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Compromising Trust

Lynn Mie Itagaki

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Compromising Trust

*Lynn Mie Itagaki**

TABLE OF CONTENTS

TABLE OF CONTENTS.....	541
I. DISTRUSTING TRUST	542
II. COMPROMISE, CONSENSUS, COMMON GROUND.....	550
III. CONCLUSION.....	553

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I. DISTRUSTING TRUST

Public distrust erodes the efficiency and productivity of our economy, government, and society. It accelerates and amplifies weaknesses in our democratic political infrastructure alongside business relationships and social interactions in mutually reinforcing ways. Determining how to cultivate public trust depends on definitions of “the public”: to whom the government and its officials are accountable. Given the history of the United States as a White settler colonial state, its dependence on African chattel slavery, and its continuing racist xenophobia, “the public” is a frustratingly elastic term. For marginalized populations, public trust might vary in intensity over the past centuries since the nation's founding. In analyses and assessments of levels of trust in the strength or fragility of public institutions, Black, Indigenous and people of color (“BIPOC”) have often been excluded from the polls and surveys upon which public opinion or sentiment is based. A lack of public trust in government significantly impacts determinations of constitutional rot and renewal; however, in the absence of BIPOC responses and inclusion in “the public” over the centuries of U.S. history, constitutional rot for marginalized populations has been an ongoing emergency in their continual lack of or restricted access to constitutional rights and protections. This perpetual constitutional rot is far from an unusual condition.

Policymakers and pundits look to influential surveys to assess levels of trust. From 1964 to 1980, public trust in federal government fell fifty percentage points, from seventy-seven to twenty-seven percent.¹ With peaks of forty-four percent in 1983 and fifty-four percent in 2002, public trust has languished well under fifty percent since 1980. Public trust dropped to its lowest, fifteen percent, in 2010 and has hovered between fifteen and twenty percent since. The Organisation for Economic Co-operation and Development (“OECD”) identifies the compounding drawbacks of public distrust: “A decline in trust can lead to lower rates of compliance with rules and regulations. Citizens and businesses can also become more risk-averse, delaying investment, innovation and employment decisions that are essential to regain competitiveness and jumpstart growth.”² The lack of public trust has long-term costs that undermine the legitimacy of the rule of law and the government that creates and enforces it.

1. Lee Rainie et al., *Trust and Distrust in America*, Pew Res. Ctr.: *U.S. Policy & Politics* (Jul. 22, 2019), <https://www.pewresearch.org/politics/2019/07/22/trust-and-distrust-in-america/> [<https://perma.cc/CL9N-QVWK>]; *Public Trust in Government: 1958-2019*, PEW RESEARCH CENTER (Apr. 11, 2019), <https://www.pewresearch.org/politics/2019/04/11/public-trust-in-government-1958-2019/> [<https://perma.cc/UD6T-67J6>].

2. Organisation for Economic Co-operation and Development [hereinafter “OECD”], *Government at a Glance 2013* 20 (2013), https://www.oecd-ilibrary.org/governance/government-at-a-glance-2013_gov_glance-2013-en [<https://perma.cc/A79F-9CAL>]; *Public Trust in Government: 1958-2019*, *supra* note 1.

Trust can be defined as “positive perception” or “confidence” in the actions of individuals or institutions.³ It is a necessary precondition for cooperation – which philosopher Diego Gambetta defines as the “abstention from mutual injury”⁴ – and which undergirds the most basic interactions of daily life: “from marriage to economic development, from buying a second-hand car to international affairs, from the minutiae of social life to the continuation of life on earth.”⁵

Trust is often perceived as the oil that greases the wheels of our foundational institutions; distrust can disrupt the smooth functioning of these systems. In his 2019 book, *The Cycles of Constitutional Time*, Jack M. Balkin identifies how our political system functions in three primary cycles: of regimes, polarization, and constitutional rot and renewal.⁶ All three cycles depend on public trust and themselves produce increases or decreases in trust at various points in the cycle.⁷ These cycles are useful typologies of decline and recovery, and Balkin’s discussion serves as an exhortation for readers of one political moment to move from one stage of a regime to a better one, from polarization to depolarization and from rot to renewal. The difficulty of analysis, of definitively apprising where we are in the cycles – whether on our way down or poised upward – stems from trust functioning simultaneously as an indicator, cause, or outcome. Trust might indicate a future trajectory, push us toward renewal or rot, or result from where we are in the cycle, respectively. In this Article, I focus on the third cycle of constitutional rot and renewal in order to evaluate the general assumption that political compromise could foster more trust, and that more trust would lead to more cooperation.

