The Problem of Clean Hands: Negotiated Compromise in Lawmaking
Eric Beerbohm, Harvard University

The problem of dirty hands isn’t ours. It gets its grip from the point of view of the official who acts in our name. To see this, suppose a coalition of lawmakers votes for an unjust bill. In their floor speeches, they stress that they are public servants, acting on behalf of their constituency. But don’t lose any sleep over this vote. The textbook model of dirty hands denies that you bear any responsibility. It doesn’t matter whether you advocated for the bill, or that you voted for a candidate who was committed to enacting this policy. You and I are morally insulated from the actions of our lawmakers. Performing unjust actions in our name but without commensurate blame is part of their job description. To refrain would reveal a grating self-preoccupation. They are doing us a favor, shielding us from the blame and resentment of our fellow citizens who have been wronged. From the perspective of the democratic citizen, there doesn’t look to be any moral problem here, but a convenient solution. We can aid and abet the passage of an unjust law without any liability. We don’t own the logrolling, horse-trading, or the floor votes of our representatives. They do.

In framing the problem this way, I’ve revealed my hand. Citizens can’t escape responsibility by authorizing another agent to do their dirty work. An agency relationship with injustice may well compound their blameworthiness. Nor should elected officials act in ways that are, in Bernard Williams’s polite way of putting it, “morally disagreeable.”¹ When they “hustle[], lie[] and intrigue[] for us,” it’s implausible to think that they alone can retain responsibility for their public acts.² We can co-own responsibility for an unjust law. I will assume that any plausible concept of democracy will acknowledge that moral liability is shared in some way. The premise of insulation is faulty, and it makes the begrudging acceptance of the dirty-handed lawmaker unsound. There isn’t a genuine problem here.³ I’m going to ask you to imagine it away.⁴ But dissolving one puzzle can create another.

The problem that emerges is ours. It’s owned by democratic citizens concerned with complicity in legislated injustice. If we place special weight on the fact that we can be used as tools
of injustice, this agent-relative concern can seem to threaten a central feature of lawmaking institutions. Call the practice of compromise that set of rules that bear upon a process of mutual concessions that aims at joint uptake of a legislative solution. We tend to assume that politics demands some willingness to engage in adjustments and even concessions to other viewpoints within a legislative body. This seems to hold even when lawmakers are in the commanding position to ignore their outvoted colleagues. My argument taps the widespread commitment that a healthy civic life involves some accommodation of the sincerely-held views of others. So it's surprising that attempts to motivate compromise have turned to values not fully endogenous to a concept of democracy – fraternity, community, or the commitment to a union. I don’t think we need to introduce these values as complements to, or even rivals of, our working idea of democracy – unless we see it as a "crude hydraulic device." The best rationale for treating compromise as a non-instrumental value relies upon a conception of democracy as a complex array of relationships.

If lawmakers aren’t our moral middlemen, then, it's tempting to demand that they refuse to go along with any compromise proposal. We might even insist that they opt out entirely – either by engaging in pure bargaining in the process, or by refusing to accept concession in the product. Yet this posture can be unsustainable when adopted by elected representatives, who participate in a complex agency relationship with ordinary citizens. To demand that they act as purists can throw our political system into a perennial state of obstruction. That’s the first hazard. But suppose we reject purism, and ask them to serve as simple bargainers. They are to make deals that advance our first-order principles of justice, with no concessions that aren’t strictly needed to achieve the compromise. Here the hazard is subtler. We’ve authorized a series of agency relationships that put legislators – and by extension, ordinary citizens – into relationships that may not be compatible with our ideal of democracy.

We can steer clear of these two ways of thinking about compromise. A lawmaker who places genuine weight on the accommodation of disagreeing parties need not betray our principles. There’s a real sense that compromise can, given certain background conditions, make a piece of
legislation more democratic. My argument turns on the view that lawmakers generally have a
weightier moral reason to countenance compromise than ordinary citizens. Assigning differential
weight can seem puzzling. How can the refusal to participate in compromise be permissible – even
laudatory – for you and me, while the same posture can be seen morally vain when insisted upon by
our elected official? Turning to a simple role theoretic explanation to deliver a special responsibility
looks suspiciously *ad hoc*. What features of the legislator’s role is capable of explaining – let alone
generating – a stronger moral reason to compromise than that of citizens? If the lawmaker stands in
a rudimentary agency relationship, it is hard to argue that the lawmaker’s moral situation is any
different from her constituents. The agent’s powers derive from their relationship to the principal.
It’s natural to think that the weight of moral reasons holds steady when one agent authorizes
another to act. So where does this asymmetrical moral reason come from? Or is it wishful alchemy?

I work out an answer in four parts. Section one sketches the package of constitutive rules
that make possible the joint activity of legislative compromise. I challenge proponents of
deliberative negotiation for relying upon a picture of compromise that can make sincere
participants prey to unscrupulous negotiators. Faced with individuals who are attempting to exploit
the practice, we can be permitted to act in ways that are presumptively wrong. Section Two begins
by casting two characters, the *purist* and the *strategist*. Neither is capable of fully participating in
compromise. I then introduce a composite figure, the *practitioner*, who is committed to principled
compromise. Section Three offers a rationale for the practitioner’s willingness to play in this crucial
legislative game, offering non-strategic concessions. The value of co-ownership describes a way of
relating to each other as co-citizens who share equal authority over lawmaking. If this democratic
ideal has force, we can defend the practice of legislative compromise. But there’s a remaining worry
that any defense of compromise will invite. Section Four clarifies how the compromise enabler that
I’ve defended can be defeated under a range of unjust and undemocratic conditions.
1. Legislative Compromise as a Practice

The furniture of legislative compromise is too familiar. It’s easy to miss the details of this designed environment. There’s a large table for extended face-to-face exchange, scheduled breaks for parties to huddle, and the contrapuntal procession of offer and counter-offer. This stage setting reminds us of two features of this practice that are not obviously compatible. First, negotiation on the way to compromise isn’t a fully cooperative activity. It’s a competitive exchange of speech acts, some aimed at persuading, others at urging. The “smoke-filled room” has become a metaphor for the crafted ambiguity of the speech acts exchanged in this setting. Parties are careful not to reveal too much of their hand, and they face powerful incentives to misrepresent their positions. Legislative compromise is a partially suspended context, where certain kinds of speech acts needn’t be treated as sincere or true within this practice. Here communication is, in Thomas Schelling’s phrase, “neither entirely impossible nor entirely reliable.”

At the same time, compromise is joint activity. Within it, rival lawmakers act together against the backdrop of rules. These rules are constitutive of, and logically prior to, actions within the practice. So as long as my fellow players and I share a commitment to honor the rules of the game, we can be said to be playing baseball together even while competing against each other. Within this practice our actions – even the objects of our environment – take on a different meaning. Canvass bags on the ground become bases. There are a series of actions that I can now perform that were unavailable outside the practice. It is not possible for me to balk on an attempted pitch if I am not a participant. The literature on shared agency has focused on the activities downstream from a joint intention, whether together painting a house or entering the battlefield. It describes the conditions for sharing an intention and then considers what this means for agents who co-participate in an activity. Here we are giving equal attention to those actions upstream of joint agency – the delicate process by which they are fastened together.

We can sketch the constitutive rules that mark out legislative compromise. Start with the characteristic aim of parties to compromise:
Co-Deliberation with Disagreement: Participants seek a resolution to a collective decision that they can accept, given background moral disagreement.

We still haven’t figured out how to live together. Our disagreements at the legislative level implicate unavoidably moral principles. But legislators aren’t your ordinary participants to a moral disagreement. So we need a way to capture their authorized position:

Agency Relationship: Participants are elected legislators who stand in a principal-agent relationship to their constituency.

This leaves open the demands of this paired agency relationship. We are supposing that the principal is a constituency and the agent is their legislator, but we don’t yet need to spell out now how the agent needs to answer to the principal. Legislative compromise is a joint activity with a characteristic agreement. So we need to register the transactional character of this activity:

Shared Commitment: Participants share a commitment to place weight on accommodating other participants’ position in the service of agreement.

Accommodation is the policy of assigning some weight to a consideration, rather than any given accommodation that one makes. So participants can share this commitment to place weight on a consideration without that consideration winning out as the all-things-considered thing to do. On my account, this commitment to accommodation is what Michael Bratman calls a “shared policy.” To see how this policy of “weighting” works, consider an admissions committee that agrees to a policy that places some weight on legacy candidates. If, after a day of deliberating about files, they end up admitting no legacy candidates, it would be too quick to conclude that they haven’t in fact shared this commitment in their decision-making. A candidate’s file can be below the bar even after applying this shared policy of giving the extra weight. So parties can participate in this practice without, in the end, offering any accommodations, if they are assigning the appropriate weight to this consideration.

By construing the activity of compromise as a shared commitment to weight accommodation, we are able to register the moral significance of parties who “come to the table” and invest in the relationships that make legislative compromise possible. Contrast this with approaches that describe a set of necessary and sufficient conditions. Without a deal, they are
unable to notice that the activity of compromise has taken place. But even if the deal isn’t required, seeking it is a characteristic feature of this practice:

Co-Acceptance: Barring defeaters, participants offer non-strategic concessions that make the package acceptable to the other party.

Non-strategic concessions, I will argue, are the watermark of negotiation in democratic settings. All compromise – whether haggling with the street vendor or pleading for a higher grade – is shot through with instrumental concessions. But lawmakers aren’t haggling over prices; they are engaging in a process that ends in authoritative demands backed by armed men and women. In the morally momentous setting of enacting coercive law, we place independent value on broad agreement as to the content of the law. To preview my position, lawmakers have a defeasible reason to make concessions that honor the procedural value of deciding together. The possibility of co-acceptance depends on a “stickiness” built in to this process. Part of agreeing to a concession is the joint intention to honor this settlement. The time frame will depend on the mutual expectations of the parties, and may well be built into the agreement with a sunsetting provision that will induce future legislatures to revisit the compromise package. So this final rule introduces the iterative character of the legislative setting.

My approach to legislative compromise is sandboxed. While it will share constitutive rules with other forms of compromise, it doesn’t treat unity as a dominant theoretical aim. It is mistaken, I think, to aim for the most generic description of compromise available. We should take this less unified route for two related reasons. First, it is easy to see the moral distinctiveness of legislated law. That a group of people can gather together, write some words down on sheets of paper, and by their communication alone have changed the law is a brazen thought. Now what constitutes “the law” is furiously contested, and I will attempt to avoid taking a position here. So long as positivists and nonpositivists accept that legislatures take actions that change our moral obligations, we can leave open precisely how legislators make the law what it is. Second, the kind of reasoning in legislative compromise is different in kind from pure bargaining models. The prudential reasoning
involved in negotiating a record deal is a distant relative of the back and forth concessions that make enacting laws possible.

*The Practice’s Exploits*

Describing a practice can throw light on its inherent vulnerabilities. You start to notice its seams and stitching. Or, to mix low- and high-tech metaphors, you begin to see potential exploits lying in plain sight. These tactics are well-known in classic discussions of bargaining, but they haven’t been systematically surveyed in settings where the subject of collective decisions is irreducibly moral in character. When we “port” these incentives from the domain of pure bargaining to legislative compromise, we can see how the tactics and strategy of compromisers are intimately related. The process of offer and counteroffer creates incentives to exploit the constitutive rules that we rehearsed earlier. The lesson is that practices don’t just create new forms of joint activity; they also make space for ingenious ways to manipulate and coerce others.

