

**THE ORIGINAL MEANING OF CIVILITY:
DEMOCRATIC DELIBERATION AT THE PHILADELPHIA CONSTITUTIONAL CONVENTION**

Introduction

On January 8, 2011, Jared Lee Loughner opened fire on a group of people gathered in a parking lot in Tucson, Arizona for a “Congress on Your Corner” meeting with Congresswoman Gabrielle Giffords.¹ Loughner injured thirteen people, including Giffords herself, and killed six, including John Roll, a U.S. District Judge, Gabe Zimmerman, one of Giffords’ staff members, and Christina-Taylor Green, a nine year old girl with a budding interest in politics who happened to have been born on September, 11, 2001.² Days after the mass shooting, President Obama delivered a condolence address in the University of Arizona field house, giving what some have called his finest and most powerful speech as President to date.³ Obama called for a new era of civility in honor of those who had lost their lives in the tragedy.⁴ While careful to avoid claiming that political incivility was itself the cause of Loughner’s actions, he suggested that the tragedy should serve as an occasion to reevaluate the tenor of national political debate. “At a time when our discourse has become so sharply polarized, at a time when we are far too eager to lay the blame for all that ails the world at the feet of those who think differently than we do, it’s important for us to pause for a moment and make sure that we are talking with each other in a

¹ Alex Altman, *Tucson Tries to Recover Civility and Peace*, Time, Jan. 10, 2011.

² James Buck and Melissa Bell, *Tucson shooting victims: lives remembered*, The Washington Post (Jan. 9, 2011), http://voices.washingtonpost.com/blog-post/2011/01/arizona_shooting_victims_the_f.html.

³ Adam Clark Estes, *From the pundits: The finest speech of Obama’s presidency*, Salon.com (Jan. 13, 2011), http://www.salon.com/news/politics/war_room/2011/01/13/obama_arizona_speech_reactions.

⁴ Helene Cooper and Jeff Zeleny, *Obama Calls for a New Era of Civility in U.S. Politics*, New York Times, (Jan. 12, 2011).

way that heals, not a way that wounds.”⁵ And later he added, “if, as has been discussed in recent days, their death helps usher in more civility in our public discourse, let us remember it is not because a simple lack of civility caused this tragedy -- it did not -- but rather because only a more civil and honest public discourse can help us face up to the challenges of our nation in a way that would make them proud.”⁶

In the aftermath of the Tucson shootings, there is some evidence that politicians, academics, and commentators alike are taking seriously this call for a renewed focus upon civility. At Obama’s January 25, 2011 state of the union address, at the urging of Colorado Senator Mark Udall, sixty Democratic and Republican members of both houses of Congress broke over a century of tradition by crossing the aisle and sitting next to each other during the speech, creating what many observers called a palpable difference in the atmosphere of the chamber.⁷ The University of Arizona announced in February, 2011 that it would create a National Institute for Civil Discourse, whose honorary chairmen would be former presidents George H. W. Bush and Bill Clinton, that would focus upon finding ways to encourage compromise among competing parties and political groups.⁸ And in late March 2011, the National Constitution Center in Philadelphia held a day long summit called “Can We Talk?: A Conversation about Civility and Democracy,” in which an eminent assembly of politicians,

⁵ President Barack Obama, Tucson Memorial Speech (Jan. 12, 2011) (transcript available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/13/AR2011011301532.html>).

⁶ *Id.*

⁷ Devin Dwyer, *State of the Union 2011: Lawmakers Cross Aisle, Sit Together, Make History*, ABC News (Jan. 25, 2011), http://abcnews.go.com/Politics/State_of_the_Union/state-union-2011-lawmakers-cross-aisle-sit-make/story?id=12760732. See also, Ben Pershing, *A bipartisan stand for legislative progress?*, Washington Post (Jan. 25, 2011), http://www.washingtonpost.com/national/a-bipartisan-stand-for-legislative-progress/2011/01/24/ABxvEzD_story.html.

⁸ M. Amedeo Tumolillo, *University of Arizona Sets up Civility Institute*, New York Times, (Feb. 21, 2011), <http://www.nytimes.com/2011/02/21/us/politics/21civility.html>.

lawyers, historians, political philosophers, and political activists gathered to discuss concerns about increasing polarization and decreasing incentives to compromise in American public life.⁹

This renewed focus on civility is in many ways the fruition of earlier efforts that had been on more of a “slow-burn” prior to the Tuscon shootings. In December 2010, an organization called “No Labels” met and established itself at Columbia University, dedicating itself to improving dialogue between the two major parties.¹⁰ Headlined by political celebrities from across the political spectrum, such as William Galston, former policy advisor to President Bill Clinton, David Frum, former strategist for President George W. Bush, and New York City Mayor Michael Bloomberg, the organization was chiefly focused upon improving the quality of debate by encouraging reflection upon major issues of public policy outside the confines of the traditional left-right framework of American politics.¹¹ In October 2010, an estimated 200,000 people filled the National Mall in Washington, D.C. to attend comedians Jon Stewart and Stephen Colbert’s “Rally to Restore Sanity and/or Fear,” which urged Americans to tone down the overheated rhetoric and reduce reliance upon the brandishing of nasty epithets in political debate.¹² “There are terrorists, and racists, and Stalinists, and theocrats,” said Stewart, “but those are titles that must be earned! You must have the résumé! Not being able to distinguish between real racists and Tea Party-ers, or real bigots and Juan Williams or Rick Sanchez is an insult—not only to those people, but to the racists themselves, who have put in the exhausting effort it takes

⁹ “Can We Talk? A Conversation about Civility and Democracy,” National Constitution Center, March 26-27, 2011, program and archived videos available at http://constitutioncenter.org/ncc_progs_Public_Symposium_on_Civility_and_Democracy.aspx.

¹⁰ Luisita Lopez Torregrosa, ‘No Labels’ Speaker David Gergen in NYC: ‘The Country is on the Edge,’ Politics Daily, (Dec. 11, 2010), <http://www.politicsdaily.com/2010/12/11/no-labels-political-group-aims-to-combat-hyper-partisanship/>.

¹¹ *Id.*

¹² Brian Montopoli, Jon Stewart Rally Attracts Estimated 215,000, CBS News (Oct. 30, 2010), http://www.cbsnews.com/8301-503544_162-20021284-503544.html.

to hate.”¹³ And in a May, 2010 commencement address at the University of Michigan, President Obama identified incivility in public life as undermining the very possibility of compromise, democratic deliberation, and learning – “since, after all, why should we listen to a ‘fascist or ‘socialist’ or ‘right wing nut?’ It makes it nearly impossible for people who have legitimate but bridgeable differences to sit down at the same table and hash things out.”¹⁴

Civility, in other words, is hot. But while it is now a central theme in political discourse and even pop culture, it has received comparatively little serious scholarly attention. Beyond recalling the lessons we learned in Kindergarten and treating each other as we would like to be treated ourselves, what does civility in public life require? What helps facilitate it and what effect does it have upon different kinds of political debate? Besides the benefits, what costs, if any, might be associated with civility? How can civility be promoted without muffling the invaluable voices of dissent? In the words of Fred DuVal, a member of the University of Arizona Board of Regents and personal friend of Congresswoman Giffords who came up with the idea for the civility institute at Arizona, what specific “best practices” help encourage civility and what specific “corrosive practices” diminish it?¹⁵

In this paper, I propose to investigate some of these questions through the prism of one particularly well known “case study,” the Constitutional Convention that met in Philadelphia during the summer of 1787. I turn to the convention as a source of potential insight on civility for two reasons.

¹³ Jon Stewart, Closing Speech of Rally to Restore Sanity and/or Fear, (Oct. 30, 2010), available at: <http://www.examiner.com/celebrity-in-national/rally-to-restore-sanity-jon-stewart-s-closing-speech-full-text>.

¹⁴ President Barack Obama, University of Michigan Commencement Address, (May 20, 2010), available at: http://www.huffingtonpost.com/2010/05/01/obama-michigan-graduation_n_559688.html.

¹⁵ M. Amedeo Tumolillo, *University of Arizona Sets up Civility Institute*, New York Times, (Feb. 21, 2011), <http://www.nytimes.com/2011/02/21/us/politics/21civility.html>.

First, over the past thirty years, constitutional scholars, historians, and political theorists have mined the convention as a source of illumination for nearly every conceivable substantive legal and doctrinal issue.¹⁶ Whether the subject has been the meaning of rights, the relationship between the states and the federal government, or the extent and limits of the commerce clause, scholars have in many cases found the debates in the Constitutional Convention to be a fruitful source of information about substantive and controversial topics.¹⁷ But if we can learn about these kinds of topics from observing what the delegates said and wrote about them during their four months in Philadelphia, can we not also learn about procedural techniques helpful (or harmful) to deliberative democracy by observing how the delegates behaved themselves during those four months?