In positing the notion of constitutional rot, Balkin argues that we can evaluate the “failures” or weakening of democracy and republicanism: a decrease or lack of “responsiveness to public opinion and public will” and “public officials’ devotion to the public good.”⁸ Balkin details further essential criteria of rot in the political system:

When public servants are increasingly diverted into the pursuit of their own wealth, or when they are increasingly diverted into serving the interests of a relatively small number of very powerful individuals, democracy and republicanism decay, and we have constitutional rot. And when public officials are no longer responsive either to public will or to the public good, and instead serve the interests of a small group

3. OECD, *supra* note 2, at 21; *Public Trust in Government: 1958-2019*, *supra* note 1.

4. Diego Gambetta, *Can We Trust Trust?* in *MAKING AND BREAKING COOPERATIVE RELATIONS* 215 (1988).

5. Diego Gambetta, *Foreword*, in *TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS* ix, ix–x (Diego Gambetta ed. 1988).

6. JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* 6 (2020)

7. *Id.* at 46–49.

8. *Id.* at 45.

of powerful and wealthy people, the result is oligarchy – rule by the few.⁹

The first two decades of the twenty-first century easily illustrate some of these warnings. Economic inequality has skyrocketed in the aftermath of the 2007–09 Great Recession and deepened during the COVID-19 lockdowns despite a global Occupy movement and some reforms and regulations in response to the global financial crisis.¹⁰ The police murders of, and brutality against, Black people have garnered more national and international media attention over the safety of Blacks in the privacy of their own homes or out in public.¹¹ Vote denial and dilution has contracted and attenuated the power of voters through gerrymandering, voter intimidation, lax voting rights enforcement, and restrictive voter identification laws; the dismantling of the 1965 Voting Rights Act in *Shelby County v. Holder* was the most prominent federal example.¹² In campaign finance deregulation, *Citizens United v. FEC* greenlighted the creation of “super PACs” with opaque donor lists and unlimited corporate general fund donations, and *McCutcheon v. FEC* removed the biennial aggregate spending cap for individual donors and allowed unlimited aggregate donations – although contributions to any

9. *Id.*

10. See Greg Iacurci, *The Legacy of 2020: Riches for the wealthy, well educated and often White, financial pain for others* (Jan. 1, 2021, 9:05 AM), <https://www.cnn.com/2021/01/01/the-covid-recession-brought-extreme-inequality-in-2020.html> [<https://perma.cc/R3JE-YC6F>]; Juliana Menasce Horowitz et. al, PEW RESEARCH CENTER, *Trends in Income and Wealth Inequality* (Jan. 9, 2020), <https://www.pewsocialtrends.org/2020/01/09/trends-in-income-and-wealth-inequality/> [<https://perma.cc/3Y6A-KNWP>]; Ray Sanchez, CNN, *Occupy Wall Street: 5 Years Later* (Sept. 16, 2016, 3:50 PM), <https://www.cnn.com/2016/09/16/us/occupy-wall-street-protest-movements/index.html> [<https://perma.cc/R473-BHVE>].

11. Jorge L. Ortiz, *‘It’s Nothing but Pain’: The Latest on the Cases of Violence against Black People that Sparked America’s Racial Reckoning*, USA TODAY (Sept. 9, 2020, 9:28 AM), <https://www.usatoday.com/story/news/nation/2020/09/09/george-floyd-breonna-taylor-jacob-blake-what-we-know/5753696002/> [<https://perma.cc/C847-SEZQ>]; Khaleda Rahman, *From George Floyd to Breonna Taylor, Remembering the Black People Killed by Police in 2020*, NEWSWEEK (Dec. 29, 2020, 12:14 PM), <https://www.newsweek.com/george-floyd-breonna-taylor-black-people-police-killed-1556285> [<https://perma.cc/4VZ8-E9KB>]; Oge Egbuonu, *Breonna Taylor and George Floyd both Deserve Justice. But Justice for Black Women is Elusive*, NBC NEWS (June 26, 2020, 11:54 AM), <https://www.nbcnews.com/think/opinion/breonna-taylor-george-floyd-both-deserve-justice-justice-black-women-ncna1232190> [<https://perma.cc/WS8G-T9ZK>].

