberalism, Legal Moralism and Moral Disagreement," *Journal of Applied Philosophy* 22, no. 2 (2005), p. 191. Robert P. George agrees in "Democracy and Moral Disagreement: Reciprocity, Slavery, and Abortion," in *Deliberative Politics: Essays on Democracy and Disagreement*, ed. Stephen Macedo (New York: Oxford University Press, 1999), pp. 184-97.

[67] See, for example, John Gray, *Two Faces of Liberalism* (Cambridge: Polity Press, 2000); Bernard P. Dauenhauer, "A Good Word for a Modus Vivendi," in *The Idea of a Political* Liberalism, eds. Victoria Davion and Clark Wolf (Lanham, MD: Rowman & Littlefield, 2000), pp. 204-20; David McCabe, *Modus Vivendi Liberalism: Theory and Practice* (Cambridge: Cambridge University Press, 2010).

of the settlement."[68]  A modus vivendi can be established "through the deployment of whatever moral, intellectual, cultural, rhetorical, emotional, motivational and other resources that the parties can bring to the political process of dealing with conflict."[69]  On Horton's view, there is no value in parsing out which motivations are moral and which motivations are not moral.

Although I find much to admire in Horton's approach to theorizing about justice, I do not think that his account of modus vivendi avoids appealing to moral criteria that are similar to Rawls's proposed moral criteria.  Horton maintains that some proposed terms of association are not morally worthy of one's consent and that "the very characterization of a modus vivendi as distinct from the strictly coercive seems unavoidably to entail some kind of normative judgment in determining what is to count as coercive."[70] Because Horton denies that moral criteria could be eliminated completely when assessing forms of consensus, the type of modus vivendi that he endorses has a principled nature. Although his understanding of the moral criteria may be minimal in comparison to the understanding proposed by "liberal moralists" such as Rawls, even a "liberal realist" such as Horton has difficulty abandoning the project of seeking terms of political association that have normative content and that are mutually justifiable.[71]

I suggest that people who are sympathetic to Rawls's ideal of political justification should move beyond the dichotomy of overlapping consensus and modus

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[68] John Horton, "Realism, Liberal Moralism, and a Political Theory of Modus Vivendi," *European Journal of Political Theory* 9, no. 4 (2010), p. 439.
[69] John Horton, "Modus Vivendi and Religious Conflict," in *Democracy, Religious Pluralism, and the Liberal Dilemma of Accommodation*, ed. Monica Mookherjee (Dordrecht: Springer, 2010), p. 124.
[70] Horton, "Realism, Liberal Moralism, and a Political Theory of Modus Vivendi," p. 444.
[71] Horton, "Realism, Liberal Moralism, and a Political Theory of Modus Vivendi," p. 432.  For a theory of justification that is intended to rival Rawls's theory of justification, see John Horton, "Political Legitimacy, Justice and Consent," *Critical Review of International Social and Political Philosophy* 15, no. 2 (2012), pp. 129-48.

vivendi and recognize principled compromise as a third kind of agreement on terms of political association. If citizens wish to construct terms of political association that both they and their fellows can endorse, then they must make mutual concessions to each other when they find themselves at odds on moral questions that relate to the basic structure of the polity. These concessions are of three kinds and occur at two stages of agreement.

First, members of the polity must concede that matters of basic justice admit of reasonable disagreement. In making this concession, participants to a principled compromise accept that their preferred claims about how the polity should be organized if it is to be just are not rationally superior to that of their rivals. They relinquish their claim to politically relevant moral truths. It will be difficult for people who prefer to believe that it is possible to arrive collectively at truth about justice through the proper use of reason to extend the burdens of judgment to the foundational norms of the polity. As Larry Krasnoff notes, non-religious citizens who strongly committed to views about the true and the good will have equal difficulty as religious believers in "suspend[ing] their own doctrinal commitments for purposes of political justification."[72]

Second, members of the polity must concede the desire for a political order that is based on views that they hold but that are rejected by some of their fellows. They accept as a compromise the belief that they should construct terms of political association that everyone can accept. They admit reluctantly that people who hold significantly different moral views should not be coerced by their fellows to accept terms of association that they reject as morally unworthy of their agreement. Having accepted these moral beliefs,

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[72] Larry Krasnoff, "Consensus, Stability, and Normativity in Rawls's Political Liberalism," *The Journal of Philosophy* 95, no. 6 (1998), p. 277.

the participants are motivated to strive for consensus as they propose and negotiate terms of political association.

The first two concessions occur at a first stage of agreement. Only after members of the polity have agreed to cooperate with each other on terms that everyone can accept are they prepared to give content to their polity's basic structure through a process that reflects their shared moral commitments to treating their fellows as equals and to cooperating on fair terms. Members of the polity make a third kind of concession in the context of this second stage of agreement. These concessions allow citizens to reach agreement on how to respond to specific controversial moral questions that relate to matters of basic justice. Although members of the political community may agree that some moral disagreements are unrelated to the basic framework of political society and thus can be bracketed, they cannot "agree to disagree" on morally controversial matters that concern the polity's constitutional essentials. In order to reach an agreement on matters of basic justice that everyone can accept, people who hold opposing views must engage in principled compromise.

Let me summarize the claims about principled compromise that I have made in this chapter. Principled compromise is an agreement to cooperate on terms that everyone could accept that is developed through negotiation and concessions-making. Although principled compromise is a compromise, it is does not take the form of modus vivendi. Unlike modus vivendi, a principled compromise has moral content, and its participants affirm the agreement for moral reasons that involve considering the interests of others. The participants to the principled compromise are motivated to accept the agreement because they believe that it is right to do so. Their motives are not solely based on

calculations of prudence or expediency.  In fact, constructing a principled compromise

may not be an expedient course of action for participants who might be able to establish

through majoritarian political processes their partisan or sectarian views in law or in

public policy.  Because they respect people who hold opposed views as worthy of living

in a political order that they can endorse, these participants do not pursue opportunities to

use state power to impose their vision of the just polity on fellow citizens.[73]  People who

are motivated to pursue principled compromise do so because they recognize, albeit

grudgingly, the importance of constructing together the terms of their shared political life.

**Conclusion:**

Because Rawls believed that his theory of political liberalism could avoid the

need to resolve disagreements about moral beliefs and values, he gave minimal attention

to the range of strategies by which such conflict could be managed.  According to Rawls,

the disagreement among citizens is not pervasive enough to generate the need for

compromise and for a theory of compromise.  Compromise is a more conceptually and

morally nuanced activity than Rawls's brief discussion implies.  In this chapter I have

established that Rawls's taxonomy of kinds of agreement on terms of political association

is inadequate for a political community in which members disagree about which

controversial issues admit reasonable disagreement and in which some members

experience conflict between their personal moral beliefs and values and the moral beliefs

and values that are associated with democratic forms of association.  Rawls stipulated

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[73] For a defense of voting as a procedure for deciding constitutional essentials and matters of basic justice, see the chapter "Legislation, Authority, and Voting" in Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1996), pp. 88-118.  Stephen Macedo responds to Waldron's argument in "Against Majoritarianism: Democratic Values and Institutional Design," *Boston University Law Review* 90, no. 2 (2010), pp. 1029-42.

that citizens who construct a modus vivendi are motivated by purely self-regarding or prudential reasons. I have argued that some citizens who construct compromises are motivated by moral reasons. These people may also agree to terms of political association that fall short of their initial preferences because they desire a political order that even people who disagree with them on moral matters can accept. I have termed such an agreement a "principled compromise" and have distinguished it from the kind of compromise that Rawls termed a "modus vivendi."

Understanding a phenomenon is an important preliminary step that theorists ought to take before issuing judgments about the phenomenon. Scholars who have a broader and a more nuanced understanding of compromise can categorize correctly instances in which people make concessions for moral reasons rather than seeing all instances of concessions-making through the lens of a modus vivendi. Many conceptual and normative questions about principled compromise remain to be answered. Having established the limitations of Rawls's understanding of compromise, it is now clear that asking and answering such questions is a worthwhile endeavor.

**Chapter Two:**
**Constitutional Consensus and Principled Compromise**

In Chapter One, I presented John Rawls's account of two kinds of agreement that people who are determining how to organize their shared political life might construct: modus vivendi and overlapping consensus. In this chapter I examine the idea of a "constitutional consensus," a third strategy that Rawls introduced in *Political Liberalism* and I articulate its relation to principled compromise. Rawls's interpreters have not said much about constitutional consensus, perhaps because he presented this form of agreement as having value only as a transitional stage between modus vivendi and overlapping consensus.[74] Because his presentation of constitutional consensus is brief, dense, and replete with Rawlsian jargon, this concept warrants a careful interpretation. I offer a descriptive account of constitutional consensus in the first part of the chapter.

Constitutional consensus and principled compromise are forms of agreement that participants accept for moral reasons, that is, for reasons that are not merely instrumental to pursuing personal self-interest. In the second part of the chapter I distinguish the moral beliefs and values that motivate people to construct a constitutional consensus from the moral beliefs and values that motivate people to construct a principled compromise. In both cases the participants affirm a theory of legitimacy and reject the belief that it is morally appropriate to coerce fellow citizens to accept a particular political position simply because they believe that the position is true or morally superior. Only parties to a principled compromise, however, are concerned that the outcome reached through the decision-making process is acceptable to all people who are recognized as reasonable.

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[74] Two exceptions to this statement are Joshua Cohen, "Pluralism and Proceduralism," *Chicago-Kent Law Review* 69, no. 3 (1994), pp. 589-618 and Jon Garthoff, "The Idea of an Overlapping Consensus Revisited," *The Journal of Value Inquiry* 46, no. 2 (2012), pp. 183-96.

Principled compromise requires the intersubjective practice of reasoning and a normative theory of the properties a citizen must have to be considered reasonable. Because a political community that is constructed according to a constitutional consensus is a partisan democracy in which government actions are decided by majority rule, it does not require either of these two features.

I conclude the chapter by discussing an important point of similarity between constitutional consensus and principled compromise. Rawls argued that parties to a constitutional consensus are transformed through their constructing and abiding by its terms. I explain that parties to a principled compromise experience a similar transformation.

**The Idea of a Constitutional Consensus:**

Beginning with his 1985 article "Justice as Fairness: Political not Metaphysical," Rawls set aside the hypothetical choice-situation of the original position with its abstract choosers behind the veil of ignorance that he developed in *A Theory of Justice*. He developed an alternative justificatory model for his new theory of agreement on a conception of justice. Rawls's original articulation of this model included two kinds of agreement: modus vivendi and overlapping consensus. Although I discussed the meaning of these terms in Chapter One, it is worth revisiting these descriptions.

Rawls took as his starting point people who live together in a community but are deeply divided on how their community should be organized politically. Initially the members of the community believe that it is morally permissible to use force to impose their political views on others. If the people who are in conflict with each other have equal strength such that no group of people can force rival groups to submit to its will,

the members of the community might devise a truce on the terms of their political

cooperation. Rawls termed this kind of agreement a "modus vivendi." The parties to the

modus vivendi accept grudgingly and as a matter of strategy the settlement that results.

The content of the agreement is that neither party will attempt to force its views on

others. Each party calculates that accepting these terms of agreement is in its best

interest. When one of the parties becomes more powerful than the other, however, it will

no longer be in its self-interest to accept this injunction against using force to attempt to

get one's way in a political dispute.

Rawls argued that a modus vivendi could develop over time into an "overlapping

consensus," an agreement that is moral in content and that participants accept for moral

reasons, that is, for reasons that appeal to beliefs and values that are independent of the

contingent desires of the person who is motivated to act. Rather than agree merely on

how to comport oneself with respect to fellow members of the political community, the

citizens—who still disagree with each other about many important matters—would agree

on political principles that apply to the design of the basic structure of society and that are

articulated in detail. Rawls maintained that the moral beliefs and values that serve as the

basis of the content of an overlapping consensus are found in the public culture of

democratic societies. Grounding the political principles in these shared values obviates

the need for citizens to resolve their disagreements about other morally controversial

matters. When citizens construct an overlapping consensus, they view the principles of

justice and the social and political institutions that are guided by these principles as a

first-best way to organize the polity. The grudging acceptance that characterized the

modus vivendi agreement is replaced by sincere endorsement of the principles of justice and the basic structure of society on their merits.

In his 1989 article, "Justice and the Aims of Political Philosophy," Kurt Baier tried to make sense of Rawls's revised account of how agreement on a conception of justice could come about in a deeply divided society.  Baier noted correctly that Rawls intended his theorizing to be realistic.  That Rawls did not employ a strategy of justification that appealed to the choices that parties would make in a hypothetical original position is a major point of difference between Rawls's original theory of justice and his theory of political liberalism.  The political agents to whom Rawls recommends political liberalism are people who have full knowledge of their identities, their desires and commitments, the history of their political community, and the opportunities that are available to them under the current political order.  Baier queried how far ordinary citizens were from overlapping consensus that is the normative aim of Rawls's theorizing.   Speaking as a member of a constitutional democracy, he asked, "Where are we now in this scenario sketched by Rawls?"[75]

Baier answered that constitutional democracies such as the United States occupy an intermediate position called a "constitutional consensus" that exists between modus vivendi and overlapping consensus.[76]  On his account, the parties to a constitutional consensus agree "on the procedures for making and interpreting law and, where that agreement is insufficiently deep to end disagreement, on the selection of persons whose adjudication is accepted as authoritative."[77]  The procedures are democratic and are grounded in acceptance of the moral beliefs that all citizens should have the opportunity

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[75] Kurt Baier, "Justice and the Aims of Political Philosophy," *Ethics* 99, no. 4 (1989), p. 774.
[76] Baier, "Justice and the Aims of Political Philosophy," p. 775.
[77] Baier, "Justice and the Aims of Political Philosophy," p. 774.

to influence and to participate in political decision-making. Because citizens accept these procedural principles as principles, the content of their agreement is moral and is thus distinct from a modus vivendi. In contrast to a modus vivendi, the parties to the constitutional consensus view their agreement on procedural values as worthy of endorsement regardless of how much power is held by groups of citizens who share convictions or interests relative to other groups. Baier claimed, "the currently dominant group does not attempt or even want to use its power to impose its conception of justice on the whole community by an oppressive use of the state power."[78]

Baier denied that agreement on a legal process for resolving political disagreements fits Rawls's understanding of an overlapping consensus on principles of justice. Although citizens agree on "a process of adjudication when interests conflict," they do not agree on how the basic structure of society should be organized.[79] Because the procedural principles are less morally substantive than a deep, broad, and highly specific shared understanding of a conception of justice, a constitutional consensus is distinct from an overlapping consensus.

Baier recommended constitutional consensus as an alternative to overlapping consensus. He disagreed with Rawls that citizens should be encouraged to find mutually acceptable principles of justice that are articulated at a high level of specificity. In Baier's view, if the citizens of a democratic society agree on what justice means and requires at an abstract level, the polity will enjoy political stability. Agreement on basic democratic procedures and the basic liberties and resources needed to exercise basic

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[78] Baier, "Justice and the Aims of Political Philosophy," p. 774.
[79] Baier, "Justice and the Aims of Political Philosophy," p. 775.

political rights is sufficient. He argued that philosophers should not consider the absence of agreement on detailed political principles a theoretical or a practical problem.

The fourth chapter of *Political Liberalism*, entitled "The Idea of an Overlapping Consensus," is a modified version of Rawls's eponymous 1987 article. Although he declined to heed Baier's suggestion to set aside the idea of overlapping consensus, Rawls revised his account of the origins of principles of justice to include Baier's constitutional consensus as the "first stage" on the way to bringing about an agreement on the nature and the requirements of justice and to rendering this agreement stable.[80] Rawls followed Baier in understanding a constitutional consensus as an agreement on procedural principles for resolving political disagreements among citizens. He claimed that a society that reaches a constitutional consensus has constructed a constitution that satisfies "certain basic principles" and that "establishes democratic electoral procedures for moderating political rivalry within society."[81] When a political matter is put to a vote, the majority is justified in translating its political position into public policy. The parties to a constitutional consensus recognize that the outcome of the democratic process has normative force for them regardless of whether their preferred position wins the vote.

The content of a constitutional consensus also includes the resources that citizens need to participate effectively in democratic processes. In a constitutional consensus, the parties also agree "on certain basic political rights and liberties—on the right to vote and freedom of political speech and association, and whatever else is required for the electoral and legislative procedures of democracy."[82] These rights are guaranteed by the constitution and constrain the outcomes that can be reached legitimately through

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[80] John Rawls, *Political Liberalism*, expanded edition (New York: Columbia University Press, 1996), p. 158.
[81] Rawls, *Political Liberalism*, p. 158.
[82] Rawls, *Political Liberalism*, p. 159.

majoritarian processes. Rawls noted that participants to a constitutional consensus will likely disagree about the nature and extent of the rights and liberties that ought to be embedded in the constitution. Citizens can use the democratic procedures to resolve these disagreements. In Rawls's view, only the procedural principles are the subject of agreement and are accepted by the citizens for moral reasons.

**Motivating a Constitutional Consensus:**

Baier did not theorize about how a constitutional consensus comes about in a society; he began with the assumption that one currently exists in constitutional democracies such as the United States. Because Rawls was concerned to defend the plausibility of ordinary citizens constructing an overlapping consensus, he had to explain how and why citizens make the transition from a modus vivendi to a constitutional consensus. In order for this shift to occur, the parties must understand the rules of political life as having moral content and normative force. The content of the agreement can no longer be an agreement on what actions are permissible given the contingent circumstances at the time at which the truce was negotiated. The parties must recognize the principles as being applicable to them no matter how much force they can exert on their rivals. This is to say, the parties must recognize reasons to accept democratic procedural principles that are not grounded solely in consideration of their self-interest.

By way of explanation, Rawls maintained, "At this point, a certain looseness in our comprehensive views, as well as their not being fully comprehensive, may be particularly significant."[83] He assumed that ordinary citizens hold moral beliefs and values and that they consider it part of their self-interest to see their particular vision of

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[83] Rawls, *Political Liberalism*, p. 159.

the good realized.  Rawls did not view human nature as fundamentally self-interested.

We are sometimes motivated to act in accordance with particular systems of belief that

are not related to self-interested goals.  Rawls's account of human motivation stands in

opposition to Hobbes's account, in which only "fear of death" and "desire of such things

as are necessary to commodious living" motivate people to determine political rules for

their life in common.[84]

Rawls also assumed that the moral beliefs and values that comprise systems of

belief do not indicate what is good and true in every domain of human interaction and

that they do not form a complete set of beliefs and values.  A set of beliefs and values is

fully comprehensive if it determines the answers to all questions about what human

beings should do.  Sets of moral beliefs and values which are loose and limited in scope

permit their holders to accept a political community that permits rival sets of moral

beliefs and values to exist on equal terms.  This looseness provides an opportunity for

citizens to develop a tolerant attitude towards citizens who hold rival sets of beliefs and

values.  A moral belief in toleration, understood as the principle of refraining from

interfering with people who hold views that one believes to be false, plays a major role in

motivating members of society to construct a constitutional consensus.

Joint agreement among citizens on democratic procedures for making political

decisions is possible is that Rawls assumed that citizens are not political fundamentalists,

that is, people whose moral beliefs and values are in opposition to democratic forms of

decision-making. Sociologists understand a fundamentalist as a person who "insists that

the sacred texts are divinely inspired and true, who tries to model his life on the ethical

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[84] Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press; 1991 [1651]), p. 90.

requirements of those texts, and who seeks to impose these requirements on the entire society."[85] Some scholars stress that the values that fundamentalists endorse may not be related to religious traditions. Paul Ott describes fundamentalism as a way in which people hold and practice beliefs and values. In this sense, fundamentalists reject the possibility that they might wish to revise their understanding of the beliefs and values or to moderate the intensity with which they hold and practice these beliefs and values.[86] Fundamentalists reject that the will of the people should be the basis of political power. According to fundamentalists, members of society have no need to decide together how to live together because the fundamentalist's comprehensive set of beliefs and values has already determined the truth about this matter.

Citizens who are not political fundamentalists recognize that some domains of human life should not be subject to coercive political power and that society should permit a range of views on some controversial issues. Some of the parties to a modus vivendi, however, are political fundamentalists. It is only because they are opposed by rival political fundamentalists who are equal in strength that the opposed groups construct a truce. Rawls argued that participants to a modus vivendi would develop over time an appreciation of the good of the kind of political coexistence that withstands changes of power and status within the society. According to Rawls, citizens who constructed the modus vivendi as fundamentalists will modify their set of moral beliefs and values such

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[85] Steve Bruce, *Fundamentalism* (Malden, MA: Blackwell, 2000), p. 116. For a definition of religious fundamentalism that is intended for political science research, see Luca Ozzano, "A Political Science Perspective on Religious Fundamentalism," *Totalitarian Movements and Political Religions* 10, nos. 3-4 (2009), pp. 339-59.
[86] Paul Ott, "Moral Pluralism, Moral Motivation, and Democracy: A Critique of Talisse's Epistemic Justification of Democracy," *Contemporary Pragmatism* 8, no. 2 (2011), pp. 145-62. For a more detailed account of how people might understand values in an experimental rather than in a fundamentalist manner, see John J. Stuhr, "Pragmatism about Values and the Valuable: Commentary on 'A Pragmatic View on Values in Economics," *Journal of Economic Methodology* 10, no. 2 (2003), pp. 213-221.

that they recognize the importance of consent in government and the desirability of tolerating fellow citizens who hold opposing views about personal matters and about collective life. This is to say, citizens will consider constitutional democracy to be superior to a fundamentalist political regime.

Rawls acknowledged many factors might motivate citizens to afford highest value to the principles of a democratic constitutional order when they conflict with fully comprehensive sets of beliefs and values. "An allegiance to institutions and to the principles that regulate them may, of course, be based in part on long-term self- and group-interests, custom and traditional attitudes, or simply on the desire to conform to what is expected and normally done."[87] On Rawls's account, the majority of primarily self-interested people come to see democratic decision-making as the most effective procedure by which to attempt to achieve their values, beliefs, and visions of the good. Rawls did not explain in detail, however, the processes by which this internal transformation might occur.[88] Moreover, he did not consider it necessary to consider the possibility of fundamentalist resistance in his account of how citizens make the transition from a political order governed by a modus vivendi to a constitutional democracy.[89] Burton Dreben praised Rawls for not wasting his time providing reasons that people should prefer to live in a constitutional liberal democracy. He explained, "We are not

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[87] Rawls, *Political Liberalism*, p. 161.

[88] Other scholars have offered more detailed accounts why self-interested citizens might endorse constitutional democracy. Robert E. Goodin argues that the fact that no citizen can be certain of how strong future support will be for his or her political position leads citizens as a whole to endorse constitutional arrangements that include majoritarian decision-making procedures. See chapter 6, "Entrenched Rights and Constitutional Constraints" in Robert E. Goodin's *Motivating Political Morality* (Cambridge: Blackwell, 1992), pp. 100-123. Daniel Weinstock argues that citizens of wealthy nations might come to endorse egalitarian global institutions for self-interested reasons in "Motivating the Global Demos," *Metaphilosophy* 40, no. 1 (2009), pp. 92-108.

