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The Variable Morality of Constitutional (and Other) Compromises: A Comment on Sanford Levinson's Compromise and Constitutionalism

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The Variable Morality Of Constitutional (and Other) Compromises: A Comment on Sanford Levinson's *Compromise and Constitutionalism*

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I. INTRODUCTION

Certain issues have a way of coming up again and again in human history, often affected by the times in which the issues are nested. Compromise is, once again, on the minds of scholars,[1] journalists, ethicists,[2]

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1. In waves spanning decades we can see resurgences of scholars seeking to grapple with the philosophy, sociology and ethics of different treatments of compromise. *See, e.g.*, MARTIN BENJAMIN, SPLITTING THE DIFFERENCE: COMPROMISE AND INTEGRITY IN ETHICS AND POLITICS (1990); AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES (2010); Carrie Menkel-Meadow, *The Ethics of Compromise*, *in* THE NEGOTIATOR'S FIELDBOOK 155 (Christopher Honeyman & Andrea Kupfer Schneider eds., 2006) [hereinafter Menkel-Meadow, *The Ethics of Compromise*]; NOMOS: COMPROMISE IN ETHICS, LAW AND POLITICS (J. Roland Pennock & John W. Chapman eds., 1979); *Compromis/Compromise*, 43 INFORMATION SUR LES SCIENCES SOCIALES 131–305 (2004).

2. This year the annual Bio-Medical Ethics seminar hosted at the National Institutes of Health,

and political actors at both national and international levels, as we seek to deal with difficult issues of international relations, war and peace, diplomatic negotiations, and our particular forms of American democracy with divided governments, separation of powers, three (or four, if our administrative agencies are recognized as almost "separate" branches) branches of government, and polarized two party systems. Philosophers, political theorists, legal scholars, and others often think of compromise as a "second best" to the preferred ideal of commitments to "principles," "rights," "justice," or "truth" which all seem so much more clean, clear, "moral," or justified. Compromise often seems a poor, if human, decision to "settle" for less than our very best.

I have been asked to comment on some of this recent rethinking of the concept of compromise, here in light of institutional issues of compromise in American constitutionalism, in part, because of my prior "defenses" or "justifications" of compromise, as a negotiation scholar who sees that sometimes, not always, compromise may itself be a moral good, justified because of the outcomes it permits (peace, some forms of justice and desert) and the process itself which recognizes the claims of "another side" and takes them seriously.[3]

Like several other scholars,[4] Professor Sanford Levinson has, in his Brandeis lecture at Pepperdine University School of Law, sought to explore the nature of compromise in our own constitutional order. He has examined several stages and aspects of our constitutional order—its *constitutive* bargaining process in the founding of our polity, which included, among many others, the compromises of the continued existence of slavery (and the concomitant measure of 3/5 of a man counted in the Constitution) and the counter-democratic representation principles of the Senate. Discussed further are the *on-going institutionalized* compromises in the functioning of the different parts of our constitutional government, and, in particular, the actions of the interpreters of the Constitution—Supreme Court justices who may compromise their own principles in their voting and opinion writing practices. By focusing on one great non-compromising justice, Justice

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Bio-medical ethics program, was devoted to compromise. I was a speaker in the series on December 14, 2010.

3. Menkel-Meadow, *The Ethics of Compromise*, *supra* note 1; WHAT'S FAIR: ETHICS FOR NEGOTIATORS (Carrie Menkel-Meadow & Michael Wheeler eds., 2004); Carrie Menkel-Meadow, *Compromise, Negotiation, and Morality*, 26 NEGOTIATION J. 483 (2010) [hereinafter Menkel-Meadow, *Compromise, Negotiation, and Morality*]; Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995).

4. *See, e.g.*, JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION (2002); MARGALIT, *supra* note 1, at 54–61; JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996); Dana Lansky, *Proceeding to a Constitution: A Multi-Party Negotiation Analysis of the Constitutional Convention of 1787*, 5 HARV. NEGOT. L. REV. 279 (2000); Jack Rakove, *The Great Compromise: Ideas, Interests and Politics of Constitution Making*, 44 WM. & MARY Q. 424 (1987).

