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

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For the past twenty years, legal scholars have pored over the records of the Philadelphia Constitutional Convention for insights into how to best interpret the Constitution's various provisions. In this Essay, I pore over these same materials for insights into how the delegates to the Convention themselves maintained a level of civility through four months of grueling deliberations. At a time when our legislative assemblies, still today populated mostly by lawyers, are too often prone to incivility, ad hominem argumentation, polarization, and resistance to compromise, the ups and downs of the Philadelphia Constitutional Convention may yet prove a fruitful model for constructive dialogue. In particular, I argue that the Convention was marked by a surprising degree of civic friendship borne out of frequent interaction, daily dinner parties that cut across party and sectional lines, and a variety of parliamentary procedures designed to encourage open-mindedness and rational deliberation. Upon this foundation of civic friendship, the delegates reasoned together, utilizing a form of public reason when deliberating about more abstract, structural matters, and compromising when deliberation broke down over issues that cut deep into economic or political interests. This rich, but often overlooked, story of our nation's founding deserves a telling for lawyers and politicians alike,

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particularly given the quality and tenor of deliberations in legislative assemblies today.

I. 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, and killed six, including John Roll, a United States District Judge, Gabriel Zimmerman, one of Giffords' staff members,[2] 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.[3] Days after the mass shooting, President Obama delivered a condolence address in the University of Arizona's McKale Center, giving what some have called his finest and most powerful speech since his election.[4] Obama called for a new era of civility in honor of those who had lost their lives in the tragedy.[5] 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:

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1. Marc Lacey & David M. Herszenhorn, *Congresswoman Is Shot in Rampage Near Tucson*, N.Y. TIMES, Jan. 9, 2011, at A1.

2. *Id.*; *see also* United States v. Loughner, 672 F.3d 731, 736 (9th Cir. 2012) (noting that six people were killed and thirteen injured).

3. Krissah Thompson & Theola Labbe-DeBose, *Christina-Taylor Green: Arizona Shooting Victim, Third-Grader, Budding Politician*, Post on *BlogPost*, WASH. POST (Jan. 9, 2011, 1:43 PM), http://voices.washingtonpost.com/blog-post/2011/01/christina_taylor_green_ariz.html.

4. Adam Clark Estes, *From the Pundits: The Finest Speech of Obama's Presidency*, SALON (Jan. 13, 2011, 7:14 AM), http://www.salon.com/news/politics/war_room/2011/01/13/obama_arizona_speech_reactions.

5. Helene Cooper & Jeff Zeleny, *Obama Calls Americans To a New Era of Civility*, N.Y. TIMES, Jan. 13, 2011, at A1.

> [A]t 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 happen to think differently than we do—it's important for us to pause for a moment and make sure that we're talking with each other in a way that heals, not in a way that wounds.[6]

President Obama later added that:

> [I]f, 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.[7]

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 on civility. At President Obama's January 25, 2011 State of the Union address, at the urging of Colorado Senator Mark Udall, scores of Democratic and Republican members of both houses of Congress broke long-standing 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.[8] In February 2011, the University of Arizona announced that it was establishing a National Institute for Civil Discourse—with former Presidents George H.W. Bush and Bill Clinton serving as honorary chairmen—which would focus on finding ways to encourage compromise among competing parties and political groups.[9] And in late March 2011, the National Constitution Center in Philadelphia held a two-day summit called "Can We Talk?: A Conversation About Civility and Democracy in America," at which an eminent assembly of politicians, lawyers, historians, political philosophers, and political activists gathered to discuss concerns about increasing polarization and decreasing incentives to compromise in American public life.[10]

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6. *See* President Barack Obama, Tucson Memorial Speech (Jan. 12, 2011) *available at* http://www.whitehouse.gov/the-press-office/2011/01/12/remarks-president-barack-obama-memorial-serv ice-victims-shooting-tucson.

7. *Id*.

8. *See* Kathleen B. Hennessey, *Lawmakers Don Their Civil Suits*, L.A. TIMES, Jan. 26, 2011, at A19; 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.