12. 507 U.S. 529, 556–57 (2013) (holding §4(b) of the Voting Rights Act of 1965 unconstitutional); see Lynn M. Itagaki, *The Racial Laundering of Equality after Shelby County v. Holder*, in *THE SHADOW OF SELMA* 264–88 (Henry K. Lozano & Joe Street, eds. 2018).

individual candidate were still capped, an individual donor could contribute up to the maximum amount to unlimited candidates.¹³

In *The Cycles of Constitutional Time*, Balkin identifies two further dimensions of constitutional rot and renewal that impede or facilitate government: levels of cooperation and trust in institutions. Constitutional rot and renewal rests on the choices of public officials and fellow citizens to uphold “political norms of mutual forbearance and fair political competition that make it possible for people who disagree with each other to jointly pursue the public good.”¹⁴ Legal and political systems, however elaborate and sophisticated, cannot incentivize all behaviors to engage in effective governance: “Republics depend on more than mere obedience to the letter of the law. They depend on well-functioning institutions that balance and check power and ambition, and conventions that require government officials to behave in a public-spirited fashion.”¹⁵

Given the repeated emphasis on the *public* good, *public* opinion, and *public* will, the notion of the public obviously plays a crucial role in public trust. The problem of public trust is that the term “public” has not referred to the same constituency since the first voting cycle of the new republic, and the opinions and preferences of those excluded are ignored. “The public” is constituted legally and politically as a grouping of citizens and eligible voters, and government officials and policymakers are perceived most accountable to this public. Although in everyday conversations we might refer to “the public” and U.S. eligible voters as if these terms always included all citizens, say over eighteen years old, the “public” of public opinion, public will, and public good has shifted along with the expansion and contraction of the franchise. And despite an implicitly anachronistic, stable assumption of a continuous body politic – that people who are citizens and voters today would have been eligible for citizenship, naturalization, or the franchise in the past – elected officials and policymakers of the day are thought to be held most accountable to their current constituents and voters since those people can vote to keep them in or kick them out of office. However, the vagaries of campaign finance and electoral politics have vaulted mega-donors to the forefront,¹⁶ which has further contracted the notion of the “public” to whom

13. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365–66 (2010) (holding *inter alia* that the government may not suppress political speech based on corporate identity and could not limit corporate independent expenditures); *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 192–93 (2014) (holding that aggregate limits on campaign expenditures violated the First Amendment); Lynn M. Itagaki, *United States, Inc.—Citizens United and the Shareholder Citizen*, KALFOU, Fall 2014, at 114, 114–136.

14. BALKIN *supra* note 6, at 45.

15. *Id.*

16. David Callahan & J. Mijin Cha, *Stacked Deck: How the Dominance of Politics by the Affluent & Business Undermines Economic Mobility in America* (February 2013).
https://www.demos.org/sites/default/files/publications/StackedDeck_1.pdf
 [https://perma.cc/N8R4-JCE8].

government is accountable. The public to whom the judiciary is accountable has also changed as judges and justices are more often noticed by elected officials through ideological and political networks of think tanks and elite donors and write their opinions for such audiences.¹⁷