[89] Only recently have liberal scholars begun to confront directly the practical possibility that fundamentalists constitute a politically significant demographic and the theoretical challenge of justifying liberal democratic institutions to this group. See, for example, Lucas Swaine, *The Liberal Conscience: Politics and Principle in a World of Religious Pluralism* (New York: Columbia University Press, 2006).

arguing *for* such a society. We take for granted that today only a fool would not want to live in such a society."[90]

**Motivating Principled Compromise:**

When members of a society construct a constitutional consensus, they decide collectively on procedural principles for resolving competing political claims. As Baier and Rawls noted, this understanding of procedural justice is narrow in scope. Citizens can use these procedures to make decisions about what rights and liberties beyond those necessary for political participation the constitution should protect and about other morally controversial political matters. The content of a constitutional consensus does not include other principles that inform the basic structure of society. The parties to a constitutional consensus regard the democratic procedures as the best way to decide contested political questions. Moreover, the outcome of the procedure is not assessed by a criterion of fairness that is independent of the procedure.

The ideal that controversial political decisions should be made in a manner that is fair to all parties and through a procedure that all parties find acceptable underlies both constitutional consensus and principled compromise. Both agreements take place within a democratic form of government, that is, a political community "that institutionalizes an idea of citizens as equals."[91] The constitutional consensus is grounded on the moral principle that all citizens are entitled to the opportunity to influence and to participate in political decision-making.

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[90] Burton Dreben, "On Rawls and Political Liberalism," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge: Cambridge University Press, 2002), p. 328.
[91] Cohen, "Pluralism and Proceduralism," p. 610.

When citizens construct a principled compromise, however, the subject of their agreement is a substantive outcome, namely the constitutional essentials of the polity. Like overlapping consensus, a principled compromise on justice sets out terms for organizing the basic structure of society that extends beyond agreement on procedural values. The participants to a political disagreement agree on the procedure of making mutual concessions. If they are successful in reaching a compromise, all reasonable participants can endorse the outcome.

Because the assent of each participant to a principled compromise is required for the compromise outcome to be legitimate, this form of agreement presupposes a normative theory of the properties a citizen must have to be considered reasonable. I follow Rawls in describing citizens as reasonable when they are willing to justify to others their political claims. Moreover, citizens who are reasonable offer reasons to their interlocutors that they believe in good faith others will recognize as having normative force. When citizens construct a principled compromise, participation is restricted to people who are willing to engage in this practice of reasoning. In the construction of a constitutional consensus, however, no such theory is required. Fundamentalists who hold moral beliefs and values in an extreme and inflexible manner can exercise their rights to participate in the democratic process even though they do not justify their preferred positions with reasons that other citizens might share.

People who pursue principled compromise concede "that given the diversity of interests and values, it is unreasonable to insist on winning," but they disagree with defenders of constitutional consensus that a conflict resolution procedure is sufficient if it

enables all parties to have a chance to be heard and to win the vote.[92]  A principled

compromise is a form of agreement in which mutual acceptance of the outcome of the

agreement is just as important as mutual acceptance of the procedure by which the

outcome is reached.  Compromise is a strategy of dispute resolution that avoids an

outcome in which some citizens are winners and some citizens are losers in resolving a

conflict about a moral issue.  Recognition of the burdens of judgment plays a role in

motivating people to making reciprocal concessions.  Because many claims about a

morally disputed matter are reasonable responses, the issue should be resolved by finding

a response that the people who endorse these conflicting views could hold jointly.  People

who are motivated to pursue compromise consider certain political positions worth

accommodating even if they judge these positions to be mistaken.

People who are motivated to pursue a compromise on the constitutional essentials

understand differently the idea that citizens have a right to equal consideration in the

design of their society than do people who pursue a constitutional consensus.  They are

motivated to pursue a compromise because they endorse the substantive norm that all

citizens ought to be able to accept the basic structure of society.  Parties to a principled

compromise are concerned that fellow citizens are able to see themselves as co-authors of

the political order.  They accept the procedure of making and accepting concessions on

the meaning and the requirements of justice because they value outcomes that realize

partially the concerns and values of everyone who is included in the decision-making

process. Parties to a principled compromise endorse the theory of legitimacy that informs

overlapping consensus, namely, the view that "exercise of political power is fully proper

only when it is exercised in accordance with a constitution the essentials of which all

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[92] Cohen, "Pluralism and Proceduralism," p. 612.

citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason."[93]

Participants to a principled compromise must justify why they judge their preferred position to be the morally correct course of action and consider the normative force of reasons that support opposed claims. In contrast, the parties to a constitutional consensus "explain and justify their preferred policies to a wider public so as to put together a majority."[94] Although this strategic goal leads advocates "to move out of the narrower circle of their own views," it is possible to secure the majority will while failing to offer justification that members of minority groups can accept. Selective engagement is not possible when citizens pursue a principled compromise on the meaning and requirements of justice. The back-and-forth process of making concessions is successful when parties to the compromise can understand each other as making an effort to be reasonable by offering each other only reasons that they anticipate their interlocutors can share.

**Cooperation and Transformation:**

Rawls stated clearly that the parties to a constitutional consensus initially do not affirm democratic procedures explicitly on the basis of shared moral beliefs and values. According to Rawls, constructing and abiding by a political agreement with fellows with whom they disagree transforms the parties. The practice of cooperating with others motivates a commitment to respecting them as equal members of society, regardless of the fact that they may hold opposed views about how the polity should be organized. Rawls noted, "Gradually, as the success of political cooperation continues, citizens gain

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[93] Rawls, *Political Liberalism*, p. 137.
[94] Rawls, *Political Liberalism,* p. 165.

increasing trust and confidence in one another."[95]  Members of society cease worrying

that their opponents will try to gain an unfair advantage over them.  Citizens develop

mutual trust that fellow members of the political community will act in accordance with

the democratic procedures.

As a society governed by a constitutional consensus is sustained by citizens over

the course of multiple generations, a democratic political culture develops.  Rawls

implied that members of a society that has a democratic political culture will be

concerned about the nature of the relations among citizens.  They will desire to work

together to make the basic structure of society just.  Parties to a constitutional consensus

come to see that society, understood as a whole, should be "a fair system of social

cooperation between free and equal citizens."[96]  Rawls maintained that citizens develop a

set of shared values and principles that can serve as the conceptual basis for a broader and

a deeper agreement on a conception of justice.

I speculate that parties to a principled compromise will likely experience a similar

transformation.  They are likely to develop a new or a deeper sense of trust in their

fellows in the same manner as parties to a constitutional consensus insofar as both

activities involve cooperating with people whom one understood previously as

opponents.  Because a principled compromise involves negotiating substantive issues, the

process of concessions-making may enable its participants to understand and appreciate

reasonable moral pluralism in their society.  The processes of reasoning together and

making concessions might lead participants to understand better why moral convictions

have significance and value for others.  Persuading others of the merits of one's position

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[95] Rawls, *Political Liberalism*, p. 168.
[96] Rawls, *Political Liberalism*, p. 166.

may not lead one's interlocutors to reject his or her opposed position, but it may transform his or her attitude.

It is important to note that the experience of transformation differs from the experience of moral correction. Citizens can modify the positions that they advocate and endorse in the political domain without modifying the positions that they hold when they are not engaged in the activity of constructing terms for shared political life in a pluralistic society. As Richard Bellamy notes, "There is a core of substantive mutual moral appreciation at the heart of the compromise that nonetheless falls short of mutual moral correction or consensus."[97] Although many parties to a principled compromise will likely persist in their belief that citizens who hold competing moral beliefs and values are wrong and misguided, they are nevertheless likely to recognize the value of creating constitutional essentials that all reasonable citizens can accept.

In contrast, parties to a constitutional consensus might not experience a new appreciation of the contents of competing views because they may not examine and assess the merits of these views as closely and as charitably as parties to a principled compromise who are striving to reach consensus on a compromise outcome. Participating in democratic processes is unlikely to be a learning experience for citizens who do not have reasons to consider the merits of opposing political positions. Rawls nevertheless maintained that the experience of living within a well-functioning constitutional consensus would "encourage the cooperative virtues of political life: the virtue of reasonableness and a sense of fairness, a spirit of compromise and a readiness to meet others halfway, all of which are connected with the willingness to cooperate with

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[97] Richard Bellamy, "Democracy, Compromise and the Representation Paradox: Coalition Government and Political Integrity," *Government and Opposition* 47, no. 3 (2012), p. 452.

others on political terms that everyone can publicly accept."[98]  He did not explain why citizens would be dissatisfied with a democracy in which political parties and partisanship are prominent features.

Perhaps when partisans attempt to persuade others to accept their preferred political position but are not successful, they will consider modifying their initial position and make concessions.  Rawls described the "spirit of compromise" and the "readiness to meet others halfway" as virtues, which implies that he considered these actions to be valuable for moral reasons as well as for strategic reasons.  I suggest that citizens may come to endorse the activity of compromise as a result of considering in good faith the objections and concerns of people who hold opposing views.  This reflection may transform partisan citizens such that they come to "wear their partisanship lightly," to borrow a phrase from Russell Muirhead.[99]  In an article in which he considers how to negotiate the tensions between partisan democracy and deliberative democracy, Muirhead recommends an ideal of "ethical partisanship."  He maintains, "The ethical partisan is capable of standing with others, of joining a sort of political team, and is at the same time capable of standing back from this very commitment, viewing it from a distance, and understanding it as something partial."[100]

I agree with Muirhead that occupying this position is challenging for most citizens who have arrived at their political convictions through a serious and an open-minded process of research.  For this reason citizens initially consider working together to

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[98] Rawls, *Political Liberalism*, p. 163.
[99] Russell Muirhead, "Can Deliberative Democracy Be Partisan?" *Critical Review* 22, nos. 2-3 (2010), p. 150.
[100] Muirhead, "Can Deliberative Democracy Be Partisan?", p. 150.

construct a compromise as a second-best course of action, one that is worth pursuing only after efforts to morally correct opponents have failed.

**Conclusion:**

In providing a developmental account of how citizens who disagree deeply might reach agreement on a procedural account of justice and then a substantive account of justice, Rawls attempted to convince critics that his normative theory was not utopian. Although citizens initially pursue a constitutional consensus because it is the most effective means for achieving their interest in peaceful coexistence, he was confident that people would recognize the intrinsic value of limited and democratic government, fairness, equal political rights, and toleration. Regardless of the balance of power among rival political groups, parties to a constitutional consensus endorse deciding controversial political matters through a fair and an open democratic process.

Rawls scholars tend to focus their attention on the concepts of modus vivendi and overlapping consensus. In this chapter I have concentrated on constitutional consensus, a relative latecomer to Rawls's conceptual toolkit. Because contemporary democratic societies are grounded in a constitutional consensus, studying this form of agreement is an opportunity for collective reflection. Because societies develop an overlapping consensus after certain transformations have occurred in the participants to a constitutional consensus, scholars who are sympathetic to Rawls's project and who wish to see it realized in actual political communities can benefit from inquiry into how constructing and abiding by democratic procedures influence the values and attitudes of citizens.

Implicit in a constitutional consensus is a particular conception of democracy as a form of government that permits partisan competition and that accords legitimacy to political positions that secure the support of the majority. This understanding of democracy stands in opposition to the conception of democracy that underlies the strategy of principled compromise. On this view, democracy is a form of collective self-government in which the fundamental political issues are decided jointly by all reasonable citizens. Democracy is also a form of social life in which citizens desire to engage productively with people who share opposing views when conflicts arise and joint decisions need to be made. Although constitutional consensus improves on the deficiencies of modus vivendi and is currently a more realistic form of agreement than overlapping consensus, I defend a similar but distinct intermediary position between Rawls's two extremes: principled compromise.

In this chapter, I have described the differences between the content of a constitutional consensus and a principled compromise and the different moral beliefs and values that motivate citizens to accept these distinct forms of agreement on terms of political cooperation. Parties to a principled compromise must affirm substantive commitments at the outset that are more demanding than the procedural commitments to equality and to democratic processes. People who recognize the value of living in a society where citizens can see themselves and others as co-authors of the shared terms of political life will be motivated to justify their political convictions to people who hold opposing views and to make mutual concessions with them on a joint course of action. Although this form of engagement may initially be onerous for citizens who hold strong convictions about truth in the domain of politics, I speculate that participants to a

principled compromise can be transformed through the activities of reasoning together and making mutual concessions. In Chapter Four I provide evidence for my speculation by considering how "a spirit of compromise and a readiness to meet others halfway" influenced the way in which the feminist activist Betty Friedan participated in the debate over the ratification of the Equal Rights Amendment to the U.S. Constitution.

**Chapter Three:**
**Deliberation, Negotiation, and Reasonable Disagreement**

In Chapter One, I proposed a descriptive account of principled compromise. In contrast to compromises that take the form of a modus vivendi, the content of a principled compromise is moral in nature and the parties who construct and accept a principled compromise are motivated by moral reasons. I developed my account of principled compromise in a context in which members of a political community initially disagreed whether they should construct terms of political association that are mutually justifiable. Citizens who set aside their desires to impose partisan or sectarian accounts of the well-ordered polity on their fellows accept as a principled compromise the joint decision to cooperate on fair terms. The parties to the principled compromise recognize that people who are subject to political power ought to be able to endorse the political order, even though they would prefer to live in the polity that is organized in the manner that they judge to be the best. I described this context as the first of two stages of agreement. Having accepted the principle of legitimacy as having normative force, participants to the principled compromise recognize moral reasons for conceding their desire to advocate for terms of cooperation that their fellows could reasonably reject. Because they parties to the agreement judge their agreement to be a second-best course of action, the terms of political cooperation are a compromise.

In this chapter, I turn my attention to the second stage of disagreement. Having agreed to work out basic political principles to which they can all agree, members of the political community must articulate the content of these political principles. As I argued in the previous chapter, citizens cannot evade controversial moral questions when they determine the constitutional essentials and matters of basic justice. Beliefs about what

entities have moral status influence what entities the political order recognizes as having

political rights, liberties, and immunities.  Beliefs about what basic goods are necessary

for human flourishing influence how the political community understands the obligations

of the state to its citizens.  Beliefs about the human condition and personal responsibility

influence what demands citizens have a right to make upon their government.  Rawls's

account of the burdens of judgment extends to disagreements about "political" matters as

well as "non-political" matters of religion, morality, and philosophy.  Acknowledging the

burdens of judgment entails recognizing that some disagreements about morally

contentious issues are reasonable, meaning that no claim about the disputed matter is

recognized by all parties as rationally superior to its rivals.  Although the interlocutors

might reason together conscientiously and civilly, considering the arguments on all sides

of the issue, they may not persuade each other to accept the position that they judge to be

correct with respect to a question of basic justice.  If they wish to live in a political order

that is structured by political principles that can be accepted by everyone who wishes to

cooperate on fair terms, they must nevertheless determine how they ought to respond to

these disagreements.

Some normative political theorists who theorize about how citizens should resolve

political disagreements have drawn a sharp contrast between deliberation and negotiation.

This distinction features prominently in theories of deliberative democracy.  Jane

Mansbridge observes, "Deliberative democracy has traditionally been defined in

opposition to self-interest, to bargaining and negotiation, to voting, and to the use of

power."[101]  Deliberation is said to be a cooperative activity that involves reason-giving

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[101] Jane Mansbridge et al., "The Place of Self-Interest and the Role of Power in Deliberative Democracy," *The Jouranl of Political Philosophy* 18, no. 1 (2010), p. 64.

about principles.  Negotiation is said to involve only strategic bargaining over interests.  In this chapter I critically examine Anthony Simon Laden's claims that deliberation and negotiation are distinct ways of resolving political disagreements and that deliberation is a normatively superior form of political interaction.  I then defend two claims against Laden.  First, his descriptive account of negotiation is too narrow.  Negotiation can involve reason-giving and may concern principles as well as interests.  Not all negotiators make concessions for purely strategic reasons.  Negotiation partners can demonstrate mutual respect in the same way in which deliberators do ideally.  Second, Laden's normative account of deliberation does not offer guidance on how to resolve reasonable disagreements about constitutional essentials and matters of basic justice.  This omission is a serious flaw in his theory of deliberative liberalism, which is intended as a guide to "the political project of working out legitimate political principles."[102]  Laden's account of deliberation assumes that participants who do not agree on what to do can set aside the matter and return to it at a future time when new evidence and changed attitudes will facilitate them to deliberate better.  I contend that modifying normative theories of deliberation to include a role for negotiation will help philosophers to confront rather than to displace deep disagreement about the terms of their shared political life.

**Deliberative Liberalism:**

James Bohman describes deliberative democracy as "any one of a family of views according to which the public deliberation of free and equal citizens is the core of

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[102] Anthony Simon Laden, *Reasonably Radical: Deliberative Liberalism and the Politics of Identity* (Ithaca, NY: Cornell University Press, 2001), p. 207.

legitimate political decision making and self-government."[103]  Deliberative democrats

understand the process of deliberation to involve exchanging and assessing the reasons

for pursuing proposed courses of action.  Many philosophers who adopt a deliberative

democratic approach understand deliberation as a practical activity by which citizens can

realize an ideal of public justification.  Theorists who hold this view take "the core

commitment of deliberative democracy" to be "the idea of publicly giving reasons to

justify decisions, policies, or laws."[104]  That is to say when people deliberate with each

other about a joint decision that concerns the exercise of political power, they offer

reasons to their interlocutors that they believe their interlocutors can accept.  If their

interlocutors accept their reasons for choosing a particular course of action, then they

have reached a consensus on what decision they should make.  When the deliberators

form a shared will, the parties to the decision are authors of the political decision as well

as subjects to it.  The activity of deliberation upholds the moral principle that members of

the political community should treat each other with mutual respect.

In the last two decades philosophers have articulated fruitful connections between

John Rawls's account of political liberalism and philosophical work on deliberative

democracy.[105]  Anthony Simon Laden is one of the foremost contributors to this project

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[103] James Bohman, "Survey Article: The Coming Age of Deliberative Democracy," *Journal of Political Philosophy* 6, no. 4 (1998), p. 401.

[104] James Bohman and Henry Richardson, "Liberalism, Deliberative Democracy, and 'Reasons that All Can Accept,'" *Journal of Political Philosophy* 17, no. 3 (2009), p. 253.

[105] See for example, Brooke A. Ackerly, *Political Theory and Feminist Social Criticism* (Cambridge: Cambridge University Press, 2000), pp. 35-72; James Bohman, "Deliberative Toleration," *Political Theory* 31, no. 6 (2003), pp. 757-79; Joshua Cohen, "Deliberation and Democratic Legitimacy," in *The Good Polity*, eds. Alan Hamlin and Phillip Pettit (New York: Blackwell, 1989), pp. 17-34 and "For a Democratic Society," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge: Cambridge University Press, 2003), pp. 86-138; Samuel Freeman, "Deliberative Democracy: A Sympathetic Comment," *Philosophy & Public Affairs* 29, no. 4 (2000), pp. 371-418.

within normative political philosophy.[106]  He pursues what he calls "Rawls-inspired work

on reasonable deliberation."[107]  How people can make collective choices about how to

organize their polity "in the face of deep diversity" is the question that animates his 2001

monograph *Reasonably Radical: Deliberative Liberalism and the Politics of Identity*.[108]

He characterizes the problem that motivated his inquiry in the following way:

> When [collective choice] happens, it is neither because [the opposed parties']
> preferences coincided more than usual, nor that one of them has strong-armed the
> other into submission.  Rather, they have come to an agreement instead of a
> compromise, and as a result are in a position to make a shared decision.  The
> question is: what makes this possible, and how does it come about?"[109]

Laden answers by offering a theory of how "actual people acting politically in actual

societies" could come to embody a shared political will.[110]  His intention in this book is

"to set out the framework in which political deliberation can fruitfully and justly take

place."[111]

Rawls's idea of public reason plays an important role in Laden's theory of

deliberation.  Laden argues that "reasonable" deliberation occurs when citizens provide

each other with "reasons all of them regard as authoritative insofar as they are citizens"

who respect each other as beings who are capable of rational, autonomous action.[112]

Laden also agrees with Rawls that justifying political principles and policies is "an

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[106] Laden argues that "the idea of public reason and its accompanying conception of reasonable political deliberation" is "the centerpiece of Rawls's work" in "The House that Jack Built: Thirty Years of Reading Rawls," *Ethics* 113, no. 2 (2003), p. 388.

[107]Anthony Simon Laden, "Reasonable Deliberation, Constructive Power, and the Struggle for Recognition," in *Recognition and Power: Axel Honneth and the Tradition of Critical Social Theory,* eds. Bert van den Brink and David Owen (Cambridge: Cambridge University Press, 2007), p. 271.  Laden first developed his theory of deliberative liberalism in his Ph.D. dissertation, "Constructing Shared Wills: Deliberative Liberalism and the Politics of Identity" (PhD diss., Harvard University, 1996).  *Reasonably Radical* is a revised and expanded presentation of the arguments developed in his dissertation.

[108] Laden, *Reasonably Radical*, p. 5.

[109] Laden, *Reasonably Radical*, p. ix.

[110] Laden, *Reasonably Radical*, p. 16.

[111] Laden, *Reasonably Radical*, p. 17.

[112] Laden, *Reasonably Radical*, p. 126.

intersubjective practice."[113]  Whether a citizen accepts a reason offered to her by a fellow

deliberator as having authority over her depends on the grounds that her interlocutor

provides for accepting the reason.   Laden takes seriously the possibility that citizens may

reject the reasons that others provide to defend their claims about how a political matter

should be jointly decided.  He explains, "We treat someone reasonably when we take

seriously their rejection of claims we make on them, when we acknowledge that what we

take as authoritative grounds for some claim may not be authoritative for them."[114]

I am sympathetic to Laden's project of developing a theory of deliberative

liberalism.  I am heartened that his theory attends to questions of identity and hierarchical

relations of power.  His normative account of deliberation recognizes that what looks like

reasonable deliberation ought not be classified as such if it was only in virtue of one

participant's greater power that the other participant accepted the reasons that were

offered as having authority.  Laden is sensitive to the ways in which people perceived as

members of marginalized social groups may not be afforded mutual respect and esteem

by partners in deliberation on account of features of their identity.

Although Laden's theory of deliberative liberalism is helpful for theorizing about

the proper role of identity-based claims in political deliberation, it is not helpful with

respect to responding to reasonable disagreement about the merits of competing political

principles.  Laden does not take into consideration that under conditions of reasonable

pluralism, citizens who exchange reasons in good faith and who respect their

interlocutors as equals may nevertheless disagree on what reasons ought to count as

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[113] Anthony Simon Laden, "Radical Liberals, Reasonable Feminists: Reason, Power, and Objectivity in MacKinnon and Rawls" in *Feminist Interpretations of John Rawls*, ed. Ruth Abbey (University Park, PA: The Pennsylvania State University Press, 2013), p. 31.
[114] Laden, "Radical Liberals, Reasonable Feminists," p. 32.  See also *Reasonably Radical*, pp. 80, 86, 88, 93-4, 96-7.

authoritative for constructing the constitutional essentials in one way rather than another. If citizens disagree about when a party is warranted in rejecting a reason, their activity of reasoning together will face a deadlock. Laden does not offer guidance about how people who conscientiously defend opposed political principles should resolve their disagreement and reach a mutually acceptable decision on how to organize the polity. He rejects negotiation as a normatively desirable strategy for resolving political disagreement.