9. M. Amedeo Tumolillo, *University of Arizona Sets Up Civility Institute*, N.Y. TIMES (Feb. 21, 2011), http://www.nytimes.com/2011/02/21/us/politics/21civility.html.

10. *See Can We Talk? A Conversation About Civility and Democracy*, NATIONAL CONST. CENTER, http://constitutioncenter.org/experience/programs-initiatives/civility-and-democracy (last

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 Tucson 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.[11] 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 on 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.[12] In October 2010, an estimated 215,000 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,"[13] which urged Americans to tone down the overheated rhetoric and reduce reliance upon the brandishing of nasty epithets in political debate.[14] As Jon Stewart put it,

> There are terrorists and racists and Stalinists and theocrats but those are titles that must be earned. You must have the resume. Not being able to distinguish between real racists and Tea Partiers or real bigots and Juan Williams and Rick Sanchez is an insult, not only to those people but to the racists themselves who have put in the exhausting effort it takes to hate ....."[15]

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 a 'socialist,' or a 'right-wing nut,' or a

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visited Nov. 2, 2012) (providing a program and event schedule, as well as archived videos); Chris Satullo, *Live Blog: Can We Talk? Event at Constitution Center*, NEWSWORKS (Mar. 26, 2011), http ://www.newsworks.org/index.php/local//centre-square/15971-live-blog-can-we-talk-event-at-constit ution-center.

11. 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/.

12. *See id*.; William A. Galston & David Frum, *A Grass-Roots Answer To Gridlock*, WASH. POST, Dec. 3, 2010, at A25.

13. Brian Montopoli, *Jon Stewart Rally Attracts Estimated 215,000*, CBS NEWS (Oct. 30, 2010, 10:39 PM), http://www.cbsnews.com/2102-503544_162-20021284.html.

14. *See* Liz Brown, *Rally to Restore Sanity—Jon Stewart's Closing Speech*, EXAMINER.COM (Oct. 30, 2010), http://www.examiner.com/article/rally-to-restore-sanity-jon-stewart-s-closing-speec h-full-text.

15. *Id*.

'left-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."[16]

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?[17]

In this Essay, 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.

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.[18] 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.[19] 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 that are 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*

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16. President Barack Obama, University of Michigan Spring Commencement Speech (May 1, 2010) (transcript available at http://www.whitehouse.gov/photos-and-video/video/president-obama-michigan-commencement#transcript).

17. Tumolillo, *supra* note 9.

18. *See generally* ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007) (collecting a quarter-century of writings regarding the originalism debate).

19. *See, e.g.*, *id.* at 117, 264 (discussing the debates in the Convention with regard to the meaning of rights, as well as the extent and limits of the Commerce Clause).

Audacity of Hope, Obama himself likened American democracy to "a conversation to be had"[20] 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, through a convention 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.'[21]

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 deliberative democracy.[22] Historians like Bernard Bailyn,[23] J.G.A. Pocock,[24] and Gordon Wood,[25] legal scholars like Cass Sunstein,[26] Frank Michelman,[27] and Paul Brest, [28] and political theorists like Joseph Bessette,[29] Amy Gutmann and Dennis Thompson,[30] and Stephen Macedo,[31] 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

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20. BARACK OBAMA, THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM 92 (2006).

21. *Id*. at 94–95 (quoting Journal Entry by Jared Sparks (Apr. 19, 1830), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 479 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND'S RECORDS]).

22. *See* JAMES T. KLOPPENBERG, READING OBAMA: DREAMS, HOPE, AND THE AMERICAN POLITICAL TRADITION 41–84 (2011).

23. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967).

24. J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975).

25. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 (1969).

26. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

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

28. Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623 (1988).

29. Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, *in* HOW DEMOCRATIC IS THE CONSTITUTION? 102 (Robert A. Goldwin & William A. Schambra eds., 1980).

30. AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? (2004).

31. STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM (1990); DELIBERATIVE POLITICS: ESSAYS ON *DEMOCRACY AND DISAGREEMENT* (Stephen Macedo ed., 1999).