When we claim we are for the public good, are we implicitly defining the public as constituted of likeminded people with similar political interests and goals? In other words, not only is the notion of the public good widely varying but so is the notion of the public itself. Considering the eighteenth-century Anglo-American historical context of traditional liberalism, political theorist Wendy Brown points out that liberalism's fundamental unit is the family, but not all of its persons were members of the public and enfranchised citizens.¹⁸ White Christian straight male property owners, as heads of households, possessed not only land, buildings, equipment, tools, and furniture, but also people: wives, children, and enslaved persons.¹⁹ In the first decades of the new republic, a much smaller community of White propertied men constituted eligible voters and were the public to which policymakers were accountable and elected officials beholden.²⁰ Even as the notion of the public has expanded (and variously contracted) to include these unenfranchised members of the household and those segregated or excluded as "a race so different,"²¹ for example, and the two Americas of rich and poor, of White and BIPOC, map onto the franchised and the disenfranchised: the citizen and the noncitizen are unevenly incorporated with varying influence into "the public." For almost two centuries of formal BIPOC disenfranchisement, American democracy was one of continual constitutional rot and crisis that might arguably persist into the present day.²² Lack of

17. BALKIN *supra* note 6, at 120–21.

18. WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 150–51 (1995).

19. *Id.* at 149.

20. Despite the 1790 Naturalization Act that had property requirements for becoming a United States citizen in addition to gender and racial ones, some states allowed women who owned property and free African Americans to vote. The exact number is difficult to assess but hovers around eighteen percent of the adult population (including women and African Americans who could or could not vote depending on the state) or twenty percent of the total White population (including women who could or could not vote depending on the state and minors). *See generally*, Dave Umhoefer, *Mark Pocan says less than 25 percent of population could vote when Constitution was written* POLITIFACT (Apr. 16, 2015), <https://www.politifact.com/factchecks/2015/apr/16/mark-pocan/mark-pocan-says-less-25-percent-population-could-v/>

21. *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting) (Harlan was referring to Chinese immigrants who were accorded some White privileges of riding in first-class train cars when Black citizens were denied; the majority opinion in this case established the "separate but equal" doctrine).

22. LYNN MIE ITAGAKI, CIVIL RACISM: THE 1992 LOS ANGELES REBELLION AND THE CRISIS OF RACIAL BURNOUT 19–22 (2016) (defining crisis in relation to interracial conflict).

political will, enforcement, and accountability has produced a hierarchy of citizenship that reinforces ideological, racial, and religious hierarchies. Under polarization, party membership resuscitates old and creates new forms of inclusion and exclusion in the concept of the “the public”: Democrats are un-American for being anti-capitalists, socialists, and communists; Republicans are anti-democratic for supporting authoritarianism, warmongering, and oligarchic capitalism.

In *The Cycles of Constitutional Time*, Balkin is directly responding to the Trump Administration and the aftermath of the 2007–2009 global economic crisis, Tea Party movement, Movement for Black Lives, and landmark Supreme Court decisions striking down or invalidating legislative voting protections, such as the Voting Rights Act.²³ However, the situation of constitutional rot seems to be much more longstanding and pervasive than the four or eight years of any presidential administration as Balkin readily recognizes. Given the above definition of constitutional rot that privileges the “interests of a small group of powerful and wealthy people,” the founding documents of our nation themselves – the Declaration of Independence, the Constitution, the Bill of Rights – are deeply rooted in constitutional rot and constitutional crisis.²⁴ Centuries-long “slow violences”²⁵ of second-class citizenship and designations of sub-humanity have allowed crimes against humanity, pain, suffering, and inequity to go unrecognized and unredressed, and these harms continue to haunt descendants and survivors into the present: land theft and genocide of Indigenous peoples, enslavement of African peoples, and xenophobic terror and harassment. Constitutional crisis, rot, and renewal is experienced unevenly, often vastly so.

I want to dwell further on this long history of contradictions. Balkin himself admits this situation:

Constitutional rot is a relative term, like being tall or short. It denotes a period of backsliding in democratic and republican norms and institutions, after a period of increasing democratization, or, at least, relative stability. This caveat is important because the United States has never been fully democratic or republican . . . When I say that constitutional rot is the gradual loss of democracy and republicanism,

23. BALKIN, *supra* note 6, at 3, 8.

24. *Id.* at 45.

25. Nixon defines slow violence as “a violence that occurs gradually and out of sight, a violence of delayed destruction that is dispersed across time and space, an attritional violence that is typically not viewed as violence at all. Violence is customarily conceived as an event or action that is immediate in time, explosive and spectacular in space, and as erupting into instant sensational visibility. We need, I believe, to engage a different kind of violence, a violence that is neither spectacular nor instantaneous, but rather incremental and accretive, its calamitous repercussions playing out across a range of temporal scales.” ROB NIXON, *SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR* 2 (2011).

therefore, I am speaking of a relative decline from an already imperfect system.²⁶

In this Article, I consider how this “imperfect system” is deliberately and intentionally created and maintained.