**Laden's Account of Deliberation and Negotiation:**

Negotiation has no place in Laden's theory of deliberative liberalism because he understands deliberation and negotiation as distinct and opposed ways in which people decide what course of action to pursue jointly. In a 2007 anthology chapter entitled "Reasonable Deliberation, Constructive Power, and the Struggle for Recognition," Laden contrasts reasoned deliberation and negotiation in this way:

> Negotiated agreements are compromises amongst parties who have different pre-existing interests they are trying to satisfy. They engage in bargaining as a means of maximizing the satisfaction of these interests, because they realize that the presence of other agents with different interests places an obstacle in their way. Deliberation, on the other hand, involves an exchange among people who regard themselves as partners trying to work out together a shared solution to a shared problem.
>
> The aim of deliberation is not merely a mutually acceptable compromise, but rather a shared solution that each of the parties can regard as expressing her investment in the issue under discussion. It aims, to put this in Rawls's terms, at something like an overlapping consensus and not merely a *modus vivendi*. […] The very act of deliberation reflects a kind of agreement among the parties to resolve their differences cooperatively and on mutually acceptable terms.[115]

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[115] Laden, "Reasonable Deliberation, Constructive Power, and the Struggle for Recognition," p. 280.

This account of the distinction between deliberation and negotiation also appears in

Laden's 2007 anthology chapter "Negotiation, Deliberation, and the Claims of

Politics"[116] and in his 2012 monograph *Reasoning: A Social Picture.*[117]

According to Laden, three features distinguish negotiation from deliberation.

First, negotiators do not understand themselves as participating in a shared project.

Negotiators understand themselves as having interests that are in competition with the

interests of others.  Determining how to resolve the conflict of interest is the only goal

that the negotiators have in common.  On Laden's account, deliberators understand

themselves as participants in a shared project that is prior to and distinct from the

political disagreement that they are working together to resolve.

The second feature that distinguishes negotiation from deliberation, according to

Laden, concerns how the participants relate to each other.  Negotiators view the parties

with whom they disagree as a regrettable source of frustration.  The presence of the

negotiation partner generates a conflict and prevents each party from pursuing its ends.

In contrast, deliberators do not evaluate negatively that their interlocutors hold opposing

positions on the matter under consideration.  Laden explains,

> [T]here is an important difference between seeing others as obstacles and seeing
> them as partners with whom we disagree, and it is this difference that I mean to
> highlight here.  Negotiation involves seeing others as obstacles and thus the need
> to deal with them as an unfortunate fact.  So, if we approach politics as
> embodying a logic of negotiation, we will be led to a view of politics as a kind of
> concession to the unfortunate plurality of our social world.[118]

[116] Anthony Simon Laden, "Negotiation, Deliberation, and the Claims of Politics," in *Multiculturalism and Political Theory*, eds. Anthony Simon Laden and David Owen (Cambridge: Cambridge University Press, 2007), pp. 198-217.

[117] Anthony Simon Laden, *Reasoning: A Social Picture* (Oxford: Oxford University Press, 2012), pp. 184-97.  The subsection titles of the relevant pages are "Deliberation vs. Negotiation," "The Logic of Negotiation," and "The Logic of Deliberation."

[118] Laden, "Negotiation, Deliberation, and the Claims of Politics," p. 205.

According to Laden, people who work within the logic of deliberation strive to work toward a solution that is informed by diverse and opposed perspectives rather than in spite of the presence of diversity.

The third distinguishing feature between negotiation and deliberation concerns the content of the claims that the parties to the disagreement make on each other. According to Laden, people who adopt the logic of negotiation hold views about what they desire to achieve before they begin the process of giving and offering reasons. The assumption that their claims are opposed shapes from the outset how they resolve their disagreement about the contested issue. "Negotiators do not enter negotiation with the thought that it will transform their interests. Negotiation is a procedure by which the satisfaction of interests can be distributed, but it takes and leaves those interests as given."[119] Bargaining takes pride of place in the activity of negotiation. Each party to the negotiation calculates the minimal amount it needs to concede in order to secure the maximal satisfaction of its preferences that its negotiation partner will permit. When negotiators modify their original claims as a concession to their negotiation partners, their motivation is purely strategic in nature. They assess their negotiation partner's proposed concessions in terms of how onerous compliance with the outcome would be. Laden maintains that when negotiators agree how to balance their competing claims, they construct a compromise that takes the form of a modus vivendi. Neither the content of the agreement nor the motivations for making the concessions and accepting a second-best outcome are moral in nature. For this reason, "negotiated agreements always require further compliance mechanisms."[120]

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[119] Laden, "Negotiation, Deliberation, and the Claims of Politics," p. 205.
[120] Laden, "Negotiation, Deliberation, and the Claims of Politics," p. 205.

On Laden's account, people who deliberate with each other make claims about what course of action would be best for all parties to the disagreement. "What is distinctive about deliberation is that despite their differences, all parties attempt to work out a set of shared reasons."[121] Deliberators do not understand the disagreement as a zero-sum conflict in which the satisfaction of some interests can be achieved only at the cost of the satisfaction of other interests. Laden maintains that people who deliberate often modify their understanding of what they wish to achieve in the process of deliberating. The parties to the deliberation are motivated to modify their original claims because they have come to recognize the normative force of reasons that support the opposed claims. When deliberators revise their original claims and reach a mutually acceptable decision about what to do, they judge the content of the agreement to be worthy on the merits. He maintains, "The aim of deliberation is not merely a mutually acceptable compromise, but rather a shared solution that each of the parties can regard as expressing her investment in the issue under discussion. It aims, to put this in Rawls's terms, at something like an overlapping consensus and not merely a *modus vivendi*."[122]

In his most recent work on the subject, Laden argues that the value of distinguishing deliberation and negotiation is hermeneutic. "Looking at an interaction as a deliberation reveals different features and possibilities than when it is seen as a negotiation."[123] Deliberation and negotiation are different "interpretive frameworks" for thinking about the activity of exchanging reasons with someone with whom one would like to come to agreement.[124] Drawing a contrast between deliberation and negotiation

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[121] Laden, *Reasoning*, p. 191.
[122] Laden, "Reasonable Deliberation, Constructive Power, and the Struggle for Recognition," p. 280.
[123] Laden, *Reasoning,* p. 185.
[124] Laden, *Reasoning*, p. 184.

allows Laden to bring to light the norms that he maintains ought to govern how people relate to each other when they attempt to resolve a conflict.[125] These norms are the Rawlsian principles that motivate the search for overlapping consensus: respect for one's fellows and a willingness to cooperate with them on fair terms. Laden argues that deliberation is a superior form of interaction to negotiation because participants who deliberate with each other abide by these norms. On his account, negotiators act like participants to compromises that take the form of modus vivendi. Their motivations for cooperating are purely self-interested; they do not respect people with whom they disagree as equal partners in constructing the terms of their shared social life.

**Negotiation about Matters that Admit Reasonable Disagreement:**

I agree with Rawls and Laden that people who disagree ought to reason with each other rather than bargain with each other. I also agree that parties to a disagreement ought to offer to their interlocutors reasons that they believe in good faith their interlocutors could accept as having normative force. I disagree, however, that it is necessary to draw a sharp contrast between deliberation and negotiation in order to elucidate the normative desirability of respecting and cooperating fairly with others. Laden appeals to Rawls's descriptive and normative claims about compromise that I argued in Chapter One are inadequate for understanding an underappreciated form of reasoned exchange whose logic differs from deliberation/overlapping consensus and negotiation/modus vivendi: principled compromise.

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[125] I thank Jon Garthoff for bringing this point to my attention in his comments on an earlier version of this chapter, which I presented at the American Philosophical Association, Central Division Annual Meeting on February 21, 2013.

Laden's account of negotiation, like Rawls's account of compromise, is flawed because it is too narrow. Laden describes accurately that people who make strategic concessions to each other construct a modus vivendi compromise. As we have seen in Chapter One, however, modus vivendi is not the only species of compromise. Because parties who resolve a disagreement by constructing a modus vivendi are not interested in why their negotiation partners are motivated to make concessions and to accept an outcome that they judge to be second-best, concerns about whether their revised proposals are reasonable do not arise. I maintain that both negotiators and deliberators can express respect for one's interlocutors as autonomous agents as they offer and assess the reasons for their claims. Laden's account of negotiation is stipulative. No intrinsic characteristics of negotiation logically prohibit it from being a process in which parties to a disagreement offer reasons in defense of claims about what course of action they should pursue jointly. For example, people who disagree about principles of justice might take as their goal reaching a joint decision about what these principles should be. They might make concessions to their interlocutors because they desire genuinely to accommodate their opposing positions. They might not view their interlocutors as obstacles whose existence is lamentable.

On my account, the primary feature that distinguishes negotiation and deliberation is that negotiators make concessions to each other and deliberators do not. When deliberators modify their original claims, they do so because they recognize that their original claims were wrong on the merits. Laden's understanding of how people might make concessions is narrow. On his account, all concessions-making involves trading and bargaining for the purpose of balancing competing interests. Laden draws a contrast

between balancing and accommodating, and he judges negatively the activity of balancing and judges positively the activity of accommodating.  Although he is correct that many negotiated agreements take the form of a modus vivendi, he does not consider that parties may be motivated by moral reasons to accommodate the views of principles advocated by their rivals.  Laden's distinction between balancing and accommodating appears to be based on the spirit with which interlocutors engage their disputants and not on a difference between how they revise their original claims about what they should do jointly.

I have a second reason for my dissatisfaction with Laden's dichotomy between deliberation and negotiation.  His account of deliberation is an insufficient tool for resolving the dilemma that motivated his inquiry: theorizing about how people who disagree with each other "can nevertheless agree to a shared form of political organization and political principles and thus legitimately structure and regulate their interactions and their lives."[126]  Laden does not acknowledge the extent to which the existence of the burdens of judgment frustrate the attempt to reach agreement on matters that concern contested moral beliefs and values.  He avoids the issue of reasonable disagreement on political principles because he focuses only on diversity of social identities and not on diversity of convictions about the meaning and the requirements of justice.

To be sure, Laden's work on social identities is a valuable contribution to Rawlsian-inspired political philosophy.  Many feminist philosophers dismiss Rawls's theory of political liberalism because they view his theory as justifying gender oppression

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[126] Laden, *Reasonably Radical*, p. 1.

rather than providing resources for criticizing relations of inequality.[127]  To his credit,

Laden takes seriously these objections.  He makes a persuasive case that critical and

constructive arguments for gender justice "might profitably be done in conversation with

Rawls's political liberalism."[128]  Moreover, Laden puts at the center of his theory of

deliberative liberalism an account of how people ought to treat each other as moral equals

while nevertheless acknowledging the role of social identities in informing their political

claims on each other.  On his account, people ought to offer what he calls "'we'-reasons"

to each other when they make joint decisions.  That is to say, "deliberators must offer

reasons to the others on the presumption that they together form a plural subject, and that

their deliberations are the deliberations of the plural subject they form together."[129]

Many critics, including feminists, argue that the Rawlsian ideal of public justification

excludes some people from participating in deliberation or permits them only on the

condition that they renounce features of their identity.  Laden agrees with these critics

that exclusion and assimilation are morally problematic and constructs an improved

theory of public justification that does not include these features.

In focusing on disagreements about political claims that make reference to social

identities, however, Laden avoids political claims that derive their normative force from

factual propositions about the world.  Such propositions involve claims about human

nature and morality.  Philosophical reflection is needed on what parties who are deciding

on constitutional essentials and questions of basic justice should do when they reject the

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[127] See, for example, John Exdell, "Feminism, Fundamentalism, and Liberal Legitimacy," *Canadian Journal of Philosophy* 24, no. 3 (1994), pp. 441-63; Sharon A. Lloyd, "Family Justice and Social Justice," *Pacific Philosophical Quarterly* 75, nos. 3-4 (1994), pp. 353-71; Eva Feder Kittay, *Love's Labor: Essays on Women, Equality, and Dependency* (New York: Routledge, 1999); Susan Moller Okin, "Political Liberalism, Justice, and Gender," *Ethics* 99, no. 2 (1994), pp. 23-43.
[128] Laden, "Radical Liberals, Reasonable Feminists," p. 26.
[129] Laden, *Reasonably Radical*, p. 96.

principles that are offered to them because they do not accept the moral beliefs and

values on which the proposed principles are based. Laden dismisses the importance of

considering what people who disagree should do when one party finds his or her

interlocutor's reason lacking because it includes a factual proposition about the world that

he or she believes is false. Laden explains,

> For now I will bracket the question of what to do about false claims about the world. It is a serious issue, but it is one all theories of practical reason have to address, and how we address it will not fundamentally change the structure of the view I am defending. At the very least, it seems as if reasonable deliberation will require that the deliberators be open to revision in light of new information about the truth or falsity of the factual content of their claims.[130]

He does not theorize about how to respond to situations in which parties to a

disagreement are deadlocked despite their observance of the norms of deliberation. His

account of how to respond to failures to construct a shared political will through the

activity of deliberation is equally terse in his recent monograph. He maintains,

> [I]n those cases where the engagement was joined as a result of the need to make some joint decision, as in the case in legislative debate, it may be that all sides have to accept that the best they can do is to all accept the outcome of a majority vote, not because it expresses the common ground they occupy but because it expresses a thinner common ground about how to resolve irreconcilable differences peacefully.[131]

Agreeing that the matter should be put to a vote seems to me to exemplify constructing a

shared political will in a minimal sense. Laden overlooks the possibility that the parties

could construct through negotiation a more content-rich shared political will in the form

of a principled compromise.

People who construct a principled compromise on a matter that admits reasonable

disagreement modify their original views because they respect their fellows as both moral

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[130] Laden, *Reasonably Radical*, p. 85. Laden first articulated this claim in his "Outline of a Theory of Reasonable Deliberation," *Canadian Journal of Philosophy* 30, no. 4 (2000), p. 566.
[131] Laden, *Reasoning*, p. 182.

and epistemic peers and wish to accommodate their rival political principles, but not

because they have been persuaded that their original views were incorrect.[132]  The

participants to the principled compromise view their preferred principles as first-best,

even after attending carefully to evidence to the contrary.  Nevertheless, they

acknowledge that opposed positions on the contested issue are equally reasonable and

that it is unreasonable to expect others ought to be persuaded to reject their preferred

principles.  The complexity of evidence on the matter and that idiosyncratic features of

the interlocutors' backgrounds influence how they interpret and assess the evidence

prevent them from determining which proposed political principle is superior.  Neither

party can accuse its dissenting interlocutor of failing to consider conscientiously the

reasons given to them or of failing to show respect.  People who accept the burdens of

judgment acknowledge that they ought not to be dogmatic about the correctness of their

preferred views in the process of making a collective decision.

Participants to a principled compromise act in accordance with Laden's primary

prescriptive norm regarding resolving conflicts: willingness to reconsider their positions

in the face of counterarguments.  They consider that they have overlooked relevant

information or that their judgment has been influenced by prejudicial background beliefs.

Nevertheless, after this conscientious assessment of their interlocutor's reasons, they may

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[132] The questions of understanding and responding to disagreement between epistemic peers are receiving increased attention by epistemologists.  See, for example, Nathan L. King, "Disagreement: What's the Problem? or A Good Peer is Hard to Find," *Philosophy and Phenomenological Research* 85, no. 2 (2012), pp. 249-72; Maria Lasonen-Aarnio, "Disagreement and Evidential Attenuation," *Noûs* 47, no. 4 (2013), pp. 767-94; Ruth Weintraub, "Can Steadfast Peer Disagreement Be Rational?" *The Philosophical Quarterly* 63, no. 253 (2013), pp. 740-59.  Although some political philosophers attend to the epistemological assumptions underlying Rawls's account of the burdens of judgment, much work on this issue remains to be done.  Jon Garthoff's "The Idea of an Overlapping Consensus Revisited" is a good example of this kind of inquiry (*Journal of Value Inquiry* 46, no. 2 [2012], pp. 183-96.)  Daniel Weinstock also distinguishes helpfully trusting and respecting disputants on epistemic grounds and on ethical grounds in "On the Possibility of Principled Moral Compromise," *Critical Review of International Social and Political Philosophy* 16, no. 4 (2013), p. 547.

not be persuaded to modify their original views on the merits. Because neither party to the disagreement views the negotiated outcome as a first-best position, their joint decision will be a compromise. Yet this compromise is an indication that they parties have formed a shared political will. They acknowledge the symmetry of their epistemic positions as well as their positions as equal co-authors of the polity's terms of social cooperation. As against Laden, a compromise agreement that is the product of negotiation and concessions-making can satisfy the norms that he argues ought to govern how people relate to each other when they attempt to resolve a conflict.

**Conclusion:**

Laden does a disservice to liberal political philosophy by understanding all forms of negotiation in a disapprobative manner. My aim in this chapter has been to make visible the need for advocates of deliberative democracy to rethink the prejudice against negotiation and to recognize interconnections between deliberation and some forms of negotiation. By expanding our understanding of how negotiators understand the activities of negotiation and concessions-making, we can see that both negotiation and deliberation can assist members of a political community to decide jointly how they should resolve contentious fundamental questions that concern moral beliefs and values. Acknowledging that negotiators and deliberators may exhibit respect and a willingness to cooperate with people with whom they disagree can help theorists produce more fruitful recommendations about how to make collective decisions about matters that admit of reasonable disagreement than simply putting the matter to a vote. If citizens can reasonably disagree about justice, as I have argued in Chapter One, people may deliberate in good faith and nevertheless fail to reconcile their opposed and equally rational claims

about constitutional essentials and matters of basic justice.  Political philosophers need to look beyond existing accounts of deliberation and theorize about other strategies for arriving at a mutually justifiable decision about what political principles constitute fair terms of social cooperation.

**Chapter Four:**
**Locating Principled Compromise in the ERA Ratification Debate**

In Chapters One and Three, I defined principled compromise and argued that it is possible that negotiation can involve reason-giving between people who respect their disputants and can take moral principles as an object. My descriptive and normative claims about principled compromise and morally-motivated negotiation have thus far been abstract. In this chapter, I use the concept of principled compromise to illuminate an empirical example of public reasoning and a proposed principled compromise about a matter of basic justice.

I argue that Betty Friedan's 1981 book *The Second Stage* is a case of principled compromise in theorizing about justice. In this popular book Friedan attempted to intervene constructively in the long-standing conflict between feminists and anti-feminists on the pressing issue of the ratification of the Equal Rights Amendment (ERA). Examining her intellectual contribution and the set of circumstances that surrounded its development and publication facilitates understanding the features of principled compromise and the motivation required of the parties to it. Because compromises are perceived generally to be motivated by only self-interested reasons, identifying cases of compromise that are motivated by both self- and other-regarding considerations can be difficult. My objective is to offer a vivid description of a suggestion that has many features of a principled compromise by carrying out a "study of the particularity and complexity of a single case, coming to understand its activity within important circumstances."[133] This case study is a piece of evidence that supports my claim that compromise does not always take the form of a modus vivendi. It also elucidates how

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[133] Robert E. Stake, *The Art of Case Study Research* (London: Sage Publications, 1995), p. xi.

people might resolve disagreements between opposed positions on how to answer a question of basic justice.

While Betty Friedan's 1963 book *The Feminine Mystique* draws popular and scholarly attention to this day,[134] her third book, entitled *The Second Stage* and published in 1981, has been forgotten by the general public and dismissed by feminist scholars for being "insufficiently revolutionary."[135] I recommend Friedan's text as a model for consensus-oriented theorists and activists for social change. *The Second Stage* is an outlier in the public debate about the ratification of the ERA because Friedan's objective was to encourage the opposed groups to modify their initial positions on what gender justice required in order to reach a mutually acceptable course of action. She acknowledged the legitimacy of concerns that opponents raised about the women's movement. Generally the documents produced by partisans were intended to increase the polarization between groups to the conflict. Theorists have overlooked the significance of *The Second Stage* for public debate in a pluralist society about gender equality. Friedan's book deserves explanation and discussion.

I interpret *The Second Stage* as an attempt to mobilize support for the Equal Rights Amendment (ERA) among people who held a range of views on the nature of gender. Friedan suggested that pro- and anti-ERA activists could find common ground if they were willing to consider the merits of views that opposed their own and to moderate their original demands in response to concerns voiced by adversaries. Although she did not use the word "compromise" to describe her recommended course of action, she

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[134] See Stephanie Coontz's "biography" of *The Feminine Mystique* and its reception, *A Strange Stirring:* The Feminine Mystique *and American Women at the Dawn of the 1960s* (New York: Basic Books, 2011).
[135] Judith Shulevitz, "Outside Agitator: Why Was Betty Friedan Ostracized by the Movement She Founded?" *The New York Times Book Review*, May 9, 1999.

suggested that both sides of the ERA ratification debate should modify their initial positions in order to reach an agreement about how to respond to a perceived social problem. Friedan attempted to bring about a gestalt shift in how advocates and opponents understand the women's movement while simultaneously persuading undecided or opposed readers to endorse the ERA. Instead of viewing the ERA ratification debate as a battle to be won or lost, constitutional amendment advocates on both sides of the issue could view the ERA as an opportunity to solve the collective problem of the law as being used to impose gender roles on citizens.

Two caveats are in order. First, I do not claim that Friedan understood herself to be recommending principled compromise. She did not employ the language of constructing a compromise. Moreover, she did not locate the motivation for the willingness to engage in compromise in political principles found in the public democratic culture. Friedan was not a democratic theorist, and she did not intend to offer a normative theory of compromise. *The Second Stage* does not address why being willing to meet with adversaries to hear their point of view on the conflict is an important aspect of democratic citizenship. Considering the specific, real-world example of Friedan's book helps me to communicate my theoretical argument that moral reasons can be given for constructing compromises on fundamental issues of justice and can facilitate a rich understanding of the complexity and dynamics of this conflict resolution strategy.

Second, to the extent that Friedan urged participants to the ERA ratification debate to engage in principled compromise, her efforts failed. Her book did not achieve its goal of bringing opposed groups into positive contact with each other and facilitating convergence on shared goals. Nevertheless, *The Second Stage* is a singular contribution

to the public debate about the ratification of the ERA from which theorists can gain insights. She attempted to open her reader's minds to the possibility that people who seem to be separated by irreconcilable differences might have more in common than they realize. Friedan recognized that parties to a disagreement cannot begin to construct a compromise until members of both groups find motivation to view their adversaries as equal authors of the terms of their shared political life.