Within a negotiation, dirty hands can seem to insinuate itself as a genuine problem. What's the practitioner to do when she goes face-to-face with a ruthless party? To an unscrupulous participant, compromise can open up novel forms of moral abuse. But these potential exploits aren't just for the ill-willed. Even morally-motivated parties can feel the temptation to use unsavory tactics to induce a legislative solution that satisfies their moral principles – or at least more closely approximates them. Keyed into these tactics, Bernard Williams held that bargaining politicians should engage in a battery of presumptive wrongs: “lying, or at least concealment and the making of misleading statements; breaking promises; special pleading; temporary coalition with the distasteful; and (at least if in a sufficiently important position) coercion up to blackmail.”

We know that parties to negotiations face threats, coercion, and bullying. A commitment to the constitutive rules of the practice can put us in a vulnerable position. Aren’t we likely to be duped or even coerced into accepting positions that are morally troubling? Let’s take up the two of these acts most central to legislative negotiation.
**Misrepresentation.** If you've ever engaged in price bargaining, you know to treat the initial offer as a conceit. There's an inoffensive sense in which parties *should* ask for more than they think they will or should get. This is permitted in prudential contexts – famously in the used car sale. But within a legislature it can be troubling. Consider the announcement of opening positions in a two legislator case. Neither party wants to reveal the extent of concessions she is prepared to make. Each realizes that insisting on a stronger position from the start can leverage her negotiating power. They might even be aware of the power of anchoring effects in framing judgments.\(^\text{13}\) This will compound their incentive to advance false positions conversationally. The iterative character of legislative compromise can even make possible double-bluffing. Say a compromising party with a track record for bluffing announces her support for a position, fully expecting that she will be disbelieved in this announcement. Her audience will assume she is falsely announcing her support to bluff them, so they arrive at the (correct) belief that the party supports the position. If her move is successful, her speech act has transmitted accurate information to her audience.\(^\text{14}\)

This creates a strong incentive to demand publicly what parties believe to be unjustified. Suppose your political principles justify a single-payer system of health care, but oppose a government-run system where health care personnel are state employees. Yet you recognize that pre-announcing your support for the “extra-strength” proposal — the one that you believe to be morally objectionable — will increase the chances you will be able to bargain toward the former system. This kind of misrepresentation can mislead parties, but even if they manage to call your bluff, it is objectionable in another way. The public backing of a policy that you believe to be unjust looks like a galling form of hypocrisy.\(^\text{15}\) This demand is of a different kind than insisting on an unreasonably high starting price for your vehicle. Of course, bluffing doesn't always involve this kind of facial inconsistency. A strict libertarian can start negotiations by demanding an ultra-minimal state knowing fully well that this offer will be a non-starter. Here the bluff doesn't involve announcing support for a position that one rejects, but implying that this is a plausible starting point given the opening positions of the parties at the table.
Notice that bluffing isn’t strictly necessary to take advantage of this exploit. Suppose a lawmaker recognizes the advantage of starting with an extreme position, but seeks to avoid public misrepresentation. This may be done for principled reasons: the desire not to defend a position one believes to be incorrect. Or it might be done because the lawmaker doubts she will be an effective bluff at the table. Our lawmaker isn’t a naïve voluntarist about beliefs. She can’t change them on the fly. But she can work, in indirect and familiar ways, to nudge her beliefs in a direction favorable to her bargaining position. She might caucus with more extreme members of her party. Perhaps repeated exposure to their reasons will recalibrate her position as she honestly grapples with their views. She might put herself on a strict media diet, closing herself off from moderating positions. If successful, this will push her opening position in a predictable way. The lawmaker may avoid making publicly deceptive statements. But the cost of this kind of tampering with one’s own moral convictions may be high.

*Threats.* Rational bargainers face incentives to make credible threats. These needn’t be all-out coercive. You can threaten to walk away if my party makes another demand without offering anything in return. You can warn your rivals that when the tables are turned, you will follow their lead, and resort to a tactic that you had previously ruled out. The difference between a *threat* and a *warning* is notoriously thorny. A lawmaker may warn parties that she cannot accept an offer in light of fellow party members who are less moderate. “Here’s my problem,” Representative Barnie Frank said to the Chairmen of the Banking Committee, “I’ve got some pretty radical guys on the left on my committee, and they’re not going to like this. They’re purists, and they don’t want any compromise at all.” But bargainers have long realized that extreme threats can be the most effective. A negotiator who can credibly threaten to “rock the boat,” risking all parties, stands in a strong position. You might insist that I row the boat, or you’ll tip it over and drown us both. This can give me a reason to accept your offer, despite its transparent coercion. A demand neatly packaged with a threat can profoundly alter the leverage of the two parties.
To make this credible, parties have an incentive to pre-commit themselves to destructive courses of action. In Schelling’s classic example of this rational commitment, “If one driver speeds up so that he cannot stop, and the other realizes it, the latter has to yield.”21 The analogue is now familiar “legislative triggers.” Compromising parties conditionally accept a series of automatic actions that are designed to be mutually unacceptable to all parties. Their aim is to make a more credible compromise co-possible for the parties. The most common objection to this device is that this type of legislation is defeasible – it lacks credible enforcement mechanisms, particularly if it applies to a future session of the legislature. In 1985, the Balanced Budget and Emergency Deficit Control Act contained a trigger that would automatically cut domestic spending across the board. When the triggers activated twice, a later session of Congress blocked the cuts or greatly reduced them. But there are deeper theoretical worries about how triggers and their accompanying supercommittees are structured. For members of committees designed to facilitate compromise have the possibility of recognizing each other as sincere peers on a subset of issues, they may need considerable time for deliberation and isolation from external actors. Insofar as triggers are buck-passing devices, they are not successful in transferring moral liability. The members of a legislative body who vote for a trigger bill can be no less responsible than the committee that fails to arrive at a compromise. When we attempt to assess the blameworthiness of those who together pass the trigger and those who fail to disarm it, we can use this conception of distributed liability to make sense of the roles in play – the principal and agent, the co-sponsor and the co-signer – these will help us assess which of the parties is most plausibly seen as holding principal responsibility and secondary responsibility.

To the good faith participant, the most arresting threat is not mutual threats, but moral blackmail.22 The other party of the practice doesn’t just pair their “offer” with a threat, but the threat directly targets your moral standing. They threaten to perform a grave moral wrong if you don’t commit a lesser wrong. On their telling, you will be implicated in the greater wrong if you
refuse the offer. This kind of blackmail takes place in perfectly ordinary political discourse. We might imagine the blackmailer presenting the argument first-personally:

P1. The national economy would be devastated by a debt default.
P2. I won’t raise the debt ceiling unless you accept this concession.
C1. So, you should accept my offer.
C2. Otherwise, you’ll be responsible for the default.23

Let’s run the interpersonal test by varying the speaker/audience. If the argument misfires when a particular speaker is presenting it to a particular group, this reveals it to be fault as a public argument. So an offer by a participant may fail in its justificatory role “on the lips” of that party.24 There are potentially two compounding wrongs going on here. First, you make the minor premise (P2) true by your announcement of an intention. Second, you have conversationally run the argument. That may be in independent site of wrong. First-personally advancing the argument made plain its unjustifiability. Put in the third person, the minor premise takes on a different valence. If our side is huddled in the corner, and the threat is credible, varying the speaker can make the argument plausible-sounding. The threatened party might insist: “So, we should accept their offer.” Then they are viewing the makers of the threat from the objective, rather than participant, stance. They suppose they will carry out an unjustifiable threat, taking their noncompliance as a feature of the world we need to negotiate around. There may be decisive reasons not to accept the kind of offer, especially if we expect to return to the table soon. The practice of compromise is paradigmatically about offer and counteroffer, so it’s especially susceptible to speaker-relativity. What’s interesting here is that the party performing the interpersonal delivery of arguments can bear on its justificatory success. This shows that parties attempting to compromise can criticize each other in two basic ways. They can challenge the substance of a position, or they can question whether the person mounting the argument is in the position to make it. It is this second-order attention to the speaker’s license to advance a claim, given his own record of speech acts extending back to past negotiation, is most relevant for our purposes.
How to Avoid Duping

If you aim to honor the constitutive rules that make up legislative compromise, what should you do when faced with these known exploits? The weight that you place on the shared commitment to accommodation is authentic. But the practitioner’s stance can seem to invite duping and other forms of misdirection. Suppose two lawmakers meet to negotiate the content of a pending statute. You assume that I am negotiating in good faith. You believe that I share the commitment to admitting considerations that facilitate agreement. This includes non-deceptively conveying your concerns, listening to your reasons, and searching for policy proposals that could bridge our disagreements. Over time it dawns on you that I am not engaging in the activity. I may well be buying time – hoping that working days in the legislative session will run out. My noncompliance can deprive you of the ability to act as a compromiser, since actions constituted by practices depend upon participants jointly satisfying them. So you are now denied the possibility of participating in this activity.25

We are engaged in different games. It turns out that you only thought that I was a party to a candidate compromise.26 If this description is right, and the practice is unavailable, you might want nothing to do with me, now that you’ve come to see the depth of my bluffing tactics. If you are a strong purist, you may avoid any kind of working relationship with me. Or you might shift to a strategic stance, willing to search for small gains that might be made against a recalcitrant party like me. I think the core of this diagnosis is appealing. There’s a sense in which the practice of compromise is dependent on jointly held attitudes, and absent those attitudes, one can’t authentically engage in the activity. A striking limitation of most treatments of compromise is the assumption of full compliance. They see themselves as writing a rulebook that both parties to a negotiation will honor.

The most difficult problems for the practice of compromise arise under conditions of noncompliance, when the rules are abused, skirted, or selectively honored, and a good faith dealer is unsure how to respond. If a lawmaker is merely using this practice as a way of biding time or
finding the weak points in another party’s positions, this diagnosis seems to me right. There’s a party who isn’t playing the game. In our case, you have updated your view of our interactions: whatever we were doing, it wasn’t the activity of negotiating to a compromise. The exchanges and good faith gestures made you think I was compromising. But that wasn’t the case. For an analogy, suppose you are celebrating your resounding victory against the rival team. But there’s a problem. The other team thought the rules of baseball awarded victory to the lowest scoring team. We can agree that your opponents were not playing baseball. But a credible case can be made that you weren’t either. I don’t want to put too much weight on this particular linguistic intuition. For our purposes here, these all-or-none judgments of whether a player really is playing a game aren’t necessary.

In actual political life, the model is rarely this tidy. A lawmaker may be participating in compromise, offering concessions at the table, while engaging in selective truth-telling and implicit threats. A virtue of the practice approach is that it promises to unify our understanding of the activity and the product of compromise. So your readiness to co-accept a compromise will turn upon how you’ve been treated in the back and forth of the process. To take a case where the activity of bargaining bears on the acceptability of its outcome, consider this exchange:

_Senator Pat Geary:_ I can get you a gaming license. The price is $250,000, plus a monthly payment of five percent of the gross of all four hotels.

_Michael Corleone:_ Now, the price of a gaming license is less than $20,000. Is that right?