In fact, the democracy for some has been cultivated and enshrined amid authoritarianism for everyone else. Political scientist Howard Winant has called the United States a *racial dictatorship* and, with sociologist Michael Omi in their classic study, *Racial Formation in the United States*, also a form of *racial despotism* that lasted until the end of Jim Crow segregation in the 1960s and 1970s.²⁷ Thus, the protection and strengthening of White interests are seen by their proponents and beneficiaries as constitutional renewal, *not* rot. History reminds us that Southern Democrats called themselves the “redeemers,” promoting the so-called “Redemption” after the end of Reconstruction and the end of federal protection of Black rights.²⁸ These stark terms of dictatorship and despotism force a nation with a foundational myth of democratic republicanism to reckon with its corollary failures: freedom for some and second-class citizenship, enslavement, dispossession, exclusion, and genocide for the rest.

Indeed, one person’s constitutional rot is another’s renewal. One person’s harbingers of rot are another’s signs of renewal. Determinations of constitutional rot or renewal are not objective facts, especially when given the deep and enduring polarization and marginalization of certain segments of the polity. The contraction of democracy and exclusion of people from the rights and protections of full citizens can be seen, as it was after 1877, as renewal or “redemption.” This conflict over which persons are allowed entry into “the public” is a struggle over who experiences constitutional rot, renewal, or crisis at each juncture. I posit that the notion of one’s rot and another’s renewal can be identified through cycles of the strengthening and weakening of what historian Gary Gerstle has termed *civic nationalism* and *racial nationalism*.²⁹ Civic nationalism is a secular trust in

the transformative power of the United States not in God but in the nation’s core political ideals, in the American belief in the fundamental equality of all human beings, in every individual’s inalienable rights

26. BALKIN, *supra* note 6, at 45.

27. For “racial dictatorship,” see HOWARD WINANT, *THE NEW POLITICS OF RACE: GLOBALISM, DIFFERENCE, JUSTICE* 205 (University of Minnesota Press 2004). For “racial despotism,” see *generally* MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (2014).

28. See *generally*, ERIC FONER, *NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY* 39–73 (2007); James T. Moore, *Redeemers Reconsidered: Change and Continuity in the Democratic South, 1870-1900*, 44 J. OF S. HIST. 357, 357 (1978).

29. GARY GERSTLE, *AMERICAN CRUCIBLE: RACE AND NATION IN THE TWENTIETH CENTURY* 3–11 (2001).

to life, liberty, and the pursuit of happiness, and in a democratic government that derives its legitimacy from the people's consent.³⁰

An integral part of the American Dream, these tenets of civic nationalism form the cornerstone of American exceptionalism, the American way, and the American Creed – this last concept what Gunnar Myrdal conceived of as driving political faith and public trust in the moral principles of U.S. governance.³¹ Moreover, these democratic founding principles are portable and can develop anywhere.

When branches of government curtail voting rights or blatantly fail to enforce and uphold the full rights and protections of all citizens, and when the public appears to support these actions, civic nationalism falters, and this failure often signals the rise of racial nationalism. The end of Reconstruction exemplifies this weakening of civic nationalism and strengthening of racial nationalism:

Throughout its history, however, American civic nationalism has contended with another potent ideological inheritance, a racial nationalism that conceives of America in ethnoracial terms, as a people held together by common blood and skin color and by an inherited fitness or self-government. This ideal, too, was inscribed in the Constitution (although not in the Declaration of Independence), which endorsed the enslavement of Africans in the southern states, and it was encoded in a key 1790 law limiting naturalization to “free white persons.”³²

In more recent critical debates, racial nationalism is the prerogative of White Christian settler colonialism, a political eugenics of democratic expression. It is colloquially expressed as “White is right” and that justice is “just us” for Whites, as poet and scholar Claudia Rankine’s collection of essays, *Just Us: An American Conversation*, has discussed.³³ The competing notions of freedom offered by civic nationalism and racial nationalism are the political calculus for most policy issues. The former can and often has led to an expansion of those who are afforded the rights and protections of full citizens and strengthened those rights and protections by facilitating the accountability of those in power to newly franchised stakeholders. Racial nationalism can and often has led to the contraction of those who can claim citizenship, residence, and the rights and protections provided by government. Constitutional instruments are often unenforced for marginalized groups who are dehumanized to legitimize their victimization, and this lack of

30. *Id.* at 4.