Brandeis (both in his general approaches to the law and in his notable dissent writing), Professor Levinson explores and exposes questions in consideration of constitutional compromises (both processual and outcomes reached), which have been raised by many others who study compromise in a deeper philosophical context or others who have recently studied the function of principled dissent in transforming our understandings of how law is made, articulated, transformed and justified in our constitutional order.[5] When should judges or other public officials "go along" with a negotiated outcome and when should they veto, dissent or otherwise "block" a governmental action or choice based on "principle?"

In this brief commentary I want to reiterate claims I have made in other contexts, but which are also true, alas, in our constitutional order, that compromise is sometimes a moral good in itself. Even more wistfully, I assert here, we will never be able to judge compromises or that seemingly greater good—"principled" decisions—by a universal standard. All compromises, whether of great constitutional, diplomatic, political, or "lesser" personal or commercial moment, must be judged by the greater *context* in which they are situated. All compromises have *temporal, social,* and *political,* effects. What seems principled or expedient or an exigent circumstance in any one moment may look different at later times, or to other decision makers. So, I suggest here, that compromise is itself a moral concept, requiring us to examine it and evaluate it in variable or "relative," not deracinated or "universal," circumstances.

Compromises, as Professor Levinson realizes, come at different times (*constitutive* moments of *institutional design* or "founding" that may differ greatly from moments of other legal or political decision making when *implementing* or *interpreting* choices that must be practically made). And compromises may be differentially evaluated depending on *who* is enacting them (the actors) and *where* (in which institutional and historical settings). Compromise cannot be universalized—it must be studied in its variable forms and enactments. Professor Levinson's examination of some "constitutional compromises" illustrates how rich, complex, and ultimately irresolvable some of these assessments are. I hope Professor Levinson's essay (and this commentary) encourage more detailed examination of these issues in a wide variety of legal and political settings.

5. *See, e.g.*, I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES (Mark Tushnet ed., 2008).

II. THE CONTEXT OF COMPROMISE

A. "Location, Location, Location"

To use a popular California (real estate) idea, one might say that the moral justification of compromise depends a great deal on "location, location, location." *Constitutive bargaining*, when constitutions and governments or organizations are formed (and commitments are made for future generations), may be quite different from assessing the actions of institutions or individuals in their practical day-to-day and *iterative* function. To use the recent analysis of social and political philosopher Avishai Margalit, "rotten" compromises are those that "establish or maintain an inhuman regime, a regime of cruelty and humiliation . . . ."[6] Thus, the negotiations (and compromise) which allowed slavery to continue for a future generation in American constitutional processes were immoral compromises (as many of the founders agreed at the time[7]) on these terms because they continued an inhumane and cruel regime, which affected those who were not themselves part of the negotiating and compromising.

Compromises should be assessed, in part, by *where* they occur (the institutional setting), whether binding on more than those who do the compromising themselves, or more mundanely, where there is the possibility to renegotiate over time (courts in common law settings, legislatures that can "redo" their legislative actions, or more commonly in repeat player situations of local, community government, workplaces or families and relationships). Perhaps this element of "constitutive" compromises makes compromises at the time of *formation* of institutions different than those of more ongoing, *iterative* or *contingent* decision-making.

B. "Timing Is Everything"

Whether the intrinsic "rottenness" of this bad (slavery) compromise was "justified" or morally (or politically) permissible because it allowed the "union" (not so perfect) to be formed must be measured not only at the time of its initial achievement, but temporally later, as we measure whether the union was able to exist or flourish because this compromise was effectuated. Most discussions of the compromise on slavery in modern times condemn the choice morally, but insist on its necessity politically—to hold the nascent and highly conflictual union together. On this issue, of whether the compromise on slavery really achieved its goals, reasonable minds may

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6. MARGALIT, *supra* note 1, at 1–2.