Friedan's recommendation to opposed parties to mutually modify their original demands does not take the shape of an argument with premises that support a conclusion. I characterize her presentation of "the second stage" as what social movement theorists term a "collective action frame" for interpreting the women's movement for equality. Collective action frames are cognitive schemes that people who hold them use as they interpret reality and "render events or occurrences meaningful" to themselves.[136] A collective action frame also serves as a persuasive tool that leaders can employ to encourage commitment to social movement activity. "Collective action frames are constructed in part as movement adherents negotiate a shared understanding of some problematic condition or situation they define in need of change, make attributions regarding who or what is to blame, articulate an alternative set of arrangements, and urge others to act in concert to affect change."[137]

Friedan understood that the debate between pro-ERA and anti-ERA activists during the late 1970s and early 1980s focused on the merits of feminism and not on the merits of the amendment. I argue that Friedan's second stage frame was an attempt to persuade participants in the ERA debate that what appeared to be irreconcilable

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[136] Robert D. Benford and David A. Snow, "Framing Processes and Social Movements: An Overview and Assessment," *Annual Review of Sociology* 26 (2000), p. 614.
[137] Benford and Snow, "Framing Processes and Social Movements," p. 615.

differences between feminists and anti-feminists could be transformed in the process of constructing a principled compromise. I identify Friedan's suggested compromise as principled rather than purely self-interested because she encouraged the parties to the debate to be motivated by respect for the individual autonomy and the moral equality of their interlocutors as well as by a desire that they be able to realize in part their moral beliefs and values. Both self- and other-regarding considerations motivate the search for common ground. According to Friedan, pro- and anti-ERA activists could agree that the amendment should not be used to compel women to inhabit a particular gender role against their wishes. On her view, requiring women to assume the "liberationist" gender role that anti-ratificationists abhorred was just as offensive as requiring women to assume the "traditional" gender role that ratificationists resisted.

Although Friedan's attempt to reframe the question of women's equality failed in the early 1980s because the ERA was not ratified, I contend that *The Second Stage* offers a model for how contemporary consensus-oriented advocates of social change might employ the framing process to persuade partisans to resolve ideological disagreements through principled compromise. Instead of attempting to win a majority of supporters for a particular doctrine about sex differences and gender roles, Friedan rejected an understanding of constitutional politics as a competition between interest groups that desire to maximize their self-interest. Respecting citizens' autonomy to determine their values, beliefs, and ways of life is important when social movement activists engage in advocacy on issues that concern the U.S. Constitution. *The Second Stage* sets an example for how people who disagree with one another might answer questions of basic justice in a manner that can earn the approval of everyone.

**The Last Phase of the ERA Ratification Campaign:**

When the U.S. Senate passed the Equal Rights Amendment on March 22, 1972, and sent it to the states, ratification seemed imminent.  The text of the amendment was seemingly uncontroversial.  Section 1 of the amendment read, "Equality of rights under the law shall not be denied or abridged by the United States or any state on account of sex."  "Support was forthcoming from a vast array of political leaders, such as President Nixon, past presidents, governors and legislators.  Both major parties made the amendment part of their platforms and did so again in 1976."[138]  Although Republicans had transformed the amendment into a partisan issue in the 1980 presidential election and removed it from the party platform, national public opinion polls indicated that the ERA "enjoyed a two-to-one margin of support" in 1982.[139]  "[B]y the end of the campaign for state ratification, more than 450 organizations with a total membership of over 50 million were on record in support of the ERA."[140]  In 1978, advocates of the ERA realized that time was running out on the original deadline for ratification by three-fourths of the states.  Although twenty-two states ratified the ERA in 1972 and the amendment passed in eight additional states in 1973, the pace slowed significantly.  In the years 1974 and 1975, only four states ratified the amendment.  No states ratified it in 1976, and in 1977, Indiana became the last state to ratify the ERA.[141]  Public opinion experts who have examined popular support for the ERA at the state level "generally agree that 1977 was a

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[138] Mark R. Daniels, Robert Darcy, Joseph W. Westphal, "The ERA Won—At Least in the Opinion Polls," *Political Science and Politics* 15, no. 4 (1982), p. 578.

[139] Daniels et al., "The ERA Won," p. 587

[140] Janet K. Boles, "Building Support for the ERA: A Case of 'Too Much, Too Late," *Political Science and Politics* 15, no. 4 (1982), p. 572.

[141] "Chronology of the Equal Rights Amendment, 1923-1996," National Organization for Women, accessed April 1, 2014, http://now.org/resource/chronology-of-the-equal-rights-amendment-1923-1996/.

turning point in attitudes toward the ERA."[142] Persuaded by the arguments that the

National Organization of Women (NOW) presented, Congress approved a 39-month

extension period in October 1978. Citizens and organizations that supported the ERA

employed a range of tactics during this period to increase support for the amendment.

These tactics included conventional lobbying techniques, political action committees to

elect pro-ERA candidates, media events featuring pro-ERA entertainers, and speaking

engagements on college campuses.[143]

When the ratification deadline for the ERA passed on June 30, 1982, only thirty-

five states had approved the amendment. The last-minute campaign drives organized by

pro-ERA activists during the final two years of the ratification period failed to motivate

the legislatures of three additional states to achieve the three-fourths majority of states

required by Article V of the Constitution.

Why the ERA failed was a popular research question for social scientists in the

1980s and 1990s. Although the countermovement against the amendment led by Phyllis

Schlafly received significant media coverage in the early phase of the ratification

campaign, it was not until the late 1970s that the STOP ERA movement began to receive

scholarly attention.[144] A consensus emerged that the opposition movement played a

primary role in thwarting popular sentiment in the unratified states. Scholars argued that

the ERA ratification campaign failed because pro-ERA advocates did not understand why

women opposed the amendment. Social historians Donald G. Mathews and Jane Sherron

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[142] Serena Mayeri, Ryan Brown, Nathaniel Persily, and Son Ho Kim, "Gender Equality," in *Public Opinion and Constitutional Controversy,* eds. Nathanial Persily, Jack Citrin, and Patrick J. Egan (Oxford: Oxford University Press, 2008), p. 153.
[143] Boles, "Building Support for the ERA," p. 575.
[144] See Martha Solomon, "The Rhetoric of STOP ERA: Fatalistic Reaffirmation," *The Southern Speech Communication Journal* 44, no. 1 (1978), pp. 42-59.

De Hart claimed that ratificationists were not able to persuade opponents and skeptics of

the ERA's merits because they employed ineffective strategies for rebutting criticisms of

the amendment. "They took opponent objections apart piece by piece, as if separating

elements of the whole could demonstrate that women had nothing to fear from ERA, but

the exercise was misleading. It reinforced belief in the irrationality, ignorance, and false

consciousness of opponents and diverted attention from why the whole paradigm would

be believed."[145] Because ERA supporters did not understand the centrality of moral

beliefs and values about traditional gender roles to the personal identities and the

worldviews of many American citizens, they did not recognize the importance of

disassociating a general constitutional guarantee of equality from contested

interpretations of the meaning of sexual difference. "For millions of people the sexual

distinction was so basic a part of selfhood, and specific gender roles so firmly implanted

by the family of origin and reinforced so well by daily interaction, that changes

anticipated by ratification could be frightening."[146]

Although the idea that the ERA would produce significant changes in gender roles

was a fiction maintained by both proponents and opponents, it served as an effective tool

that anti-ERA activists employed in persuading citizens and legislators to oppose the

amendment. In *The Power of the Positive Woman*, Phyllis Schlafly argued that the ERA

would "dictate a whole new principle of family support" in legally requiring married

women to work for wages outside of the home by denying the legal responsibility of

husbands to provide financially for their wives.[147] Social anthropologist Susan Harding

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[145] Donald G. Mathews and Jane Sherron De Hart, *Sex, Gender, and the Politics of ERA: A State and the Nation* (New York: Oxford University Press, 1990), p. 155.
[146] Mathews and De Hart, *Sex, Gender, and the Politics of ERA*, p. 162.
[147] Phyllis Schlafly, *The Power of the Positive Woman* (New York: Jove Publications, 1978), pp. 84-85.

described feminist advocates of the ERA as endorsing an "androgynous family strategy" that "promotes gender-free roles for spouses regardless of the law."[148] Jane J. Mansbridge, a political scientist whose monograph on the anti-deliberative dynamics in the anti-ratificationist movement has been a touchstone for almost three decades of research on the modern ERA, suggested that pro-ERA activists would have been more successful had they downplayed the practical consequences of ratification. For example, the amendment would not have legally required husbands and wives to adopt egalitarian strategies in their marriage and child-rearing. "The only possible way to have persuaded three more state legislatures to ratify the ERA would have been to insist—correctly—that it would do relatively little in the short run, and to insist equally strongly—and correctly—on the importance of placing this principle in the Constitution to guide the Supreme Court in its long-run evolution of constitutional law."[149] Reasoned arguments for and against the symbolic importance of the amendment did not emerge in media coverage and public discussion. "Anyone who followed the debate over the ERA is likely to have been impressed by the fact that it was both grossly oversimplified and extremely antagonistic."[150]

Jane Sherron De Hart maintained that advocates of the ERA did not devise strategies by which to undermine "the intensity of the attachment to traditional gender definitions" that anti-ERA advocates experienced.[151] Anti-ERA activists argued that women already enjoyed the same constitutional rights as men.[152] Opponents argued that

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[148] Susan Harding, "Family Reform Movements: Recent Feminism and Its Opposition," *Feminist Studies* 7, no. 1 (1981), p. 69.
[149] Jane J. Mansbridge, *Why We Lost the ERA* (Chicago: University of Chicago Press, 1986), p. 4.
[150] Mansbridge, *Why We Lost the ERA*, p. 118.
[151] Jane Sherron De Hart, "Gender on the Right: Meanings Behind the Existential Scream," *Gender and History* 3, no. 3 (1991), p. 247.
[152] See Phyllis Schlafly, *The Power of the Positive Woman* (New Rochelle, NY: Arlington House, 1977).

removing what sex-based classifications remained in the law would lead to a widespread subversion of gender roles. They believed that "ERA was to be the legal means of imposing feminists' ideas about gender roles on America."[153] After conducting ethnographic research on rank and file members of the countermobilization, De Hart noted that anti-ERA activists "spoke as if feminists had violated them. Feminists were not content with changing themselves. They also wanted to force other women into new roles."[154]

Antiratificationists valued a social order in which men and women followed and maintained fixed gender categories. They viewed gender as "a biologically, physically, spiritually defined thing; an unambiguous, clear, definite division of humanity into two."[155] Feminists strongly opposed the belief in a fixed social meaning of sexual difference. Because anti-ERA activists saw the nature and social meaning of gender as irreconcilable differences between them and feminist supporters of the ERA, they did not take seriously the arguments about the merits of the amendment. Pro- and anti-ERA activists did not think that they shared enough common ground to make worthwhile the effort to resolve specific disagreements about the implications of the amendment for law and society. Mathews and De Hart explained,

> The two sides of the issue were not symmetrical, that is, for every argument supporting ratification, there was not a counterargument addressed to that particular way of understanding the issue. Both sides talked past each other. Arguments representing strands within the webs of meaning were held in place by whether or not the people making them thought that traditional ways of thinking about gender were adequate for the equitable treatment of women.[156]

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[153] De Hart, "Gender on the Right: Meanings Behind the Existential Scream," p. 251.
[154] De Hart, "Gender on the Right: Meanings Behind the Existential Scream," p. 257.
[155] De Hart, "Gender on the Right: Meanings Behind the Existential Scream," p. 256.
[156] Mathews and De Hart, *Sex, Gender, and the Politics of ERA*, p. 223.

Pro- and anti-ERA activists spoke past one another in their discussion of the proposed amendment. Although the question at hand was whether making legal classifications by sex is constitutional, ERA opponents understood the amendment as a universal promotion of "masculine" values. "Feminism seemed to demean what women traditionally had valued and, through the Equal Rights Amendment, seemed about to be written into the fundamental law of the land."[157] Efforts by ERA advocates to explain that women would benefit from receiving equal rights as men failed to persuade opponents who "did not need feminist political theorists to tell them that […] the language of equality and individual rights is 'masculine.'"[158] According to Mathews and De Hart, pro- and anti-ERA activists missed an opportunity to work together to challenge a male standard of behavior that excluded and denigrated affiliative values. "In some ways, women on each side shared a skeptical attitude toward men and masculinity, an attitude that may be the means of future cooperation among women."[159]

**Frame Transformation as a Strategy of Persuasion:**

The disillusionment with traditional male social roles that Betty Friedan experienced and observed in other women inspired her argument that the women's movement needed to shift its orientation from its "first stage" to a "second stage." Friedan knew well the first stage of the modern women's movement. The publication of her book *The Feminine Mystique* served as a catalyst for the emergence of the women's movement. *The Feminine Mystique* was interpreted by many of its middle-class female readers as a call to abandon completely the care-giving roles of wife, mother, and

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[157] Mathews and De Hart, *Sex, Gender, and the Politics of ERA*, pp. 152-3.
[158] Mathews and De Hart, *Sex, Gender, and the Politics of ERA*, p. 220.
[159] Mathews and De Hart, *Sex, Gender, and the Politics of ERA*, p. 223.

homemaker for paid work and sexual liberation. Underlying this recommendation to resist sex-role stereotypes was an endorsement of assuming the ability and the courage to define oneself for oneself. She urged women to "be recognized as a person, an individual in her own right,"[160] rather than simply being seen "as someone else's wife or mother, defined by her service role in the family."[161] Housewives should not feel guilty if they were unfulfilled by the domestic tasks that they were expected to carry out and if they desired to take on projects and goals outside of the home. The objective of the first stage of the women's movement was "full participation, power and voice in the mainstream, inside the party, the political process, the professions, the business world."[162]

Friedan co-founded the National Organization for Women (NOW) in 1966 to challenge systemic barriers to women's becoming full human beings. She also served as its first president. NOW supported women as they challenged sex discrimination in the workplace and in the law. Friedan organized the Women's Strike for Equality on August 26, 1970, which brought the women's movement for equality to the attention of the mainstream media.

During the first stage of the women's movement for equality, participants saw as the problem the exclusion of women from opportunities that were open previously only to men. Although the ERA was pending in the states, a series of significant equal protection cases had secured the pro-ERA activists' central demand: the principle of anti-discrimination on the basis of sex. Legal scholars would term the interpretation of the Fourteenth Amendment as a guarantee of protection from sex-based discrimination by the

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[160] Betty Friedan, *The Second Stage* (New York: Summit, 1981), p. 18.

[161] Friedan, *The Second Stage*, p. 33.

[162] Friedan, *The Second Stage*, p. 15.

state the "de facto ERA."[163] Friedan noted that the women's movement played an

important role in changing the legal landscape of sex equality. Women have secured a

"semblance of equal opportunity" in the course of a decade.[164] She did not deny that sex-

based classifications remain in the law. This fact is one reason she contended that the

ERA remained relevant.

As women who had the privilege of being a full-time mothers and housewives

began to assume the traditional roles and responsibilities of men by entering the paid

labor force, they found this gender role just as undesirable as the traditional female

gender role. Independence from the financial support of men did not turn out to be so

desirable as feminists had thought. Many women "shifted their focus from home and

family to job or career, exchanging one half-life for another,"[165] by becoming "passive

and acquiescent to the excessive rigidities of masculine careerism."[166]

Friedan acknowledged that many women who had pursued work outside of the

home were unhappy and that divorced women were unlikely to have the skills and

training to enable them to compete as equals with men in the workforce. To force

women to assume the role of the "superwoman" was wrong and so too was taking up

male values that are associated with careerism. Putting career first was not normatively

superior to putting one's family first.

Friedan granted that opponents have legitimate concerns about the first stage of

the women's movement because it "fought within, and against and defined by that old

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[163] See Reva B. Siegel, "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA," *California Law Review* 94, no. 5 (2006), pp. 1323-1419.
[164] Friedan, *The Second Stage*, p. 24.
[165] Friedan, *The Second Stage*, p. 45.
[166] Friedan, *The Second Stage*, p. 46.

structure of unequal, polarized male and female sex roles."[167]  Friedan argued that it was

wrong of the first stage of the movement to deny "the reality of woman's own sexuality,

her childbearing, her roots and life connection in the family."[168]  She regretted that

radical factions of the women's movement "played into the fears and violated the feelings

and needs of a great many women, and men, who still look to the family for security,

love, roots in life."[169]  She reassured opponents and skeptics that the second stage of the

women's movement would correct this overemphasis on career with a positive

endorsement of the affiliated virtues associated traditionally with women.

Although Friedan did not mention her by name, she conceded that Phyllis

Schlafly and other defenders of the value of women's traditional gender roles and family

responsibilities were correct in noting that practical obstacles might make it difficult for

women to combine work and family responsibilities.  But instead of agreeing with them

that we should return to traditional sex roles, she argued that everyone would benefit if

social arrangements were no longer defined in male terms.  Instead of directing their

critical energies at women, Friedan argued that feminists and antifeminists should work

together to assess critically the traditional meaning of masculinity that has dominated

law, politics, business, and family life.  By stressing the opportunity to work together

throughout *The Second Stage*, she encouraged movement participants and potential

adherents to make the transition into a "second stage" in which feminists and non-

feminists could agree on a mutually acceptable course of action.

Friedan did not present her argument in a logical form that opponents of the ERA

should not fear the movement for women's equality.  Instead of constructing an argument

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[167] Friedan, *The Second Stage*, p. 29.
[168] Friedan, *The Second Stage*, p. 39.
[169] Friedan, *The Second Stage*, p. 32.

"piece by piece" in an analytical fashion, she presented a picture that she hoped would have "evocative power" for her readers.[170] According to social movement theorists, presenting a picture that helps one's audience to interpret its experience in a way that leads its members to work together to make change is a species of "movement framing process."[171] Beginning in the early 1980s, social movement scholars began to characterize the activity of influencing how others make sense of their experience as "framing." Framing is a process of influencing the production of meaning on an issue by "focus[ing] attention by punctuating or specifying what in our sensual field is relevant and what is irrelevant."[172] Theorists who study the framing activity of social movement leaders are interested in "collective action frames" that "offer strategic interpretations of issues with the intention of mobilizing people to act."[173]

Friedan countered the "apocalyptic future" that Phyllis Schlafly claimed would result from a feminist-inspired revolution in gender norms by detailing the ways gender roles are already being made more flexible in society by forces that are not connected explicitly to feminism.[174] For example, Friedan recounted her observations and conversations with West Point cadets and officers about how "the men have begun to change at West Point since the women have come in."[175] Before women were admitted to the military academy, cadets were trained only to be warriors. Because female cadets and officers were prohibited from serving in combat roles, implementing the co-ed policy

[170] Mathews and De Hart, *Sex, Gender, and the Politics of ERA*, p. 155.
[171] Benford and Snow, "Framing Processes and Social Movements," p. 614.
[172] David A. Snow, "Framing Processes, Ideology, and Discursive Fields," in *The Blackwell Companion to Social Movements*, eds. David A. Snow, Sarah A. Soule, and Hanspeter Kriesi (Malden: Blackwell, 2004), p. 384.
[173] John A. Noakes and Hank Johnston, "Frames of Protest: A Road Map to a Perspective," in *Frames of Protest: Social Movements and the Framing Perspective*, ed. Hank Johnston and John A. Noakes (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2005), p. 5.
[174] Mathews and De Hart, *Sex, Gender, and the Politics of ERA*, p. 154.
[175] Friedan, *The Second Stage*, p. 175.

forced the institution to reevaluate and broaden its educational mission. Including

women at West Point expanded career choices for men and allowed men to subvert

gender stereotypes. An army officer told Friedan, "Now, with the entrance of women,

the men are choosing other options—all hatches are open, the top men go to graduate

school. Suddenly, West Point is training managers, democratic leaders, not war-fighting

oriented."[176] Cadets and officers now express concern that leaders who embody an

attitude of authoritarian machismo are less likely to be effective as leaders who are

capable of empathizing and care, two activities that are traditionally associated with

women. Another officer commented,

> I've learned a lot about myself since we let the women in; it's challenged so much
> we never questioned before. Within this all-male environment, men were
> punished for being sensitive, flexible—condemned for being weak, cowardly, if
> they admitted these fears, these very questions. So West Point actually fostered a
> phony, false strength, covering up unadmitted weaknesses and inability to cope
> with reality, alienating men from their own real feelings and the realities of
> leading others.[177]

Although the female cadets admitted that some classmates and instructors treated them

differently because of their gender, Friedan reported that many of the women felt that

they were judged by their individual strengths and weaknesses rather than by

stereotypical assumptions about "women" as an alleged natural kind.

Friedan's "second stage" frame includes two defining characteristics. First, she

argued that advocates of women's equality should cease viewing anti-ERA activists and

traditional homemakers as adversaries and instead should see them as potential coalition

partners. Ushering in the second stage of the movement for equality and liberation

should be a collaborative endeavor. The relationship between pro- and anti-ERA

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[176] Friedan, *The Second Stage*, p. 165.
[177] Friedan, *The Second Stage*, p. 176.

activists was characterized formerly by mutual suspicion and mistrust.  Friedan's desire

was for members of society to commit jointly to recognizing the principle of equality.

She addressed her imagined audience in *The Second Stage* as a group that includes men

and women, participants in the women's movement and outsiders.  Her goal was to

persuade all people, regardless of their relation to feminism, to recognize the importance

of the principle of equality that the ERA would guarantee.

Although many participants in the women's movement endorsed the ERA, their

understanding of how the principle of equality would be applied was outdated because

they denigrated women who chose willingly to derive their satisfaction from participating

in family life rather than in the paid workforce.  Friedan acknowledged that women might

choose freely to behave as traditional gender roles dictate.  Although feminists might

object personally to this way of life, she argued that they should not use political means

to prevent it.  Free choice is a key factor in the modification of gender roles, but instead

of emphasizing the value of free choice, she stressed the harm of coercion.  Both

feminists and antifeminists recognized that coercion was unjust and undesirable.  Each

group resented the efforts of the other to codify its ideas about gender in the law.

Second, Friedan contended that the social and political changes desired by

participants in the women's movement should benefit women, men, and society as a

whole.  It should take as its objective the issues that affect all human beings.  In first-

stage feminism, women were understood as a separate interest group.  Originally the

women's movement for equality was framed in terms of women's expressing grievances.

By 1981, many of the movement's goals in preventing discrimination in the law had been

secured.  Friedan stressed that the objective of the second stage was to achieve a livable

form of equality by ensuring that both women and men had the opportunity to make meaningful choices about what goals to pursue in life. Her focus was on something that men and women could enjoy equally: human satisfaction. Family-work balance was a key determinate of human satisfaction. The sex-role revolution in which she was interested was one aspect of a larger reform effort. She desired the modification of work practices such that both women and men could choose to work outside the home and to participate in family and domestic life.

Friedan contended that citizens who desired to "get on with solving the concrete, practical, everyday problems of living, working, and loving as equal persons" ought to work to make fixed gender roles more flexible and to remove the stigma of choosing activities that had been associated primarily with members of the opposite gender.[178] Women and men stood to benefit from modifying the traditional gender roles. She recommended an attitude of pluralism that respects the ability of women and of men to decide who they are and what they want to do without constraint by externally-imposed sex-role norms. One of Friedan's interviewees confided, "I've had enough of being told the right way to live as a feminist."[179] Friedan acknowledged that women could find fulfillment in many patterns of life. "There may be various paths and choices possible for women today, with different tradeoffs and payoffs, in different patterns at different times, rather than that single pattern of lifelong full-time wife and mother, or lifelong male-career pattern, or even a simple combination of those two confining and possibly obsolete paths."[180] She insisted that men had an important role to play in constructing new forms

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[178] Friedan, *The Second Stage*, p. 30.
[179] Friedan, *The Second Stage*, p. 57.
[180] Friedan, *The Second Stage*, p.69.

of social life.  Men and women needed to support one another as they tried new ways of being in the world.