31. *Id.*; see generally, GUNNAR MYRDAL, AN AMERICAN DILEMMA; THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944).

32. GERSTLE, *supra* note 28, at 4.

33. CLAUDIA RANKINE, JUST US: AN AMERICAN CONVERSATION (2020).

enforcement excludes them from being claims-bearing complainants to whom governments and “the public” are accountable.

II. COMPROMISE, CONSENSUS, COMMON GROUND

Although compromise is a useful political strategy and necessary for human relations, the much-heralded political compromises of the first century of United States history all involved the continued existence of White supremacy and racial despotism through labor and personhood stolen from enslaved Africans on land stolen from Indigenous peoples. Known through popular history as such, the allegedly great compromises of the eighteenth and nineteenth centuries underwrote the expansion of slavery through the death and displacement of Indigenous populations, whether the Three-Fifths Compromise that brought slave states to support the Constitution or the Compromise of 1850 that tried to preserve the Union.

How does trust function in these political negotiations? From popular belief to scholarly treatises, trust is most often manifested in cooperation and mutually beneficial relationships. Most people will generally advocate for political leaders to seek compromise, cooperation, common ground, and even consensus. They usually extoll these virtues in their everyday, interpersonal situations. Strong trust builds social cohesion which “increase[s] the efficiency and effectiveness of government operations” and allows governments “to act without having to resort to coercion.”³⁴

Political polarization threatens this cooperation and the trust it fosters. Despite these high levels of polarization, however, the Pew Research Center found a consensus across both parties in nine of the top ten issues facing Americans and overwhelming agreement for “keeping the country safe from terrorism (91%), responding to natural disasters (87%) and ensuring safe food and medicine (87%).”³⁵ A majority of self-identified Democrats and Republicans agreed that “government should play a major role” in six other issues relating to the economy, environment, immigration, infrastructure, poverty, and public health.³⁶ In only one of the ten issues did a minority of Republicans (42 percent) in contrast to a vast majority of Democrats (85 percent) favor the government playing a major role in “ensuring access to healthcare”³⁷ – recording the highest difference between parties at 43 percent. The next two issues with the most variance between party-affiliated respondents showed a slim majority of Republicans believing the government should play a large part in “protecting the environment” (52 percent) and

34. OECD, *supra* note 2, at 21.

35. *Americans’ View of Government: Low Trust, but Some Positive Performance Ratings*, PEW RESEARCH CENTER (Sept. 14, 2020), <https://www.pewresearch.org/politics/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings/> [<https://perma.cc/U2P4-AJY2>].

36. *Id.*

37. *Id.*

“helping people get out of poverty” (50 percent) whereas Democrats were 90 percent and 74 percent, respectively.³⁸

In more alarming results regarding compromise and common ground, the Georgetown Institute of Politics and Public Service Battleground Poll in April and October 2019 added a few statements related to civility for respondents to agree or disagree with, such as the “political, racial, and class divisions in this country are getting worse and our national dialogue is breaking down,” or “I am frustrated by the uncivil and rude behavior of many politicians.”³⁹ With percentages between 77 to 83 for the former and 88 to 90 percent for the latter, respondents clearly signaled their beliefs that politicians, pundits, and the public were divided, unable to dialogue, and uncivil. In response to the statement, “Compromise and common ground should be the goal for political leaders,” an overwhelming majority – 85 percent in April and 87 percent in October – agreed.⁴⁰ Pew’s mid-2020 survey on public trust in federal government also revealed that most respondents “say that Americans can solve problems” and wanted the federal government to continue working on a variety of issues.⁴¹ Implicitly, these relatively stable majorities demonstrate a trust in the federal government’s capacity for improving people’s lives. To act on these findings still requires political compromise and cooperation, which often depend on mutual trust.