7. *See* ELLIS, *supra* note 4; PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 32–37 (2010); JACK RACKOVE, REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA (2010).

certainly differ. As many scholars are now revisiting the Constitutional Convention as a site to study and to apply negotiation theory (examined through the modern lens of "multi-party negotiation theory"[8] or system design[9]), one might profitably do a retrospective political, economic, social, and human analysis of whether the union which existed (and then was rended apart at the great cost of the lives lost in the Civil War) at the time of framing really was "worth it" or, at least, was "better than" (in relative terms) whatever other political solutions might have been achieved (No slavery, two countries? Many little ones? Back to England?) if the compromise had not been reached at all.

And compromises or adjustments made in constitutional formation (which are likely to be "one-shot" or "one off," even if they take quite awhile to be concluded and ratified) are quite different from compromises that might be reached in more iterative environments, such as when judges, even on the rights-based Supreme Court interact with each other more often. Trade-offs, even about principled items, can be "rationalized" and indeed can lead to important democratization of process and equalization of outcomes if trades are monitored, subject to accountability, and shared. Thus, "one-off" constitutional compromises (such as slavery and the Senate[10]) must be judged and measured differently than those which allow for repetition, correction, accountability, and reciprocity norms, as in other political processes (such as are more common in at least some legislative processes).

C. "The Process Really Matters"—Principled, Problem-Solving, or Something Else?

In what is, for me, the most interesting and provocative treatment of the negotiation processes which affect constitutive processes, Jon Elster has compared the "first best" principled French constitutional formation process with that of the "second best" American compromising founding processes and found the latter to have been, ultimately, more "robust" than the former, precisely because of "second best" compromises and less than ideal processes.[11] Elster suggests that where the French committed themselves to

8. *See* Lansky, *supra* note 4.

9. Symposium, *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1 (2009).

10. It should be noted that both of these "one-off" negotiations still produced significant ongoing negotiations and rule changes in subsequent amendments, etc., e.g. elimination of slavery and direct election of the Senate.

11. Jon Elster, *The Strategic Uses of Argument*, *in* BARRIERS TO CONFLICT RESOLUTION 236

public, *plenary*, and *principled* processes in constitutional formation, negotiations became brittle, rigid, and difficult to maneuver around. With the equivalent of modern press conferences, public statements of principles and disagreements led to transfers of power (and murders) of those whom the revolutionary majorities disfavored. In contrast, the American constitutional process was more or less *confidential* (until its results were announced at the end), and was accomplished in *committee* (not plenary) sessions, which allowed for more detailed working out of issues and then trades (or log-rolling) between committees. This, in the end, allowed a great variety of *compromises* to bring in, through trading, those who got some, but not all, of what they wanted. The American Constitution thus (albeit with its many amendments and a punishing civil war) has lasted far longer than the many French constitutional orders.[12]

Compromises, then, might be assessed by their practical *temporal robustness*, as well as by their formative principles. If the purposes of constitutionalism (the creation of structures of government with commitments for a longer term) are to create a political order, then perhaps at least one "relative" measure of the success of that constitutionalism is its *longevity* or ability to adapt and use additional forms of compromise (interpretation, new amendments, new institutional orders[13]) in order to continue to exist.

At the same time, while many would persist in the claim (Levinson, Margalit, and many other legal and political scholars are among those, I think) that constitutive bargaining and moments of institutional design might require more "principled" thinking (and doing), just because constitutional commitments are those which are intended to go forward with effects for many generations and thus bind more than the compromisers themselves, other "locations" or sites of political action which are more "ordinary" might permit more "expedient" compromises.

Professor Levinson does an able job of reviewing the elements of the thinking processes of interpreters of the Constitution (justices on the Supreme Court) who must decide whether it is appropriate or desirable to go along with a vote in one case, with the hope of being able to "call in a chit" later (judicial log-rolling), or whether to go public, in a principled way, with a dissent that may have either positive (changing the law in that direction later) or negative (alienating further possible judicial allies) effects. His *realpolitik* approach to judicial voting and decision making reminds me of

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(Kenneth J. Arrow et al. eds., 1995).