_Senator:_ That’s right.

_Corleone:_ So why would I ever consider paying more than that?

_Senator:_ Because I intend to squeeze you. I don’t like your kind of people. I don’t like to see you come out to this clean country with your oily hair, dressed up in those silk suits, passing yourselves off as decent Americans. I’ll do business with you, but the fact is that I despise your masquerade, the dishonest way you pose yourself. Yourself and your whole fucking family.

_Corleone:_ Senator. We’re both part of the same hypocrisy...but never think it applies to my family.

_Senator:_ Okay. Some people need to play little games. You play yours. Let’s just say that you’ll pay me because it’s in your interest to pay me. But I want your answer and the money by noon tomorrow.

_Corleone:_ Senator? You can have my answer now, if you like. My offer is this: nothing...²⁷

Prudential reasoning among scoundrels is, we hope, of a different piece than the moral reasoning about collective decisions. But unscrupulous tactics are not uncommon events within legislatures. The threat here could not be clearer: “I intend to squeeze you.” And the underlying rationale for the
threat is spelled out in xenophobic detail. Senator Geary makes clear his intent to exhort. When Corleone stresses that they are "part of the same hypocrisy," he reminds the Senator that they are playing a game. In response, the Senator reframes his threat in the language of a traditional offer. He's willing to play this "little game," where each party advances its interests. Corleone walks away, with a simple counteroffer and the suggestion that the Senator personally pay the license fee. The foul tactic that produced the counteroffer was, of course, the insult to family. Wrongful tactics can make a deal rejectible, even if the terms of the deal are acceptable on their face. We can't look at the text of an agreement alone.

To see how the interplay of the activity and the product of compromises function together, let's walk through the two exploits from earlier. Misrepresentation can put parties in a stronger position. Take a party's announcements of its opening position. If concessions are measured from the opening baseline set out by each party, the farther they can place that position, the less of substance they will need to give up. This seems to give the insincere and hypocritical party undeserved leverage. Seanna Shiffrin raises the stakes of this objection:

Deliberate misrepresentation not only eviscerates the point of compromise, it fuels its cynical opposition. It justifies the suspicion that parties are not negotiating and compromising from genuine positions of conviction but rather that they are advancing false positions to gain leverage and advantage. Misrepresentation undermines the crucial sense of reciprocity – of mutual commitment to good-faith – that is essential to sustaining a culture of well-considered compromise.

We can accept the form of this objection. But when a party to a compromise engages in this species of bluffing, does this relax this kind of condemnation? Suppose you recognize the other party’s opening position as a deliberate misrepresentation. You might be inclined to simply leave the table. But this reaction may be too quick. The other party has already violated a rule of the practice, where each side sincerely presents the position that fits with its principles. Your opponents didn't just state the position that follows from their principles. They were engaged in a different price-setting activity: they attempted to credibly assert a more extreme position in an effort to gain leverage.
Faced with deliberative misrepresentation, can you respond in kind? An opening offer can be put in terms that don’t assert the correctness of a position. So you might spell out your opening policy position without insisting that it is the policy that you think is all-things-considered justified. Here we can follow David Lewis’s picture of conversation as a game with an “evolving scoreboard.” What your opponent says they are telling you and what they are actually saying are coming apart. You understand the other party’s opening offer to be a deliberately overplayed position. Now using similar standards of precision can be acceptable. So when you counter with the claim, “Our opening position is X,” and you are careful not to insist on X’s following from your political convictions, you may be engaged in a permissible speech act. This will depend on the relevant context. In J.L. Austin’s famous example, when you say “France is hexagonal,” you may be saying something truth or false. At a cartography conference, you’ve just made a false claim. When uttered to a tourist who is having trouble picking France out on a map, you’ve told the truth. When you encounter the misrepresenting legislator, you recognize the context of their assertion and respond with a claim that is not untrue, but not a full representation of your beliefs about the policy issue. This permission is only available to a negotiator who has faced misrepresentation. Absent the infraction by the other party, the context of your opening offer would be different. In that case, the norms of sincerity and good faith would not allow you to speak in these kind of coached and potentially misleading words.

In ordinary legislating, there is considerable range in how each side presents an opening policy position. A common blunder occurs when one party engages in what we might call "pre-compromise." The opening offer isn’t a genuine statement of their policy position, nor is it an attempt to misrepresent their position to gain leverage. The pre-compromiser announces a position that includes hypothetical concessions in advance of negotiation. Here is its characteristic form: "While it’s not my ideal plan to further reduce the deficit, it’s a compromise I’m willing to accept." To be sure, after a compromise has been agreed to, this kind of language seems perfectly
apt. A lawmaker will want to publicly clarify the terms that they co-authored and the terms that they merely accepted as accommodations.

Before the negotiation process, pre-compromise makes one vulnerable to duping. A legislator reveals the actual, not hypothetical, give-and-take that pre-compromise precludes. A former legislator puts it this way: “To get to an end point, you have to plant a flag, get reactions, then you have to move, that is, compromise, and you get to a product that is hopefully what you want. If you start here [he gestured to the middle], you’re never going to get here [he gestured to a place on the edge].” The pre-compromiser fails to appreciate the relational side of legislative life. Accepting the concession of another party at the negotiation table is importantly different from imagining what they might say. The actual dealing in the former case involves what I will call “co-ownership.” One side has either accepted or even offered a policy that represents a concession. Their acceptance is critical to the liability sharing process that produces co-owned legislation. When a pre-compromise merely imagines what a reasonable version of the other party might assent to, this kind of shared liability isn’t possible, since there is no genuine transaction.

Democratic theorists have taken an alarmingly purist posture toward negotiated compromise. In their account of deliberative negotiation, Jane Mansbridge and Mark Warren condemn threats and misrepresentation. I will argue that they take an overly rigoristic line on both exploits. There are, of course, subtle ways for threats to be implied within the context of negotiation. Consider a violation of the sincerity condition of ordinary speech. The party across the table says: “If I were you, I would accept that compromise.” Suppose the context of this remark clarifies that it is a veiled threat. Deliberative theorists treat this as a paradigm of objectionable negotiation. But on my view, this judgment is premature. We’ll need further contextual details to draw this conclusion. Who offered what? And what was threatened? In a competitive electoral system where representatives can be held accountable for their voting record, it can be perfectly acceptable to threaten to “target” a representative if she doesn’t accept a particular concession.
The worry is that deliberative negotiation makes the practice of negotiation impossible. Mansbridge and Warren hold that “not revealing one’s reservation price...border[s] on the unethical.”\textsuperscript{36} Let’s assume, plausibly, that we generally shouldn’t engage in activities that are borderline unethical. Without the ability to hold this information tight, it is hardly clear that lawmakers can be parties to negotiation as commonly understood. In legislative compromise, the “reservation price” is shorthand for the enablers and defeaters that parties bring to the table. At what point would they be willing to offer a concession in return for a counter-concession? What kind of concession would be enough for them to accept the package as a whole? Even the judgment of how much an apparent concession \textit{really} is a concession is a piece of information that parties will want to keep close in hand. But on my reading, protecting information of this kind isn’t available to defenders of deliberative negotiation. We don’t normally think that we need to convey the particular position where a party will co-accept a compromise. I take this to be a low-level feature of negotiation as we know the practice. To demand this kind of pre-announcement invites the same duping as we saw with pre-compromise. Deliberative democrats express reservations when parties leverage “asymmetric information.”\textsuperscript{37} But why should this condition undermine the conditions for deliberative negotiation? In any legislature, information will be unevenly distributed.\textsuperscript{38} Some lawmakers will choose to put themselves in epistemic bubbles, where they will have little exposure to the opposing social-scientific literature. If, in a compromise setting, my preferred concession seems significant to another party because of ignorance, why should I have to inform them otherwise? This kind of prohibition relies upon an unnecessary rigorism. After all, even Kant distinguished between lying to the murderer and merely failing to inform.\textsuperscript{39}

I have attempted to show how revisionary of ordinary legislative practice deliberative approaches can be.\textsuperscript{40} We know that the practice of negotiating towards a compromise can be exploited by bluffing and threats. But it can be undermined just as surely by stringent rules that require real-time disclosure of one’s mental contents. I’ve claimed that this demand for self-revelation by parties is not obviously compatible with legislative compromise as a sustainable
practice. What we need to find is a place for strategic speech within legislative settings. To see how essential this feature of speech is within the legislative mark-up of a bill, consider a paradigm use of implicature. We are participating in the practice of compromise. In our exchange of demands, we are willing to implicate more than what we can make explicit with our words. If we have to reveal much of our agenda as we enter negotiations, making explicit our aims *ex ante*, the possibility of us making progress will be greatly diminished. Proponents of deliberative negotiation neglect the value of avoiding explicit claiming within the practice. In sketching this permission to conceal intentions and information, I’ve attempted to steer in between two objectionable conceptions of the negotiating context. It is neither a fully suspended context, where outright lies are fair game, nor is it continuous with ordinary interpersonal speech, where concealment and implicature can be worrisome.41

Behind the rigorism of deliberative negotiation is a picture of compromise as an essentially cooperative activity. If you and I are cooperatively building a Lego set together, failing to disclose to you how to connect the 4 X 4 brick to the steering wheel would be unacceptable. When you are stumped and I keep this information from you, it is no longer plausible to think of our activity cooperative. A competitive, but still jointly performed, activity is more tolerant of the failure to disclose information. It can allow for some inequalities in bargaining power and it can acknowledge the competitive dimension of the activity. Each side can rightly attempt to “get the better deal” in good faith. There need not be anything off-putting about this aim. We can allow room for the ordinary parts of the practice, jockeying for position, maneuvering to a concession by making a “compromise gesture,” and sequencing issues to prime the pump for major issues to be negotiated downstream.42

A modest picture of joint action needn’t place an all-out ban on deception, coercion, and differences in power. We’ve seen how negotiation itself depends on the availability of low-grade deception to participants. Arguably without the bluff participants may perceive themselves in a very different activity, much closer to discursive accounts of democratic decision-making. If this is
right, strategists may feel vindicated, since they never conceived of this practice as involving actions jointly doing anything interesting. But I think this conclusion comes too easy. Even when negotiations begin to break down, it’s hard to deny that there is genuine shared activity occurring. The spiral of reciprocal expectations may bring the activity down.