Of these terms promoting agreement and mutuality, compromise is one of the most complex. Beyond the notion of consensus as general agreement, compromise is reached through concessions made by all parties. Admittedly, compromise has negative connotations: it can signal “the acceptance of standards that are lower than is desirable.”⁴² And, the related adjectives “compromising” or “compromised” can mean shameful as well as a discredited position and weakened status.

Cooperation and trust, like dissension and distrust, are strategies that are not always the most effective depending on the circumstances. Diego Gambetta trenchantly asks, “Can we trust trust?”⁴³ He points out that cooperation and trust are not uniformly desirable in all situations.⁴⁴ In economic and political contexts, a healthy and productive competition

38. *Id.*

39. *October 2019 Civility Poll*, GEORGETOWN UNIV. INST. OF POLITICS AND PUB. SERV. (Oct. 2019), <https://politics.georgetown.edu/battleground-poll/october-2019/> [<https://perma.cc/8T96-EXC3>] (see “Graphics and Slides” <https://drive.google.com/file/d/1ucvkLBbDkV31UjkXHcnty3ftWz2fb0Dy/view>). This poll is run semi-annually by the Institute of Politics at Georgetown University with Republican-leaning and Democrat-leaning polling outfits.

40. *Id.*

41. *Americans’ View of Government: Low Trust, but Some Positive Performance Ratings*, *supra* note 34.

42. *Compromise*, LEXICO (last visited Mar. 15, 2021), <https://www.lexico.com/en/definition/compromise> [<https://perma.cc/8DRX-WG6Y>].

43. Gambetta, *supra* note 4, at 213.

44. *Id.* at 215.

“enriching the human lot” might be warranted before cooperation, although this effective competition might depend on trust in one’s competitors and the perception of mutual benefits.⁴⁵ One side might actively thwart cooperation and trust in those on the other side: for example, among a nation’s enemies, however identified. Propaganda, disinformation, agent provocateurs, and other strategies of psychological warfare have been used to foment dissension and distrust among perceived enemies of the state, whether foreign nations or domestic organizations. On a personal level, abuse, gaslighting, and other forms of manipulation work to foster distrust in a victim’s own cognition.

Compromise, as a political strategy, necessitates trust and cooperation after or even before a period of competition in laying the ground rules, as in international trade agreements. Compromise cultivates and indicates trust in the system. Here, I return to another important exhortation in Balkin’s definition of constitutional rot: the cohesion of “the public” supporting the republic depends “on mutual toleration and forbearance that makes it possible for contending sides to view each other not as implacable enemies that must be eliminated but as fellow citizens who, despite their differences, all aim at the larger goal of serving the *res publica*.”⁴⁶ What happens when a republic incorporates people who have been historically perceived as implacable enemies? Racial nationalism identifies nonwhite, often non-Christian and non-European citizens and immigrants as these implacable enemies, and this flexible, catch-all category of threat to the American way of life and American institutions is useful for racist appeals and demagoguery.

Specifically, the famed compromises throughout U.S. history that have ostensibly “healed the Union” have reunited White ruling factions to protect White interests: (1) the Three-Fifths Compromise that constitutionally cemented the electoral representation of enslaved persons but not their freedom nor franchise;⁴⁷ (2) the antebellum compromises that balanced “slave” and “free” states’ entry into the Union;⁴⁸ and (3) the Compromise of 1877 that guaranteed states’ autonomy to disenfranchise and terrorize their unenslaved people.⁴⁹ These compromises have reinforced the continued

45. *Id.* at 5.

46. BALKIN, *supra* note 6, at 45.

47. *See* U.S. CONST. art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons... *three fifths* of all other Persons.”) (emphasis added).

48. *See Missouri Compromise*, ENCYCLOPEDIA BRITANNICA (last visited Jan. 31, 2021), <https://www.britannica.com/event/Missouri-Compromise> (discussing the extension of slavery through the Missouri Compromise of 1820, the Kansas-Nebraska Act of 1854, and the Compromise of 1850).