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.[32] 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"[33] that enabled the delegates to change their positions when confronted with new evidence or better arguments.[34] Pocock described the Convention even more glowingly, saying that the "debates of the Philadelphia Convention are notoriously the highest point ever reached by civic humanist theory in practice."[35]

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 demigods."[36] One month into the Convention, Alexander Hamilton observed in the Assembly Room: "It is a miracle that we were now here exercising our tranquil & free deliberations on the subject."[37] 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."[38] And writing approximately forty years after the Convention, James Madison said that "there never was an assembly of men, charged with a great & arduous trust, who were more pure in their motives, or more exclusively or anxiously devoted to the object committed to them."[39] 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

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32. *See supra* notes 23–31. *See generally* SUNSTEIN, THE PARTIAL CONSTITUTION, *supra* note 26, at 19–20 (explaining the concept of the "republic of reasons").

33. SUNSTEIN, THE PARTIAL CONSTITUTION, *supra* note 26, at 22 (quoting 3 FARRAND'S RECORDS, *supra* note 21, at 479).

34. *See id*. at 22 (quoting 3 FARRAND'S RECORDS, *supra* note 21, at 479).

35. J.G.A. Pocock, *Cambridge Paradigms and Scotch Philosophers: A Study of the Relations Between the Civic Humanist and the Civil Jurisprudential Interpretation of Eighteenth-Century Social Thought, in* WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT 235, 239 (Istvan Hont & Michael Ignatieff eds., 1983).

36. Letter from Thomas Jefferson to John Adams (Aug. 30, 1787), *in* 1 THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 194, 196 (Lester J. Cappon ed., 1959).

37. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 216 (1987) (Adrienne Koch ed., 1966) [hereinafter MADISON'S NOTES] (Alexander Hamilton, June 29, 1787).

38. 6 JOHN ADAMS, *A Defence of the Constitutions of Government of the United States of America, in* THE WORKS OF JOHN ADAMS 3, 220 (Charles C. Little & James Brown eds., 1851).

39. MADISON'S NOTES, *supra* note 37, at 19.

"Miracle at Philadelphia,"[40] 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.

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.[41]

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 operation. 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.[42] 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.[43] 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 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.[44]

I submit, by contrast, that the delegates adopted two sharply distinct modes of deliberation depending on the issue before them. When the topic was one of

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40. Borrowing the phrase from CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787 (1966).

41. *Cf. infra* notes 90, 105 and accompanying text (quoting Madison and Franklin on the ways in which the delegates narrowed the considerable initial gap between the delegates through debate, an accommodating spirit, and various parliamentary rules).

42. *See* Martin Diamond, *The American Idea of Man: The View from the Founding*, *in* THE AMERICANS: 1976, at 1–2 (Irving Kristol & Paul H. Weaver eds., 1976) (arguing that "the Convention supplies a remarkable example of . . . how theoretical matters govern the disposition of practical matters").

43. *See* SUNSTEIN, THE PARTIAL CONSTITUTION *supra* note 26, at 20–24.

44. *See* John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799, 800–01 (1961).

broad constitutional structure, such as the powers of Congress, the composition of the Executive Branch, 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.

II. CIVIC FRIENDSHIP

On Monday, June 11, more than two full weeks into the Convention, the legendary Benjamin Franklin made one of his earliest interventions in the delegates' deliberations.[45] 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 despot than under the large states' Virginia Plan, in which small states like New Jersey would be "swallowed up,"[46] Franklin wrote out a speech to be read by his fellow Pennsylvania delegate James Wilson.[47] 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 & temper. If any thing 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 & division in a great concern, wherein harmony & Union are extremely necessary to give weight to our Councils, and render them effectual in promoting & securing the common good.[48]

Franklin's intervention, arguably the earliest explicit "call for civility" under the soon-to-be-created Constitution, indicates, among other things, one relatively

45. *See* MADISON'S NOTES, *supra* note 37, at 99–103 (Benjamin Franklin, June 11, 1787).
46. *See id.* at 94–97 (William Patterson, June 9, 1787).
47. *Id.* at 99 (Benjamin Franklin, June 11, 1787).
48. *Id.* (Benjamin Franklin, June 11, 1787).

astounding fact: for more than two full weeks the deliberations had proceeded with "great coolness & temper."[49] 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 four to six hours a day, without a break, for six days per week.[50] 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.[51] One might have expected some rhetorical fireworks earlier in the proceedings.