My account of the tactics of compromise, then, isn’t sanguine. One party’s violation of a rule creates a cascade of further rule violations, each of which is a permissible reaction to non-compliance. Facing procedural exploits and grave injustices, Lyndon Johnson’s license to deceive, threaten and act uncivilly may be justified in the partially suspended context of negotiation with unjust and undemocratic parties.43 The license to act in ways that are normally uncivil does not, I think, solely follow from the fact that his opponents were insensitive to moral considerations. Suppose Johnson’s segregationist colleagues were motivated by an intrinsic or extrinsic racism, contorted to fit their moral beliefs. They were morally motivated in this most minimalist sense. It doesn’t necessarily follow, as Amy Gutmann and Dennis Thompson suggest, that some amount of civility – they describe magnanimity as a close cousin to civility – is owed on the grounds one’s opponent is not indifferent to moral status.44

My practice conception gives us a better explanation of why we depart from the normally required attitudes of members of this practice. Namely, that Johnson was not constitutively able to negotiate to a compromise or even practice civility in an authentic way. There remains an attenuated sense in which one can continue to compromise or exhibit civility under conditions as nonideal as this case. One may be able to go through the moves of a compromiser or deliberator, knowing full well that these actions are not fully possible. At this point one’s action would be better described as a form of method acting, serving an expressive function. Like any shared activity, compromise can be gradually and even unintentionally brought down by participants, brick-by-brick. There’s nothing dramatic about this collapse – it can creep up upon a legislative body. Lawmakers can find themselves in a situation where this activity is no longer available. Later I will consider how a practice this fragile, yet potentially fecund to democratic life, can be rebuilt.
2. Three Players

The Purist

Purist legislators wave a recognized banner: “I won’t compromise on issues of moral principle.” They take this slogan to rule out two constitutive rules: *Shared Commitment* and *Co-Acceptance*. Purists won’t accept a policy that places weight on accommodating the other party’s position. For them, it isn’t enough to refuse to sign on to a compromise package. They view the activity of legislative compromise as potentially corrupting, since it gives weight to positions that are, by their own lights, unjustifiable. To structure our deliberation in this way is to put our finger on the scale. This isn’t just a failure to act according to our principles. It suggests a betrayal of them. Given the weight carried by the notion of “principles,” it is striking how little purists say about their form and function. They tend to take the idea as primitive. “When something is a matter of principle for a person,” Onora O’Neil and C.A.J.Coady write, “it is fundamental and not up for negotiation.” This line builds non-negotiability into the function of principles. While I'll be referring to the all-out purist, the more familiar form of purist in political life is selective. It holds this posture around a particular issue, or for a tract of time.

To participate in the practice is to support legislation that fails to satisfy each party’s respective moral principles. The intuitive worry is that holding a moral principle involves having a durable commitment to its realization. But the compromising party goes along with a paler version within arm’s reach. The purist argument relies on two premises:

*Complicity Premise*: It is impermissible to cooperate with individuals in jointly authoring and assenting to an unjust policy.

*Cooperation Premise*: The practice of legislative compromise is necessarily a cooperative form of joint action.

*Conclusion*: So, participating in legislative compromise is impermissible.

Let us assess the ethical premise before taking up the action-theoretic premise. The major premise expresses the agent-relative constraint that you shouldn’t personally collaborate in the production of a morally unsatisfactory piece of legislation, even when that statute would reduce the overall
amount of injustice in your political institutions. It makes a distinctive position-sensitive demand: that you not play a role in accepting an unjust law. This turns upon a legislative version of the distinction between doing and allowing.\textsuperscript{48} The purist may well allow an institutional injustice in the status quo to remain by refusing to jointly act with co-lawmakers in placing weight on concessions to opposing parties. Perhaps she is in the position to block a piece of legislation in committee, as the gatekeeping theory of committee power explains.\textsuperscript{49} Her unwillingness to co-accept a deal doesn’t flinch, even when a compromise will almost certainly nudge her political institutions closer to realizing her own moral principles.\textsuperscript{50}

Purists fix on a curious property of moral compromise – mutually-perceived unjustifiability by all signing parties.\textsuperscript{51} On the one hand, you risk betraying your principles when you insist upon their complete realization, knowing that they will find no traction in the world. On the other, when you sign on to policies that deviate from your principles, this can seem to reduce them to fungible rules of thumb. Consider this imagined exchange between Hubert Humphrey and Lyndon Johnson on the 1957 Civil Rights Act. In \textit{All the Way}, Humphrey takes experiences the force of both of these moral pulls:

\begin{quote}
Senator Hubert Humphrey: If I am anything like what you say, it’s because people know I stand by my principles. I can’t sell what I don’t believe in! I won’t.

LBJ: This ain’t about Principles, it’s about Votes. That’s the problem with you Liberals - you don’t know how to fight! You wanta get something done in the real world, Hubert, you’re gonna have to get your hands wet.\textsuperscript{52}
\end{quote}

The purist isn’t fully satisfied by the usual response to this alleged paradox. Individuals who are genuinely committed to a moral principle have reason to care about their realization. If, under conditions of disagreement, compromising on the principle’s verdicts can lead to their partial satisfaction, then the purist polity can be charged with a serious misunderstanding. Its members fail to appreciate the practical role of principles, which provide direction-guidance to agents under seriously imperfect conditions.

Are purists committing an easy conceptual mistake? Are they assimilating the value of principles as both \textit{convictions} that structure our evaluative lives and as \textit{regulative devices} that we
attempt to put into practice? Are they eliding principles of justice with rules of regulation?\footnote{53} When parties to a compromise sign on to a policy framework, it seems clear that they are accepting a policy that does not fully satisfy their moral principles. But to think that they have compromised their principles is to misunderstand the activity they have engaged in: the site of the back and forth of compromise was what rules of regulation to adopt, given the background disagreement about their moral principles. To make matters worse, they can seem to be in the grip of a crude picture of moral reasoning. For them, we can “read off” policy verdicts from our collection of moral principles, with little or no judgment. We then derive verdicts by applying a relevant rule.\footnote{54} Maybe they are overly impressed with the tidiness of the algorithmic approach. If we see moral principles as issuing normally conclusive reasons for certain courses of action, this can take away the purist’s stinging charge that compromisers are putting a price on their principles.

Putting these conceptual worries aside, I suspect that the purists’ principal mistake is deeper and more philosophically interesting. When they inspect the practice of legislative compromise, purists conflate cooperation with shared action.\footnote{55} Later I will attempt to pry apart these two concepts. For now we can note the rational pressure that this puts on the purist to accept the minor premise. To act under the constitutive rules of legislative compromise, on their view, \textit{just is} to become a plural subject with their fellow legislators. The upshot of this strong ontology is that they would be “jointly committed to doing something as a body – in a broad sense of ‘do.’”\footnote{56} To the purist, political talk of Gangs of Seven legislators then takes on a more ominous meaning. Maybe these really are gangs in the team-like and colluding sense. This is where the purist draws the line. They might put the worry this way: “Expecting me to participate in this practice is asking too much. It is one thing to hold one’s nose when voting for an imperfect law in a floor vote. But there can’t be a moral reason to co-produce – and even co-author – a statute that contains significant injustices.” This stronger idea of shared agency raises the moral stakes considerably for purists. They are not merely being asked to \textit{allow} the passage of a piece of legislation that is morally disagreeable. They
are now asked to become an equal partner at the table. They may perceive this as a direct affront to their integrity, or to the integrity of segments of their constituency.\textsuperscript{57}

This way of thinking about compromise – as a robustly cooperative activity – carries with it a notion of shared moral responsibility that repels the purist. To see this, let’s begin with the most famous purist in normative ethics. The murderer knocks on your door, and politely asks you whether your friend is hiding in the your attic. Suppose you deceive this visitor, but despite your effort, this deceptive speech act leads him back to your friend. What is most striking about the Kantian verdict is that you now share full liability for the murder. Once you violated a moral principle prohibiting deception, you come to own all the consequences of your infraction. In Kant’s damning verdict, you become the “author”\textsuperscript{58} — presumably he means the co-author — of your friend’s death. The conception of moral liability here is strict, since unforeseeability can serve as no excuse. And the internal logic of this view carries over to purist legislators. They view their refusal to take part in the activity of compromise as a way of cancelling their moral connection to an objectionable policy. To engage in this practice would open them up to the charge that they share in responsibility for the accepted package. Take a minority party that is considering whether to come to the table. If they participate in this practice, they might see themselves as cooperators in the full-bodied sense: \textit{equally sharing} in responsibility for the creation and enactment of a law that violates their moral principles.\textsuperscript{59}

The purist’s posture contains an enduring intuitive force. Most of us accept that compromises have defeaters. Some candidate compromises are so unjust that they should be rejected, even if they would make the world morally better by one’s lights. Countenancing a policy at odds with our moral principles can, in certain circumstances, betray them. The admirable feature of purists is their recognition that there are genuinely “rotten” compromises.\textsuperscript{60} I will suggest a way to accept the presence of defeaters without an approach so preoccupied with one’s agency. But first, we need to get to know the purist’s alter ego.
The Strategist

Strategists have a way of looking right through the practice of compromise. What they see is a series of causal levers that they can pull to maximize the advancement of their substantive principles of justice. So they may find themselves engaged in a give and take in Shared Commitment. But their reasons for placing extra weight on the positions of disagreeing parties will always be instrumental. If being perceived by others as concessionary will maximize the fulfillment of their first-order moral principles, they will gladly engage in this tradition. And when they face an up-or-down vote, they will often find themselves willing to sign on to a policy proposal that is seriously morally inferior by their own moral principles. If it is done in service of the closet available approximation of their moral principles, they will participate in Co-Acceptance. But their willingness to join will turn on whether their participation is likely to satisfy their own moral commitments, given the institutional obstacles in the background.

The strategist’s game plan is deceptively simple: “to plant the flag of his convictions,” as Ronald Dworkin pictured it, “over as large a domain of power or rules as possible.”61 We can leave open the temporal “give” – how long a game our strategist plays – and how she runs her risk-rewards analysis when entertaining a concession. There isn’t a single strategist but a larger cast of characters that shares an instrumental way of conceiving their involvement in compromise and the other legislative activities – whether agenda-setting, representation, or oversight. Let's take our initial model of the strategist to be a fair dealer. She refuses to engage in the ruthless tactics familiar to negotiations. Even without the power to grossly misrepresent her position or threaten her rivals, there remains something ruthless about this political figure. When the numbers are on her side, and the anticipated repercussions will be few, her counteroffer to the party out of power will be: nothing.

My portrait of the strategist has been, I confess, a bit unfair. If anything, the strategist occupies a presumptively justified role in negotiation. In a political society where levels of party polarization that have no precedent,62 the logic of planting the flag as far as possible can be
mesmerizing. The strategist isn’t concerned with an array of defeaters; she only has one. Her deal-breaker is any proposal that doesn’t advance her substantive principles. She is acutely “tolerant of small gains” and more than willing to “settle for less in order to prevent even worse.” This kind of unsentimental view of legislative life may well earn her the laudatory title of the “pragmatist.”

Placed within a system that provides incentives for participation in the practice, at least some of the time, the strategist is perfectly willing to strike a concessionary pose. But notice that her willingness to give anything – no matter how small or low-ranked on her agenda – must be forced out of the strategist’s hands. In interactions where the numbers are on her side and the institutional incentives are not present, her demand will be total capitulation.

My hope is that this character is beginning to look less appealing. The strategic position towards flesh-and-blood parties is actuarial. You begin to see the other parties as potential obstacles to the realization of your first-order principles. Those posturing agents across the table aren’t interestingly different than impediments in the natural world. This brings into focus what the strategist is missing as a member of a lawmaking body. In short, no value is placed on enacting law together. The strategist, I will argue, doesn’t relate to her co-legislators in a way that appreciates their shared moral predicament. They are in the unusual situation of simultaneously being the law’s co-producers and its co-subjects, authorized with the terrifying power to alter our moral requirements just by writing some words down together and publishing them. If democracy’s value lies in the relationship of shared authority that it makes possible, we can detect an impaired relationship among co-legislators. This move, I think, doesn’t require a strong civic analogue to friendship.