A minority of feminists considered the solution to the problem of reconciling the values associated with masculinity and femininity is the elimination of gender categories.[181]  In their view, the problem is that society affords public recognition to physiological sex differences between people.  Their goal was to bring about a social and political order in which human beings are not classified according to the categories "male" and "female."  In contrast, Friedan presented the vision of a polity in which relationships between men and women can be egalitarian without the abolition of gender categories.  Men and women should not be coerced or steered by law to adopt a gender identity that is not their construction.  Requiring citizens to adopt a sex-neutral gender identity would equally violate requiring citizens to act within the restraints of traditional male and female sex roles.  Friedan intended to construct proposals for social change that are based on principles that all members of society could reasonably be expected to accept, such as the principles of non-coercion and respect for individual autonomy.

**The Second Stage and Principled Compromise:**

ERA advocates and opponents disagreed fundamentally about the importance of gender roles.  For many conservatives, tradition and authority had normative force.  On this view, there are substantively correct ways that men and women should act.  Their understanding of gender roles conflicts with the social constructionist view offered by feminists.  Both pro- and anti-ERA activists accused their opponents of attempting to

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[181] See Alison Jaggar, "On Sexual Equality," *Ethics* 84, no. 4 (1974), pp. 275-291 and Louise Antony, "Back to Androgyny: What Bathrooms Can Teach Us about Equality," *Journal of Contemporary Legal Issues* 9 (1998), pp. 1-20.

enshrine their respective moral beliefs and values in the Constitution. Friedan recognized that the disagreement on whether gender was constructed or was part of the natural order would not be solved by one side's persuading the other that its view was incorrect. Again, although she did not use the term "compromise" in her book, I argue that Friedan's proposal to move beyond the conflict on sex roles between the women's movement and the anti-ERA countermovement can be understood as a principled compromise. Keeping the debate on the ERA at a high level of generality allows potential supporters to express their affirmation of the principle of sex equality while permitting them to hold a plurality of views about the relative importance of gender roles and what substantive forms they should take. She suggested an outcome that both parties could likely accept as an alternative to either persuading their opponents or being defeated by them.

A compromise is a form of dispute resolution that requires both parties to give ground by making concessions. The original goal of both ERA advocates and opponents was to garner a majority of support for their conception of gender norms, which would give them the legitimate authority to impose their moral beliefs on citizens who disagreed and who held a different view of gender norms. In the first stage of the conflict between the women's movement and cultural fundamentalists, the parties to the disagreement considered their views to be comprehensive. Friedan attempted to reframe the debate over legal equality such that it was not necessary for the involved parties to agree on the truth about sex roles in order to resolve their disagreement. In her call for movement participants to shift their understanding of their cause from the first to the second stage, Friedan encouraged feminists and anti-feminists to relinquish their desire to realize fully

in the basic structure of society their personal beliefs about the most accurate or most beneficial way of conceiving gender and gender norms. Instead she insisted they ought to adopt the position that citizens should be permitted by law to hold a range of beliefs about sex roles. Each side of the debate should reject the view that its ideological claims ought to be accepted universally by members of the polity. Principled compromise, understood as a strategy for living together justly, requires recognizing the equal ability of fellow citizens to make free choices about their beliefs, values, and worldviews.

Friedan did not describe the second stage of the women's movement as an attempt to balance the extreme demands of radical feminists and antifeminist conservatives, although sometimes she was interpreted this way. A member of the audience in a speech given in her hometown of Peoria, Illinois, told a reporter for *The New York Times*, "She makes it sound like it's not real radical. She points out both sides of the spectrum […] She's sort of in the middle and so are we."[182] A more accurate interpretation of Friedan's proposal was that she endorsed a moral position that would permit the accommodation of a range of views about gender roles and that would permit individual citizens to work out for themselves their relation to gender and gender roles. The values she championed were "human freedom and individual choice."[183] Friedan lent herself to be interpreted as being "sort of in the middle" because she was willing to accommodate her opponents' views in order to reach agreement on moral beliefs and values that could be shared. Although Friedan held a partisan view in favor of the ERA and saw *The Second Stage* as an instrument by which to mobilize support for the amendment, she wished to persuade

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[182] Enid Nemy, "Back Home to Peoria—and a Sequel to 'Feminine Mystique," *The New York Times*, May 21, 1976.
[183] Betty Friedan, "Women on the Firing Line," *The New York Times*, October 28, 1984.

her opponents that the ERA was a constitutional change that everyone had moral reasons to accept.

Friedan's proposed policy of accommodation required both feminists and antifeminists to give ground by willingly constraining the comprehensiveness of their moral beliefs about sex roles. Defenders of traditional family values would have to acknowledge the acceptability of multiple family forms. Feminists would have to acknowledge that caretaking labor was genuinely valuable from the perspective of many women and that women might have consented to family forms that seem patriarchal from a feminist perspective. Gender conservatives would have to cease advocacy for public policies that discourage women from working outside of the home. All women would have to acknowledge that separating care-work from sex roles entailed that men should be permitted to share in the responsibilities of rearing children and caring for loved ones. Neither feminists nor antifeminists would have a right to impose on fellow citizens their preferred conception of gender roles.

Friedan did not attempt to prescribe the content of the choices of women and men. She refused to make claims about having the final and complete truth about which gendered behavior led to personal fulfillment. ERA activists in the first stage denied the value of the affiliative virtues because the activities of nurturing and providing care had been seen traditionally as female. She had learned from the negative consequences of the feminist reaction against families and partnership with men that feminists do not have a privileged insight about which gender roles are best for society. Friedan intended to persuade participants, opponents, and observers to adopt a way of thinking about sex roles that permitted people freely to construct their lives. She called for accommodation

of pluralism rather than for a sex-neutral society.  Friedan desired that people work

together to create a society in which women and men could develop their personalities

with or without reference to traditional gender role stereotypes.

Friedan's accommodating approach is motivated by both self- and other-regarding

considerations.  Her motivation for writing *The Second Stage* was to see an improvement

in the subjective well-being of men and women through efforts such as the ratification of

the ERA.  Although this goal was partisan in nature, she also desired to facilitate

convergence on shared goals by bringing opposed groups into positive contact with each

other.  Friedan realized that making concessions could help ERA advocates achieve the

goal of passing the amendment in three additional state legislatures.  She also realized

that advocates of the ERA could increase allegiance to the principle of equality more

easily if they did not associate directly the ERA with any particular conception of sex

roles.  Persuading antagonists to modify their position on women's equality could have

influenced positively efforts to meet the requirement for ratification before the deadline

on June 30, 1982.

Friedan's proposed second stage is guided by the norm of respect for autonomous

choice because the constitutional guarantee of women's equality under the law should be

founded on the democratic principle of mutual consent rather than on force.  Her restraint

in trying to persuade her audience to accept her conception of sex roles is grounded in

recognition of reasonable disagreement about questions of gender justice.  She wanted

feminists to live in peaceful coexistence with people who held a range of views about

human flourishing.  The cooperative approach set out in the frame of the second stage

reflects her belief that settling the rules of a democratic political community is a joint

activity.  The principle of non-coercion provides each of the parties with a reason for

compromise that outweighs its commitment to instituting in the political domain the truth

of its preferred conception.  People who hold very different conceptions of sex roles

could agree to the ERA because it would not enshrine a particular conception of gender

in the amended Constitution.  Women and men do not have to reject their beliefs about

gender or about how men and women ought to relate to each other in order to be able to

endorse the equality of the sexes under the law.

Friedan's proposed compromise did not require advocates to alter their judgments

that their particular conceptions of sex roles are true or are the most normatively worthy

conceptions to hold.  Moving to the second stage does not entail that the activity of

correction has occurred.  Partisans must simply modify how comprehensively they

understand their conceptions of sex roles to be.  Although they may continue to maintain

that only their view is correct, each side must refrain from using the democratic process

to impose its beliefs about the nature of gender on people who disagree.  Members of the

women's movement might earnestly believe that women should have projects outside of

the home, but if they accept the terms of the second stage, they will not use coercive

political power to impose this view on dissenters. Likewise, defenders of cultural

fundamentalism will not seek to enshrine in the basic structure of the polity their belief in

the fundamental duality of the sexes.

**Resistance to the Second Stage:**

Many feminist readers were shocked that one of the leaders of the modern

women's rights movement in the United States would fail to discuss the possibility of

patriarchal relations within family forms that women chose freely.  They claimed that

Friedan "sold out to the male and female conservative right" and that the book "may be

interpreted as a retreat or a repudiation of all that the women's movement has fought for

in the last twenty years."[184]  The Pulitzer-Prize winning journalist Susan Faludi

contended infamously that "of all the declarations of apostasy, *The Second Stage* had the

potential to be the most damaging to the feminist cause."[185]  She interpreted Friedan as

pandering to conservatives by valuing positively women's caretaking, by downplaying

social issues like rape and abortion, and by stressing that the women's movement should

look to changing attitudes and customs within civil society as a resource rather than to the

coercive power of the state.  "By accepting the New Right language, Friedan has walked

right into the New Right's 'pro-family' semantic trap.  She is reacting to the backlash

rather than setting her own agenda."[186]

Friedan's critics offered their assessment of *The Second Stage* from the

perspective of interest group pluralism, which political scientists note is "[t]he dominant

framework for understanding public policymaking in the United States."[187]  In their view,

feminists and anti-feminists were engaged in a contest for influence and power.  Faludi

failed to recognize Friedan's respect for the principles of non-coercion and respect for

individual autonomy and her democratic commitment to including moderates and

conservatives in the joint project of constructing the Constitutional text and interpreting

its meaning.

[184] Nan Robertson, "Betty Friedan Ushers in a 'Second Stage'" *The New York Times*, October 19, 1981.
[185] Susan Faludi, *Backlash: The Undeclared War against American Women* (New York: Crown, 1991), p. 321.
[186] Faludi, *Backlash*, p. 324.
[187] Matthew C. Stephenson and Howell E. Jackson, "Lobbyists as Imperfect Agents: Implications for Public Policy in a Pluralist System," *Harvard Journal on Legislation* 47, no. 1 (2010), p. 1.

Both constitutional amendment advocacy groups rejected Friedan's suggestion to transform their vision of the women's movement for equality. The primary feature of the transformation that she recommended was restructuring their efforts to accommodate their opponents' vision of gender roles in the last year of the ratification campaign. Instead, feminists and antifeminists wanted their conception of gender to be comprehensive and to be realized fully in the polity. They did not consider the real possibility that the nature of gender and its role in human life is a matter that permits reasonable disagreement. They preferred to cast judgments from their partisan perspective on the issue of a constitutional guarantee of sex equality under the law rather than to follow Friedan's strategy of opening up a space for fellow citizens to make choices freely, including choices that one may view from an outsider's perspective as misguided or inauthentic.

**Conclusion:**

In this chapter, I described the shift in understanding of the women's movement for equality that Betty Friedan attempted to persuade readers of *The Second Stage* to adopt. Friedan recognized that the association of the ratification of the ERA with support for feminism was hindering advocacy efforts for the constitutional amendment. She recognized the culture war that fueled resistance to the effort to ratify the ERA and the need for defenders of the proposed amendment to modify their objectives and rhetoric. In the years between the amendment's passage in Congress and its defeat in 1982, the ERA became "a potent symbol of partisan and ideological polarization."[188] *The Second Stage* was an attempt to make the changes in traditional notions of women's appropriate

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[188] Serena Mayeri, "A New E.R.A. or a New Era? Amendment Advocacy and the Reconstitution of Feminism," *Northwestern University Law Review* 103, no. 3 (2009), p. 1230.

place in society seem less antagonistic in nature by characterizing the movement for

equality as beneficial to men and to women who preferred to adhere to the traditional

female gender role.  Friedan attempted to characterize the ERA as a way to make

progress on a work-family life balance.  Modifying the conditions under which adults

care and labor would facilitate the flourishing of everyone.  Friedan did not pass moral

judgment on women's choices to participate in the domestic realm; rather she strove for

equality of opportunity for men and women to choose their ways of living.  The respect

for individual autonomy she championed in *The Feminine Mystique* is present in this later

book.  My interpretation of Friedan's *The Second Stage* highlights that she recognized

that "rarely can movements completely realize their aims in law.  More often, a

movement's aims are transformed in the quest."[189]  When the aims of a social movement

pertain to a moral matter that admit reasonable disagreement, this transformation

motivates partisans to show respect to others who hold competing views that are not

rationally inferior to the views that they prefer by accommodating values and beliefs that

they would otherwise exclude.

  Some social movement scholars who have played an important role in developing

the framing approach to understanding collective action lament that "too few movement

scholars have made actual framing activity the focus of empirical inquiry."[190]  "We lack

studies of negative cases, as when framings fail to stimulate collective action."[191]

Friedan's effort appears to be a negative case study of a framing attempt from the short

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[189] Jack M. Balkin and Reva B. Siegel, "Principles, Practices, and Social Movements," *University of Pennsylvania Law Review* 154, no. 4 (2006), p. 950.

[190] David A. Snow and Robert D. Benford, "Clarifying the Relationship Between Framing and Ideology," in *Frames of Protest: Social Movements and the Framing Perspective*, eds. Hank Johnston and John A. Noakes (Lanham, MD: Rowman & Littlefield, 2005), p. 210.

[191] Robert D. Benford, "An Insider's Critique of the Social Movement Framing Perspective," *Sociological Inquiry* 67, no. 4 (1997), p. 412.

term perspective. Although her book was reviewed in the popular media, the language

and substance of second stage feminism did not take hold. Today *The Second Stage* is

neither read widely by popular audiences nor discussed by scholars.[192] Contemporary

theorists do not recognize Friedan for her contribution to "reshaping the work-family

debate."[193] Although her attempt to reframe the movement for women's equality failed

in the early 1980s, Friedan's effort to open up possibilities for men and women was

successful in the long term. The journalist Judith Shulevitz notes, "These days she's

mostly written off as obsolete—too bourgeois for left-wing feminists, too feminist for the

family-values right, and too kooky for everyone else […] But Friedan's feminism is not

irrelevant. We just can't see it anymore."[194]

Not being able to see easily the influence of sex-based stereotypes in the daily

lives of women and men is a success indicator of Friedan's approach to the pursuit of

gender justice. It is a sign that members of a society have reached agreement on the

importance of interacting with people as individuals rather than interpreting them

primarily as members of a sex class. Examining Friedan's *The Second Stage* and the set

of circumstances in which it intervened facilitates an understanding how someone

recommended the strategy of principled compromise. *The Second Stage* offers promise

to contemporary consensus-oriented advocates of social change that the framing process

can persuade partisans to negotiate with their opponents and to accommodate their

concerns.

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[192] Randy Lee's "A Look at God, Feminism, and Tort Law" is an exception. See *Marquette Law Review* 75, no. 2 (1992), pp. 369-408.
[193] For an example of contemporary recommendations that are congruent with those Friedan offers in *The Second Stage*, see Joan C. Williams, *Reshaping the Work-Family Debate: Why Men and Class Matter* (Cambridge, MA: Harvard University Press, 2010) and Hanna Rosin, *The End of Men: And the Rise of Women* (New York: Riverhead Books, 2012).
[194] Shulevitz, "Outside Agitator."

**Chapter Five:**
**Shared Responsibility for Public Justification**

In the previous chapters I have appealed to Rawls's idea of public justification to defend the goal of reaching agreement on the terms of our shared political life. The idea of public justification grounds his claim that reasonable citizens ought to be able to accept for moral reasons the constitutional essentials of a polity if it is just. Rawls termed this claim "the principle of liberal legitimacy."[195] A polity that is legitimate has a right to exercise coercive political power over its citizens. According to Rawls's understanding of legitimacy, if a polity's constitutional essentials can be rejected for moral reasons by citizens who respect each other as equals and who are willing to cooperate with their fellows on fair terms, then the polity is not legitimate.

In Chapter One, I argued that citizens of a pluralist democracy who hold strong moral convictions can accept the principle of legitimacy as a principled compromise. Citizens who prefer, all things considered, that the polity realize fully their moral beliefs and values may concede this desire for moral reasons and agree that political cooperation should be guided by terms that everyone can accept. To use Rawls's language, such citizens "seek an agreed basis of public justification in matters of justice."[196] Having recognized the normative force of the principle that decisions about the basic political principles should be acceptable to all reasonable members of the political community, these citizens are committed to reaching mutually acceptable agreements on the content of particular constitutional essentials.

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[195] John Rawls, *Political Liberalism*, expanded edition (New York: Columbia University Press, 1996), pp. 137, 217, 224.
[196] Rawls, *Political Liberalism,* p. 150.

In Chapter Three, I agreed with Laden that deliberation on constitutional essentials should be "reasonable," which is to say that citizens should provide each other with reasons that they believe their interlocutors will recognize as having normative force for them. As against Laden, however, I argued that people can also satisfy the norms of reasonableness when they negotiate and make concessions on matters that admit reasonable disagreement. In Chapter Four, I argued that Betty Friedan encouraged activists who defended opposed views about how their polity should decide a matter of basic justice to deliberate and to negotiate reasonably.

Many philosophers have criticized Rawls's principle of liberal legitimacy and its attendant idea of public justification.[197] In this chapter I focus on the criticisms offered by Simon Căbulea May. May argues that a polity can be legitimate even if some reasonable citizens reject the constitutional essentials for moral reasons. So long as the constitutional order "respects the equal status of all citizens" and "effectively guarantees the basic liberal rights and entitlements necessary to participate in political processes on equal terms," the polity satisfies what he calls "the democratic principle of legitimacy."[198] May stresses that legitimacy and justice are distinct concepts and that legitimacy is the property that determines whether the constitutional essentials of the polity should be recognized as binding on its members. On his account, a political community can be "well-constituted" even if reasonable citizens reasonably reject its constitution.[199]

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[197] See, for example, Gerald Gaus, *Justificatory Liberalism: An Essay on Epistemology and Political Theory* (New York: Oxford University Press, 1996); John Horton, "Rawls, Public Reason and the Limits of Liberal Justification," *Contemporary Political Theory* 2, no. 1 (2003), pp. 5-23; David A. Reidy, "Reciprocity and Reasonable Disagreement: From Liberal to Democratic Legitimacy," *Philosophical Studies* 132, no. 2 (2007), pp. 243-91; Steven Wall, *Liberalism, Perfectionism, and Restraint* (Cambridge: Cambridge University Press, 1998).
[198] Simon Căbulea May, "Religious Democracy and the Liberal Principle of Legitimacy," *Philosophy & Public Affairs* 37, no. 2 (2009), p. 136.
[199] May, "Religious Democracy," p. 148.

May's claims about legitimacy are related to his opposition to principled compromise in the domain of politics. Unlike Rawls and Laden, May recognizes that compromise is a phenomenon that deserves sustained philosophical attention. In fact, May introduced the term "principled compromise" and distinguished it from other species of compromise.[200] His argument against principled compromise is not based on a narrow and stipulative understanding of compromise.

My aim in this chapter is to defend principled compromise against May's criticisms. This chapter consists of three sections. In the first section I present May's argument that citizens of a pluralist democracy do not have principled reasons to compromise about constitutional essentials. He contends that only people who "share responsibility for ends" have principled reasons to make concessions and to accept a joint course of action that they judge conscientiously to be morally inferior to an alternative.[201] Appealing to an "account of the social division of responsibility" that he attributes to Rawls, May argues that citizens do not share responsibility for the successful pursuit of their ends, which he understands as their personal desires to pursue their moral, philosophical, and religious commitments.[202]

In the second section, I argue against May's interpretation of Rawls's understanding of the collective sphere of responsibility. He claims that Rawls viewed citizens as "shar[ing] responsibility for reaching correct decisions through deliberative processes in which all have equal standing."[203] May ignores that Rawls's theory of

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[200] Simon Căbulea May, "Principled Compromise and the Abortion Controversy," *Philosophy & Public Affairs* 33 (2005), pp. 317-48.
[201] Simon Căbulea May, "Moral Compromise, Civic Friendship, and Political Reconciliation," *Critical Review of International Social and Political Philosophy* 14, no. 5 (2011), p. 597.
[202] May, "Moral Compromise, Civic Friendship, and Political Reconciliation," p. 582.
[203] May, "Moral Compromise, Civic Friendship, and Political Reconciliation," p. 596.

political liberalism "does without the concept of truth" and pursues instead courses of action that are reasonable.[204]  Rawls maintains, "An essential feature of a well-ordered society is that its public conception of justice establishes a shared basis for citizens to justify to one another their political judgments: each cooperates, politically and socially, with the rest on terms all can endorse as just.  This is the meaning of public justification."[205]  I argue that in Rawls's theory of political liberalism citizens share responsibility for constructing constitutional essentials that are mutually acceptable.

In the third section, I offer to the reader reasons for preferring Rawls's understanding of democratic community to May's understanding of democratic community.  I hope to move readers to endorse "a community in which citizens attempt to build bridges toward reasonable others with whom they disagree, rather than maximizing the extent of their policy victories, at the cost of contributing to a 'winner-take-all' society."[206]  Rawls's theory of political liberalism presents an account of democratic community in which no member is alienated from the fundamental terms of political life.  Readers who find persuasive the claim that citizens have shared responsibility for articulating basic political principles that can be justified publicly can use May's account of the conditions of principled compromise to defend principled compromise on matters of basic justice.

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[204] Rawls, *Political Liberalism*, p. 94.

[205] John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, MA: Harvard University Press, 2001), p. 27.

[206] Daniel Weinstock, "On the Possibility of Principled Moral Compromise," *Critical Review of International Social and Political Philosophy* 16, no. 4 (2013), p. 552.

**May's Arguments against Principled Compromise:**

"Principled Compromise and the Abortion Controversy" is May's first statement

of his views on the ethics of compromise. In this article May intends "to cast doubt on

the very idea of principled compromise."[207]  He argues that people never have what he

calls "principled reasons" to accept a political course of action that they judge

conscientiously to be morally inferior to an alternative political course of action. On

May's account, a political position that is not the morally superior position does not

deserve accommodation as a matter of principle. He critically examines principles that

some philosophers allege generate reasons for compromise and is not persuaded by these

arguments. For example, May argues that it does not follow from the fact that opponents

on both sides of a morally complex issue may be mistaken that resolving the

disagreement through compromise is likely to produce the correct outcome. Moreover,

"the values of respect and accommodation can be realized without any form of moral

compromise between opposing reasonable viewpoints."[208]  May concludes that a

politician who "endorses the best position on the issue"[209] and who is "in a position to

successfully implement her political position in its entirety, say after leading her political

party to a decisive electoral victory" has no principled reason to make concessions to the

minority of citizens who endorse rival views.[210]

May acknowledges that it may be unwise and even immoral in certain

circumstances for a person not to compromise with others on a matter about which people

disagree reasonably. In these cases, the deliberators have what he calls "pragmatic

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[207] May, "Principled Compromise and the Abortion Controversy," p. 317.
[208] May, "Principled Compromise and the Abortion Controversy," p. 344.
[209] May, "Principled Compromise and the Abortion Controversy," pp. 318-9.
[210] May, "Principled Compromise and the Abortion Controversy," p. 321.

reasons" to pursue an inferior course of action. In his early work, May describes pragmatic reasons as "extrinsic reasons" because they do not appeal to the fact of disagreement but rather to contingent infelicitous conditions in the world.[211] People who engage in pragmatic compromise are motivated to make concessions because they believe that doing so will help them to achieve a goal. They prefer realizing this goal to holding firmly to their conviction that their political position is the best and implementing this position. Because the goal that the parties to the compromise pursue may be moral in nature, May stresses that it is not accurate to describe pragmatic compromises as non-morally motivated. An important difference between May's description of pragmatic compromise and Rawls's description of a modus vivendi is that May recognizes that pragmatic reasons for moral compromise may be motivated by both self-regarding and other-regarding considerations.