What likely accounts for the "great coolness & temper"[52] 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. Regardless of whether they liked each other personally, the delegates laid down a social, ethical, and parliamentary framework within which to navigate the personal and philosophical differences that would inevitably 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.[53] 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.[54] From 10 or 11 a.m. to 3 or 3:30 p.m., they spent all of their time in the Assembly Room, hashing out business around tables squeezed closely together.[55] After every day's business, they ate dinner at various taverns—with names like the Indian Queen, City Tavern, Epple's, or Oeller's—which were sprinkled liberally throughout the city.[56] Eventually, dinner "clubs" formed in which eight or more delegates would regularly dine together at a time.[57] These clubs were open to delegates from all the states, and their informal membership typically cut across sectional and ideological lines.[58] And after dinner, around 8 or 9 p.m., delegates typically would have an evening tea with each other and other prominent citizens

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49. *Id*. (Benjamin Franklin, June 11, 1787).

50. *See* RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 58–85 (2009).

51. *See id*. at 68–85.

52. MADISON'S NOTES, *supra* note 37, at 99 (Benjamin Franklin, June 11, 1787).

53. *See* BEEMAN, *supra* note 50, at 75–78.

54. *Id*. at 75.

55. *Id*. at 72.

56. *Id*. at 78.

57. *Id*.

58. *Id*. (citing 1787: THE DAY-TO-DAY STORY OF THE CONSTITUTIONAL CONVENTION 37–38 (Independence Nat'l Historical Park Serv., Nat'l Park Serv. eds., 1987)).

of Philadelphia.[59] It was in these boardinghouses, club dinners, and evening teas where much of the business of the Convention would transpire.[60]

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 Pennsylvania delegates leading up to the Convention.[61] 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 prior to the start of the Convention.[62] Though the Convention had been scheduled to start on Monday, May 14, distance, weather, business, and sheer apathy had prevented a quorum of delegates from assembling until the following Friday, May 25.[63] 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.[64] Franklin laid out a lavish meal and provided a special cask of porter that, according to Franklin, "met with the most cordial and universal approbation."[65] 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 to 'form a proper correspondence of sentiments'"[66] that would eventually consummate in the Virginia Proposal.[67] But for Franklin's cask of porter, the Virginia Proposal may never have stolen the show in the first few weeks of the Convention.[68]

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 on Friday, May 25, to nominate George Washington as president of the Assembly.[69] Though he was physically incapable of attending that day to deliver the nomination in person, and therefore did so through the Pennsylvania delegation

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59. *Id*. at 79.

60. *Id*. at 72.

61. *See id*. at 53.

62. *Id*. at 52, 57. *See generally id*. at 41–57 (referring to this pre-Convention time period as "The Delay that Produced a Revolution").

63. *See id*. at 41–42, 57.

64. *Id*. at 52.

65. *Id*. at 53.

66. *Id*. (quoting Letter from George Mason to George Mason, Jr. (May 20, 1787), *in* 3 FARRAND'S RECORDS, *supra* note 21, at 22, 23).

67. *See id*.

68. *See id*.

69. *Cf*. MADISON'S NOTES, *supra* note 37, at 23, 24 (noting that Robert Morris of Pennsylvania nominated George Washington for president of the Convention, pursuant to instructions from his delegation, as Benjamin Franklin was confined to his house due to "the state of the weather and of his health").

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,[70] signaled to the assembled delegates the importance of unity and moderate sacrifice of private ambition.