If the practice of legislative compromise is necessary for sustaining valuable democratic relationships, we will have in hand a moral reason for legislators to participate in the practice. That “if,” of course, is substantial. Why should you and I particularly care about the terms on which our authorized representatives are relating to each other? How do those relationships bear upon how we relate to each other as citizens? The strategist has a readymade response: Why shouldn’t we
concern ourselves solely with a legislature’s productive output, the substantive acceptability of legislative law? I’ve only hinted at the countertype to the strategist here, the legislator who interacts with fellow lawmakers on more than purely instrumental terms. Such a concern can seem far removed for the usual values we draw upon in democratic theory. So let me ask you to suspend judgment until the next section, when we’ll cast a final character, designed to avoid the shortcomings of the previous two.

We began by building out the constitutive rules that together make up this fragile practice. I claimed that we could see legislative compromise as a morally distinctive activity, one that resisted attempts to fold it into a generic account of the conditions for compromise. It’s useful to see how strategists challenge this claim. They seem content to treat all negotiation – whether private labor disputes or legislative contest over the minimum wage – as much more unified than I’m assuming here. Strategists hold no pretension that legislative compromise is a cooperative practice. They take seriously its competitive character. My worry is that they lose sight of its valuable character as a vehicle for us to make decisions together. Strategists, I will argue, fail to recognize compromises as a joint activity whose worth is not exhausted by its production value.

Strategists refuse to participate in the practice of legislative compromise. Their willingness to use negotiation as a piece of social technology falls short of authentic participation. To begin with an analogy, it is subversive of the practice of baseball when a batter pleads the umpire for “just one more strike.” Now imagine a team whose win-lose record is so poor that they have stopped aiming a victory. They show up for games. But their effort is not one of players collectively attempting to win a game. Suppose this becomes clear after repeated interactions. At some point an observer will conclude that it’s overwhelmingly likely that this team isn’t participating in the practice. So, too, strategists are selective in their policy of assigning weights to the accommodation of other party’s positions. Or when their decision to co-accept the product of a compromise turns on a purely instrumental calculation. But this suggests that their “play” within the practice isn’t enough. They utilize the practice without accepting the standing policies that would mark them out as
participants. They have found a way to take advantage of the practice without resorting to the familiar series of bluffs and threats. The charge of non-participation is not an indictment of the strategist. Whether lawmakers have moral reason to participate in compromise will turn upon it the function in a representative democracy. We’ll turn to this question in the next two sections, where we will search for a figure and an accompanying rationale that avoids instrumentalism.

The Practitioner

In their own signature ways, the purist and strategist lawmakers keep their hands clean. Purists wear this ambition prominently, abandoning negotiation rather than entering a genuine process of give and take and refusing co-acceptance even when they agree that the compromise would improve their moral situation. Participating in a practice entails cooperation, they think, and this tight-knit level of shared agency threatens their integrity. Their concern to avoid collaboration with injustice is all-trumping. Strategists also keep a certain distance from a practice, not by walking away, but by selective participation. After repeated interactions, other parties come to notice the strategist’s bargain, and learn to read them in the “spiral of mutual expectations” that marks out negotiation and compromise. What results from this dialectic, I hope, isn’t a compromised figure — at least in the pejorative sense. My aim, instead, is to construct a composite character, who incorporates attractive properties of our two figures.

Let’s call the legislator who attempts to comply with the letter and spirit of the constitutive rules of compromise the practitioner. This breaks with purists, who refuse to place any weight on accommodation. They viewed compromise as a kind of “pay-to-play” scheme that unacceptably put them in collaboration with injustice. They refuse to pay that price. Purists violate the letter of the practice, refusing to share in a policy that assigns weights to any substantive position that they have rejected. Strategists, in contrast, violate the spirit of the practice by only accepting its norms when it served the purposes of advancing their first-order principles. Practitioners strike a unified pose toward the both means and ends of legislative compromise. To appreciate this unique stance, notice the two silos in which political theorists have discussed compromise. They have considered
the limits of negotiated in isolation of their policy substance. Or they have set a threshold for rejecting a compromise – its "rottenness" point – without taking into account the significance of the give and take of negotiations. I'm proposing that these two sites work together in a systemic way. We can see this interplay by mapping the three ways that legislators can relate to each other and the citizens who authorize them. How do these attitudes bear on the means and ends of negotiated compromise?

<table>
<thead>
<tr>
<th>Negotiation Means: Speech Context</th>
<th>Purist</th>
<th>Strategist</th>
<th>Practitioner</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Unsuspended</td>
<td>Fully-Suspended</td>
<td>Partially-Suspended</td>
</tr>
<tr>
<td>Negotiation Ends: Legislative Content</td>
<td>Rigorism</td>
<td>Instrumentalism</td>
<td>Non-Instrumentalism</td>
</tr>
</tbody>
</table>

Here we’ve placed our three characters into two acts: one about process and the other about substance. Purists are so averse to complicity that they are only loosely involved in the process of compromise, listening but never conceding anything to a mistaken peer. They are tempted to only have relationships to colleagues in full moral agreement. Purists about the means of negotiation won’t bluff, mislead, or even withhold details about their first-best policy. For them, there’s nothing distinctive about the speech context of negotiators that permits them to act differently from any other domain of speech. This is consistent with purists about ends. They only sign on to policies that satisfy their principles of justice. There simply aren’t permissions to settle for anything less. In contrast, strategists about means see the practice as a game that allows them to say anything, short of making coercive threats, that will help them achieve their political aims. This doesn’t commit them to a self-defeating policy of habitual deceit. Otherwise they wouldn’t earn their name. Strategists put the default constraints on deception and false promising on hold, since they take themselves to stand in a fully-suspended context. This reflects their view of relationships with co-legislators as purely instrumental.

This makes room for a middle stance towards the means and ends of negotiation. For practitioners, negotiations are partially suspended contexts. Certain types of misrepresentation can be permitted and even required of participants. When faced with means-strategists who attempt to dupe them, practitioners acquire further permissions to engage in deception. They don’t take the
context of negotiation as fixed, since opposing parties to negotiation can, quite literally, change the game they find themselves playing. What motivates practitioners is concern about relating to their fellow lawmakers – and by extension, the whole democratic citizenry – as equally sharing in authority. So they place independent weight on accommodation when co-parties to a compromise meet certain procedural and substantive conditions. This follows not from a calculation of their long-term political goals, from the value of relating to their co-citizens on justifiable terms. In the next section, I will say more about how the relational good of democracy underwrites my argument.

Let me preview the form of the argument. The practice of compromise, on my view, is a response to the value we place in deciding together, even when serious disagreements remain. Democracy's value can only be captured relationally in the equal sharing in authority over our political institutions. The practice can make disagreeing legislators “co-owners” of a legislature’s outputs. I will argue that the available rationales for compromise – solidarity, magnanimity, or commitment to union – are less successful at motivating the practitioner’s posture.71 In the absence of other mechanisms that allow citizens to share responsibility for their political institutions, compromise can play an essential part in a democratic system. Let me mention three limits of this abductive argument. First, it brings on board a particular idea of democracy for free. Second, the argument is only good as the list of explanations you start with. This invites the charge that your favored explanation is merely “the best of a bad lot.”72 To avoid this known bug in abductive reasoning, we’ll canvass leading defenses of noninstrumental reasons to compromise as offering an alternative explanation. Third, the argument doesn’t yield a conclusive verdict. Even if you accept its soundness and validity, it only makes compromise an essential practice when there is no alternative mechanism capable of playing this role. I think these limits end up working in the argument's favor, but let’s first step back and see the fruits of our extended dialectic.

3. Co-Ownership as a Democratic Value

Think of a piece of democratic pageantry. The parties to a compromise lavish praise on a brokered piece of legislation. They insist that the process made the proposal a better law. To the
cynic, the parties have become so acclimated to bluffing within the process, their speech acts are spilling over to public speech. In their defense, perhaps the parties haven’t realized that they have left the suspended context of the negotiation room, where certain kinds of deception are countenanced. In this section I will offer an alternative explanation. We can make sense of the intuition that the process of compromise can improve a piece of legislation. Negotiation can produce a law mildly worse on the substance, but better in the process. It can raise a law’s democratic credentials. There’s nothing mysterious about the idea that a practice can honor a process-related value that would not exist but for the actual give and take of participants. Consider elections. The process of citizens submitting ballots needn’t get its value solely from its tendency to produce results that are good or right. We think that electoral procedures themselves can invest authority in a political system.

Once we accept that substance and process-based reasons make up ”two distinct and irreducible points of view,” as Thomas Christiano holds, we can see a chronic mistake in the literature on compromise. On the prevailing view, if parties to a negotiation come to see the package as all-things-considered better by their own convictions, then they haven’t really engaged in a compromise. The process has been epistemically productive. It has led to the correction of false beliefs, not an authentic compromise. But this overlooks the two distinct dimensions by which we assess a piece of legislation. It treats negotiation as functionally equivalent to a seminar room, where the central business is the rooting out of mistaken convictions. On this model, successful negotiation often doesn’t produce compromise but correction. It leads to one party that comes to see it was in error. But like elections, negotiation seems to have the potential to be a normativity-conferring process. If conducted according to certain rules, the process can seem to change our valuation of a proposal or law. This can explain what the sincere lawmaker means when she insists that the process made the bill better. The legislation really is morally better, all things considered. But it doesn’t follow that the law is now better on every dimension, each considered in isolation.
To see how this argument might work, let us start with schematics and descend to concrete cases of policy.

Two Bills. Suppose Bill X is somewhat more likely to fully satisfy your first-order principles than Bill Y. For Bill X, the only concessions extracted were those strictly necessary to attain the bare 51 majority in a body of 100 members. Bill Y is the upshot of an extended negotiation that, through non-strategic concessions, ends up eliciting near universal support – say 98 of 100 legislators. At this point, strategists have heard enough. They don't need to know anything more about the pedigree of these two bills. Their approach doesn't give them any resources to place weight on the value of the respective processes behind these two bills. Their sole criterion for selection is the bill's substantive merits. Of course, if strategists become convinced that Law Y is less likely to be overturned, they can take that as a reason to support Y. So they could sign on to a negotiated compromise that is more likely to be politically sustainable, even somewhat less effective. Now practitioners aren't yet ready to lend support to either bill. They will need to engage in a process of weighing the substantive and procedural considerations at stake. Were the non-strategic concessions worth the price? To answer this, we'll need to clarify what is valuable about a bill that receives this level of consensus. But first let's put one more case into memory.

The Omnibus. Next consider an omnibus spending bill. Suppose the majority party offers non-strategic concessions to secure bipartisan support. There are billions of dollars at stake in the negotiation process. The minority party agrees to support the bill if certain projects receive more funding than the majority party thinks is likely necessary for their success. On the merits, the bill sent out of the committee has been made somewhat worse by the negotiation process – by the lights of the majority party. This kind of negotiated compromise doesn't just frustrate the strategist. It baffles her. How could members of the majority party justify this kind of overfunding? This strikes her as an injustice. Without a story about how this concession serves their long-term electoral strategy, there just isn’t any reason to have made these concessions in committee. The minority
party, in contrast, has reason to think that the bill is doubly improved. It is mildly better on the substance and on the process.