Second, whenever politicians or commentators discuss the topic of civility in the public square, they often bring up the Constitutional Convention as a model for polite but vigorous and public-spirited political debate. In his book *The Audacity of Hope*, Obama himself likened American democracy to “a conversation to be had”¹⁸ in which individuals

test out their ideals, vision, and values against the realities of a common life, so that over time they may be refined, discarded, or replaced by new ideals, sharper visions, deeper values. Indeed, it is that process, according to Madison, that brought about the Constitution itself in which ‘no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth, and was open to the force of argument.’¹⁹

According to James Kloppenberg, Obama’s view of the convention likely emerged through his familiarity with a school of late twentieth century scholars who analyzed the presence of civic republicanism at the founding and saw in that original moment a prime example of civility and

¹⁶ See generally, e.g., Steven G. Calabresi, ORIGINALISM: A QUARTER CENTURY OF DEBATE (2007).

¹⁷ *Id.*

¹⁸ Barack Obama, THE AUDACITY OF HOPE 92 (2006).

¹⁹ *Id.* at 94-5.

“deliberative democracy.”²⁰ Historians like Bernard Bailyn,²¹ J.G.A. Pocock,²² and Gordon Wood,²³ legal scholars like Cass Sunstein,²⁴ Frank Michelman,²⁵ and Paul Brest,²⁶ and political theorists like Joseph Bessette,²⁷ Amy Gutmann and Dennis Thompson,²⁸ and Stephen Macedo,²⁹ all in their unique way contributed to a rethinking of the Constitutional convention and the system it created. Above all they emphasized the ways in which the convention represented and created a “republic of reasons,” in which power could be exercised only through a process that required argumentation and reason-giving, that often resulted in a transformation (as opposed to the mere aggregation) of interests and, at least occasionally, redirected people’s gaze away from their more private needs and interests and towards the needs of the larger good. Sunstein saw this very process at work in Philadelphia, pointing out Madison’s assessment that various procedural rules of the convention encouraged a “yielding and accommodating spirit” that enabled the delegates to change their positions when confronted with new evidence or better

²⁰ James T. Kloppenberg, *READING OBAMA: DREAMS, HOPE, AND THE AMERICAN POLITICAL TRADITION* 1-84 (2011).

²¹ Bernard Bailyn, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

²² J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975).

²³ Gordon Wood, *THE CREATION OF THE AMERICAN REPUBLIC* (1969).

²⁴ Cass R. Sunstein, *THE PARTIAL CONSTITUTION* (1993); *Beyond the Republican Revival*, 97 *YALE L.J.* 1539 (1987-1988).

²⁵ Frank I. Michelman, *The Supreme Court 1985 Term – Foreword: Traces of Self-Government*, 100 *HARV. L. REV.* 4 (1986-1987).

²⁶ Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 *Yale L.J.* 1623 (1987-1988).

²⁷ Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in *HOW DEMOCRATIC IS THE CONSTITUTION?* (Robert A. Goldwin and William A. Schambra eds., 1980).

²⁸ Amy Gutmann and Dennis Thompson, *DEMOCRACY AND DISAGREEMENT* (1996); *WHY DELIBERATIVE DEMOCRACY?* (2004).

²⁹ Stephen Macedo, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* (1991); ed., *DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT* (1999).

arguments.³⁰ Pocock described the convention even more glowingly, saying that the “debates of the Philadelphia Convention are notoriously the highest power ever reached by civic humanist theory in practice.”³¹

Another reason why some contemporary commentators tend to praise the proceedings of the Philadelphia convention is because of the esteem in which its work was held by many of the more illustrious figures from the era. Writing from France just as the convention was about to convene, Thomas Jefferson described the delegates to the convention as “an assembly of demi-gods.”³² One month into the convention, Alexander Hamilton observed in the Assembly Room that “It is a miracle that we were now here exercising our tranquil and free deliberations on the subject.”³³ Writing one year after the convention had adjourned, John Adams described it as “the greatest single effort of national deliberation that the world has ever seen.”³⁴ And writing approximately forty years after the convention, Madison said, “there never was an assembly of men, charged with a great and arduous trust, who were more pure in their motives, or more exclusively or anxiously devoted to the object committed to them.”³⁵ In spite of the best efforts of some of the brightest scholarly minds of the twentieth century to poke various holes in the sepia-tinted portrait of the “Miracle at Philadelphia,” the positive self-assessment of those closest to the convention may continue to exert at least some pull on the heartstrings of contemporary politicians, commentators, and scholars alike.

³⁰ Sunstein, *PARTIAL CONSTITUTION*, 20-24.

³¹ Quoted in Sunstein, *Beyond the Republican Revival*, 1559.

³² Jefferson letters.

³³ James Madison, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787* 216 (Adrienne Koch, 1987) (Alexander Hamilton, June 29, 1787) [Hereinafter Notes].

³⁴ John Adams, *A Defence of the Constitutions of Government of the United States of America*, in *THE WORKS OF JOHN ADAMS VI*, 220 (1850-56).

³⁵ Notes at 19.

So what was the “original meaning of civility”? I submit that the Constitutional Convention in Philadelphia was marked, first, by an unusual degree of civic friendship fostered through ground rules of parliamentary procedure that facilitated respect, listening, and open-mindedness, initial gestures of respect and deference, and extensive social interaction among the delegates leading up to and during the convention. Delegates like Madison and Franklin themselves suggested that without this foundation, the convention may not have even been able to last a few weeks, much less four months.

Beyond this foundation of civic friendship, I contend that the substance of the deliberations among the delegates was marked by two fundamentally different – indeed nearly opposite – modes of operating. For many scholars, the Constitutional Convention stands for one particular style of political deliberation. The conversation among these scholars has typically been focused on how to best characterize that style. For some, like Martin Diamond, the delegates in Philadelphia represented a collection of veritable philosopher kings whose familiarity with ancient political history, early modern political philosophy, and European experiments in confederacies provided the material for much of their debate.³⁶ For others, like Cass Sunstein, the convention represented a return to a civic republican style of debate which did not merely aggregate selfish interests or accommodate fixed positions on the model of social choice theory but, through the open-minded give and take of debate, managed to transform those interests into something approximating a passion for the common good.³⁷ And for still others, like John Roche, the delegates to the convention were at their core savvy democratic politicians, not unlike the ones we have today, whose focus was not on transcendent principles learned

³⁶ Martin Diamond, *The American idea of man: The view from the founding*, in *THE AMERICANS* (Kristol and Weaver eds., 1976) (arguing that “the Convention supplies a remarkable example of... how theoretical matters govern the disposition of practical matters.”)

³⁷ Sunstein, *THE PARTIAL CONSTITUTION*, 20-24.

through political philosophy or some emergent common good divined through democratic deliberation, but on the fixed interests of their constituents and the most effective means by which to satisfy them.³⁸

I submit, by contrast, that the delegates adopted two sharply distinct modes of deliberation depending upon the issue before them. When the topic was one of broad constitutional structure, such as the powers of Congress, the composition of the executive, or the proper mode of ratification and amendment of the Constitution, the delegates argued with each other in a mode that emphasized rational discovery of the best, safest, and most efficacious solution. But when the topic was one that impinged directly upon interests of various kinds, such as the allotment of representatives in Congress, the delegates argued with each other in a mode that emphasized compromise among the seemingly irreconcilable sets of principles and interests. When the topic was constitutional structure, the delegates acted more like Martin Diamond's philosopher-kings or Cass Sunstein's deliberative democrats. But when the topic hit a raw, interest-based nerve, the delegates transformed themselves into John Roche's politicians and deal-makers. Civic friendship, reason, and compromise, then, constituted the core of the original meaning of civility.

1. Civic Friendship

On Monday, June 11th, more than two full weeks into the convention, the legendary Benjamin Franklin made one of his earliest interventions in the delegates' deliberations. Concerned with a recent spike in heated rhetoric from the prior Saturday, in which William Patterson, a delegate from New Jersey, had said that he would prefer to live under a monarch or

³⁸ John Roche, *The Founding Fathers: A Reform Caucus in Action*, AMERICAN POLITICAL SCIENCE REVIEW, Vol. 55, No. 4 (Dec. 1961), 799-816.

despot than under the large states' Virginia Plan, in which small states like New Jersey would be "swallowed up,"³⁹ Franklin wrote out a speech to be read by his fellow Pennsylvania delegate

James Wilson. In his speech Franklin observed that,

It has given me great pleasure to observe that till this point, the proportion of representation, came before us, our debates were carried on with great coolness and temper. If anything of a contrary kind, has on this occasion appeared, I hope it will not be repeated; for we are sent here to consult, not to contend, with each other; and declarations of a fixed opinion, and of determined resolution, never to change it, neither enlighten nor convince us. Positiveness and warmth on one side, naturally beget their like on the other; and tend to create and augment discord and division in a great concern, wherein harmony and Union are extremely necessary to give weight to our Councils, and render them effectual in promoting and securing the common good.⁴⁰

Franklin's intervention, arguably the earliest explicit "call for civility" under the soon to be created new Constitution, indicates, among other things, one relatively astounding fact: for more than two full weeks the deliberations had proceeded with "great coolness and temper." Fifty five of the most celebrated and ambitious lawyers and politicians from all the states in the union had been meeting in one relatively small, austere assembly room with its doors and windows shut to the outside for six to seven hours a day without a break for six days per week.⁴¹ During those days they had elected their leaders for the summer, laid out the ground rules, and started debating the sweepingly radical overhaul of the Articles of Confederation. One might have expected some rhetorical fireworks earlier in the proceedings.