Distinguishing principled and pragmatic compromises allows May to articulate precisely why resolving a disagreement on a morally contested matter through compromise is sometimes morally desirable. May is an instrumentalist about compromise: when someone has moral reasons for compromising, these reasons are pragmatic in nature. "It is quite enough that moral compromise is accepted as a necessity without its being revered as a virtue."[212] He argues that people are mistaken if they claim that some intrinsic feature of reasonable moral disagreement invokes moral reasons for compromise. Steadfast insistence on the truth of one's political position in contexts of reasonable disagreement is compatible with the principles that many people believe ought to inform democratic forms of political association.

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[211] Simon James Peter May, "The Significance of Moral Disagreement," Ph.D. dissertation (Stanford University, 2004).
[212] May, "Principled Compromise and the Abortion Controversy," p. 317.

In "Moral Compromise, Civic Friendship, and Political Reconciliation," which was published six years after his first article on compromise, May admits that he was wrong to claim that the idea of principled compromise was incoherent. Principled reasons for moral compromise exist in the domains of close personal friendship and of marriage because friends and spouses "shar[e] responsibility for the successful pursuit of their ends."[213] It is in virtue of this feature of their relation that they have non-instrumental reasons for making concessions even if each party is certain that its position on a contested matter of shared concern is morally best. Because the parties have made a joint commitment to share responsibility for ends, their motivation to arrive at "collective decisions [that] are substantially reflective of each other's moral convictions and aspirations" should outweigh their interest in realizing fully their preferred view.[214] Insofar as friends and spouses share responsibility for ends, they have principled reason to resolve disagreements through compromise regardless of the positive consequences of reaching a mutually acceptable agreement.

May's position that only pragmatic reasons can be given to justify moral compromise in the domain of politics does not need modification in light of this new information about principled compromise because, in his view, members of a democratic political community do not share responsibility for ends. Citizens are thus not "implicitly committed to accepting a deliberative norm of mutual concession and accommodation" in the way that friends and spouses are.[215] May admits, however, "Were the relationship between citizens any more like personal relationships, then instrumentalists would seem

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[213] May, "Moral Compromise, Civic Friendship, and Political Reconciliation," p. 582.
[214] May, "Moral Compromise, Civic Friendship, and Political Reconciliation," p. 582.
[215] May, "Moral Compromise, Civic Friendship, and Political Reconciliation," p. 595.

obliged to concede the gradual emergence of non-instrumental reasons for moral compromise in politics."[216]

By appealing to Rawls's "account of the social division of responsibility in justice as fairness," May defends the claim that citizens do not share responsibility for ends.[217] May locates textual support for the view that he attributes to Rawls in two essays that he published in the years before he "recast justice as fairness as a political liberalism."[218] Citing "A Kantian Conception of Equality" (1975) and "Social Unity and Primary Goods" (1982), May argues that in Rawls's theory of justice as fairness, "responsibility for an individual's ends is allocated to the private sphere entirely."[219]  Citizens have shared final ends for which they share responsibility, but the content of these ends includes only "ensuring that citizens have their fair share of primary goods."[220]  In "A Kantian Conception of Equality," Rawls described primary goods as "rights, liberties, and opportunities, income and wealth, and the social bases of self-respect."[221]  Primary goods are goods that citizens desire "whatever else they want, or whatever their final ends."[222]  Rawls maintained that members of a political community have personal "final ends," that is, "fundamental aims and higher-order interests (a conception of their

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[216] May, "Moral Compromise, Civic Friendship, and Political Reconciliation," p. 587.

[217] May, "Moral Compromise, Civic Friendship, and Political Reconciliation," p. 582.

[218] Paul Weithman, *Why Political Liberalism?: On John Rawls's Political Turn* (Oxford: Oxford University Press, 2010), pp. 5, 7, 344.  Rawls's first use of the term "political liberalism" in a publication is "The Idea of an Overlapping Consensus," *Oxford Journal of Legal Studies* 7, no. 1 (1987), pp. 21, 23-24.

[219] May, "Moral Compromise, Civic Friendship, and Political Reconciliation," p. 596.

[220] May, "Moral Compromise, Civic Friendship, and Political Reconciliation," p. 596.

[221] John Rawls, "A Kantian Conception of Equality" in John Rawls, *Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 1999 [1975]), p. 258.  See also John Rawls, "Social Unity and Primary Goods," in John Rawls, *Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 1999 [1982]), pp. 362-3, 366.  For Rawls's initial account of the primary goods, see §15, "Primary Social Goods as the Basis of Expectations" in John Rawls, *A Theory of Justice*, revised edition (Cambridge, MA: Harvard University Press, 1999 [1971]), pp. 78-80.

[222] Rawls, "A Kantian Conception of Equality," p. 258.

good)."[223]  Personal final ends might include commitments to feminism, libertarianism, animal rights, or environmentalism and the corresponding desire to secure the passage of feminist legislation or the legal recognition of animal rights.  May stresses that on Rawls's view, citizens do not have an obligation to help their fellows realize their personal final ends by modifying the basic social structure of the polity so that it is more conducive to their personal beliefs and values.  "[T]he shared final ends of a well-ordered society do not extend to ensuring success in each member's pursuit of their conception of the good life."[224]

According to May, citizens are responsible for ensuring that all members of the political community can participate as equals in democratic decision-making, but the winners of a vote have no obligations to the losing parties.  "[W]hen citizens do not succeed in winning support for their political ends through properly conducted public deliberation in a democratic political system, this failure should be relegated to the private sphere of responsibility."[225]  May endorses this claim regardless of whether the contested matter concerns constitutional essentials and matters of basic justice or legislation passed after the basic structure of society is constructed.  Consequently, he maintains that it is not morally problematic if a pluralist democracy adopts a constitution that contains controversial beliefs and values of a religion that many citizens do not accept so long as the constitutional order "respects the equal status of all citizens" and "effectively guarantees each citizen the basic liberal rights and entitlements necessary to

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[223] Rawls, "A Kantian Conception of Equality," p. 255.  See also Rawls, "Social Unity and Primary Goods," pp. 365, 369.
[224] May, "Moral Compromise, Civic Friendship, and Political Reconciliation," p. 596.
[225] May, "Moral Compromise, Civic Friendship, and Political Reconciliation," p. 596.

participate in political processes on equal terms."[226] So long as the citizens enacted the

decision on the constitutional essentials in accordance with a legitimate democratic

procedure, the winning party may realize fully its position on how to decide basic matters

of justice. According to May, the majority does not violate any principle that ought to

generate reasons for accommodating and making concessions to citizens who disagree

with their position. Being subject to a constitutional order that one accepts for moral

reasons is not a shared end for which all citizens have shared responsibility.

**An Alternative Interpretation of Rawls's Collective Sphere of Responsibility:**

    I disagree with May's interpretation of what Rawls argued are the shared

responsibilities of citizens of a just democratic society. On my interpretation of Rawls,

citizens do share a responsibility to construct a basic social structure that all reasonable

citizens can endorse. May is correct to recognize that some of the political ends of

citizens are located outside of the collective sphere of responsibility. Rawls distinguished

constitutional essentials and questions of basic justice and political decisions that do not

concern the basic structure of society in order to identify which kind of political decisions

must be mutually acceptable. Rawls maintained that reasonable citizens would agree

how to classify particular issues. May is correct to challenge this claim, as I do in

Chapter One in expressing my skepticism of Rawls's idea of overlapping consensus. I

admit that it is difficult to determine conclusively which contested moral questions

concern constitutional essentials within Rawls's theory of political liberalism.

Nevertheless, May is incorrect to claim that Rawls did not view articulating a mutually

acceptable basic structure to be a shared responsibility of reasonable citizens.

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[226] May, "Religious Democracy and the Liberal Principle of Legitimacy," p. 136.

Beginning in 1980s, Rawls reconsidered the role that that the idea of justification

should have in his work.  In *A Theory of Justice*, the parties who select principles of

justice from within the original position justify their decision only to themselves.[227]

Moreover, the parties are concerned with only choosing rationally.[228]  Because all of the

parties to the original position are assumed to satisfy a univocal standard of rationality,

the parties to the original position make identical assessments about proposed principles

of justice.  There is no need for the parties in the original position to consider whether the

choice is mutually acceptable.  In the writings in which Rawls developed his theory of

political liberalism, however, he understands justification as an intersubjective practice.

Whether a proposed claim about a question of justice is mutually acceptable became a

relevant question.  In his 1980 article, "Kantian Constructivism in Moral Theory," Rawls

claimed:

> [C]onditions for justifying a conception of justice hold only when a basis is
> established for political reasoning and understanding within a public culture.  The
> social role of a conception of justice is to enable all members of society to make
> mutually acceptable to one another their shared institutions and basic
> arrangements, by citing what are publicly recognized as sufficient reasons, as
> identified by that conception.  To succeed in doing this, a conception must specify
> admissible social institutions and their possible arrangements into one system, so
> that they can be justified to all citizens, whatever their social position or more
> particular interests.[229]

In this article Rawls identified discovering a shared understanding of justice as "the

practical social task" of his political philosophy.[230]  In the 1985 article "Justice as

Fairness: Political not Metaphysical," Rawls also described as the aim of his theory

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[227] For a paradigm example of intrasubjective justification, see §26, "The Reasoning Leading to the Two
Principles of Justice" in Rawls, *A Theory of Justice*, pp. 130-9.
[228] See §25, "The Rationality of the Parties" in Rawls, *A Theory of Justice*, pp. 123-30.
[229] John Rawls, "Kantian Constructivism in Moral Theory," in John Rawls, *Collected Papers*, ed. Samuel
Freeman (Cambridge, MA: Harvard University Press, 1999 [1980]), p. 305.
[230] Rawls, "Kantian Constructivism in Moral Theory," p. 306.  See also Rawls, *Political Liberalism*, p. 218.

finding "a publicly acceptable political conception of justice."[231]  A conception of justice is "political" if it does not rely on moral beliefs and values that reasonable people may reasonably reject.  Because this conception of justice can be shared by all reasonable members of the political community, it "provides a publicly recognized point of view from which all citizens can examine before one another whether or not their political and social institutions are just."[232]

As I understand Rawls's theory of political liberalism, identifying fair terms of social cooperation, that is "terms that each participant may reasonably accept, provided that everyone else likewise accepts them," is the shared responsibility for citizens.[233] Citizens must do more than to ensure "that citizens have their fair share of primary goods."[234]  In Rawls's 1982 anthology chapter "Social Unity and Primary Goods," which May cites as support for Rawls's account of the social division of responsibility, Rawls maintained that before citizens determine what primary goods the polity should guarantee, they must identify "a shared conception of justice as the starting point."[235]  As against May's interpretation of Rawls, citizens do share ends, namely, responsibility for reaching mutually acceptable constitutional essentials.

May favors Rawls's theory of justice before Rawls modified as a consequence of his shift to political liberalism.[236]  In his publications, May describes citizens as if they

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[231] John Rawls, "Justice as Fairness: Political not Metaphysical" in John Rawls, *Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 1999 [1985]), p. 394.  See also Rawls, *Political Liberalism*, p. 9.
[232] Rawls, "Justice as Fairness," p. 394.  See also Rawls, *Political Liberalism*, pp. 9, 35.
[233] Rawls, "Justice as Fairness," p. 396.  See also Rawls, *Political Liberalism*, p. 16.
[234] May, "Moral Compromise, Civic Friendship, and Political Reconciliation," p. 596.
[235] Rawls, "Social Unity and Primary Goods," in John Rawls, *Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 1999 [1982]), p. 385.
[236] May indicates that "there are reasons to doubt the wisdom of this broadened understanding of reciprocity (and the more general shift to political liberalism)" without identifying whether he holds these

are deciding constitutional essentials and questions of basic justice from within the

original position. Citizens do not decide matters collectively. On May's account,

decision-making about the basic structure of the polity is intersubjective only in the sense

that contested matters are decided by voting. When a member of the polity fails to

persuade her interlocutors of the merits of her view about how the polity should decide

questions of basic justice, the "political failure" that she experiences as the losing party is

a matter with which she must come to terms privately.[237] Advocacy for particular

constitutional essentials and matters of basic justice lies within the individual sphere of

responsibility. May compares the experience of being a member of the minority in a vote

to the experience of being a member of a community sports league whose team loses

consistently. The sports league has no reason to mollify the member's discontent if the

terms of team play are fair, and the opposing teams have no reason to "curb their goal-

scoring or alter their championship fixtures in deference to a player's delicate

sensitivities."[238]

     I maintain that May is wrong to claim that the two situations are analogous. His

sports example takes place after the players on all of the teams have accepted the basic

rules of the community sports league. Citizens who disagree on constitutional essentials,

however, are striving to reach agreement on the basic rules of their life in common.

Rawls stated clearly in his theory of political liberalism that citizens who wish to

construct a just polity ought to find a shared basis to resolve fundamental political

questions. The relationship between citizens is thus similar to the relationship between

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reasons in "Principled Compromise and the Abortion Controversy," p. 346. May directly opposes Rawls's
political liberalism in "Religious Democracy and the Liberal Principle of Legitimacy."
[237] May, "Moral Compromise, Civic Friendship, and Political Reconciliation," p. 596.
[238] May, "Moral Compromise, Civic Friendship, and Political Reconciliation," p. 595.

close personal friends and spouses because citizens share responsibility of identifying

terms of cooperation that both they and their fellows can accept.

Because citizens are unlikely to reach consensus on matters of reasonable moral

disagreement, it is likely that mutually acceptable constitutional essentials will need to

take the form of a principled compromise. Citizens on both sides of the contested issue

will experience moral loss as a result of setting aside their desire to realize fully their

moral beliefs and values in the polity's basic structure. Their experience will be

analogous to the hypothetical couple that May describes in his article and not to the

member of the persistently losing sports team. In May's example, one spouse is religious

and the other spouse is not religious. They disagree whether their children should attend

church and should be educated at a private religious school. May argues that the couple

should construct a principled compromise that accommodates some but not all of both

parties' opposing convictions. The spouses may "plausibly suppose that they have non-

instrumental reasons to accommodate each other's moral goals and commitments in their

joint plans," because they share responsibility for reaching a mutually acceptable

agreement on how to organize their family life. [239] I maintain that Rawls presented a

similar account of how citizens should understand their relation to their fellows, namely

one in which they articulate together a shared basis of public justification for the basic

social structure of their polity.

**Choosing an Account of Democratic Community:**

May claims to have defeated the arguments for principled compromise in the

domain of politics on Rawls's terms. I have offered a counterinterpretation of Rawls's

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[239] May, "Moral Compromise, Civic Friendship, and Political Reconciliation," p. 586.

understanding of the shared responsibility of citizens. I have established principled

reasons for resolving disagreements about matters of basic justice through compromise

by using May's argument that people who share ends have principled reasons to

compromise. To settle the disagreement between May and me, readers must decide

which one of us offers the better interpretation of Rawls.

Some readers may not be invested in the question how to interpret Rawls's claims

about to whom and for what we are responsible as citizens who strive toward "the end of

supporting just institutions and of giving one another justice accordingly."[240] These

readers may be more interested in the question whether to accept Rawls's principle of

liberal legitimacy, that is, his claim that the essentials of a constitution ought to be

reasonably acceptable to all citizens. Is this a productive way of understanding how

citizens ought to relate to the fundamental principles that give shape to our political

order, to the extent that we are aware of the possibility of experiencing a relation to these

abstract and often ambiguously articulated beliefs and values?

I answer yes, as I am sympathetic to an understanding of democracy as a shared

project. Although the richness of our social world is generated by diversity and

difference, by the partialities and idiosyncrasies of its members, I maintain that we each

ought to view as one of the many projects that deserve our attention the project of

determining together guiding principles for our life in common. Moreover, I am of the

view that we ought to strive to articulate principles that all members who share a

commitment to respecting their fellows and cooperating with them on fair terms can

affirm.

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[240] Rawls, *Political Liberalism*, p. 202.

May rejects this understanding of democratic community in his 2009 article "Religious Democracy and the Liberal Principle of Legitimacy," although he frames differently the context in which he asks the question of how we ought to organize our shared political life. Rather than asking this question from a particular location in time and space and asking it among compatriots who have embodied perspectives and social identities, May works within Rawls's original position thought experiment. May argues "that the parties in the original position have no compelling reason to select the liberal principle in addition to a democratic principle of legitimacy," by which he means that these deliberators have no grounds to prefer terms of cooperation that are mutually acceptable to terms of cooperation that a minority has reasons to reject.[241] He maintains that a political community has a moral right to exercise coercive power over its members even if its constitutional order include moral beliefs and values that are at odds with the moral beliefs and values of the minority.

May emphasizes the philosophical importance of distinguishing the conditions of legitimacy from the conditions of justice, and he appeals to Rawls's understanding of the distinction in an effort to engage Rawls's arguments on Rawls's own terms. In his 1996 "Reply to Habermas," Rawls claimed, "Laws passed by solid majorities are counted legitimate, even though many protest and correctly judge them unjust or otherwise wrong. Thus, legitimacy is a weaker idea than justice and imposes weaker constraints on what can be done."[242] May infers from this distinction the conclusion that a just political community must only satisfy what he calls "the principle of democratic legitimacy," which states "that political power must be exercised within a constitutional order that

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[241] May, "Religious Democracy and the Liberal Principle of Legitimacy," p. 136.
[242] Rawls, *Political Liberalism*, p. 427.

respects the equal status of all citizens and that effectively guarantees each citizen the basic liberal rights and entitlements necessary to participate in political processes on equal terms."[243] May argues that it is possible that a constitutional order grounded on moral beliefs and values about which citizens reasonably disagree would not interfere with the political rights of citizens who do not accept the constitutional essentials in ways that would be so excessively unjust as to render the political order illegitimate.

It seems to me that May misinterprets Rawls. I understand Rawls to be discussing in this passage laws created after the members of the political community have decided together the basic structure of their polity and not the constitutional provisions that comprise the basic structure. Although it is often difficult to distinguish the practical difference between laws and policies that pertain to what Rawls terms constitutional essentials and matters of basic justice and those which are secondary and not fundamental, I follow Rawls in finding helpful the distinction between political decisions that construct the basic structure of society and the political decisions that are enacted once the basic structure is constituted. Rawls used this distinction to classify what kind of matters we should strive to decide in a mutually acceptable manner and what kind of matters can be decided by putting the matter to a vote.

I began this section, however, by expressing my desire to set aside Rawls's body of work as a source for grounding claims about how citizens of a pluralist democracy should organize their life in common. The question which conception of democratic community is more desirable than the other is worthy of philosophical examination apart from what Rawls had to say on the matter. How should reasonable people settle morally

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[243] Simon Căbulea May, "Religious Democracy and the Liberal Principle of Legitimacy," *Philosophy & Public Affairs* 37, no. 2 (2009), p. 136.

controversial political questions?  Is it desirable to live in a polity that resolves issues that

concern basic questions of justice through majoritarian decision-making processes?  Do

citizens experience harm when they live in a polity whose fundamental political

principles they do not accept on principled grounds?  If so, do these citizens deserve not

to experience this harm?

Daniel Weinstock suggests in a 2013 article in which he examines May's

argument against principled compromise that distaste for "'winner-take-all' societies"

may generate within citizens principled reasons for resolving disagreements about

political matters through compromise.[244]  As May noted, if citizens decide to settle

disagreements through a vote, then the winning party does not have an obligation not to

realize fully its position on the contested matter.  If the losing party wishes to change this

outcome, it must persuade enough people to bring the matter to another vote and

persuade the people who comprised the majority in the first vote to correct their initial

views about which policy is best.  On this understanding, to use Rawls's words, "the

democratic political process is at best regulated rivalry."[245]  Weinstock maintains that

some citizens may find undesirable this understanding of democratic political

community.  They "find societies in which people prescind from pressing their maximal

advantage on every occasion more attractive than ones in which they claim everything

that they are, strictly speaking, entitled to, given the outcome of the relevant decision-

making process."[246]  Such citizens would "affirm a conception of community in which

citizens attempt to build bridges toward reasonable others with whom they disagree,

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[244] Weinstock, "On the Possibility of Principled Moral Compromise," p. 552.
[245] Rawls, *A Theory of Justice*, p. 199.
[246] Weinstock, "On the Possibility of Principled Moral Compromise," p. 552.

rather than maximizing the extent of their policy victories, at the cost of contributing to a 'winner-take-all' society."[247]

Weinstock does not identify why these citizens have a moral opposition to winner-take-all societies. He simply states that some people may endorse "ideals of the kind of society in which [they] wan[t] to live," and that commitment to a social ideal that rejects a winner-take-all society provides principled reasons for people who can garner the support of the majority for the political position that they believe is correct or is best to accommodate political positions that they believe to be epistemically or morally inferior.[248] Perhaps these citizens judge as undesirable a constitutional order that does not recognize that it is equally rational for citizens to hold positions on matters that admit reasonable disagreement that stand in opposition to the positions that was instituted through the democratic process. It is in virtue of the fact that the disagreement is a reasonable disagreement that these citizens might believe that the political order ought to show respect for opposing views by accommodating some of their concerns. Weinstock characterizes as supererogatory the willingness of the winners of a democratic process to accommodate the moral goals and commitments of the losing party in the shared terms of their political life. The winners are not obligated to accommodate the losers, but doing so is intrinsically morally praiseworthy. Consequently, Weinstock argues that principled reasons for moral compromise on constitutional essentials exist even though these reasons do not have prescriptive force.

Although I find plausible Weinstock's account of principled compromise as a supererogatory action, I am inclined to oppose winner-take-all societies for a different

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[247] Weinstock, "On the Possibility of Principled Moral Compromise," p. 552.
[248] Weinstock, "On the Possibility of Principled Moral Compromise," p. 552.

reason. People who hold moral values and beliefs that are at odds with constitutional essentials that admit reasonable moral disagreement deserve not to be alienated from their polity's basic structure. If one is sympathetic to an understanding of democratic community in which citizens understand themselves sharing a responsibility for supporting just institutions and giving each other justice, the experience of estrangement by citizens from the fundamental political principles is cause for philosophical reflection and perhaps also for amelioration.