What, then, is the procedural value that is being honored here? I am proposing that we place value on legislators “co-owning” statutes that they enact together. The democratic value of co-ownership captures the sense in which large-scale social legislation can become a kind of public property. It can explain the force of the elusive political virtue of two-party systems: bipartisanship. The idea isn’t that there is value somehow inherent in two parties agreeing on something. The mere alignment of policy preferences across the aisle doesn’t make a virtue. Indeed, for modern day Schumpeterians, this picks out a negative value. They see bipartisan agreement as probative evidence of inter-party collusion. If we confine the good at stake to the valuable relationship that holds when lawmakers decide together, we are missing the deeper location of value. On my view, it’s a constitutive part of legislative compromise legislators are our agents in a large-scale principal-agency relationship. So when a non-strategic concession is offered to members in the minority party, by extension this concession is offered to the principals who authorize them to stand at the negotiating table. It is offered to you and me. The legislator we have placed in power is offered a concession that convinces her to sign on to the bill. Add “winner-takes-all.” What, exactly, is worrying here?

The value of co-ownership, then, doesn’t ultimately lie in lawmakers standing in relationships of mutual, non-instrumental concern. We locate it in the relationships among democratic citizens. In claiming that legislators speak in the name of a subset of citizens, I’m departing from views that suppose that legislators stand in a principal-agent relationship with society as a whole. Jeremy Waldron takes this line when he worries about the purist. “[P]rincipled opposition to compromise at the level of partisanship,” he argues, “may seem blinkered, self-centered, and obtuse when one is acting in the name of the whole society.” If lawmakers stand in an agency relationship with a subset of citizens, they have reason to value practices that put their...
principal in valuable democratic relationships. In contrast, I think that ordinary citizens have a prerogative to be purists – to place considerable weight on their doings.

We can now defend an asymmetry in how lawmakers and citizens relate to compromise. Suppose a citizen faces an initiative that contains three policy choices: the first satisfies, more or less, his full set of moral principles, the second is an attempt to approximate a compromise option, and the third is the policy that flies in the face of his principles. I think it can be perfectly justified for this citizen to select the policy option that most purely expresses his political principles. This holds, I think, even if he realizes that this pattern of voting, conducted by his fellow citizens, could well lead to the enactment of the unjustified policy. My explanation for this position should now be predictable. The practice of compromise, with the regulative rules that I've sketched, wasn't available to this citizen. He was handed a ballot with a pre-packaged set of options. He never had an opportunity to be part of the process of crafting these options.

This verdict departs from prevailing defenses of compromise in two ways. First, it can explain the conditions under which legislators have a stronger presumptive moral reason to make concessions than ordinary citizens. This obligation does not emerge out of the lawmakers' official role.79 There's nothing in their official oath or even implicit in their agency relationship that delivers this weightier obligation. What ordinarily distinguishes the citizen from the official who speaks for them is the latter's access to the practice of compromise. This won't always be a clean line. Think of a citizen who joins a committee assigned with the task of participatory budgeting. Within this emerging practice, now in place in over 1500 municipalities worldwide, community members are given considerable discretion about how public funds are to be spent.80 A role-based view would experience pressure to reclassify this citizen as a part-time legislator. But this wouldn't be enough to justify this conceptual redistricting. A practice-based view offers a simpler explanation of how our citizen acquires a weightier moral reason to engage in mutual concession.

Second, my approach avoids role gerrymandering. We can explain why lawmakers don't have the purist's prerogative without altering the usual terms of representation. We needn't
assume that a lawmaker’s paradigmatic agency relationship is to the whole community. If legislators must aim to “name” all citizens in their decision-making, they may experience pressure to take concessions seriously in their deliberative framework. This is the route that Waldron takes. My worry is that it provides the right answer for the wrong reason. Let’s grant, for the sake of argument, that executive officials may have reason to act under this banner: to see themselves as “acting in the name of the whole society.”81 I think that this is a highly revisionary description of the role of the legislator.82 My account of compromise took the unfashionable view that the central agency relationship of the legislator is organized around one’s constituency. I refrained from taking a line on precisely how this power-sharing arrangement between principal and agent is to be worked out.

We’ve seen how co-ownership gives parties a reason to offer non-strategic concessions. Now we can switch perspectives. How does the value bear on whether a party offered a non-strategic concession has reason to accept it? Consider a case based on a major piece of social legislation. Suppose members of two political parties spend more than a year in iterated negotiations over a universal health insurance program. Bipartisan “gangs” spring up and concessions are made in both sides in the process. Each side is placing weight on making mutual concessions. The social policy fundamentally changes in the process. Its final form has taken on board a remarkable number of provisions from the minority party, in the hope that there will be substantial bipartisan floor vote. But suppose that despite this genuine process, there isn’t any co-acceptance. This series of compromises fails to generate enough support to get any votes from the minority party, whether in committee or on the floor, for the piece of legislation. If we based our analysis of co-ownership on roll call voting, we’d conclude that no legislator in the minority party bears any liability for the ensuing law. But on my account of the practice, this would be a mistake. Making offers and having them incorporated into a statute is undeniably a liability-accruing activity. If this transaction was performed behind closed doors, it is not always datable and checkable, but this doesn’t undermine the force of this verdict.
This distinction will strike purists as casuistry. On their view, if you refuse to accept a compromise or even engage in the process of give and take, you can “disown” any legislation downstream. The law didn’t pass through your hands. If you participate in the process of concession and eventually accept a compromise, you become a kind of moral co-sponsor of the resulting law. There is no sense in which some constituent parts of the package are more or less identified with any given party. This “lumping” derives from their athletic conception of joint activity, which we located in their Cooperation Premise. For them, here’s no way around the idea that compromise is a robustly cooperative activity that makes all of us share responsibility for each and every line-item. Our responsibility is all or none. On the flip side, strategists never saw compromise’s give and take as a shared activity. The admissibility of concession and accommodation depended on first-order judgments about the acceptability of a policy. They ask whether giving up anything of substance, however small, would advance their principles of distributive justice. We can now see more clearly the dimension of democracy that they are indifferent to. They don’t place any independent value on a distinctly democratic consideration: the value of legislators co-sharing in the responsibility for legislation. We ask them the usual questions about the process of negotiation: Who demanded what? Who gave up what? They don’t think that answers to these questions will be morally revealing. Instead of focusing the causal processes that produced this law, they direct our attention to the gains they have made in serve of our first-order principles.

There are two ways legislators can stand in relation to a concession. Let’s say that a party is responsible for some aspect of the law when they proposed or supported it in the negotiation process. This makes them co-authors or sponsors of a provision, exposing them to moral complaint from individuals wronged by the law, including the negative reactive attitudes of blame, resentment, and indignation. In contrast, a party who co-accepts a compromise is morally liable for all of its provisions, including the concessions that they made to a disagreeing party. But they need not bear strong moral responsibility. When you raise a moral complaint against a concessionary provision,
the lawmaker can point out that she accepted this provision, so she bears a kind of secondary responsibility for it. But her acceptance doesn’t alter her belief that that provision was unjust. This notion of liability isn’t inert. It acknowledges that in going with the compromise, warts and all, the Signing parties take responsibility for its contents. When a lawmaker accrues liability for their accommodations, this can affect her future agenda-setting. It may shift the policy profile of legislators, putting pressure on them to prioritize a concern that has been neglected in the negotiation process. A negotiation begins, with strategists placing no weight on accommodation, and offer nothing to parties in a minority position of power. They rely upon a bare majority to pass the bill when they could have ensured much broader support with a small concession. Notice that the out-of-power party to compromise wanted to share in some kind of ownership of the law. If their offer had been accepted, they would have accrued narrow responsibility for the provisions they actively supported and broad liability for accepting the whole package. But when their offer is altogether rejected by the strategist, the outvoted party can rightly claim that this wasn’t their doing. The strategists have now put themselves in a situation where they and their principals solely bear responsibility for this law. The possibility of sharing in liability has been closed off.

Now let’s add a twist to this case. Suppose our strategists were mistaken about the substance of this issue. They passed a bill – their opponents would say they “rammed it through” – that made their shared political institutions more unjust. If you reject the democratic value that I’m calling co-ownership, you will dwell on their substantive mistake. Simon May suggests that attending to their first-order mistake can explain our reaction to the uncompromising individuals who push through unjust legislation: “Those who refuse to compromise unjustifiable positions are acting improperly, not because they refuse to pursue principled compromises, but because their positions are unjustifiable from the beginning. The error lies at the first order, not the second.” On my view, there is a compound error here. Imagine addressing these strategists at a town meeting. Even if they were blamelessly mistaken about the moral status of the law, there still seems to be a remainder. They refused to enter a relationship with legislators whose small concessions would
have altered the terms of their moral liability for the law. The charge that they neglected the value of co-ownership is compatible with criticism on the substance of the law.

Precisely how liability gets shared is crucial for this picture. It will partly depend on what this practice is like. The underlying ontology may make all the difference. The purist assumed, without argument, that compromise must be a cooperative activity. She flinched at the thought of merging into a group subject with rival legislators, given the commitments that thought seems to have carried with it. We unearthed the nested assumption that all joint intentional activity must be cooperative. But this may be false. I’m assuming cooperative activity is a moralized idea that rules out background coercion and deception, and includes the idea of sharing responsibility for our endeavor. A cooperative activity needn’t involve the equal sharing of responsibility, but an equal division may serve as a default setting.

How does participation with other parties in the production of a compromise bear on the participants’ moral liability? Purists are convinced that either avoidance of the practice or bare-knuckled obstructionism within it can block them from liability. They think that their hands-off posture allows them to insist: “we had no part in the making of that law.” Conversely, strategists can’t understand why you’d ever pass on the chance to make your political institutions less unjust. They might say to their brethren: “Take the deal.” Their view of shared liability might put considerable weight on the negative responsibility of lawmakers. Suppose they have a causal opportunity to accept a reforming statute, only to take a pass. For them, interposing yourself in a compromise reduces or even eliminates your liability for a prevailing injustice by mitigating it. Practitioners can accept this claim. They can hold, sensibly, that legislators can be responsible for their doings and allowings. What the practitioner owes us is an answer to the puzzle of concession and accommodation. How does liability shift when a concession is made that isn’t strictly necessary for the long-term promotion of their principles? When they can plant the flag of their convictions as far as possible with impunity, why shouldn’t they? The purist and strategist altogether miss the procedural side of justice.
We can close this section with two limitations of this argument. First, the conclusion may seem too weak. If you continue to doubt that lawmakers can be *required* to compromise, my argument is compatible with the weaker conclusion that they can be *permitted* to engage in this practice. This lighter weight conclusion follows from granting any weight at all on the policy of Shared Deliberation and Co-Acceptance. This unofficial position treats the posture of the practitioner as *permissible*, if not generally required. Lawmakers who value co-ownership are not acting wrongly when they offer non-strategic concessions. This may sound like a relatively weak position, but it is enough to refute those who reject the entire space of principled compromise.86

Second, the conclusion of my argument may seem too strong. Am I assuming that any legislator, whatever their institutional backdrop, has a reason to engage in non-instrumental compromise? I’m not. The overall institutional design and internal organization of lawmakers can affect the valance of moral compromise. My argument has taken for granted a first-past-the-post system. For a system of proportional representation, compromise may be induced through other means. So this reveals a contingency of my argument that I welcome. My claim isn’t that there is a universal moral reason to engage in this kind of accommodation whenever one is producing statutes. Institutional mechanisms can alter the terms of this practice, shifting sites of concession within the system.87 But in the absence of these concessionary features, an informal practice of compromise may be necessary to honor our democratic values.