49. *See* Michael L. Benedict, *Southern Democrats in the Crisis of 1876-1877: A Reconsideration of Reunion and Reaction*, 46 J. OF S. HIST. 489, 489–90 (1980) (“In return for southern Democratic support at his inauguration, [President] Hayes agreed to end the interference in southern states that was no irrelevant to northern Republican industrial interests.”). I use Patricia J. Williams’ term “unenslaved” to recognize the varying states of unfreedom experienced by Black people after their ostensible

dominance of White supremacy. White power elites have reaffirmed and consolidated the prerogatives of Whites by the expulsion and rejection of the rights and privileges of nonwhites, a category that has also included Jews, Muslims, Irish, and southern and eastern Europeans, in addition to African enslaved persons, Indigenous peoples, or Asian aliens ineligible for citizenship. Compromise has been achieved through the exploitation of the physical bodies and legal personhood of the most historically vulnerable or those most often excluded. Mutuality and cooperation often effectuate the continued power of White supremacy in U.S. politics, society, economics, and culture. In fact, compromise that reestablishes trust has often restricted the very notion of who can belong to the public itself and furthered exclusion. Consensus has often been achieved through normalizing the violence of White supremacy and redefining the public good as resources primarily allocated to Whites. The promise of White superiority produces trust repeatedly throughout U.S. history.

III. CONCLUSION

In the decades following Reconstruction, local, state, and federal governments refused to enforce the Fourteenth and Fifteenth Amendments and racial terror increased at this “nadir” of United States history.⁵⁰ Leading Black intellectuals founded *The Crisis*, the official journal of the NAACP in November 1910.⁵¹ Writing for the editorial page, W.E.B. Du Bois marked the journal’s establishment during a “critical time in the history of the advancement of men,” and *The Crisis* editorials would “stand for the rights of men, irrespective of color or race, for the highest ideals of American democracy, and for [the] reasonable but earnest and persistent attempt to gain these rights and realize these ideals.”⁵² His words resonate now, as some populations have been forced to continually negotiate constitutional crises over their civil and human rights since the moment of the Constitution’s crafting and ratification. While this crisis has waxed and waned in intensity, it has been a crisis for much longer than the first shots fired on Fort Sumter and the agreement at Appomattox.⁵³

emancipation in 1863. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 4, 143–47 (1992).

50. RAYFORD LOGAN, *The Negro in American Life and Thought: The Nadir, 1877–1901* (1954).

51. *HOME*, *THE CRISIS*, <https://www.thecrisismagazine.com/> [<https://perma.cc/4ZWG-S9R3>]; *The Crisis*, *ENCYCLOPEDIA BRITANNICA* (last visited Jan. 31, 2021), <https://www.britannica.com/topic/The-Crisis-American-magazine> [<https://perma.cc/DN7U-MSZC>].

52. W.E.B. Du Bois, *Editorial*, *THE CRISIS*, Nov. 1910, at 10.

53. See *Who First Fired at Sumter*, *DAILY GLOBE*, Oct. 20, 1882, at 4 (“At 4:30 a.m. [April 12, 1861] the first gun was fired at Fort Sumter”); *The Surrender Meeting*, *NAT’L PARK SERV.* (last visited Jan. 31, 2021), <https://www.nps.gov/apco/learn/historyculture/the-surrender-meeting.htm>

Public trust has proven a crucial factor in turning the cycles of constitutional time and amplifying the cyclical highs and lows of rot and renewal. A strategy of compromise that increases trust through mutual cooperation is often implicitly advocated to smooth over polarization or begin a constitutional renewal. However, the most pivotal compromises in U.S. history were made among political elites who represented wealthy White interests and who made decisions about the lives of people who were disenfranchised, dispossessed, and enslaved, and these marginalized people had interests of their own that were scarcely represented and mostly countermanded. While advocating for renewed trust through cooperation, we must recognize and prevent the ways in which these famed compromises further entrenched discrimination. These legacies of exclusion and inequality continue to negatively impact the opportunities and quality of life for many people today.

[<https://perma.cc/Q89J-N27X>] (“April 9th, 1865, was the end of the Civil War for General Robert E. Lee and the Confederate Army of Northern Virginia.”).