What likely accounts for the "great coolness and temper" of the proceedings up to that point, and indeed for much of the remainder of the summer (notwithstanding considerably nastier and more intense rhetoric in the coming months), is the spirit of "civic friendship" that was established at an early point in the convention. Whether they liked or disliked each other

³⁹ Notes, 94-96 (William Patterson, June 9, 1787).

⁴⁰ *Id.* at 99 (Benjamin Franklin, June 11, 1787).

⁴¹ See Richard Beeman, *PLAIN HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 58-85 (2009).

personally, the delegates laid down a social/ethical/parliamentary framework in which to navigate the inevitable personal and philosophical differences that would arise. This framework pushed the delegates towards civility, whether they liked it or not.

The first and perhaps most important element of this framework was the simple fact that these delegates had physically housed themselves up with each other for four months in the relatively small city of Philadelphia. They stayed in many of the same boardinghouses, taverns, and private homes, all within easy walking distance of the Pennsylvania State House where they met every day.⁴² From 10 or 11 AM to 3 or 3:30 PM, they spent all their time in the Assembly Room, hashing out business around tables squeezed closely next to each other.⁴³ After every day's business they ate dinner at various taverns with names like the Indian Queen, City Tavern, Epple's, or Oeller's, that were sprinkled liberally throughout the city.⁴⁴ Eventually dinner "clubs" formed in which eight or more delegates would regularly dine together at a time.⁴⁵ These clubs were open to delegates from all the states and their informal membership typically cut across sectional and ideological lines.⁴⁶ And after dinner, around 8 or 9 PM, delegates typically would have an evening tea with each other and other prominent citizens from Philadelphia.⁴⁷ It was in these boardinghouses, club dinners, and evening teas where much of the business of the convention would transpire.⁴⁸

Perhaps the most concrete and well known of the bonding that occurred as a consequence of this frequent and informal interaction was the connection formed between the Virginia and

⁴² *Id.* at 72-9.

⁴³ *Id.* at 72.

⁴⁴ *Id.* at 78.

⁴⁵ *Id.*

⁴⁶ *Id.* See also David Dutcher, Anna Coxe Toogood, et al., 1787: THE DAY-TO-DAY STORY OF THE CONSTITUTIONAL CONVENTION 37-8 (1987).

⁴⁷ *Id.* at 79.

⁴⁸ *Id.* at 72.

Pennsylvania delegates leading up to the convention. Though unknown to each other except by repute, these delegates, whose numbers included George Washington, James Madison, George Mason, and Edmund Randolph from Virginia and Benjamin Franklin, Gouverneur Morris, and James Wilson from Pennsylvania, met on a daily basis for nearly two full weeks together prior to the start of the convention.⁴⁹ Though the convention had been scheduled to start on Monday May, 14, distance, weather, business, and sheer apathy had prevented a quorum of enough delegates from assembling until the following Friday, May 25.⁵⁰ Franklin took this occasion to invite those who had arrived – namely the early bird Virginians – to meet the already assembled Pennsylvania delegates at his home for dinner on Wednesday, May 16.⁵¹ Franklin laid out a lavish meal and provided a special cask of porter which, according to Franklin, “met with the most cordial and universal approbation.”⁵² This dinner laid the foundation for seven days of more business-oriented meetings among these delegates which allowed them, in the opinion of Mason, to “grow into some acquaintance with each other” and “form a proper correspondence of sentiments” that would eventually consummate in the Virginia Proposal.⁵³ But for Franklin’s cask of porter, the Virginia proposal may never have stolen the show in the first few weeks of the convention.

In addition to the easy familiarity encouraged by frequent interaction and cross-sectional dinners, several delegates made deliberate, self-conscious, and in some ways self-sacrificing early efforts to encourage mutual respect among the assembly. The first was Franklin’s decision on the first day of the meeting, Friday, May 25 to nominate George Washington as president of

⁴⁹ *Id.* at 41-57, (calling this time period the “The Delay that Produced a Revolution.”)

⁵⁰ *Id.* at 41-2.

⁵¹ *Id.* at 52-3.

⁵² *Id.* at 53.

⁵³ *Id.*

the Assembly.⁵⁴ Though he was physically incapable of attending that day to deliver the nomination in person, and therefore did so through the Pennsylvania delegation as a whole, his gracious decision to publicly prefer Washington to himself, whom Madison described as the only other delegate who “could have been thought of as a competitor” to Washington, signaled to the assembled delegates the importance of unity and moderate sacrifice of private ambition.⁵⁵

The other early effort to encourage mutual respect cost considerably more than Franklin’s decision to defer to Washington. The delegates needed to quickly determine how they would vote for measures. The Pennsylvania delegation pressed for proportional representation, by which each state would have the voting strength proportional to the population of its state.⁵⁶ Thus Delaware, with its 60,000 residents, would have less than 1/10 the voting power of Virginia with its 750,000 residents. The delegates from Virginia, however, sensing that such a “hard ball” move so early in the convention might, in the words of Madison,

beget fatal altercations between the large and small states, and that it would be easier to prevail on the latter, in the course of the deliberations, to give up their equality for the sake of an effective government, than on taking the field of discussion to disarm themselves of the right and thereby throw themselves on the mercy of the large states, discountenanced and stifled the project.⁵⁷

Though the Virginians arguably sacrificed an early advantage, their offer to count all the states equally in the deliberations of the convention proved a smart first step towards opening up and sustaining conversation between the small and large states.

Besides the informal “correspondence of sentiments” among the delegates and the early, self-sacrificing gestures towards civility and mutual respect, the delegates adopted various formal rules of parliamentary procedure in the opening days of the convention that proved

⁵⁴ Notes at 24.

⁵⁵ *Id.*

⁵⁶ *Id.* at 25.

⁵⁷ *Id.*

indispensable in encouraging open-mindedness, active listening, and deliberation. Some of the rules were obvious and perhaps elementary aids in helping the delegates remain politely focused on the task at hand without the distraction of inconsiderate or domineering participants.

Whenever a member was speaking, the other members were expected to listen to him and not carry on a conversation with others or read a book or pamphlet.⁵⁸ No member could speak twice on the same topic before any other member not previously recognized on the subject.⁵⁹

Whenever the debate of a topic was underway, no other motions on unrelated topics could be made.⁶⁰ Whenever a particular debate was particularly complex and multi-faceted, a member could move to divide the subject into discrete parts and focus the debate on each part separately.⁶¹ Attendance was required and whenever members were assigned to do committee work that required substantial time, the convention as a whole would not meet so as to prevent members from having to choose between committee service and convention attendance.⁶² And members who transgressed lines of decorum could be called to order by either the President or any other member, but would be given an opportunity to first explain and defend the allegedly uncivil conduct.⁶³

While the foregoing rules helped ensure focus and attentive listening, three other rules were devised to free the delegates to float new ideas, change their minds, alter course, and flexibly respond to new arguments, evidence, and proposals without fear of recrimination.

First, the delegates agreed not to keep an official record of the votes of individual delegates. Rufus King proposed this rule because “changes of opinion would be frequent in the

⁵⁸ *Id.*

⁵⁹ *Id.* at 26.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 27.

⁶³ *Id.* at 26.

course of the business & would fill the minutes with contradictions” while George Mason seconded it, adding that “such a record of the opinions of members would be an obstacle to a change of them on conviction.”⁶⁴ If delegates knew their votes were being recorded for posterity, simple pride might very well prevent them from yielding to new information or better arguments.

Second, and related, the delegates chose to keep their proceeding secret, not publishing the minutes in newspapers or even permitting delegates to notify others of the proceedings through letters.⁶⁵ Madison would later remark in 1830 that the combination of these two rules had been essential to the success of their deliberations.

Opinions were so various and at first so crude that it was necessary they should be long debated before any uniform system of opinion could be formed. Meantime the minds of the members were changing, and much was to be gained by a yielding and accommodating spirit. Had the members committed themselves publicly at first, they would have afterwards supposed consistency required them to maintain their ground, whereas by secret discussion no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth and was open to the force of argument.⁶⁶

These two rules, in other words, protected the delegates from needing to publicly appear to be principled, consistent champions of “their ground” and thereby liberated them to be “open to the force of argument.”