4. Compromise’s Defeaters under Unjust Conditions

Nearly every piece of legislation contains substantive unjust. This holds true in legislative systems that enact law in a sprawling, omnibus form.88 So lawmakers face a persistent question: Should I support a bill that introduces certain substantive injustices whileremedying status quo injustices? Some pieces of legislation are, of course, more grievous than others. And the species of substantive injustices will surely matter in our reckoning. This is what made the purist’s position problematic under conditions of actual politics. I’ve defended non-strategic concessions that honor a procedural value. This value of co-ownership, on my view, exerts a presumptive pull on the give
and take of negotiations. When a concession can create broad “buy-in” across the legislature, co-ownership explains how the compromise process can make legislation more justifiable. Still, to the conceding party, the ensuing law is less justifiable on the substance. So while the product is, all things considered, a morally better law, the process creates a moral remainder. In this final section, I will describe two compromise defeaters, and then answer two objections that draw their force from this remainder.

Critics of non-strategic compromise have fed off a one-sided diet. That is how Ludwig Wittgenstein characterized philosophical approaches that “nourish one's thinking with only one kind of example.”\textsuperscript{89} Objectors have selected negotiation topics that make their case – with the most grievous concerns on offer. The leading rejection of non-strategic compromise is built entirely around a single example of abortion policy.\textsuperscript{90} We shouldn’t be surprised that when confronted with this degree of moral gravity acknowledged by both sides, the substance of negotiations swamp the relatively modest weight assigned to being accommodating. The conclusion that neither side should offer non-strategic concessions is precisely what we would expect. It provides no evidence that a value like democratic co-ownership is inert. Opponents have made their case too easy, relying on cases that ensure their conclusion. A distinctive feature of my account of compromise was that parties don’t offer concessions without reason. If certain conditions of negotiation have been met, they share a policy of placing weight on giving accommodations if and only if they bring on board the other party. We won’t be able to observe this weight directly in a range of cases. We won’t know, for example, if each party shared this weighing policy only to have substantive considerations override it. Recall the analogy from earlier. Suppose the admissions director who has a personal policy of placing weight on legacy candidates rejects a candidate who is far below the bar. This isn’t evidence that there wasn’t any weight placed on this consideration in her deliberations. It’s entirely consistent that this policy of weighting has been overridden by substantial considerations.

There’s a second way that injustice can serve as a compromise defeater. The means or ends of a negotiating party can directly affront the democratic value of co-ownership. In these cases, the
weight a party should assign to accommodation is voided. Consider Lyndon Johnson’s stripping down of the Civil Rights Bill of 1957. Hubert Humphrey accused him of “gutting” the act by conceding the voting rights section. When pressed to justify this concession, Johnson’s reason is strictly instrumental: “You can’t pass a Civil Rights bill with Voting Rights intact! Not this year. Not now.” There wasn’t any non-instrumental reason “leftover” in these negotiations. For in this case, the tactics and ends of the bill’s Southern opponents serve as paradigms of compromise defeaters. Their “hardball tactics” included an array of deception and outright lies, procedural violations documented by the Senate parliamentarian, and chronic stalling with the hope that white backlash would lead the Majority Leader to stand down. What’s more, their substantive principles directly targeted the value of citizens relating to each other as equally sharing authority. So when a party to a legislative compromise holds aims that affront this democratic value, the ordinary weight placed on non-strategic concessions is “silenced.” In negotiation, the substantive injustice of a party’s proposal doesn’t outweigh the procedural value of deciding together; it cancels the moral reason to offer non-strategic concessions.

With these two defeaters in place, let us consider two objections. The strategist takes up the point of view of victims of substantive injustice. How can lawmakers who make a non-strategic concession answer this moral complaint? The first thing to stress is that both substantial and procedural considerations matter to us. So let’s see how these two distinct values may enter into a compromise. Suppose a legislative committee is distributing one hundred million dollars within a larger farm bill. You believe that roughly half of these funds should be distributed to more sustainable crops like soybeans, while the other party to the negotiation believes that only one third of these funds should be distributed in this way. But if you offer a concession, in this case literally meeting them halfway, they will support the farm bill in its entirety. Now imagine the moral complaints of the soybean farmers who receive less federal aid than they are due. You can grant the substance of their complaint but appeal to the procedural value that this compromise has respected. Now whether your appeal to the value of a broad swath of legislators – and by extension
citizens – co-owning the farm bill will be convincing to them is an open question. But notice that in this kind of case, if the lawmaker had not made a non-strategic concession, there would be “victims” as well. If citizens value relating to each other as sharing in the momentous task of legislating, then they will have a moral complaint when lawmakers treat compromise like the strategist. I want to stress two features of this case. First, the farmer's moral claim isn't silenced by the lawmaker's answer, but it has been permissibly overridden. One virtue of my account is that it can explain the moral remainder that compromises leave in their path. They tend to look “ragged and unsatisfactory” in retrospect.\(^{92}\) A theory shouldn’t make them look any better than this. Second, to see where non-instrumental compromise makes a difference, we should look for the run-of-the-mill legislation that makes up the bulk of what lawmakers attend to, not moments of higher lawmakerin\(^{93}\) The democratic value of co-ownership is, I've argued, a workhorse virtue, but it does little work in the high gravity legislating that critics of non-strategic compromise have focused on.

A second objection to non-strategic compromise comes from the purist, who fixes on the unjustifiability of checkerboard solutions. We know that legislative compromises produce statutes that are theoretically incoherent. They may clash with components of existing laws on the books. Or their internal workings may stand in tension with each other. They may draw distinctions without reasons. In a system where omnibus bills are standard fare, this concern is only heightened. Consider the checkerboard legislation that only subjects women born in even years to criminal sanction for abortion.\(^{94}\) This reduction marks out a series of cases that are alleged to violate a master-value of lawmakers. I think our reasons for worrying about checkerboard laws are diverse – they may be inconsistent, incoherent, or even unintelligible. I doubt that they fall under a unified objection. My point can be put more strongly. I think we shouldn’t appeal to legislative integrity as an independent ideal. My answer holds for two independent reasons. First, we don’t strictly need it. There are more economical ways to account for our intuitive worries about the checkerboard than to discover our Neptune, a planet whose presence was inferred because of the orbits of its moons. And second, assigning integrity independent value generates implausible verdicts. It is an
oversensitive compromise *defeater,* condemning perfectly innocent legislative compromise. At the same time, it can induce compromises that are pro tanto objectionable. To make the first point, consider a law that looks incoherent on the books, but can have a rationale that is acceptable. Consider the heavily brokered deal that produced the National Breast and Cervical Cancer Early Detection Program. The law funded screenings for poor women. But a rough and tumble conference compromise stripped funds for treatment for women who received positive test results. Now tens of thousands of poor women were learning about their diagnosis with no ability to do anything. Nine years later Congress approved funding for women. As some of the legislators who went along with a deeply incoherent law anticipated, the effect of this law was to develop a constituency where it didn’t exist before. Once poor women had this knowledge, they organized and pressed legislators to render the law coherent.

Integrity can also induce compromises that can't sustain justification. Consider an actual, if even more fantastical case where legislative integrity seems overvalued. A legislative compromise scheduled the estate tax to be eliminated in 2010. On January 1, 2011, it was scheduled to return to its 2001 level of 55%, providing a disturbing incentive structure for affected individuals and their families. The decision to add a sunset clause to this tax-cut was a peculiar kind of compromise that repays reflection. Those lawmakers who pursued a shift in tax law came to believe that it was morally less acceptable to compromise on the essential principle. Notice the self-reported attitude towards compromise that exercised the bill’s supporters:

> If you oppose a tax on the grounds that it is wrong and should not exist at all, a sunset clause that might bring the tax back in the future must seem profoundly unsatisfying. However, as many of the moral crusaders told us, any of the compromises that might have secured permanent legislation were simply unacceptable. A moral argument that a tax is wrong does not permit distinctions among farmers, small businesses, and large businesses...The same moral commitments that held the group together made it difficult for them to compromise.95

We can take two points from this interpretation of opponents of the “death tax.” First, this case shows the difficulty of unpacking the lawmaker’s moral reason to make the whole of the law as morally coherent as possible. Without guidance on how to weigh incoherence in the law in a
synchronic and diachronic way, we are left without direction-guidance in this kind of tradeoff. This suggests that ordinary political morality has an uneasy relationship with the demands and the strength of integrity-based considerations. Second, these moral crusaders appeal to the distinction between internal and external compromise. Opting for an ideologically pure law with a sharp sunset over a pared-down law that was permanent was seen as a clear decision. They saw themselves as having stronger reasons to reject internal compromises – for these are seen as more direct threats to their principles. This may be especially true in this case, where a single principle about the unconditional wrongness of the estate tax appears to be doing all of the work.

Conclusion

If compromise didn’t exist as a part of our politics, we’d have a reason to invent it. And if the practice becomes a sham, brought down by purists, strategists, and ruthless tacticians, we’d have reason to rebuild it. Against the deliberative picture of negotiation, I’ve defended “sharp dealing” within the practice of compromise. When another party resorts to bluffing or threats, this can license actions that would not normally be permitted by compromising parties. Such tactics can also diminish the weight that parties must place on accommodation. My approach, in this way, runs counter to the rigoristic treatment of compromise in democratic theory. Instead of developing principles ported from purely deliberative settings, I’ve tried to develop an account of compromise from the ground-up, from within a more empirically based picture of what parties to compromise see themselves as doing.

Building the account from this direction reveals the fragility of the practice. Good faith legislators may find themselves within a practice so corrupted that the moral reason to accommodate is frustratingly weak. In these cases a legislator’s reason to compromise won’t be enough to inform her actions, since competing moral reasons will outweigh her policy of adjusting their position in response to a rival position. My account has the resources to explain how rebuilding the practice can be morally permissible, if not required. The process of restoring integrity to the practice of compromise will be an inherently risky one. It will demand that
legislators commit together to be more open to concessions than they strictly must be. This kind of joint supererogation is particularly difficult in electoral settings, where one’s attempt to accommodate can lead to charges of spinelessness and hypocrisy. This is a reminder of the enduring advantage of parties that reject the spirit and letter of the compromise practice. They can insist they are “dupe-proof.”

Most of us think that a culture of compromise is a core part of a working democracy. We’re already in the market for a conception of democracy that can explain this. We’ve met a cast of characters and have gotten to know their underlying rationales. A system that gives purists and strategists the power to block or stall legislation makes them into obstructionists. The two of them can end up feeding off each other’s vices, with the purist chastening the strategists for abandoning their principles by their flexibility, and the strategist accusing the purists of undermining their principles by their rigidity. In this downward spiral, both sides insist that the political crisis they create is “not on my hands, but my opponent.” Each may refuse to take any kind of responsibility for a system that they inevitably co-own. Deadlocks like this remind us that the problem of clean hands cannot be wished away.
Affairs: "What Is It to Believe Someone?" says, on the strength of his saying it hand B would be believing the opposite of the truth. By calculation on this, then, I believe what B says, on the strength of his saying it — but only in a comical sense can I be said to believe him.