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.[71] The Pennsylvania delegation pressed for proportional representation, by which each state would have voting strength proportional to the population of its state.[72] Thus, Delaware, with its 60,000 residents, would have less than one-tenth the voting power of Virginia with its 750,000 residents.[73] The delegates from Virginia, however, sensed that such a "hard ball" move so early in the Convention might, in the words of Madison, "beget fatal altercations between the large & small States."[74] Moreover, the Virginia delegates thought that:

> [I]t 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 & thereby throw themselves on the mercy of the large States .....[75]

Accordingly, the delegation "discountenanced & stifled the project."[76] 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"[77] among them, 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 indispensable in encouraging open-mindedness, active listening, and deliberation.[78] 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

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70. *Id*. at 24.
71. *See* BEEMAN, *supra* note 50, at 55.
72. *See* MADISON'S NOTES, *supra* note 37, at 25 n.*.
73. *See* BEEMAN, *supra* note 50, at 72.
74. *See* MADISON'S NOTES, *supra* note 37, at 25 n.*.
75. *Id*.
76. *Id*.
77. BEEMAN, *supra* note 50, at 53 (quoting Letter from George Mason to George Mason, Jr. (May 20, 1787), *in* 3 FARRAND'S RECORDS, *supra* note 21, at 23) (internal quotation marks omitted).
78. *See id*. at 81.

him and not carry on a conversation with others or read a book or pamphlet.[79] No member could speak twice on the same topic before any other member not previously recognized on the subject.[80] Once the debate of a topic was underway, no other motions on unrelated topics could be made.[81] 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.[82] 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.[83] Finally, 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.[84]

While the foregoing rules helped ensure focused 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.[85]

First, the delegates agreed not to keep an official record of the votes of individual delegates.[86] Rufus King proposed this rule because "changes of opinion would be frequent in the course of the business & would fill the minutes with contradictions,"[87] and 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."[88] If delegates knew their votes were being recorded for posterity, simple pride might very well have prevented them from yielding to new information or better arguments.

Second, and related, the delegates chose to keep their proceedings secret, not publishing the minutes in newspapers or even permitting delegates to notify others of the proceedings through letters.[89] Madison would later remark in 1830 that the combination of these two rules had been essential to the success of their deliberations:

> [O]pinions 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

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79. MADISON'S NOTES, *supra* note 37, at 25.
80. *Id.* at 26.
81. *Id.*
82. *Id.*
83. *See id.* at 27.
84. *Id.* at 26.
85. *See id.* at 25, 28.
86. *See id.* at 25.
87. *Id.* (Rufus King, May 28, 1787).
88. *Id.* (George Mason, May 28, 1787).
89. *Id.* at 28.

> 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.[90]

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."[91]

The third rule allowed any member to move to reconsider any vote that had already been taken.[92] If new ideas presented themselves or new coalitions formed, any member could ask the Convention to revisit a topic already discussed and voted on.[93] The daily votes in the Convention thus amounted to provisional straw votes which allowed delegates to test the support behind certain ideas, but set nothing permanently in stone.[94] However, to avoid hasty reconsideration of all issues, a motion to reconsider required one day's prior notice and a majority vote of the Convention.[95] 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."[96]

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. However, it should be noted 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 sanitation,[97] had been crowded into a stuffy assembly room[98] for four to six hours a day[99] where they were tasked with papering over differences between large states and small

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90. *See* Journal Entry by Jared Sparks (Apr. 19, 1830), *in* 3 FARRAND'S RECORDS, *supra* note 21, at 479 (citing 1 HERBERT B. ADAMS, THE LIFE AND WRITINGS OF JARED SPARKS 560–61 (1893)).

91. *See id*. (citing 1 HERBERT B. ADAMS, THE LIFE AND WRITINGS OF JARED SPARKS 560–61 (1893)).

92. MADISON'S NOTES, *supra* note 37, at 28.

93. *See id*.

94. *See* BEEMAN, *supra* note 50, at 82.

95. MADISON'S NOTES, *supra* note 37, at 28.

96. *Id*. at 27 (Pierce Butler, May 28, 1787).