12. I have explored the consequences of these different constitution-making processes in Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347 (2004–2005) [hereinafter Menkel-Meadow, *The Lawyer's Role(s)*] and Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553 (2006).

13. For example, Bruce Ackerman's "constitutional moments." BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1993).

an event over twenty years ago when the California Judicial Education Association (or some such entity) asked me to speak on the skills of negotiation or "Getting to Yes"[14] in appellate decision making so that judges could openly examine their negotiation behaviors and skills while working together to decide cases and craft decisions. I believed that this was truly avant-garde at the time—judges explicitly looking at their own decision-making, deliberative, and opinion writing processes through the lens of "principled and problem-solving" negotiation (as I taught it then). Judges understood what all legislators already knew—all political decision making is filled with negotiation, whether called "principled persuasion" or "creative problem solving" (or in its more sinister form—Machiavellian "machinations" (more on Machiavelli in a moment)).

Negotiation and compromise does occur in all political decision making—legislators quite explicitly trade votes or "log-roll" and these days it is clear that the political parties and the different branches of government will likely get nowhere unless they explicitly engage in negotiated processes. President Obama gave up the "public option" in order to enact his health care plan.[15] Recently, President Obama also agreed to continue expiring tax cuts in order to obtain extended unemployment benefits and ratification of a controversial treaty with Russia on strategic arms reduction. While many of us might prefer "principled" votes and decisions in our polity, it is widely known, and a shared value, I believe, that legislatures would get nowhere without trades, log-rolling, and compromises with each other as legislators, and with other parts of the government (whether the President or his designates in other executive departments).

At the level of international diplomacy, it is widely accepted that negotiation and compromise will often be a necessity. Avishai Margalit's recent book, along with Robert Mnookin's similar undertaking,[16] seeks to explore the dimensions and limits of negotiating and compromising in different circumstances. While I focus here on location or "site" of compromises, Margalit focuses on the particular *actors*—when should we not compromise with someone we know to be evil? Were the many founding fathers, who were also slaveholders, "evil" in Margalit's (or Levinson's) calculus? Should principled death penalty abolitionists on the

14. RODGER FISHER, BRUCE PATTON & WILLIAM L. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1991).

15. Carrie Menkel-Meadow, *Scaling up Deliberative Democracy in Health Care: A Work in Progress*, 74 LAW & CONTEMP. PROBS. (forthcoming 2011).

16. ROBERT MNOOKIN, BARGAINING WITH THE DEVIL: WHEN TO NEGOTIATE, WHEN TO FIGHT (2010); *see also* FREDRIK STANTON, GREAT NEGOTIATIONS: AGREEMENTS THAT CHANGED THE MODERN WORLD (2010).

bench never "compromise" with pro-death penalty judges on that issue (or other issues)? Is one's negotiation partner's "evilness" to be determined on an issue-by-issue basis or more generally and completely as that person's total character or gestalt?

III. VARIATIONS IN JUSTIFICATIONS FOR COMPROMISES

While often the symbol of principle-less strategic behavior, Niccolo Machiavelli actually supplies moral justification for the kind of compromises in which "princes" or other public officials (including judges, presidents, legislators, and diplomats) must engage to lead their polities. Machiavelli wrote to guide those who must lead principalities or states (or create new ones, in constitutional, or other forms of government):

> You must realize this: that a prince, and especially a new prince, cannot observe all those things which give men a reputation for virtue, because in order to maintain his state he is often forced to act in defiance of good faith, of charity, of kindness, of religion. And so he should have a flexible disposition, varying as fortune and circumstances dictate. As I said above, he should not deviate from what is good, if that is possible, but he should know how to do evil, if that is necessary.
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> . . . .
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> . . . [T]he Prince should . . . determine to avoid anything which will make him hated and despised.
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> . . . .
>
> I also believe that the one who adapts his policy to the times prospers, and likewise that the one whose policy clashes with the demands of the times does not.[17]