The third rule allowed any member to move to reconsider any vote that had already been taken.⁶⁷ If new ideas presented themselves or new coalitions formed, any member could ask the convention to revisit a topic already discussed and voted upon. The daily votes in the convention thus amounted to provisional straw votes which allowed delegates to test the support behind

⁶⁴ *Id.* at 25. (Rufus King and George Mason, May 28, 1787).

⁶⁵ *Id.* at 28.

⁶⁶ James Madison to Jared Sparks, April, 1830, Max Farrand, RECORDS OF THE FEDERAL CONVENTION, III, 479.

⁶⁷ Notes at 28.

certain ideas but set nothing permanently in stone. But to avoid hasty reconsideration of all issues, a motion to reconsider required one day's prior notice and a majority vote of the convention.⁶⁸ In the words of Pierce Butler, the rule of reconsideration would guarantee that “the House might not be precluded by a vote upon any question, from revising the subject matter of it when they see cause, nor, on the other hand, be led too hastily to rescind a decision, which was the result of mature discussion.”⁶⁹

The informal social interaction, early gestures of mutual respect, and formal rules of parliamentary procedure that emphasized listening and open-mindedness thus helped lay the foundation for what could be described as civic friendship among the delegates. It deserves mention, however, to note that the convention was not all sweetness and light. Fifty five lawyers and politicians, separated from their families for four hot months in a city not known for its public sanitation⁷⁰ had been crowded into a stuffy Assembly room⁷¹ for six hours a day where they were tasked with papering over differences between large states and small states, northern states and southern states, and free states and slaveholding states. Intemperance, irritation, and angry disputation were not uncommon. By the end of June, Elbridge Gerry lamented that “Instead of coming here like a band of brothers, belonging to the same family, we seemed to have brought with us the spirit of political negotiators.”⁷² And around that same time, Gouverneur Morris, after a gloomy late night consultation with George Washington about the state of the convention, wrote despairingly that “debates had run high, conflicting opinions were

⁶⁸ *Id.*

⁶⁹ *Id.* at 27.

⁷⁰ Beeman, 74-75, (graphically detailing the remarkable volume of animal carcasses in public spaces throughout Philadelphia.)

⁷¹ *Id.* at 83 (explaining that, due to the secrecy rule, the windows and doors of the Assembly Room were regularly kept shut).

⁷² Notes at 217.

obstinately adhered to, animosities were kindling, some of the members were threatening to go home, and, at this alarming crisis, a dissolution of the Convention was hourly to be apprehended.”⁷³ And at the very peak of “overheated rhetoric” during the summer, two delegates became so enraged with the other side that both suggested that violent civil war between the large and small states might be a welcome fait accompli if the other side did not budge from its intransigence.⁷⁴

Notwithstanding these lapses, the delegates did, on the whole, maintain enough cordiality and mutual respect between each other to continue to meet on a daily basis and eventually put together a highly detailed and intricate proposal. In the circular letter they sent to Congress when they proposed the Constitution, the convention delegates drew attention to the indispensable spirit of civic friendship that had prevailed during their deliberations: “thus the Constitution, which we now present, is the result of a spirit of amity, and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable.”⁷⁵ And as Franklin, a delegate who was as sensitive to the underlying tenor of debate as any of the delegates, noted on the very last day, the convention had managed to transcend the many likely sources of division that could have brought the affair to an end.

For when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men, all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an assembly can a perfect production be expected? It therefore astonishes me, Sir, to find this system approaching so near to perfection as it does.⁷⁶

Franklin, of course, was also well known for his capacity for salesmanship. But his observation that the convention had managed to function despite the many possible sources of disagreement

⁷³ Beeman at 185.

⁷⁴ Notes at 230, 241.

⁷⁵ Notes at 627.

⁷⁶ *Id.* at 653.

and faction is attributable, at least in part, to the foundation of civility and mutual respect laid at the very outset of the proceedings.

2. Civility in the Forum: Reason Giving at the Convention

The social and political theorist Jon Elster once observed that there are two basic and nearly opposite models or “ideal types” for democratic deliberation – the market and the forum.⁷⁷ In the market, citizens start with their raw, unmediated self interest, act directly on behalf of this interest, and through the give and take of compromise, negotiation, and voting, aggregate these interests into a final agreement that yields as much utility as possible for as many as possible. In the forum, by contrast, citizens also start with their raw self-interest, but through the process of conversation, deliberation, and reason-giving, partially modify or in some cases completely transform some of their initial interests in the light of reflection upon the requirements of justice and the larger common good. Democratic theorists have feasted upon this distinction, exploring and debating the relative advantages and disadvantages of these two models of deliberation.⁷⁸ And historians and legal scholars have debated for approximately a century which of the two models prevailed during the Constitutional Convention in Philadelphia.⁷⁹

In the following two sections of this article, I suggest that, as an historical matter, these two distinct models of deliberation were actually both present in Philadelphia, though they

⁷⁷ Jon Elster, *The Market and the Forum: Three Varieties of Political Theory* in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS (James Bohman and William Rehg, eds., 1997).

⁷⁸ See generally James Bohman and William Rehg, eds., DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS (1997).

⁷⁹ For a representative example of the different positions, compare Charles A. Beard, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913) with Forrest McDonald, NORVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1986).

emerged at different times and in response to different issues. Roughly speaking, the delegates operated more on the basis of the forum model for the first month (from the opening of the convention on May 25 until June 27) and most of the final two months of the convention (from July 18 to August 20 and August 27 to September 17), while they operated more clearly under the principles of the market during two fateful and intense periods in the middle and towards the very end of the convention (stretching from June 27 to July 17, and then again from August 21 to August 25).

Different kinds of issues triggered the different styles of deliberation. When the discussion turned to broad issues of constitutional design that did not immediately or obviously implicate economic interests or entrenched political powers, such as the enumeration of Congress' powers, the length of terms for Senators, the impeachability of the president, the method of appointment of judges, and the procedure for ratifying the Constitution, the style was more deliberative and oriented towards discovery of the most sensible or correct answer. When the discussion turned to issues that did touch sensitive political and economic interests, however, such as whether the states would be represented equally or proportionally, or whether Congress could have any power to prohibit the slave trade, the style turned, eventually, towards negotiation and compromise of seemingly fixed interests and principles.

But while the delegates thus mixed together in the same convention two quite different, in some ways opposite, styles of discussion, I suggest that whether they were in mode of the "forum" or the "market," they managed to maintain a baseline of civility. But the opposing styles of the forum and the market required, as we shall see, considerably different norms and behaviors to maintain civility.

When the delegates reasoned together on issues of broad constitutional design in a forum-like context, three characteristics of civility stood out as particularly significant. In one sentence, their reasoning was a civil affair because it was an open-minded, publicly accessible, and expert-driven conversation. First, there is evidence that at least several important delegates entered into the conversation with minds open to the illumination available from additional evidence and alternative perspectives. In addition, they indicated that they thought that as trustees of their constituents' confidence, it would be a good thing to be open to persuasion in this way. Second, their conversation was public in that it occurred in the committee of the whole, rather than in smaller committees, and was thus open to the contributions and participation of all the delegates. Moreover, it was public in an even deeper sense in that it proceeded upon the basis and within the framework of commonly shared first principles, or as contemporary political theorists might put it, a mutually understood and embraced "public reason," which helped the delegates maintain mutual respect in the midst of vigorous debate. Third, their reasoning was mostly driven and facilitated by experts whose familiarity with various technical points of political science, economy, and history helped ensure that disputes turned more on evidence and the strength of argument than force of personality or groupthink.

Throughout the two main periods in which the delegates argued in the manner of the forum, the first month and most of the final two months of the convention, the delegates regularly indicated their openness to being led to new conclusions through the course of debate. On the very first day of substantive and extemporaneous debate regarding the merits of the Virginia Plan, Wednesday, May 30, Pierce Butler of South Carolina said "he had not made up his mind on the subject, and was open to the light which discussion might throw on it."⁸⁰ And in

⁸⁰ Notes at 34.

response to a particularly obstreperous objection to the grant of broad powers to Congress by Edmund Randolph, in which Randolph said “His opinion was fixed on this point,” Madison immediately responded with a paean to intellectual flexibility.

Mr. Madison said that he had brought with him into the Convention a strong bias in favor of an enumeration and definition of the powers necessary to be exercised by the national legislature; but had also brought doubts concerning its practicability. His wishes remained unaltered; but his doubts had become stronger. What his opinion might ultimately be he could not yet tell. But he would shrink from nothing which should be found essential to such a form of government as would provide for the safety, liberty and happiness of the community. This being the end of all our deliberations, all the necessary means for attaining it must, however reluctantly, be submitted to.⁸¹

Madison here 1) acknowledged his initial bias in favor of a clear enumeration of powers, 2) recognized the practical difficulty of neatly drawing the appropriate jurisdictional lines, and 3) declared above all his openness to a solution to this chestnut that he hoped would emerge through the contestation of debate.