The law creates obligations: "[Legislators] do so by changing the morally relevant facts and relevant parties to the compromise had taken the policy in Shared Commitment.

I'm not eliminating the problem by denying the possibility of moral dilemmas. My suggestion is that we can reveal this as a non-problem simply by looking at its picture of democratic agency.

1 Bernard Williams, "Politics and Moral Character," Public and Private Morality.
2 Michael Walzer, "The Problem of Dirty Hands." Though Walzer went on to eliminate most of the problem in later writings: "...dirty hands aren't permissible (or necessary) when anything less than the ongoingness of the community is at stake, or when the danger that we face is anything less than communal death" (Walzer 2004, 46). Dennis Thompson places the problem in a democratic setting in Political Ethics and Public Office (Harvard University Press, 1987). Jeremy Waldron accepts the dilemmic character of democratic dirty hands in "Dirtying One's Hands by Sharing a Polity with Others," draft paper for Office and Responsibility Conference, Fall 2012.

Unlike the view I am proposing here, Thompson and Waldron suppose that the problem survives in representative democracies.

3 I'm not eliminating the problem by denying the possibility of moral dilemmas. My suggestion is that we can reveal this as a non-problem simply by looking at its picture of democratic agency.

5 Charles Beitz, Political Equality, p. 113

8 Rawls stresses that it is "logically impossible" to perform a series of actions without the background practice in play. Here I shift our focus from the individual actions of baseball – striking out, fouling – to the forms of joint agency that social practices make possible John Rawls, Collected Papers, ed. Samuel Richard Freeman (Cambridge: Harvard University Press, 1999).

9 Simon May clarifies his rejection of principled compromise in this way: "it would not be procedurally illegitimate for a majority to enact a law without concessions if it could." But I can accept this as a claim about a particular compromise. It can be procedurally acceptable for a majority to, in the end, enact a law without concessions. The relevant question is whether the relevant parties to the compromise had taken the policy in Shared Commitment.

11 "Mark Greenberg's moral impact view avoids the traditional divide, but flips the way that law creates obligations: "[Legislators] do so by changing the morally relevant facts and circumstances, for example by changing people's expectations, providing new options, or altering what has been chosen by democratically elected representatives," Mark Greenberg, "The Moral Impact Theory of Law," (2013).
14 G.E.M. Anscombe offers a version of this character: "[S]uppose I was convinced that B wished to deceive me, and would tell the opposite of what he believed, but that on the matter in hand B would be believing the opposite of the truth. By calculation on this, then, I believe what B says, on the strength of his saying it — but only in a comical sense can I be said to believe him;" "What Is It to Believe Someone?" p. 9.
17 Matthew Boyle, "Active Belief," In D. Hunter, ed., Belief and Agency. (Calgary: University of
18 Robert Nozick offers the parent warning the child: “If you do A I’ll have a heart attack.”
See Nozick, “Coercion.”
20 Schelling 45.
21 Schelling 45-56.
23 The basic form of this argument has been mounted by both political parties, with our current President having voted for default as a Senator, so it cuts ice in both directions.
26 This case is loosely based on the nine months of negotiations over the Affordable Care Act, which involved a Gang of Six and, later, a Gang of Eight. Eventually the charge was made that one side was going through the motions of the practice of compromise, but wasn’t actually taking up accommodating stances.
27 The Godfather: Part II, written by Frances Ford Coppola and Mario Puzo.
28 The special kind of wrong of this threat may be something in the neighborhood of A.J. Julius’ Inducement Principle, according to which “threats wrong the threatened person, when they do, because they aim to get the threatened person to act in a certain way,” A.J. Julius, “The Possibility of Exchange,” 2013.
29 Seana Valentine Shiffrin, "Lying and the Law, 2013."
31 J.L. Austin, How to Do Things with Words, 1975, p. 143.
32 Cite Thompson/Gutmann, The Spirit of Compromise.
33 Carlo Muñoz, Washington Post, "Budget proposal 'not my ideal plan,' Obama says in weekly address"
34 Kaiser, Act of Congress: How America’s Essential Institution Works, and How It Doesn’t
35 While I understand legislative compromise as a distinctive subspecies of negotiation, many theorists have dismissed the exchange of demands in negotiation as mere “haggling.” Joshua Cohen warns that “collective decision-making ought to be different from bargaining, contracting, and other market-type interactions, both in its explicit attention to considerations of the common advantage and in the ways that that attention helps to form the aims of the participants” 1989, 17. For defenses of compromise that see it as part of the architecture of bargaining, see Andrew Sabl, 2002. Ruling Passions: Political Offices and Democratic Ethics. Princeton: Princeton University Press. Nancy Rosenblum also accepts this view: “Deliberation is not an animal different from negotiation and compromise,” On the Side of the Angels: An Appreciation of Parties and Partisanship, p. 147. Cass Sunstein, for example, holds that civic republicans should be “hostile to bargaining mechanisms in the political process and will instead seek to ensure agreement among political participants.” Cass Sunstein, 1988, 1554
36 Jane Mansbridge and Mark Warren, “Deliberative Negotiation”
37 Jane Mansbridge and Mark Warren, “Deliberative Negotiation”
39 In his murderer example, even Kant sought to distinguish dissembling and lying. Only the latter is impermissible, if “we do not actually assert anything contrary to what we believe” (27:700).
40 Contrast with Gutmann/Thompson, who leave a little more wiggle room in The Spirit of Compromise.
This kind of purism about speech contexts takes what Austin calls a “constative utterance,” upholding “the ideal of what would be right to say in all circumstances, for any purpose, to any audience, etc.” (Austin, 1962, p. 146).

Schelling, p. 45
Robert Caro, Master of the Senate
Messy Morality and the Art of the Possible, C. A. J. Coady and Onora O’Neill, Page (269); Theodore M. Benditt, “Compromising Interests and Principles,” NOMOS XXI: Compromise in Ethics, Law and Politics
I’m grateful to Alex Zakaras for stressing this point about selective or inauthentic purism.

Robert Schenkan, All the Way, script.
G.A. Cohen, Rescuing Justice and Equality

“[W]hen we reflect on a principle, and ask ourselves what that principle requires, we are always engaging in moral reasoning, not just deriving a conclusion from some given rule. Scanlon, T. M. (2014-01-06). Being Realistic about Reasons (Kindle Locations 2042-2044). Oxford University Press, USA.

John Searle, for instance, thinks these two ideas come pre-packaged together: “the notion of collective intentionality implies the notion of cooperation,” “Collective Intentions and Actions,” p. 406.

Sen. Olympia Snowe (R-ME), participated in health care negotiations, members of her constituency accused her of committing an act of treason.


Ronald Dworkin, Law’s Empire, p. 211.


Simon May defends the strategist as the only justifiable approach to moral compromise. For him, even the slightest concession must pass the instrumental test: “only ever warranted for pragmatic reasons' (May 2005, p. 317).
Philippe van Parijs describes this state as one where “where there is unconditional surrender or submission of one party to domination by the other,” “What Makes a Good Compromise?”

As participants in political decision-making, citizens share responsibility for reaching correct decisions through deliberative processes in which all have equal standing,” May.

Beerbohm, “How to Value Democracy,” In Our Name

This point about participation and nonparticipation came out recently in the Olympic trials for badminton. Eight athletes were disqualified exploiting a matched system that encouraged early loses. The charge was that they were acting a “in a manner that is clearly abusive or detrimental to the sport,” Olympic Ideal Takes Beating in Badminton, New York Times, August 1, 2012.

Qualifying statement. DFT/Gutmann do and don’t.

Cite NOMOS on the distinction between means and ends, but note that the way these two dimensions of compromise work together: generating defeaters and enablers, is novel.


This is not an unusual diagnosis, but it has been a kind of dangling modified. It’s not clear how this argument works. P. Dobel, Compromise and Political Action: Political Morality in Liberal Democratic Life


For this kind of consideration, see A. John Simmons, “Ideal and Nonideal Theory,” PAPA.

Simmons writes: “Is a politically popular but likely less effective policy to be preferred to one that has questionable political support but is more likely to be effective?”

Bipartisanship is a much discussed value in ordinary political morality, but almost never acknowledged in democratic theory. The concept only comes up in Nancy Rosenblum’s treatise on parties as synonymous with anti-partyism. But on the gloss I’m giving it here, we needn’t assimilate these two concepts.

Ian Shapiro, The State of Democratic Theory, p. *

Jeremy Waldron, Law and Disagreement, p. 205

Here my view instructively contrasts with Andrew Sabi’s role-based defense of compromise in Ruling Passions.

See, for instance, Andrea Cornwall and Vera Schattan P. Coelho, “Spaces for Change? The Politics of Participation in New Democratic Arenas”

In the 2000 presidential election, candidate Al Gore began most speeches by reminding his audience that the Presidency was the only constitutional position where one is obligated to represent every member of society.

My view is consistent with the claim that the law, in some metaphorical sense, speaks on behalf of the whole community. What I’m resisting is the assume that our representatives represent every member of our polity. In Law and Disagreement, Waldron has a footnote that personally addresses candidate reviewers of this book, warning them that he is not proffering an account of political representation.

May, 2005, p. 325


And purists derived this from what I claimed was an overstrong reliance on the doing/allowing distinction.


“Political scientists study the internal rules of legislatures that encourage or inhibit negotiation “across the aisle.” Rules for agenda setting, committee assignments and the degree of
independence of committee chairs, the possibility of amending bills, cloture, and so on make it more or less likely that the dominant party will be able to avoid hearing out the minority (or factions within its own ranks), much less make concessions." Nancy L. Rosenblum. On the Side of the Angels: An Appreciation of Parties and Partisanship (p. 404). Princeton University Press.

88 For an analysis of this relatively new norm, see Barbara Sinclair’s *Unorthodox Lawmaking: New Legislative Processes in the US Congress* (CQ Press, 2011).

89 Philosophical Investigations.

90 To be fair to Simon May impressive challenge, proponents of non-instrumental concessions had advanced this case as a useful starting point. But I think this is among the worst possible cases for a defense of non-strategic compromise to work with. May’s argument is conceded by Dennis Thompson and Amy Gutmann in *The Spirit of Compromise.* “In our view, mutual respect...does not provide a sufficient reason to compromise, nor does it give compromise an independent intrinsic value. The general value of compromise, as we defend it here, does not alone determine whether the content of any particular compromise is acceptable,” p. 225. I accept that the “appeal to mutual respect” isn’t enough to serve as a compromise enabler. But Gutmann and Thompson mistakenly conclude that there is no available enabler that can serve this role. Here I take myself to be offering a distinctive defense of non-strategic concession.

91 I’m using this term differently than ***.

92 Jeremy Waldron, Torture, p. 92.

93 Bruce Ackerman, *We the People: Volume 1.*


96 Ronald Dworkin holds that “it is part of our collective political morality that such compromises are wrong, that the community as a whole and not just individual officials must act in a principled way,” Dworkin, *Law’s Empire*, 182. I am here raising doubts about his confidence in this claim.

97 “A compromise must be external, not internal; it must be a compromise about which scheme of justice to adopt rather than a compromised scheme of justice” ibid., 179.