Machiavelli suggests that Princes (leaders) cannot always be totally virtuous themselves if they are to lead others (of different views, values, and religions). Rather, being flexible and sensitive to the policies required "of the times" may be essential for preserving the Prince's "rule" or, in Machiavelli's terms, the longevity of the State. Thus, while we may decry the strategic advice to "bend with the times" or to not be totally virtuous all of the time, Machiavelli is known for reminding us that the virtue of "political science" (in the sense of studying and doing political leadership) is that it must have a "virtue" or ethics that may be different from individual or personal "principles." The "principles" of government are different from the principles of individuals (and of groups as well, as modern multi-party negotiation theory tells us[18]). Perhaps this is, in part, what worried Justice

17. NICCOLÒ MACHIAVELLI, THE PRINCE 101–02, 131 (George Bull trans. & ed., 1961).

18. *See, e.g.*, HOWARD RAIFFA WITH JOHN RICHARDSON & DAVID METCALFE, NEGOTIATION

Stanley Reed in *Brown v. Board of Education*.[19] He knew the United States Supreme Court, as a political institution, needed to speak as "one," not as a divided group, but he also wanted to affect the process by which the whole polity could be brought to come around to compliance with a command order of "right." He knew, as we all do now, that principled and "right" decisions may not necessarily be adhered to. There is Law and there is Politics. Even these great forces have to negotiate with each other, as Professor Levinson recognizes when he asks whether religious freedom and equal rights for women must be included in Afghani or Iraqi new constitutions. Whose Law? Whose Constitution? Whose Rights? And, Whose Culture will mediate these issues?

The examination of these great constitutional issues and moments sometimes obscures the importance of equally important everyday interactions that involve the confrontation of equally held and valid different "principles" or values—consider religious differences (as I know Professor Levinson has), the "equal" rights of two separating parents to have custody of their children, comparative or "equal" fault for an accident or wrong in our multi-causal world of harm, or competing, but equally valid, claims to the use of some property. In many such cases compromise is actually a moral good, for it can allocate goods or rights in a more precise and intermediate (not brittle or binary) way.[20] Various forms of compromise can actually more accurately reflect the just allocation of goods and rights. This observation about legal rules and remedies (the need for less absolute and binary solutions in many matters) is what has given birth to the modern alternative dispute resolution movement in law[21] and also to more supple and subtle legal doctrines, such as proportionality in constitutional adjudication.[22]

In one sense, Justice Brandeis's famous argument (in a dissent[23]) to encourage "laboratories of democracy" in different state experimentations with regulation, is a recognition that not all legal or political issues should be answered in the same or universal way. Whether as a defense of "federalism" compromises[24] (or different, not universal, legal solutions), or

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ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING (2002).

19. 349 U.S. 294 (1955); *see also* Stanley F. Reed. HISTORY.COM, http://www.history.com/topics/stanley-f-reed.

20. John E. Coons, *Compromise as Precise Justice*, *in* NOMOS, *supra* note 1, at 190.

21. CARRIE MENKEL-MEADOW, LELA LOVE, ANDREA KUPFER SCHNEIDER & JEAN STERNLIGHT, DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL (2d ed. 2011).

22. AHARON BARACK, THE JUDGE IN A DEMOCRACY 254–59 (2006).

23. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

24. Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011).

the newer form of decentralized "democratic experimentalism"[25], the recognition that governmental bodies, institutions or polities "negotiate" with each other to try different solutions to common legal problems, is a recognition that even in constitutional governance, there are variations, not universals, in governance and legal decisions. "Principle" does not necessarily point in only one direction.