Benjamin Franklin also regularly beat the drum for revision of ideas, consultation, and a pinch of self-doubt. Before weighing in with a proposal for salaries for the executive, he prefaced his comments with this modest homage to rational discourse and open-mindedness: “The Committee will judge of my reasons when they have heard them, and their judgment may possibly change mine.”⁸² As noted earlier, when deliberations started to make some delegates hot under the collar, he urged the body to remember the importance of civic friendship, as we have already seen, and also of intellectual flexibility: “we are sent here to consult, not to contend, with each other; and declarations of a fixed opinion, and of determined resolution, never to change it, neither enlighten nor convince us.”⁸³ And in his penultimate speech to the Convention on its final day, in recommending that all the delegates put aside whatever hesitations they had

⁸¹ *Id.* at 44.

⁸² *Id.* at 52

⁸³ *Id.* at 99.

and sign the Constitution, he offered an extensive meditation upon the value of remaining open to correction and, in his words, doubting a little of one's own infallibility.⁸⁴

I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them. For having lived long, I have experienced many instances of being obliged by better information, or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others. Most men indeed as well as most sects in Religion, think themselves in possession of all truth, and that whatever others differ from them it is so far error. Steele a Protestant in a Dedication tells the Pope, that the only difference between our Churches in their opinions of the certainty of their doctrines is, the Church of Rome is infallible and the Church of England is never in the wrong. But though many private persons think almost as highly of their own infallibility as of that of their sect, few express it so naturally as a certain French lady, who in a dispute with her sister, said "I don't know how it happens, Sister but I meet with no body but myself, that's always in the right – *Il n'y a que moi qui a toujours raison.*"⁸⁵

When "better information" or "fuller consideration" counseled it, change of opinion was a mark of maturity and reasonableness, not a sign of weakness.

This was a working maxim for the delegates that they not only preached but also practiced. For example, as the historian Marvin Meyers points out, Madison had initially and zealously supported a Congressional "negative" or veto power over state laws by which Congress could choose to strike down state laws that conflicted with the Constitution. By the conclusion of the convention, however, after many delegates had expressed concern about the sheer impracticability of subjecting so many state laws to Congressional review, he was willing to put aside this proposal and would later concede that the Convention had "justly abandoned" it.⁸⁶ In Meyers' words, Madison had "learned something from the judgment of his peers" on this topic and, as Franklin had suggested, wisely doubted a little of his infallibility.⁸⁷

⁸⁴ *Id.* at 654

⁸⁵ *Id.* at 653

⁸⁶ Marvin Meyers, *THE MIND OF THE FOUNDER*, xxxv (1973).

⁸⁷ *Id.*

The delegates were willing to doubt themselves and follow the argument where it led because at least on issues that did not directly affect the interests of their constituents, they saw their role as trustees rather than mere delegates of their constituents' wishes. In the classic terms in which Edmund Burke put it, delegates merely had the authority to act as their constituents had expressly requested while trustees had the greater authority to act on their own judgment of what was truly in their constituents' interests. In response to one delegate who suggested that Congressmen be elected annually because vigilant constituents in New England would be suspicious of any longer time period, Madison responded

if the opinions of the people were to be our guide, it would be difficult to say what course we ought to take. No member of the Convention could say what the opinions of his Constituents were at this time; much less could he say what they would think if possessed of the information and lights possessed by the members here; and still less what would be their way of thinking 6 or 12 months hence. We ought to consider what was right and necessary in itself for the attainment of a proper government.⁸⁸

The very job of the delegates to a Constitutional Convention that was not itself *enacting* a Constitution but merely *proposing* one for ratification was to reflectively consider “what was right and necessary in itself” and to then propose that to the constituents for their ultimate ratification. And for Madison, Franklin, and many of the other leading participants in this reflective determination, open-mindedness and truth-seeking were the *sine qua non* of a successful and civil deliberation.

The second way in which civility prevailed in their reason-giving was that their deliberations were, at least amongst them, publicly accessible. Democratic theorists Amy Guttmann and Dennis Thompson have traced two distinct ways in which democratic deliberation can and should be public.⁸⁹ First, the deliberation must literally take place in a public sphere,

⁸⁸ Notes at 107.

⁸⁹ Guttmann and Thompson, *WHY DELIBERATIVE DEMOCRACY?*, 4.

open to the back and forth of discussion and critique, not in the privacy of one's own mind or amongst some small cabal of likeminded individuals. And second, the content of the arguments themselves must be publicly accessible, reliant only upon background assumptions, evidence, and logic that anyone could understand and evaluate. In Rawls' language, the "duty of civility" itself requires participants in a public dialogue to appeal only to those principles and values that others could reasonably be expected to endorse.⁹⁰

In both respects in which publicity can be understood, the delegates to the Convention appeared to reason together in a public fashion. First, whenever they turned to topics of broad constitutional design, they did so mostly in the open air of the Assembly Room with all delegates able to contribute. In a Constitutional Convention that relied heavily upon committees, appointed 12 in total, received full reports from 11 of them, and which asked nearly 75% of its members at one point or another to serve on a committee,⁹¹ rational debate and determination of the broad outlines of the Constitution were mainly reserved for the assembly as a whole. The committees were charged with two broad sets of tasks: 1) parliamentary and procedural issues that required granular inspection of rules, details, and the style of the document impossible in a large setting, and 2) divisive issues such as representation and slavery that required coolness and conciliation less likely to be found in a large assembly. While it is certainly true that momentous decisions were made in these committees that ultimately affected the overall distribution of powers and rights in the Constitution,⁹² the broad shape of the system was still left in the hands

⁹⁰ Rawls, *The Idea of Public Reason*, 96-7 in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS.

⁹¹ John R. Vile, *The Critical Role of Committees at the U.S. Constitutional Convention of 1787*, AMERICAN JOURNAL OF LEGAL HISTORY, 174-76.

⁹² *Id.* See also John C. Hueston, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers*, 100 YALE LAW JOURNAL 765, 1990-1991.

of the assembly as a whole. In brief, it was that Assembly that had to determine as a group whether to merely modify the Articles of Confederation or replace them with an entirely new system, invest the federal government with authority over both state governments and individuals, create a bicameral Congress, distribute voting rights between the state legislatures and the people, determine eligibility for public office in the federal system, establish a unitary but impeachable executive with considerable discretionary authority who would be elected by an Electoral College, and agree upon the modes of ratification and amendment to the Constitution.

Beyond the public setting, and at a deeper level, when the delegates reasoned with each other about the broad shape of the system, they did so within the framework of a lingua franca of background theoretical assumptions that all the delegates basically shared. Thus when they debated whether Senators should be elected directly by individuals or indirectly by their state legislatures, for example, they did not organize themselves into two separate armies with two distinct sets of first principles with which they clashed by night. Rather, in these and many of the other topics that came before them in the setting of the “forum,” the delegates narrowly confined their focus to a discussion of the best instrumental means to agreed-upon ends. As Elbridge Gerry put it, “All aim at the same end, but there are great differences as to the means.”⁹³ In other words, the reasoning that took place in the convention was not in the order of political philosophy – regarding which foundational ends they should pursue as a people – but rather in the order of political science – regarding which institutional arrangements would be most likely to lead to the desired ends.⁹⁴

⁹³ Notes at 196-97.

⁹⁴ For treatment of the distinction between “political philosophy” and “political science” which the delegates would have been familiar with, see Locke’s *Educational Writings*, p. 400, where he observed that “Politics contains parts very different the one from the other, the one containing the original of societies and the rise and extent of political power, the other, the art of governing

This dynamic can be seen in a vigorous debate that took place on June 6 over whether Senators should be elected indirectly by state legislatures or directly by the people. Those who spoke out in favor of election by state legislatures, including Pinckney, Sherman, Read, Gerry, and Dickenson, and those in favor of direct election, including Madison, Wilson, and Mason, each articulated their defense in terms of the protection of individual or “republican” liberty. Gerry, for example, prefaced his defense of indirect election by noting that “Much depends on the mode of election. In England, the people will probably lose their liberty from the smallness of the proportion having a right of suffrage. Our danger arises from the opposite extreme.”⁹⁵ Madison, by contrast, prefaced his defense of direct election by underlining that one of the primary tasks for the new federal government was “providing more effectually for the security of private rights, and the steady dispensation of justice. Interferences with these were evils which had more perhaps than anything else produced this convention. Was it supposed that republican liberty could long exist under the abuses of it practiced in some of the States.”⁹⁶ And Mason sung the praises of direct election because of “the advantage of this form in favor of the rights of the people, in favor of human nature.”⁹⁷

The two groups thus agreed in broad terms on the end of securing individual liberty but disagreed vigorously about the best institutional means to accomplish this. Those in favor of election by state legislature contended that liberty would be threatened by direct election of Senators because 1) the people as a whole, as attested by the experience in the states, were not fit

men in society.” For scholarly agreement with the claim that their focus was not on political philosophy, see Roche, 809 (“There is a common rumor that the Framers divided their time between philosophical discussions of government and reading the classics in political theory. Perhaps this is as good a time as any to note that their concerns were highly practical, that they spent little time canvassing abstractions.”)