97. *See* BEEMAN, *supra* note 50, at 74–75 (graphically detailing the remarkable volume of animal carcasses in public spaces throughout Philadelphia).

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

99. *See id*. at 72.

states, northern states and southern states, and free states and slaveholding states. Intemperance, irritation, and angry disputation were not uncommon.[100] 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 negociators."[101] Around the same time, Gouverneur Morris, after a gloomy late night consultation with George Washington about the state of the Convention, wrote despairingly that "[d]ebates had run high, conflicting opinions were 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."[102] 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.[103]

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: "[T]hus 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."[104] 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 ..... [105]

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100. *See id*. at 185 (quoting CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787, at 125 (1986) [hereinafter COLLIER & COLLIER]).

101. MADISON'S NOTES, *supra* note 37, at 217 (Elbridge Gerry, June 29, 1787).

102. BEEMAN, *supra* note 50, at 185 (quoting COLLIER & COLLIER, *supra* note 100, at 125).

103. *See* MADISON'S NOTES, *supra* note 37, at 230 (Gunning Bedford, June 30, 1787); *id*. at 241 (Gouverneur Morris, July 5, 1787).

104. *Id*. at 627.

105. *Id*. at 653 (Benjamin Franklin, Sept. 17, 1787).

Franklin, of course, was also well known for his salesmanship. His observation that the Convention had managed to function despite the many possible sources of disagreement and faction is, however, to a certain degree attributable to the foundation of civility and mutual respect laid at the very outset of the proceedings.

III. 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."[106] 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.[107] 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 light of reflection upon the requirements of justice and the larger common good.[108] Democratic theorists have feasted upon this distinction, exploring and debating the relative advantages and disadvantages of these two models of deliberation.[109] And historians and legal scholars have debated for approximately a century which of the two models prevailed during the Constitutional Convention in Philadelphia.[110]

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

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106. *See* Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 3, 25–26 (James Bohman & William Rehg eds., 1997) [hereinafter DELIBERATIVE DEMOCRACY].

107. *See id*.

108. *See id*. at 26.

109. *See generally* DELIBERATIVE DEMOCRACY, *supra* note 106 (compiling essays by political theorists discussing the idea of deliberative democracy).

110. *Compare* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1935 ed. 1943) (stressing the market-like dimensions of the Convention), *with* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985) (stressing its forum-like dimensions).

Different kinds of issues triggered varying 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.

While the delegates thus mixed together in the same Convention two quite different, and in some ways opposite, styles of discussion, I suggest that, whether they were in the 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 in order 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,"[111] which helped the delegates maintain mutual respect amid 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—they regularly indicated their openness to being led to new conclusions through the course of debate. On the very first day of substantive

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111. *See, e.g.*, John Rawls, *The Idea of Public Reason*, *in* DELIBERATIVE DEMOCRACY, *supra* note 106, at 93–94 (explaining the concept of "public reason").

and extemporaneous debate regarding the merits of the Virginia Plan, Wednesday, May 30, Pierce Butler of South Carolina said that "he had not made up his mind on the subject, and was open to the light which discussion might throw on it."[112] And in response to a particularly obstreperous objection to the grant of broad powers to Congress by Edmund Randolph, in which Randolph said that "[h]is opinion was fixed on this point,"[113] 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.[114]

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 dilemma that he hoped would emerge through the contestation of debate.[115]

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."[116] 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: "[W]e 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."[117] And in his speech on the final day of the Convention, in recommending that all the delegates put aside whatever hesitations they had and sign the Constitution, he offered an extensive meditation upon the value of

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112. *See* MADISON'S NOTES, *supra* note 37, at 34 (Pierce Butler, May 30, 1787).
113. *Id*. at 44 (Edmund Randolph, May 31, 1787).
114. *Id*. (James Madison, May 31, 1787).
115. *See id*. (James Madison, May 31, 1787).
116. *Id*. at 52 (Benjamin Franklin, June 2, 1787).
117. *Id*. at 99 (Benjamin Franklin, June 11, 1787).

remaining open to correction and "doubt[ing] a little of [one's] own infallibility"[118]:

> 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 wherever 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 Bujours raison*."[119]

When "better information" or "fuller consideration" counseled it, change of opinion was a mark of maturity and reasonableness, not a sign of weakness.[120]

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.[121] 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 put aside this proposal and later conceded that the Convention had "justly abandoned" it.[122] In Meyers' words, Madison had "learned something from the

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118. *Id*. at 654 (Benjamin Franklin, Sept. 17, 1787).