And consider, in the context of the assessment of constitutional compromises, that some polities have feared pursuing the constitutional "principled" negotiation route completely. Where other values may be both more important than political agreement or settlement (religion, faith, preservation of resources and unity), some polities (e.g. Israel) have decided to avoid the fissures that truly principled constitution making might cause in the larger society.[26] Even Great Britain which has more or less successfully operated a very rich and deep common law system of "constitutional" judicial decision making and basic human rights has thus far not engaged in the process of "writing" down the text of those constitutional commitments. An unwritten constitution provides that much more flexibility in interpretation and legal evolution.[27]

And, in legal decision making and dispute resolution (where precedent may not be required, desired, or achievable), appeals to religion, faith, emotion (affective appeals), as well as to very contested principled reasons which are (currently) irreconcilable (consider tax policy, gun control, affirmative action, gay marriage, etc. issues), some forms of negotiated processes or decision making might provide some alternative, variable and more flexible solutions to be achieved at different levels (non-constitutional) of action or regulation. I am not here suggesting that these hotly contested issues like gun control, abortion, affirmative action, etc., do not or should not have "constitutional" and "principled" solutions, just that some intermediated and variable solutions, whether "temporary" or more permanent, might be more productive to pursue, absent a clear constitutional resolution. I have elaborated on how a form of three process (reason, bargaining, and appeals to the affective) democratic deliberation might be used in variable forms for different kinds of disputes and issues elsewhere.[28] Thus, other forms of decision making, more akin to "compromise" or

25. Michael C. Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

26. Barak, *supra* note 22, at 20–35.

27. Recently there has been debate about whether Great Britain (or more controversially, England, separate from other parts of the island nation) should enact its own constitution or "Bill of Rights." This is part of an internal debate about the role of the European Union in regulating such matters as human rights, and it produces political arguments about sovereignty that are not so dissimilar as those which characterized our own formative years. *See, e.g.*, VERNON BOGDANOR, THE NEW BRITISH CONSTITUTION (2009); DAWN OLIVER, CONSTITUTIONAL REFORM IN THE UNITED KINGDOM (2003).

28. *See* Menkel-Meadow, *The Lawyer's Role(s)*, *supra* note 12.

contingently arrived at outcomes might actually have greater legitimacy and moral defensibility than the blunt and sharp-edged non-compromised "principled" outcome (in some matters).

Truly negotiated compromise may also have the advantage of consent and agreement, whether explicit, or even perhaps implicit (as in those silent negotiated "deals" or logrolls for votes by judges who sit on the same courts over time). Compromise reached by agreement (if real and not coerced, either by power or circumstance) is consent, and that is at least one form of legitimate justification for outcomes reached in both political and personal life. Thus, we could profitably examine, as historians now do, how real was the consent that framed our constitution; how "free" are the justices of the Supreme Court in tacitly or explicitly negotiating votes and opinion writing? Are there (as Professor Levinson seems to agree in his comparative analysis of *Naim*[29] ("rotten") and *Newdow*[30] (not so rotten)) variations in the justifications we can offer in the compromises reached at both institutional and individual levels in constitutional (and other) decision making?

From the rigorous study of political and legal action and judicial decision making as it actually unfolds in a variety of different locations, constitutively creating new orders, iteratively implementing and engaging in governance and law making, we should be able to see that it really is virtually impossible to specify in advance when and how compromise is to be assessed as "second best" to a preferred sense of "right" or "principle." This notion of not always doing what is "principled" seems to offend at least some of us, especially for those who, like Ronald Dworkin, think there is a "right" answer to legal dilemmas,[31] but in my view, as Professor Levinson has illuminated with some of his illustrations and examples of constitutional compromises, the analysis and assessments of compromise in both constitutional and other settings is deeply contextual and variegated. We would do well to understand that we may need to make variable and relative, not universal and uniform, our moral assessments of compromise. We need human flexibility, negotiation, and compromise to live, indeed to flourish, but we also do need to assess when and how to treat those with whom we negotiate as our moral counterparts.[32] Professor Levinson has joined a group of scholars and decision makers who are interested in rigorously exploring how we can see the variability and "relativity" in the

29. Naim v. Naim, 350 U.S. 985 (1956).

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

31. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 288 (1978).

32. *See* MARGALIT, *supra* note 1; Menkel-Meadow, *Compromise, Negotiation, and Morality*, *supra* note 3.

constitutional, legal, political, and personal choices we make. In my view, the more deeply and contextually we explore those choices, the greater is the likelihood our choices will be at least temporarily wise, at least until the context changes and we have to revisit the compromises we have made.