⁹⁵ Notes at 73.

⁹⁶ *Id.* at 76.

⁹⁷ *Id.* at 75.

to make wise decisions, whereas state legislators were more likely to select individuals of merit, 2) excluding the states from the electoral process would make them more “jealous” of their own interests and less inclined to support the new federal government, 3) canvassing the people of an entire state would be impractical and liable to corruption, 4) the people should be represented not only individually but in their collective capacity as organized in states, and 5) liberty is more happily exercised in small republican settings. Those in favor of direct election contended that liberty would be better advanced by direct election of Senators because 1) the people as a whole, as attested by other experiences in the states, were often wiser than their state legislatures, 2) including the states in the electoral process would give them greater opportunities for creating mischief in the federal system, 3) corruption was an inevitable part of all elections but was actually more likely in smaller districts than in larger settings where greater transparency was available, 4) representation was more fully achieved when the elected officials were an “exact transcript of the whole society,” looking, feeling, and thinking like their constituents, and 5) liberty is more happily exercised in a large, extended republic in which minority rights were better secured against the tyranny of majority will.

As this list indicates, the disagreements between the two sides were substantial. At its heart was a fundamental difference of opinion regarding what kind of society is most friendly to liberty: a small republic of virtuous citizens in which the rulers are held on “short leash” or a large, extended republic in which the absence of virtue is accommodated by a multiplicity of different, contending and watchful groups and in which rulers are given more discretion in their deliberations. This disagreement would later replay itself on a nationwide scale during the ratification debates between the Federalists and Anti-Federalists. But what helped the delegates maintain some civility in the midst of this disagreement was that, as deep and substantial as their

differences were, they were not as deep as they could have been. They disagreed about the relative merits of the small republic and the large extended republic, but they agreed upon the general purposes of government and the background natural rights individuals possessed even prior to the formation of government.⁹⁸ They disputed with each other over questions of political history (did small state legislatures tend to be good for minority rights?) and political science (are elections more likely to be corrupt when carried out on a large scale?), but they agreed upon some of the deeper questions of political philosophy.

They thus shared a common “public reason” by which they could explain to one another their institutional preferences in a way that would be understandable, and perhaps even attractive, to the other side. In this respect they carried out, although of course unknowingly, what Rawls once said was the “duty of civility.” As he put it in “The Idea of Public Reason,”

Our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational. This is the liberal principle of legitimacy. And since the exercise of political power itself must be legitimate, the ideal of citizenship imposes a moral, not a legal, duty – the duty of civility – to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason.⁹⁹

Although it may strike one as awkward to describe the delegates as “Rawlsians” ahead of their time, in this respect this is precisely what they were.¹⁰⁰

But at a more important level, their appeal to a common philosophical starting point was central to the civility of their discussions because it made it possible for them to have any kind of argument in the first place. For without it, the two sides would have been reduced to either

⁹⁸ Storing, *WHAT THE ANTI-FEDERALISTS WERE FOR* 83 n. 7 (1981)

⁹⁹ Rawls, 96-97.

¹⁰⁰ *Id.* at 110. There is some evidence that Rawls himself agreed that the American founding represented a moment in which its central players relied upon, and only upon, the political values of public reason.

vainly insisting upon their own first principles or “proving” that their institutional proposals were effective means to ends that the other side did not embrace. But instead of merely shouting at each other or talking past each other, given their common starting point, the two sides could have a rational argument based in evidence and common sense about how their institutional proposals were sensible means to achieving common ends. They may not have always been persuasive to the other side. Many of the votes on topics that came up in the context of the “forum” were closely contested. But by sincerely appealing to the first principles of their interlocutors, they were able to speak a common language and thereby show respect for the other side in the midst of vigorous disagreement.

The third and final way in which civility reigned in their reason-giving deliberations was through the respected presence of experts in their midst. While open-mindedness and publicly accessible arguments provided the opportunity for evidence, experience, common sense, and logic to carry the day, but for the presence of individuals with a firm intellectual and practical handle on the many complex topics that came before the convention, the deliberations may have broken down into referenda on who the delegates considered to be the most popular, forceful, or powerful among them. When it got down to discussing whether the Articles of Confederation could legally be scrapped, how many executives there should be, and what most often led confederacies of sovereign states to disintegrate, the presence of experts in law, comparative political science, and world history helped ensure that their deliberations remained informed by facts.

While Benjamin Franklin was the likely spiritual and emotional leader of the delegates, and George Washington its stoic day-to-day leader, James Madison emerged as its unquestioned

intellectual leader and expert. Madison took the lead from the outset. According to William Pierce of Georgia,

Mr. Madison is a character who has long been in public life; and what is very remarkable every person seems to acknowledge his greatness. He blends together the profound politician, with the Scholar. In the management of every great question, he evidently took the lead in the Convention, and though he cannot be called an Orator, he is a most agreeable, eloquent, and convincing speaker. From a spirit of industry and application which he possesses in a most eminent degree, he always comes forward the best informed man of any point in debate. The affairs of the United States, he perhaps, has the most correct knowledge of, of any man in the Union.¹⁰¹

What was most needed at this stage were individuals whose talents and backgrounds made them particularly adept at truth-seeking. The delegates were at this point making arguments, encountering objections, learning from others, rethinking their positions, and testing ideas against a resistant reality. If an accurate vision of the common good were to emerge from this discussion, then the quality and tenor of that debate were all-important. If the delegates were to remain open to the force of argument, then those who were making the arguments had better have something worthy of consideration. In Madison in particular, who had spent months prior to the convention reading from two trunk loads of books that Jefferson had sent him from Paris about the history of “ancient and modern confederacies,” the delegates had just the kind of expert they needed.¹⁰²

Thus in broad matters of constitutional design, the delegates were able to maintain a level of civility in their discussion by insisting upon open-mindedness, reasoning publicly on foundational terms that the other side could understand and accept, and relying often upon the historical information and facts made available to them by experts of constitutional design.

¹⁰¹ Quoted in Dana Lansky, *Proceeding to a Constitution: A Multi-Party Negotiation Analysis of the Constitutional Convention of 1787*, 5 Harv. Negot. L. Rev. 279, 319 (2000).

¹⁰² Jack N. Rakove, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION*, 42 (1996).

Discussions did nonetheless occasionally become heated and contested. But the framework of civility which guided their forum-like deliberations helped at least provide some ballast against the all too common tendency for public debates to break down into uncivil shouting matches and willful contestations of personality.

3. Civility in the Marketplace: Compromise and Negotiation at the Convention

From time to time, however, conversations do break down. The interests at stake may run too deep. Or the principles involved may be too fundamental and divergent. The delegates to the Constitutional Convention encountered one such moment in particular when their conversation, as described in the previous section, broke down. This moment occurred when the subject turned to the issue of representation of the states in Congress from June 27 to July 17. On this occasion, the characteristics of civility that had prevailed in the mode of the “forum” – open-minded, expert driven, public deliberation – were either unavailing or even positively harmful to the proceedings. When topics that directly touched upon sensitive economic and political interests or foundational issues of justice were on the table, as opposed to the more abstract questions of constitutional design, the delegates required another *modus operandi* that, eventually, they stumbled upon.

To meet the challenges of this difficult conversation, the delegates adopted a style that involved three different characteristics of civil discourse. In one sentence, their approach focused upon conscious sacrifice of interests or principles to avoid the *status quo ante*, privately conducted negotiation as opposed to outright public debate of the merits of positions, and the utilization of known moderates as opposed to intellectuals and experts. Thus, when their conversation turned to the thorny issue of representation, the proverbial “elephant in the room”

that threatened to derail the entire convention, the delegates turned from the style of the forum, in which rational deliberation of ideas could change minds, to the style of the market, in which negotiation, accommodation, and aggregation of interests could bridge otherwise inflexible positions. Through compromise, guided by explicit calls for concession, private negotiation, and moderation, the delegates managed to bridge differences of interest and principle not by trying to change those interests or principles, exactly, but by temporarily “bracketing” them and focusing instead upon their deeper interests in unity and their shared antipathy to the status quo under the Articles of Confederation.