Rawls claimed that "citizens tend to be come resentful, cynical, and apathetic" when they live in a political community that lacks "the public recognition that background justice is maintained."[249] The cause of these attitudes or ways of relating is not disappointment that a piece of legislation that one supported failed to garner majority support but rather a sense of separation from a project that ought to be understood as common and shared. Daniel Brudney considers the phenomenon of alienation from the constitutional order in his 2005 article "On Noncoercive Establishment." Brudney argues that citizens who are alienated from the fundamental terms of social cooperation "might feel a sense of deep disconnectedness from society's central political institutions and probably also from their fellow citizens."[250] In order to experience this disconnect as alienation, these citizens must believe that the proper relation to the polity and to its members ought to be "a relation of connectedness or intimacy."[251]

The concept of alienation differs from the concept of domination, which Iris Marion Young defined as "institutional conditions which inhibit or prevent people from

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[249] Rawls, *Political Liberalism*, p. 363.
[250] Daniel Brudney, "On Noncoercive Establishment," *Political Theory* 33, no. 6 (2005), p. 819.
[251] Brudney, "On Noncoercive Establishment," p. 820.

participating in determining their actions or the conditions of their actions."[252]

"Thorough social and political democracy is the opposite of domination," she maintained.[253] Her proposed solutions focused on democratizing institutions and practices and "bring[ing] them under more direct popular control."[254] Alienation, however, is not an experience that occurs when one has been excluded from a decision-making process. As I understand the term, alienation is an experience of a particular kind of relation to the outcome of an activity such as a decision-making process. Alienation from one's political community results when one's effort to make a connection to the outcome has been frustrated even though one participated as an equal in public deliberation and in the decision-making process.

Because I am sympathetic to accounts of democratic political association in which citizens understand themselves as participating in a common project, namely the project of constructing shared terms for the polity, I hold that citizens ought to share a conception of justice that all can accept. Both the process of decision-making and the content of the decision are important. A democratic decision-making process that is winner-take-all may include everyone whose actions or the conditions of their actions are affected by the decision but may produce the experience of alienation in the minority. People who experience alienation on account of the political decisions of others are not treated with the respect due to fellow co-contributors to a shared endeavor. Some political issues ought to be excluded from majoritarian decision-making processes because they concern the fundamental principles of political association and are thus too important to not have

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[252] Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990), p. 38.
[253] Young, *Justice and the Politics of Difference*, p. 38.
[254] Young, *Justice and the Politics of Difference*, p. 83.

the consensus of all of the citizens, even if this consensus takes the form of a principled compromise. I recommend that citizens resolve disagreements about the content of the basic structure of the polity from "a shared point of view" rather than from the point of view of a majority of citizens.[255] Because the majority's position on a question of basic justice about which it is reasonable to disagree is not rationally superior to the minority position, it should not have normative force simply because it is the view that is affirmed by a greater number of citizens.

May considers the merits of arguments for accommodation that are "premised on the threat of alienation and the value of self-respect."[256] He argues that citizens of pluralist democracies are not entitled to feel positively connected to the fundamental principles of their polity. May maintains that "a sense of identification with one's polity is not a primary good that one needs for the pursuit of a wide variety of other goods. Instead, it is a value that many citizens may not care very much about and may not include as an ultimate end in their conception of the good life."[257] May's concern is only whether citizens who are disaffected from the constitutional order enjoy equal political and social status with people who affirm the basic structure.

My discussion of the Equal Rights Amendment ratification debate in Chapter Three, however, sheds light on the importance that citizens sometimes attribute to the content of the constitutional order. Ordinary citizens were motivated to form and to express their views about what understanding of gender the polity should affirm in the constitution. Ordinary citizens expended a large amount of time and energy with the hope of bringing about a constitutional order with which they identified positively.

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[255] Rawls, *Political Liberalism*, p. 35.
[256] May, "Religious Democracy and the Liberal Principle of Legitimacy," p. 137.
[257] May, "Religious Democracy and the Liberal Principle of Legitimacy," pp. 153.

Whereas pro- and anti-ERA activists sought a constitutional order that realized fully their beliefs about gender, Betty Friedan attempted to persuade partisans to recognize the intrinsic value of resolving the dispute so that people on both sides of the issues could endorse the decision and thus feel connected to the polity and to their fellow citizens. Although Friedan considered feminist beliefs and values to be the best guides to enriching one's personal and shared pursuits, she encouraged readers of *The Second Stage* to work together to bring about a social order to which people who understood differently gender and gender relations could also feel connected.

It is unlikely that my argument that it is intrinsically desirable that citizens can accept the constitutional essentials of their polity will convince May or any reader who does not share my vision of democratic community or my understanding of political alienation as a serious harm to citizens who desire to cooperate with their fellows on fair terms. It seems to me that what Rawls termed "the burdens of judgment" frustrate rational resolution of the question which understanding of democratic community ought to be endorsed by members of a pluralist democracy. In a matter that admits reasonable disagreement, the evidence for and against a contested matter "is conflicting and complex, and thus hard to assess and evaluate."[258] Moreover,

> "[t]he way we assess evidence and weigh moral and political values is shaped by our total experience, our whole course of life up to now; and our total experiences must always differ. Thus, in a modern society with its numerous offices and positions, its various divisions of labor, its many social groups and their ethnic variety, citizens' total experiences are disparate enough for their judgments to diverge, at least to some degree, on many if not most cases of any significant complexity."[259]

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[258] Rawls, *Political Liberalism*, p. 56.
[259] Rawls, *Political Liberalism*, pp. 56-7.

Although I cannot prove to a level of certainty that my normative claims about the nature of democratic community are rationally superior to May's claims, I have offered reasons to prefer the idea of a political community whose constitutional essentials all reasonable citizens can accept that I think people who disagree with me might be persuaded to accept. When the burdens of judgment frustrate efforts to decide the method for resolving reasonable disagreements, I contend that the best way to persuade skeptics of the idea of public justification to see the merits of the intersubjective practice of public justification is to approximate it in one's reasoned engagement.

**Conclusion:**

In this chapter, I have argued that Rawls's theory of political liberalism and his idea of public justification provide citizens with principled reasons to compromise in order to construct constitutional essentials that can be accepted by all members of the polity. On Rawls's understanding of democratic community, citizen share responsibility for constructing constitutional essentials that are mutually acceptable. This shared responsibility generates principled reasons for citizens to resolve some political disagreements, namely, those which concern the basic structure of the polity, through compromise. As against May's position, principled reasons exist for compromise in the domain of politics.

Because some readers may challenge my interpretation of Rawls or take little interest in the project of working out what is possible within Rawls's theory of political liberalism, I have offered an independent reason for preferring a democratic community that is not a winner-take-all society with respect to its constitutional essentials. No member of a pluralist democratic polity ought to be alienated from the fundamental terms

of political life when these terms concern matters about which people can reasonably disagree. May's presentation of a democratic community in which some citizens are disaffected from the constitutional order because the constitutional essentials include controversial moral beliefs and values that they do not share seems to me to be a situation that citizens should strive to avoid.

My claim about the undesirability of a political association whose basic principles are rejected by some members who wish to cooperate on fair terms is supported by convictions that I realize that May and perhaps some of my readers do not share. It seems to me that people could make a plausible case that how citizens ought to relate to their polity and to their fellows is a matter about which reasonable people may reasonably disagree. Nevertheless, I remain firm in my convictions that citizens ought to decide together how their common life should be structured and that the best way to respond to disagreements about the content of these terms is by striving to reach sharable conclusions as a matter of principle. I agree with May that pursuing compromises often produces desirable consequences. In this chapter I have argued that pursuing principled compromises can and ought to be a part of how we understand the task of living together in a shared political world.

**Chapter Six:**
**Compromise, Toleration, and Justice**

The goal of understanding how citizens who disagree on controversial moral questions can determine together the basic structure of their shared political life motivates the arguments that I have offered thus far. In Chapters One and Two, I examined Rawls's account of overlapping consensus, which he understood as a form of agreement about justice that allows members of a political community to avoid disagreements about other matters. Rawls was confident that citizens could agree which moral questions were pertinent to the constitutional structure of the polity and which matters could be set aside temporarily and resolved through the newly created institutional structure. I have argued that citizens are unlikely to agree how to distinguish issues that pertain to the constitutional order from issues that can be determined through majoritarian political processes. I have suggested that citizens should resolve disagreements about how to organize their shared political community by constructing principled compromises. When citizens who are willing to cooperate on fair terms construct mutually acceptable terms of social and political cooperation, they understand people with whom they disagree as fellow participants in a common project. Compromise is a strategy for creating consensus that does not require participants to ignore differences or to cease making judgments about which individual and collective decisions are normatively superior to others.

In this final chapter, I discuss the relation of compromise to toleration. While many philosophers in the liberal political tradition have ignored compromise or have discussed it in only a negative light, toleration has received considerable attention from philosophers in the last twenty-five years. Although no consensus exists in the

philosophical literature on a single theory of toleration and on accounts of its justification and its limits, most philosophers who take toleration as a subject of normative inquiry discuss it in a morally favorable light. Many liberal philosophers identify toleration as a practice that can help people to live together in a political community despite significant disagreement. Rawls described his philosophical methodology as one that "applies the principle of toleration to philosophy itself."[260] Although recognizing the existence of the burdens of judgment plays a role in motivating people both to tolerate and to engage in principled compromise, I argue that compromise and toleration are distinct strategies for responding to pluralism within contemporary societies. Moreover, each activity produces a distinct kind of agreement. It may seem that the practice of toleration among citizens secures the goal of agreement on a shared conception of justice equally well as the practice of compromise. My goal in this chapter is to clarify the different kinds of work that each activity can accomplish. I argue that the ideal and practice of toleration presuppose agreement among citizens on the desirability of accommodating certain kinds of disagreement. Because toleration cannot do the work of producing agreement, compromise remains a relevant course of action.

In the first section, I define compromise and toleration. The conceptual structures of toleration and compromise bear similarities that have been overlooked in the philosophical literature. Both toleration and compromise require people to hold simultaneously an attitude of rejection and an attitude of acceptance. Although the reasons for disapproval are trumped by reasons that motivate people to tolerate or to participate in the construction of a compromise, the reasons to motivate them to

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[260] John Rawls, *Political Liberalism*, expanded edition (New York: Columbia University Press, 1996), p. 10.

disapprove of others' positions remain as one tolerates or participates in the construction of a compromise. Toleration and compromise are nevertheless responses to different practical contexts, produce different outcomes, and involve different sacrifices and kinds of moral loss. In the second section, I articulate four distinctions between these activities.

In the third section, I present and examine critically Rawls's account of toleration. Although I am sympathetic to his normative justification for toleration as a response to certain kinds of differences, I disagree that toleration ought to have pride of place in an account of how to theorize about the meaning and requirements of justice. Toleration, understood as an intentional act of self-restraint, is a morally desirable way for citizens to relate to each other when they encounter many differences in daily life; however, toleration is not a practice that contributes to the resolution of a disagreement about which course of action citizens should pursue jointly. Toleration cannot do the work that Rawls thought that it could do in his account of how citizens ought to deal with their differences. I contend that compromise and not toleration is a practice through which citizens can reach agreement on principles of justice. Attending to the differences between toleration and compromise helps citizens and philosophers understand better in which contexts toleration or compromise are relevant responses.

**Defining Compromise and Toleration:**

Sometimes we celebrate the fact that people hold and practice diverse beliefs and values. At other times, the fact that some beliefs and values stand in opposition creates a conflict among the people who endorse them. If I believe that a polity is unjust if it gives preference to members of a particular religious denomination, that a just polity ought to recognize fetuses as having moral rights, or that a polity must abolish the social

institution of gender in order to be structured justly, I am not likely to celebrate that

fellow citizens hold rival views.  I might wish to engage in discussion with people who

hold opposing views so that I can understand better their positions and their reasons for

endorsing them.  I might, however, believe that holding and practicing these views causes

great harm to other citizens and to the people who advocate them.  Determining how to

respond to fellow citizens who oppose our moral beliefs and values, including our beliefs

about how society ought to be organized, is a challenge.  Compromise and toleration are

two courses of action that members of pluralist democracies might pursue intentionally in

contexts of disagreement about moral matters.

T. M. Scanlon describes tolerance as "an attitude that is intermediate between

wholehearted acceptance and unrestrained opposition."[261]  I maintain that compromise

involves a similar attitude.  In order to engage in toleration or in the construction of a

compromise, people must simultaneously oppose and accept a belief or a value that

another person holds or practices.  Although the reasons for disapproval are trumped by

reasons for accommodating the disapproved object, the grounds for negative appraisal of

the other's position remain as one tolerates or participates in the construction of a

compromise.  To explain how both activities share this conceptual structure, I sketch the

basic features of compromise and of toleration.

Compromise is a strategy for resolving a disagreement between two or more

parties about which course of action they should pursue jointly.  A compromise outcome

accommodates aspects of each of the opposing views and is constructed through

negotiation and the process of making mutual concessions.  People who construct

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[261] T. M. Scanlon, "The Difficulty of Tolerance" in *Toleration: An Elusive Virtue*, ed. David Heyd (Princeton, NJ: Princeton University Press, 1996), p. 226.

compromises hold two contrasting attitudes. They wish to reach a mutually acceptable agreement with their interlocutors, and yet they wish to realize fully their preferred political position. People resist compromises because they require sacrifice and because the compromise agreement falls short of their initial preferences regarding how the disagreement should be resolved. A compromise nevertheless makes mutual gain possible. The parties value reaching an agreement over continuing to disagree and maintaining the status quo. Although the parties disagree on what they should jointly do, they agree on the desirability of reaching a mutually acceptable agreement. In order for an agreement to be classified properly as a compromise, all parties must continue to judge the outcome to be inferior to the course of action that they preferred initially. They view the compromise as a desirable outcome only because neither party can persuade the other that its view is superior and neither party wishes to impose by force its view on the other.

The verb "to tolerate" derives etymologically from the Latin verb that means "to bear, to endure," and the sense that toleration involves self-control and non-interference informs what philosophers call the "traditional" conception of toleration.[262] On this understanding, the activity of tolerating others is "a deliberate exercise of self-restraint, a willed refusal to interfere coercively with what is regarded as the objectionable behavior of others."[263] In order for toleration to make sense as a course of action for an agent, he or she must live in a world in which multiple beliefs, values, and ways of life exist. Like

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[262] Susan Mendus's 1988 edited anthology *Justifying Toleration: Conceptual and Historical Perspectives* (Cambridge: Cambridge University Press, 1988) and Heyd's 1996 edited anthology, *Toleration: An Elusive Virtue* (Princeton, NJ: Princeton University Press, 1996) are representative examples of texts in which many of the authors defend the traditional conception of toleration.

[263] John Horton, "Why the Traditional Conception of Toleration Still Matters," *Critical Review of International Social and Political Philosophy* 14, no. 3 (2011), p. 290.

compromise, toleration becomes possible in contexts when one person disagrees with another person about a matter that he or she judges to be of moral concern.  To tolerate another is voluntarily to put up with the beliefs, practices, or ways of life of others, even though the tolerator disapproves of them and would otherwise prefer to curtail, constrain, or suppress them.  Toleration involves a component of rejection and a component of acceptance that stand in a relation of internal tension.  In contemporary liberal democratic discourse, toleration is often associated with rights.[264]  David Heyd explains, "We tolerate other people whose views and practices we find objectionable because we respect their autonomy—that is their capacity and right to make choices and live by them."[265] Toleration involves accepting that others are entitled to choose their beliefs and values and to attempt to persuade others of their merit.[266]  Accepting toleration as a moral principle entails recognizing that others have "a right to do wrong."[267]

Traditionally toleration is distinguished from passive indifference.  If a person does not judge the tolerated object as wrong or false, he or she cannot be said to be engaging in toleration.  Toleration does not arise as a possibility in contexts in which a citizen does not care about the beliefs and values of others and does not appraise them. According to the traditional conception of the term, the activity of toleration also differs from the positive appraisal of difference.  Most philosophers insist that disapproval is a

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[264] Daniel Augenstein explores the relationship between liberal rights and tolerance in "Tolerance and Liberal Justice," *Ratio Juris* 23, no. 4 (2010), pp. 450-6.

[265] David Heyd, "Education to Toleration: Some Philosophical Obstacles and Their Resolution," in *The Culture of Toleration in Diverse Societies: Reasonable Tolerance*, eds. Catriona McKinnon and Dario Castiglione (Manchester: Manchester University Press, 2003), p. 202.

[266] Scanlon notes that the desire to interfere negatively with views that we oppose is often motivated by the desire not to have the opposed view take greater hold in society.  One reason that toleration is so difficult to endorse and to practice is that we fear the possibility of positions that we disapprove gaining "social predominance" ("The Difficulty of Tolerance," p. 230).

[267] Jeremy Waldron, "A Right to Do Wrong," *Ethics* 92, no. 1 (1981), p. 22.

necessary feature of "the core idea" of toleration.[268] The combination of competing

reasons to object to a belief, value, or way of life and yet to restrain oneself from

disallowing the disapproved object is, according to Peter Jones, "essential to the idea of

toleration."[269]

In contexts outside of philosophy, however, people often invoke an understanding

of toleration in which negative appraisal is not a component. For example, in the

UNESCO Declaration of Principles on Tolerance, tolerance is defined as "respect,

acceptance, and appreciation of the rich diversity of our world's cultures, our forms of

expression and our ways of being human."[270] The United Nations Millennium

Declaration describes tolerance in the following manner: "Human beings must respect

one another, in all their diversity of belief, culture and language. Differences within and

between societies should be neither feared nor repressed, but cherished as a precious asset

of humanity."[271] As Michalinos Zembylas notes, "Both documents view tolerance

positively, that is, as a type of respect and appreciation of diversity and pluralism."[272] A

few philosophers, most notably Anna Elisabetta Galeotti, have argued that "a positive

interpretation of toleration as acceptance" should replace the traditional conception of

toleration.[273] Galeotti maintains that only the practice of toleration as "the public

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[268] Andrew Jason Cohen, "What Toleration Is," *Ethics* 115, no. 1 (2004), pp. 71.
[269] Peter Jones, "Toleration and Recognition: What Should We Teach?" *Educational Philosophy and Theory* 42, no. 1 (2010), p. 39.
[270] UNESCO, "Declaration of the Principles on Tolerance." This document was proclaimed and signed by the member states of UNESCO on November 16, 1995.
[271] United Nations, "United Nations Millennium Declaration." This document was proclaimed and signed by the member states of the United Nations General Assembly in September 2000.
[272] Michalinos Zembylas, "Toleration and Coexistence in Conflicting Societies: Some Tensions and Implications for Education," *Pedagogy, Culture & Society* 19, no. 3 (2011), p. 388.
[273] Anna Elisabetta Galeotti, *Toleration as Recognition* (Cambridge: Cambridge University Press, 2002), p. 21.

recognition of differences" constitutes "a proper solution to the problem of conflicts of religious, moral, and cultural pluralism."[274]

Theorists who defend the usefulness of the traditional conception of toleration argue that people ought to separate the question what differences citizens of a liberal democracy ought to be permitted to criticize or take offense at from the question how citizens ought to respond to those things which they judge negatively. John Horton argues that defenders of an understanding of toleration as recognition and affirmation ignore that some beliefs and values are "mutually antagonistic" and that it is not possible for ways of life that claim to be true to appraise positively opposed ways of life.[275] How to make sense of the meaning of toleration remains a live question for philosophers who ought to take care that they are engaging directly alternative approaches and understanding what purposes these approaches serve rather than talking past each other.

Determining what we desire "toleration" to mean and what we wish toleration to look like in practice are also shared projects that members of pluralistic democratic societies should undertake. Some citizens petition others for toleration and some citizens are offended that others view their convictions and ways of life as objects to be tolerated. David Heyd notes,

> [R]eligious, ethnic, and sexual minorities have become more and more impatient with the status of being tolerated. In a multicultural society, the demand for recognition supersedes that of toleration. The state is expected to be neutral rather than restrained in its treatment of conflicts of value or religion. Pluralistic conceptions of value call for acceptance rather than toleration, which is often considered patronizing and condescending.[276]

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[274] Galeotti, *Toleration as Recognition*, pp. 101, 23.
[275] Horton, "Why the Traditional Conception of Toleration Still Matters," p. 303.
[276] David Heyd, "Is Toleration a Political Virtue?", in *Toleration and Its Limits*, eds. Melissa S. Williams and Jeremy Waldron (New York: New York University Press, 2008), p. 175.

In the Enlightenment era in which philosophical defenses of toleration were first developed, toleration was understood as a vertical relationship between a political authority and a minority group. Toleration was something that the political authority granted to the minority group if the minority group satisfied conditions that it often did not have a role in articulating. On this understanding, the practice of toleration involves recognizing an exception to an assumed norm and granting latitude to those who are classified as deviating from the norm.

An understanding of toleration as a horizontal relationship between citizens who recognize each other as moral equals and who enjoy constitutionally protected rights, liberties, and immunities finds more favor among people who are committed to equality and to democracy. Rainer Forst describes this understanding as the "respect conception" of toleration. "The basic idea is that toleration is a stance adopted by the citizens toward each other. They are simultaneously tolerating and tolerated."[277] On this understanding, toleration is a "multilateral" relationship.[278] Citizens do not interfere with beliefs and values which they regard as false or wrong, and they expect that others will comport themselves likewise. Although they may prefer to be accepted rather than tolerated, citizens can engage in toleration while showing respect for the person whose beliefs or values they oppose. Forst and other defenders of toleration as a mutual practice in which reciprocal respect plays an important role maintain that this understanding of toleration avoids the morally objectionable features of the vertical understanding of toleration.

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[277] Rainer Forst, "Toleration and Democracy," *Journal of Social Philosophy* 45, no. 1 (2014), p. 69. See also, Rainer Forst, "The Limits of Toleration," *Constellations* 11, no. 3 (2004), pp. 316-22.
[278] Peter Jones, "Toleration and Neutrality: Compatible Ideals?" in *Toleration, Neutrality, and Democracy*, eds. Dario Castiglione and Catriona McKinnon (Dordrecht: Kluwer Academic Publishers, 2003), p. 108.

An important feature of the descriptive accounts of compromise and toleration that I have offered is that I understand both activities as tools for achieving a desired outcome rather than as activities that we value intrinsically.[279] Although some theorists identify a tolerant disposition and a "compromising mindset" as virtues,[280] I take it that these character traits are constituted through repeated activity. People who wish to speak intelligently about the virtue of compromise and toleration must have an account of the nature of these activities. For this reason I focus on understanding the conceptual structure of the activities of compromise and toleration.

Moreover, not presenting compromise and toleration as virtues allows me to keep distinct my normative recommendations about what we should do from my descriptive accounts of possible courses of action. Forst describes toleration as a "normatively dependent concept," that is, one "that must be filled with normative substance, substance that has to be drawn from resources that it does not contain itself."[281] He argues that a descriptive theory of toleration cannot provide normative justification that toleration is the morally right action in a particular circumstance. I maintain that compromise is also a normatively dependent concept. A principled compromise about justice is desirable because citizens of pluralist democracies ought to be able to justify publicly their constitutional order to themselves and to fellow citizens. Adopting this approach to the concepts of toleration and compromise helps philosophers who are interested in

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[279] For a defense of instrumental approaches to toleration, see Enzo Rossi, "Can Tolerance Be Grounded in Equal Respect?" *European Journal of Political Theory* 12, no. 3 (2013), pp. 240-52.