Explicit appeals to the value of compromise were common in this mode of the “market,” just as appeals to the value of open-mindedness and flexibility had been in the “forum.” And just as he had proven to be something of an oracle in the forum, so too in the context of the market did Benjamin Franklin nicely articulate what he thought needed to happen. Speaking on the contested issue of whether the states should be represented equally or proportionally in Congress, he said

The diversity of opinions turns on two points. If a proportional representation takes place, the small States contend that their liberties will be in danger. If an equality of votes is to be put in its place, the large States say their money will be in danger. When a broad table is to be made, and the edges of planks do not fit, the artist takes a little from both, and makes a good joint. In like manner here both sides must part with some of their demands, in order that they may join in some accommodating proposition.¹⁰³

Noting that the controversy turned on issues of fundamental interest – the liberties of small states and the wealth of large states – he essentially conceded that no tidy intellectual resolution would be forthcoming. This was not a case in which instrumental reason could save the day. James Madison’s months of intellectual preparation prior to the convention and his encyclopedic knowledge of ancient and modern confederacies was not going to assuage the small states. And

¹⁰³ Notes at 226-27.

Luther Martin's citations of Vattel in defense of state sovereignty were not going to budge the large states. One side, the other side, neither side, or both sides, would simply have to give something up. And since the first two possibilities looked increasingly unlikely, as representatives from the small and large states dug in their heels, and the third possibility of total breakdown appeared undesirable from the standpoint of both sides, the only viable solution left seemed to be to "take a little from both." It was not a matter – so much – of reasoning to a brilliant solution. Rather, it was a matter of both sides making some kind of sacrifice.

Franklin would again repair to the language of "sacrifice" in his penultimate speech to the convention. There he said,

Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure, that it is not the best. The opinions I have had of its errors, I sacrifice to the public good.¹⁰⁴

Franklin, like many of the delegates, had some doubts about certain parts of the new arrangement. But he was willing, he said, to "sacrifice" them so that a constitution of some description could be proposed and ratified.

Other delegates, though less epigrammatic than Franklin, similarly sensed that the key to resolving the central issue of representation was compromise and sacrifice of some interests and/or principles. Oliver Ellsworth of Connecticut argued that the delegates reconcile themselves to being "half-way men." He thought that they should seek out a middle ground along the lines of the Connecticut compromise – in which the House would be proportional and the Senate equal – since the alternative to doing "half the good we could" was doing nothing.

We are partly national; partly federal. The proportional representation in the first branch was conformable to the national principle & would secure the large States against the small. An equality of voices was conformable to the federal principle and was necessary to secure the Small States against the large. He trusted that on this middle ground a

¹⁰⁴ *Id.* at 654.

compromise would take place. He did not see that it could on any other. And if no compromise should take place, our meeting would not only be in vain but worse than in vain... He was not in general a half-way man, yet he preferred doing half the good we could, rather than do nothing at all. The other half may be added, when the necessity shall be more fully experienced.¹⁰⁵

Elbridge Gerry of Massachusetts made a similar point, emphasizing in particular that the alternative to compromise – doing nothing, as Ellsworth had put it – was decidedly worse than doing the half the good that was possible at the time.

Something must be done, or we shall disappoint not only America, but the whole world. He suggested a consideration of the State we should be thrown into by the failure of the Union. We should be without an Umpire to decide controversies and must be at the mercy of events. What too is to become of our treaties – what of our foreign debts, what of our domestic? We must make concessions on both sides. Without these the Constitutions of the several States would never have been formed.¹⁰⁶

If the delegates wanted to extract themselves from the status quo that had brought them all to Philadelphia in the first place, then concession, compromise, and sacrifice were the order of the day.

These and other delegates gradually began to beat the drum for compromise. The difficulty, however, was not so much in making these eloquent appeals but in securing the necessary conditions to make compromise likely. Many delegates remained adamantly opposed to compromise. They insisted that the convention instead continue to publicly debate the issue on its merits. The trouble with this approach, however, was that the debate about equal/proportional representation in Congress, unlike the debates over broad constitutional design, was marked by a persistently interminable quality. Unlike the debates canvassed earlier, in which publicity – both in terms of forum and mode of argument – was the silver bullet, these debates were not so easily resolvable.

¹⁰⁵ *Id.* at 218-19.

¹⁰⁶ *Id.* at 236-37.

The reason for the interminability was that on these topics the delegates operated, for all intents and purposes, from contradictory starting points. They were no longer debating within the friendly confines of agreed upon first principles. Instead, it was the very first principles themselves that were at issue. The debates were no longer about how to get from A to B, but instead whether to go to B in the first place. In other words, the character of the debate shifted from one in which only instrumental reasoning was called for to one in which deeper philosophical assessments were needed. But because a constitutional convention, however heady an environment, was not really the place to wade through these deeper waters, the public debate on these topics amounted to little more than stirring rhetorical flourishes proceeding from mutually incompatible starting points.

In the debate over representation, the sides were clearly demarcated. On the one side were those for whom the states represented sovereign political societies, not too different from nation states, which, like individuals, had rights of their own in need of protection, and whose continued existence was central to the happiness of its members. Luther Martin of Maryland hammered away at the analogy between individuals and states, pointing out that the great Enlightenment political theorists like Locke, Vattel, and Priestly, who enjoyed considerable authority among the delegates, had all concluded that “the States like individuals were in a State of nature equally sovereign and free.”¹⁰⁷ And Oliver Ellsworth insisted that the continued existence and dignity of the states was the *sine qua non* of the political and personal happiness of their citizens.

What he wanted was domestic happiness. The National Government could not descend to the local objects on which this depended. It could only embrace objects of a general nature. He turned his eyes therefore for the preservation of his rights to the State Gov. From these alone he could derive the greatest happiness he expects in this life. His

¹⁰⁷ *Id.* at 202.

happiness depends upon their existence, as much as a new born infant on its mother for nourishment. If this reasoning be not satisfactory, he had nothing to add that could be so.¹⁰⁸

The issue was therefore one that ran deep and elicited considerable emotion. Jonathan Dayton of New Jersey stated simply that equal representation of the states in Congress was non-negotiable. “The smaller States can never give up their equality. For himself he would in no event yield that security for their rights.”¹⁰⁹ And in one of the more fiery moments in the entire summer, Gunning Bedford of Delaware suggested that the small states would not accept union upon any other terms than equal representation and, if this led to dissolution of the Confederacy, then “the small states will find some foreign ally of more honor and good faith, who will take them by the hand and do them justice.”¹¹⁰ For the smaller states the matter of equal representation was thus fundamental, personal, and highly emotional.

On the other side of the issue, the stakes were similarly charged. Madison, Hamilton, Wilson, and others all insisted that the states were merely artificially created districts of real people. The real sovereign entities being represented in the system were the people, not the unreal “phantoms” known as states. Madison pleaded with delegates from the smaller states to simply renounce their starting point: “He entreated the gentlemen representing the small States to renounce a principle which was confessedly unjust, which could never be admitted, & if admitted must infuse mortality into a Constitution which we wished to last forever.”¹¹¹ Hamilton hammered away at this fundamental principle as well: “But as States are a collection of individual men which ought we to respect most, the rights of the people composing them, or of

¹⁰⁸ *Id.* at 230.

¹⁰⁹ *Id.* at 291.

¹¹⁰ *Id.* at 230.

¹¹¹ *Id.* at 214.

the artificial beings resulting from the composition.”¹¹² And Wilson weighed in as well on the philosophical issue at stake. “Can we forget for whom we are forming a Government? Is it for *men*, or for the imaginary beings called *States*? ... The rule of suffrage ought on every principle to be the same in the 2d as in the 1st branch. If the Government be not laid on this foundation, it can be neither solid nor lasting. Any other principle will be local, confined, and temporary.”¹¹³ And in response to Gunning Bedford’s suggestion that the small states might seek out foreign aid, Gouverneur Morris of Pennsylvania threatened to use force against such seceding states, coolly warning that “This Country must be united. If persuasion does not unite it, the sword will.”¹¹⁴ For delegates from the large states of Virginia and Pennsylvania, the issue of proportional representation in Congress was philosophically foundational and eminently worth fighting for.

Two armies were thus set to clash by night. And though the principal combatants kept looking to talk it out, other delegates sensed that further public deliberation of the merits of the two rival positions was likely to be unavailing and even counterproductive. William Samuel Johnson of Connecticut, in easily his most shining moment throughout the summer, observed in the midst of the debate that the argument was necessarily interminable.

The controversy must be endless whilst Gentlemen differ in the grounds of their arguments; Those on one side considering the States as districts of people composing one political Society; those on the other considering them as so many political societies.¹¹⁵

Johnson went on to observe (although not in so many words) that the debate between the two sides was in some respects similar to a debate between two individuals who, while looking upon the famous old lady/young girl optical illusion, each insisted that it was decidedly just the old

¹¹² *Id.* at 215.

¹¹³ *Id.* at 221.

¹¹⁴ *Id.* at 241.

¹¹⁵ *Id.* at 211.

lady or just the young girl. When looked at from one perspective, the states were indeed mere administrative collections of real persons. But when looked at from another perspective, the states were societies in their own right. The trouble was that no single side could see the same picture from both perspectives at the same time. When one party just saw the young girl, they could not see the old lady, and of course vice versa. Consequently, “debate” between the two sides amounted to little more than insisting upon the correctness of the particular angle at which they happened to be viewing the picture/states. Consequently, it was not further debate that would be helpful, but a willingness to concede the validity of both perspectives by allowing each perspective to serve as the foundation for one house. In Johnson’s words,

The fact is that the States do exist as political Societies, and a Government is to be formed for them in their political capacity, as well as for the individuals composing them... On the whole he thought that as in some respects the States are to be considered in their political capacity, and in others as districts of individual citizens, the two ideas embraced on different sides, instead of being opposed to each other, ought to be combined; that in *one* branch the *people*, ought to be represented; in the *other* the *States*.¹¹⁶

Other delegates also sensed the fruitlessness of further public deliberation and the need for some kind of compromise along the lines suggested by Johnson. Accordingly, on July 2, Charles Pinckney of South Carolina proposed that a committee be formed to consider this more quietly without the verbal pyrotechnics of the more outspoken members.¹¹⁷ Roger Sherman of Connecticut agreed, saying that the usefulness of public debate had been simply tapped out: “We are now at a full stop, and nobody he supposed meant that we should break up without doing something.”¹¹⁸ And Hugh Williamson of North Carolina observed, “If we do not concede on both sides, our business must soon be at an end. He approved of the Commitment, supposing

¹¹⁶ *Id.* at 211.

¹¹⁷ *Id.* at 232.

¹¹⁸ *Id.*

that as the Committee would be a smaller body, a compromise would be pursued with more coolness.”¹¹⁹ With that, a committee was formed to hammer out a compromise over representation, out of the spotlight of the general convention and over the course of a two day break for the upcoming Independence Day holiday on the Fourth of July.¹²⁰

By July 5, the Committee had done its work. Out of the spotlight of the State House and once again in the friendlier confines of Benjamin Franklin’s home, where good food, good humor, and the all-important ample liquor flowed more freely, the eleven members of the committee hammered out a compromise deal.¹²¹ After a “lengthy recapitulation” of all the arguments on both sides of the debate that again went nowhere, the committee got down to the real business they had been charged to do – negotiate, not deliberate.¹²² Franklin proposed a package deal in which the House would be proportional – using the formula of 40,000:1 that had been made in the original Virginia plan – the Senate would have equal votes from all the states – and, in a critical additional concession to sweeten the deal for the large states, only the House of Representatives could originate bills for raising or apportioning money.¹²³ This was ultimately the deal that would be presented to the Convention on July 5 and, eventually ratified by the full Convention on July 16 in a narrow vote of 5 states to 4.

The committee managed to do its work thanks in part to the presence of enough moderates on the committee to move them towards the center. While debate in the forum had been civil partly as a consequence of the presence of intellectuals and experts like Madison and Wilson, negotiation in the context of the marketplace had, if anything, been hindered by such

¹¹⁹ *Id.* at 230.

¹²⁰ Beeman, at 189.

¹²¹ *Id.* at 200-201.

¹²² *Id.*

¹²³ *Id.* at 201.

figures. Despite his reputation as the “father of the Constitution,” Madison bitterly opposed the “Great Compromise” to the very end. He rejected Johnson’s suggestion that the issue was one of perspective, insisting rather that the states could simply not be accurately seen as “political societies” in the sense in which the small states believed.¹²⁴ He opposed the formation of a committee to resolve the issue, predicting (inaccurately) that it would only produce delay and that debate should instead proceed in the full convention.¹²⁵ And when the committee proposed its package deal, he opposed it in the strongest terms, noting that

The Convention was reduced to the alternative of either departing from justice in order to conciliate the smaller States, and the minority of the people of the U.S. or of displeasing these by justly gratifying the larger states and the majority of the people.¹²⁶

Harmony in the convention, while all well and good, was simply not as important as principles of justice and majority rule. James Wilson was even more enraged by the committee’s handiwork.

In a speech delivered two days after the committee made its proposal, he said that he

was not deficient in a conciliating temper, but firmness was sometimes a duty of higher obligation. Conciliation was also misapplied in this instance. It was pursued here rather among the Representatives, than among the Constituents; and it would be of little consequence, if not established among the latter; and there could be little hope of its being established among them if the foundation should not be laid in justice and right.¹²⁷

Madison and Wilson, so helpful in getting the Convention from A to B in the context of the forum, seemed to lack the touch necessary to help the Convention bridge some of its deeper differences in the context of the market. For them, this debate involved too fundamental an issue of justice to even be compromised upon. In short, they refused to acknowledge that the rules of the market, rather than the forum, should prevail in this conversation.

¹²⁴ Notes at 213.

¹²⁵ *Id.* at 236.

¹²⁶ *Id.* at 239.

¹²⁷ *Id.* at 254.

But the members who made up the committee and who ultimately voted for its proposal did not lack this touch. While some of the committee's members had a hot streak, like Luther Martin of Maryland, Gunning Bedford of Delaware, and Robert Yates of New York, enough among them, like Benjamin Franklin, Oliver Ellsworth of Connecticut, George Mason of Virginia, William Davie of North Carolina, John Rutledge of South Carolina, and Abraham Baldwin of Georgia, had a desire to seek out ground for possible conciliation.¹²⁸ In the words of John Roche, this was not to be “a ‘fighting’ committee: the emphasis in membership was on what might be described as ‘second-level political entrepreneurs.’”¹²⁹ The conciliating temper of Franklin, et al. “was more valuable at this juncture than Wilson’s logical genius, or Morris’s acerbic wit.”¹³⁰

Thus, by explicitly and even artfully calling for compromise and concession, shifting from the mode of public deliberation to private negotiation, and bringing more moderates into the nerve center of discussion, the delegates stumbled upon a mode of proceeding that could help them negotiate with each other in the context of the market and eke out agreement in the midst of considerable disagreement.

Conclusion

In public life today, few topics carry more of a charge than either civility in public discourse or the original meaning of the Constitution and its many provisions. For years, and especially recently, we have worried about the tenor of public discussion. And for years we have grown ever more intrigued by the example of the founding generation and what relevance, if any,

¹²⁸ Beeman at 200.

¹²⁹ Roche at 809.

¹³⁰ *Id.*

and for better or worse, their thoughts and deeds may continue to have for us today. Typically, however, these topics are treated in separate kinds of conversation. This article has suggested that the very processes that led to the creation of the Constitution may offer some insights into how democratic deliberation, at least for a summer in 1787, happened to play out and worked well.

First, it shows the importance of the often neglected virtue of civic friendship. By establishing a “correspondence of sentiments” through roaring evenings at Benjamin Franklin’s house and cross-sectional dinner parties, the delegates placed themselves in the way of recognizing in their colleagues and their intellectual/political/sectional rivals a common humanity that underlied their differences. Charles Pinckney of South Carolina, for instance, noted a change of heart that he had undergone at the convention when he observed that “He had himself... prejudices against the Eastern States before he came here, but would acknowledge that he had found them as liberal and candid as any men whatever.”¹³¹ And by observing parliamentary rules of procedure that encouraged paying attention, listening to others, creative brainstorming, and adaptive changes of opinion in response to new evidence or argument, the delegates gave themselves the maximal freedom to deliberate and follow their best lights wherever they might lead.

Second, it reveals the value of debating questions amenable to intellectual resolution in the context of an open-minded, robust, expert-driven, and public setting on the same terms occupied by one’s interlocutors. It would not have behooved any of them to show that a particular constitutional arrangement was particularly well designed to lead to a result that others did not want. Where the delegates made particular progress in debate was when the sides were

¹³¹ Notes at 548.

basically agreed upon where they wanted to go and when they had the individuals with the technical expertise and constitutional know-how like James Madison and James Wilson to help them figure out the best possible means to get there.

Third, in those cases where fundamental agreement is lacking but important values and powerful emotions hang in the balance, self-consciously shifting away from an interminable debate conducted by intellectually charged leaders and towards private negotiation conducted by more moderate figures can, at least on occasion, resolve otherwise intractable disputes. When in the context of a public forum, leaders like Madison and Wilson can be exceedingly helpful. But in the sensitive back and forth of the market, moderate conciliators with a pulse for the emotional undercurrents of debate like Benjamin Franklin may prove indispensable.

These “lessons” are not offered as hard and fast, immediately applicable rules of the road for today. Hundreds of years and a nearly complete reorganization of our political, legal, economic, intellectual, and cultural landscape separates us from the fifty-five delegates who in the summer of 1787 conceived, debated, nitpicked, fought over, reworked, and finally proposed the Constitution of the United States. What worked for them may not work for us. And what may work for us, may not have worked for them. But as lawyers, historians, politicians, and political philosophers continue to repair back to the founding moment as useful in understanding different parts of our constitutional heritage and ongoing political order, it may help us in some way in our search for a more civil public discourse, especially in the context of legislative assemblies, where incivility, polarization, ad hominem argumentation, and gridlock are today too often the norm, to observe not only the end product that they left us, and the meaning of its many parts, but also the very tools of deliberation they used to bring it into being.