[280] For discussions of toleration as a virtue, see Barry Barnes, "Tolerance as a Primary Virtue," *Res Publica* 7, no. 3 (2001), pp. 231-45; Anna Elisabetta Galeotti, "Do We Need Toleration as a Moral Virtue?" *Res Publica* 7, no. 3 (2001), pp. 273-92; Bernard Williams, "Toleration: An Impossible Virtue?" in *Toleration: An Elusive Virtue*, ed. David Heyd (Princeton, NJ: Princeton University Press, 1996), pp. 18-27. For a discussion of the attribute of being willing to compromise, see Amy Gutmann and Dennis F. Thompson, "The Mindsets of Political Compromise," *Perspectives on Politics* 8, no. 4 (2010), pp. 1125-43; Rawls, *Political Liberalism*, p. 163.

[281] Forst, "Toleration and Democracy," p. 68.

analyzing the conceptual structures of these activities understand to what political use we can put these concepts and what actions they require of us. I agree with Peter Balint that philosophers should not "buil[d] the messiness of our values into the tools that serve them" by constructing a "moralized conception of tolerance."[282] Although the question what kinds of differences it is reasonable or morally acceptable for people to disapprove of is philosophically intriguing and relevant to everyday life, it ought to be kept distinct from the question how people should deal with differences that provoke negative moral judgment for good reasons.

**Distinguishing Compromise and Toleration:**

Both compromise and toleration can contribute to the project of peaceful and respectful coexistence between members of a pluralist democracy, but their contributions take different forms. In this section I articulate four differences between these activities.

Recognizing a distinction between conflicts that occur within a person and conflicts that occur between people plays a central role in understanding the differences between the activities of toleration and compromise. Someone may negatively evaluate another's beliefs, values, or actions and experience an internal conflict about how to act on this negative appraisal. A person who observes that she disagrees with another person's judgment about what is good or true might pursue one among a range of courses of action: she might be indifferent to the existence of disagreement; she might interfere negatively with the person who holds the opposed view and attempt to prohibit him from holding or practicing the belief or value. She might also exercise self-restraint and tolerate the disapproved of difference. One way in which compromise and toleration

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[282] Peter Balint, "Acts of Tolerance: A Political and Descriptive Account," *European Journal of Political Theory* (2013), p. 11.

differ is that the potential tolerator does not need to deliberate with the tolerated person or group of people in order to arrive at her decision on the matter.  As Amy Gutmann and Dennis Thompson note, toleration does not require the tolerator to engage in "constructive interaction with the person with whom one disagrees."[283]

Because toleration is not a joint activity, it may be exercised anonymously.  A person or group of people can be the objects of toleration without knowing that others disapprove of something that they affirm or hold and that these others are exercising self-restraint by not interfering with their beliefs and actions.  In contrast, the activity of constructing an agreement is a joint activity undertaken by two or more people.  A compromise that resolves a disagreement between people cannot be constructed unilaterally; it requires at least two parties who share the intention of identifying a mutually acceptable alternative.  In contrast, a singular agent engages in toleration by restraining himself, herself, or itself in cases where the agent is a group that exercises restraint as a joint activity.

To be sure, a policy of toleration may be the result of a collective decision among citizens about how their society should be organized.  Including toleration in the constitutional structure of polity, however, is not an act of toleration; it is rather an act of joint decision-making.  The unilateral exercise of toleration by one person toward another does not create agreement on how to resolve the contested issue.  The activity of self-restraint does not generate points of common ground or proposed alternatives to the parties' initial positions on the matter.

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[283] Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton, NJ: Princeton University Press, 2004), p. 79.

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Not all collective decisions, however, can be resolved by the parties who disagree about endorsing a policy of toleration. Jones argues that adopting a policy of toleration in a political context "is an option only when the actions at stake are compossible."[284] Two courses of action are compossible if an agent can pursue one of the courses of action without precluding another agent from pursuing the other course of action. Many moral disagreements that arise in the context of a group of people determining how to organize their shared life concern a disagreement between two incompossible positions. For example, a constitutional order of a polity cannot both permit the state to spend money on behalf of the interests of a particular religion and maintain a commitment to neutrality among religions. These political positions generate conflicting demands, and realizing one position forecloses the possibility of realizing its rival. Disagreement about the proper relationship between church and state cannot be resolved by citizens who advocate state neutrality by agreeing not to interfere with citizens who advocate state nonneutrality, and vice versa. They must decide jointly on a single course of action or on a decision procedure through which to determine a course of action.

A third point of difference between compromise and toleration is that parties to the negotiation of a shared conflict mutually and explicitly express recognition to each other as they attempt to construct a compromise. Toleration can be exercised from a distance, and the tolerating party may convey that it considers itself superior to the parties who are being tolerated. When parties to a disagreement construct a compromise, however, they acknowledge each other as equally entitled to participate in the resolution of the conflict. Negotiating a compromise involves constructive interaction between the

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[284] Peter Jones, "Making Sense of Political Toleration," *British Journal of Political Science* 37, no. 3 (2007), p. 402.

parties to the disagreement.  Each party strives to find something in its opponents' view

that it can support or to find a way to modify its initial proposal in order to allay its

opponents' concerns.  Although disagreement remains after a compromise is constructed,

the parties gain a better understanding of each others' commitments in a way that does

not occur through the practice of tolerant non-interference.  As I discussed in Chapter

Two, the participants who construct a compromise may experience a transformation in

attitude as a result of justifying publicly their proposals and listening to others' responses.

A fourth distinction between toleration and compromise regards the status of the

activity as either a first-best or a second-best response to diversity and difference.

Because a compromise outcome accommodates aspects of the opposed positions and is

viewed by all parties as a second-best outcome, each party to the compromise can

identify a feature of the compromise that it dislikes or to which it objects.  The parties to

the compromise would prefer to persuade their interlocutors to adopt their partisan

position or to acquire through the majoritarian political process the right to realize fully a

particular moral belief or value that bears on the constitutional structure.

In contrast, citizens may consider toleration either a first-best or a second-best

response to the fact of difference and disagreement.  Citizens who attribute highest value

to upholding the beliefs and values that they consider to be true will engage in toleration

of dissenting views grudgingly, if at all.  For these citizens, engaging in toleration

involves betraying their principles.  Only when citizens respect each other's rights to

freedom of thought, conscience, and expression and limits on politically sanctioned

interference in citizens' lives will they be able to endorse toleration without incurring

moral loss at not attempting to realize fully their partisan beliefs and values.

Attending to the four points of distinction should give us reason to pause when scholars use the term "toleration" to describe an activity of accommodating difference through the identification or construction of agreement. For example, Scanlon describes "the spirit of tolerance" as "a spirit of accommodation, a desire to find a system of rights that others (all those within the broad reach of the relation "fellow citizen") could also be asked to accept."[285] Although he explains that people who are tolerant may also be willing to consider accommodating opposing claims, beliefs, and values through a compromise, Scanlon does not acknowledge that accommodation can also take the form of letting people believe or behave differently do so at a distance from oneself. He conflates toleration and compromise when he claims that "we need a larger attitude of toleration and accommodation" in order to ensure that the views of all citizens are considered when we define what we would like our society to be.[286] Scanlon does not differentiate disagreements that citizens must resolve jointly because the contested issue concerns the fundamental political order and disagreements between compossible options that citizens can manage by agreeing mutually to not interfere with the beliefs and values of others. In his theorizing about toleration, Horton stresses that "toleration should be thought of as an appropriate response only to some circumstances, and not as a universal panacea for problems of diversity and conflict."[287] He distinguishes clearly disagreements that can be resolved personally through a personal choice to tolerate the other from disagreements that must be resolved jointly with others.[288]

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[285] Scanlon, "The Difficulty of Tolerance," p. 236.

[286] Scanlon, "The Difficulty of Tolerance," p. 238.

[287] Horton, "Why the Traditional Conception of Toleration Still Matters," p. 292.

[288] As I discussed in Chapter One, Horton maintains that citizens should resolve shared disagreements through constructing a modus vivendi. He argues that "the traditional conception of toleration offers one important form that a modus vivendi may take" ("Why the Traditional Conception of Toleration Still Matters," p. 296).

**Compromise, Toleration, and Constructing Principles of Justice:**

As I have established in the preceding section, engaging in toleration does not help parties to a disagreement resolve a conflict about what course of action they should jointly undertake. This claim appears to stand in opposition to Rawls's claim in *Political Liberalism* that a commitment to toleration ought to inform how citizens and philosophers engage in the shared project of theorizing about justice. He argued that toleration, understood as an activity of intentional self-restraint, is the appropriate strategy through which to determine principles of justice that people who are deeply divided on moral, religious, and philosophical matters could accept and could use as the basis of their shared political life.

Rawls's endorsement of "the principle of toleration" is a prominent feature of his work. In *A Theory of Justice*, he argued that a just society, that is, one whose basic structure is informed by the two principles of justice chosen by parties in the original position, would be tolerant. The polity's basic rules and institutions would uphold an ideal of toleration by prohibiting the state and other citizens from interfering with a citizen's sphere of private choices. On Rawls's account, "Moral and religious freedom follows from the principle of equal liberty," which is the first principle of justice.[289] Once the parties leave the original position, he maintained that they "must choose a constitution that guarantees an equal liberty of conscience regulated solely by forms of argument generally accepted, and limited only when such argument establishes a reasonably certain interference with the essentials of public order."[290] In *A Theory of*

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[289] John Rawls, *A Theory of Justice*, revised edition (Cambridge, MA: Harvard University Press, 1999 [1971]), p. 188.
[290] Rawls, *A Theory of Justice*, p. 189.

*Justice* Rawls did not explain in more detail the limits of toleration and how these limits are identified and justified.

In *Political Liberalism*, Rawls theorized about the choices of citizens who are currently members of liberal democratic societies rather than about the choices of hypothetical parties in the original position. He maintained that the principle of toleration has become part of the public political culture of democratic societies.[291] Most people regard toleration as morally valuable and believe that a political order ought to guarantee freedom of thought and liberty of conscience.[292] As a result of the success of the modus vivendi on toleration in the sixteenth century and its important historical role in the development of liberal political thought, most people are willing to live together with people who practice different religions, hold different philosophical positions, and endorse different conceptions of the good.[293] When citizens endorse the principle of toleration and its applications in political contexts, they recognize a distinction between decisions that people should be free to make according to individual conscience and actions that the state is justified in censuring or in curtailing.

Rawls intended to establish both the normative conclusion that citizens of a just polity ought to be committed to the principle and the practice of toleration and the metaphilosophical conclusion that a commitment to toleration ought to inform how people theorize about political justice. On his view, the theory of political liberalism and its idea of public reasoning, that is, reasoning that appeals to "a public and shared basis of justification," provided the best answer to the question how members of pluralist

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[291] Rawls, *Political Liberalism*, pp. xxv, 159.
[292] Rawls, *Political Liberalism*, p. 154.
[293] Rawls, *Political Liberalism*, p. xxviii.

democratic societies ought to respond to moral disagreement.[294] Rawls attempted in

*Political Liberalism* to explain in greater detail than he had in *A Theory of Justice* what it

means to engage in argumentation in a manner that can be "generally accepted" by other

citizens. On his account, political liberalism is a philosophical approach that applies the

principle of toleration to philosophy.[295] "To apply the principles of toleration to

philosophy itself is to leave to citizens themselves to settle the questions of religion,

philosophy, and morals in accordance with views they freely affirm."[296] The principle of

toleration informs a framework of mutual respect within which people who hold

opposing views on a matter can resolve their disagreement.

Rawls argued that by applying the principle of toleration to philosophy, people

who hold a range of "comprehensive doctrines," that is, accounts "of what is of value in

human life, as well as ideals of personal virtue and character, that are to inform much of

our nonpolitical conduct," could agree on the meaning and requirements of justice.[297] As

I discussed in Chapter One, Rawls argued that "the burdens of judgment" prevent people

from determining which comprehensive doctrines is true.[298] A "reasonable pluralism" of

moral beliefs and values exists. On his account, recognizing the burdens of judgment

motivates "reasonable" people to oppose interfering with the belief in and the practice of

rival comprehensive doctrines that purport to be uniquely true. "These burdens of

judgment are of first significance for a democratic idea of toleration," Rawls stated.[299] A

constitutional order that includes a commitment to toleration realizes the value of

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[294] Rawls, *Political Liberalism*, p. 61.
[295] Rawls, *Political Liberalism*, p. 10.
[296] Rawls, *Political Liberalism*, p. 154.
[297] Rawls, *Political Liberalism*, p. 175.
[298] Rawls, *Political Liberalism*, pp. 55, 60.
[299] Rawls, *Political Liberalism*, p. 58.

personal autonomy.  Rawls understood himself to have explained adequately that citizens are motivated to construct jointly principles of justice that establish in a constitutional order the values of personal autonomy and of tolerating reasonable disagreement.

In adumbrating the limits of the principle of toleration, Rawls had to distinguish between "political" and "nonpolitical" matters.  Political matters are those which can be decided jointly without reference to beliefs and values that cannot be shared by reasonable people.  A political decision must be able to be justified by beliefs and values that are embodied in the shared public culture of the democratic society.  It is appropriate for a polity to identify some views about political matters as not deserving toleration.  In contrast, the proper response to nonpolitical disagreements is toleration.  Rawls classified an action or a decision as nonpolitical if citizens can be motivated by reasons for action that appeal to beliefs and values about which people can disagree reasonably.

I disagree with Rawls that toleration is the appropriate strategy through which to determine principles of justice.  Applying the principle of toleration to philosophy itself does not help people who disagree about which philosophical commitments they should share to find common ground or mutually acceptable alternatives.  Although people may recognize the burdens of judgment and will not wish to use political power to impose their preferred views on others, the practice of toleration does not resolve the stalemate between the opposing claims about what the parties to the disagreement should do jointly.  As I argued in Chapter One, Rawls assumed falsely that people would agree about whether to classify a contested moral question as a reasonable disagreement or as a matter that admits of a rationally superior answer.  The burdens of judgment extend to disagreements about justice and the collective good of political communities.  Rawls

ignored the possibility that citizens would not agree on how to organize their shared political life and that they might endorse in good faith mutually exclusive positions about what justice means and requires.

The constitutional order cannot assume a neutral position on many morally controversial issues. When the polity cannot advance simultaneously opposing views about matters of basic justice because defending one position on justice makes it impossible to hold a competing position on justice, toleration is not an appropriate course of action. Justice is a virtue of a political system, and an internally consistent political order cannot contain a rule or norm and its opposite without pain of contradiction. The structure of toleration precludes it from doing the theoretical work that Rawls intended it to do in his account of how to reach consensus on justice in a divided polity. Disagreements about joint courses of action can be resolved only through strategies for constructing agreements and not through the strategy of tolerant self-restraint. Although people who are tolerant are likely to be more willing to cooperate with people who hold rival views, resolving the dispute over how to organize a just democratic society requires that one party persuade the other to reject its initial views about justice or that the parties agree mutually to make concessions to their initial views.

**Conclusion:**

In this chapter, I have established that compromise and toleration offer distinct contributions toward the goal of constructing a just pluralist democracy. A commitment to toleration is a part of the constitutional structure that citizens of democratic societies might endorse. Insofar as we believe that citizens should have, for the most part, the right to choose what to believe and how to act, the principle of toleration is central to

sustaining a democratic political community in which members who hold and practice views about what is true and good coexist peacefully and respectfully. Toleration will continue to be a relevant practice as long as members of pluralist democracies disagree about how people and groups of people ought to live. Although some people may choose to discuss the fact of difference with people who hold rival beliefs and values, others may prefer to keep their distance from citizens who hold beliefs and values that they oppose. Both ways of responding to difference are compatible with a commitment to tolerating beliefs, values, and practices that one judges as morally wrong and yet tolerable.

It is often desirable that citizens refrain from interfering with objects that they disapprove of. Citizens can set aside some disagreements both during and after the construction of a constitutional order, and it is in these contexts that toleration is a relevant course of action. Other disagreements, however, cannot be set aside without frustrating a common project that the parties to the disagreement wish to pursue jointly. My aim in this chapter is to clarify that citizens who disagree can make progress in determining how to act jointly when they compromise and that toleration is not an equivalent strategy for producing this end.

In this dissertation, I have focused on the common project of living together justly in a political community and on disagreement about how to organize such a political community. Compromise is a strategy through which citizens of democratic societies can resolve disagreements about what shape their constitutional structure should take. In contexts in which neither party succeeds at persuading the other to reject its initial view on what course of action they should pursue together, compromise becomes a relevant strategy for reaching agreement. Compromise is morally desirable insofar as we believe

that all reasonable citizens ought to be able to endorse the constitutional order in which they live.

Whereas toleration is appropriate for resolving disagreements among citizens about personal belief and behavior, compromise is appropriate for resolving disagreements among citizens about what joint course of action they should pursue. Understanding this simple distinction will help scholars and citizens to undertake the difficult work of determining which disagreements they must resolve together and which disagreements they can live with.

**Conclusion**

Whether or not we like it or realize it, we are involved in the common project of living together in a political community. We stand in a persistent relationship to each other as citizens regardless of whether we judge our fellows as unusual or familiar, misguided or judicious, and repugnant or estimable. Laws, policies, and coercive sanctions apply to all citizens. Members of the political community cannot help but receive the benefits and burdens of political membership even if they do not participate in political life by voting, contacting officials, campaigning for candidates or for issues, or protesting. We have the opportunity to choose how to relate to our fellows and to the instruments and institutions of government power.

Justice bears on the way people live together under political and social institutions. Following John Rawls, I have maintained that we can give content to the concept of justice by identifying substantive principles of justice. An understanding of the meaning and the requirements of justice guides how members of a political community ought to interact with each other. A polity's constitutional structure articulates the fundamental rules by which coercive political power is organized and exercised and the basic guarantees to which members of the political community are entitled. In Rawls's theory of political liberalism, members of the political community decide jointly how to constitute their political order. Political liberalism is an approach to theorizing about justice in which lay citizens have the authority to make and to respond to claims about what constitutional norms ought to guide their shared political life.

Professional philosophers and politically active citizens have proposed a wide range of accounts of what the principles of justice should be and which issues and

institutions are a part of the basic structure of society. Deep and widespread

disagreement about value-laden issues and about foundational moral beliefs and values is

pervasive, and determining jointly how we should respond to conflicts of moral beliefs

and values is a formidable task. Rawls established an important theory of how people

who hold conflicting convictions about moral, religious, and philosophical matters can

coexist in a just democratic polity; however Rawls failed to confront directly the depth of

disagreement about justice among citizens. As against Rawls, I have argued that the

meaning and requirements of justice are subject to reasonable disagreement. The

constitutional order cannot remain neutral on many fundamental questions, such as what

entities ought to have political rights, liberties, and immunities and what features of a

member of the political community's identity are morally relevant in determining the

content of these rights, liberties, and immunities. As long as reasonable pluralism about

moral beliefs and values exists, citizens of a pluralist democracy cannot expect to form a

Rawlsian overlapping consensus on questions of basic justice.

In the dissertation, I have suggested principled compromise as a strategy through

which members of a democratic political community can reach agreement on what justice

means and requires. A compromise that is principled stands in contrast to a truce

between parties who have opposed views about how to decide jointly a matter of

common concern. Principled compromises have moral content and normative force that

the parties who construct the compromise acknowledge. As against Anthony Simon

Laden and other philosophers who defend a deliberative democratic approach to

theorizing about political decision-making, I have argued that negotiation is not a

normatively deficient form of interaction. Negotiation can involve reason-giving and can

be guided by norms of respect for one's negotiation partners and by a desire to cooperate with them on fair terms.

My descriptive account of principled compromise challenges the adequacy of existing understandings of compromise in the liberal political tradition as a balance of forces between self-interested parties. Some compromises are not motivated by calculations of prudence and expediency. I have argued that principled compromise is a strategy by which citizens can realize Rawls's liberal principle of legitimacy, namely the belief that the basic structure of society ought to be acceptable to all members of the political community who are willing to respect others and to cooperate with them. Reaching a mutually acceptable agreement on matters that admit reasonable disagreement requires citizens to tolerate rival proposals for designing the basic structure of society and to consider the legitimacy of their fellows' concerns about their preferred proposals. By reaching agreement through concessions-making, members of political communities ensure that no moral belief or value about which citizens can disagree reasonably provides the sole basis for the polity's constitutional essentials and the answers to questions of basic justice.

Normative political philosophers often suggest that majoritarian processes are appropriate means for resolving seeming irreconcilable differences among citizens. I have argued that principled compromise is a more desirable decision rule than majority voting when the disagreement concerns the polity's basic institutional structure. As against Simon Căbulea May, I have defended Rawls's liberal principle of legitimacy against his proposed democratic principle of legitimacy. Parties who construct a principled compromise about matters of basic justice make possible a democratic

community in which the resolution of disagreements does not produce winners and losers. Resolving disagreements through principled compromise ensures that the polity's conception of justice can be endorsed by citizens who hold a range of partisan commitments and that no reasonable person will experience a sense of alienation from the political order. Principled compromise is a means by which citizens can create a constitutional order that is genuinely shared.

Although I contended that constructing a compromise allows parties to resolve their disagreement in a manner that is consonant with the norms of respect and fair cooperation, I acknowledged that compromise on moral beliefs and values necessarily involves loss. When disputants acknowledge the rationality of opposing moral beliefs and values, they cannot simultaneously maintain that their moral beliefs and values are rationally superior. Recognizing reasonable disagreement about the meaning and requirements of justice is not easy for people who wish to realize fully their beliefs about moral truth in the basic structure of the polity. Neither toleration nor principled compromise is possible until citizens relinquish this desire and accept the value of accommodating and of respecting difference.

In this dissertation I have brought to light a different way to think about compromise. We would do well to reconsider the stipulative definitions of compromise and of negotiation and to enrich our vocabulary of concepts by introducing principled compromise. We would also do well to recognize that the activity of toleration presupposes agreement rather than produces agreement and that citizens who disagree can make progress in their efforts to determine the fundamental principles for living together by compromising rather than by tolerating. We continue to debate whether the

American constitutional order ought to include "equality of rights under the law," to use the language of the proposed Equal Rights Amendment, and how to understand this idea and to apply it in practice. Philosophers and partisans devote considerable effort to attempting to convince opponents to renounce the beliefs and convictions that lead them to endorse rival positions. I have argued that the underappreciated strategy of identifying concessions that might satisfy the concerns of people with whom we disagree is a more productive response to the fundamental moral issues that divide us. Instead of articulating a solution to Susan Moller Okin's important question "What are the justifiable limits of toleration of religious and philosophical conceptions regarding gender?", I have proposed and defended a strategy by which citizens who offer competing solutions might move beyond their deadlock.[300] Without an understanding of principled compromise and its value, citizens of pluralist democracies lack an important tool for resolving disagreements about justice and for bringing about a just society.

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[300] Susan Moller Okin, "*Political Liberalism*, Justice, and Gender," *Ethics* 105, no. 1 (1994), p. 31.

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