119. *Id*. at 653 (Benjamin Franklin, Sept. 17, 1787).

120. *See id*. (Benjamin Franklin, Sept. 17, 1787).

121. *See* Marvin Myers, *Introduction* to THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON, at xxxv (Marvin Meyers ed., rev. ed. 1981); MADISON'S NOTES, *supra* note 37, at 304 (James Madison, July 17, 1787) (observing that he "considered the negative on the laws of the States as essential to the efficacy & security of the Gen[eral] Gov[ernment]").

122. James Madison, *Preface to Debates in the Convention of 1787*, *in* 3 FARRAND'S RECORDS, *supra* note 21, at 539, 549.

judgment of his peers"[123] on this topic and, as Franklin had suggested, wisely doubted a little of his infallibility.[124]

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.[125] 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.[126] 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:

> [I]f 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 & lights possessed by the members here; & still less what would be their way of thinking 6 or 12 months hence. We ought to consider what was right & necessary in itself for the attainment of a proper Government.[127]

The very job of the delegates to a Constitutional Convention—not to themselves *enact* a Constitution, but merely to *propose* one for ratification—was to reflectively consider "what was right & necessary in itself,"[128] 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 Guttman and Dennis Thompson have traced two distinct ways in which democratic deliberation can and should be public.[129] First, the deliberation must literally take place in a public sphere, open to the back and forth of discussion and critique, not in the "privacy of one's own mind" or

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123. Meyers, *supra* note 121, at xxxv.

124. MADISON'S NOTES, *supra* note 37, at 654 (Benjamin Franklin, Sept. 17, 1787).

125. *See* BAILYN, *supra* note 23, at 163–64 (quoting Burke on the desirability of Parliament being guided not by local instructions from constituents, but rather by "the general good, resulting from the general reason of the whole" (quoting Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), *in* EDMUND BURKE ON GOVERNMENT, POLITICS AND SOCIETY 156, 158 (B.W. Hill ed., 1976) [hereinafter Burke])).

126. *See* Burke, *supra* note 125, at 157.

127. MADISON'S NOTES, *supra* note 37, at 107 (James Madison, June 12, 1787).

128. *Id.* (James Madison, June 12, 1787).

129. AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 4 (2004).

amongst some small cabal of like-minded individuals.[130] Second, the content of the arguments themselves must be publicly accessible, reliant only upon background assumptions, evidence, and logic that anyone can understand and evaluate.[131] 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.[132]

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.[133] In a Constitutional Convention that relied heavily upon committees—twelve appointed in total, with full reports received from eleven of them—and which asked nearly seventy-five percent of its members, at one point or another, to serve on a committee,[134] rational debate and determination of the broad outlines of the Constitution were mainly reserved for the Assembly as a whole.[135] The committees were charged with two broad sets of tasks: (1) resolving parliamentary and procedural issues that required a granular inspection of rules, details, and the style of the document that would otherwise be impossible in a large setting;[136] and (2) addressing divisive issues such as representation[137] and slavery[138] that required a level of coolness and conciliation less likely to be found in a large assembly.[139] 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,[140] the broad shape of the system was still left in the hands of the assembly as a whole.[141] In brief, it was the Assembly that had to determine, as a group, whether to merely modify the Articles of Confederation or replace them with an entirely new system, vest the federal

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130. *Id*.

131. *Id*.

132. Rawls, *supra* note 111, at 96–97.

133. *See, e.g.*, John R. Vile, *The Critical Role of Committees at the U.S. Constitutional Convention of 1787*, 48 AM. J. LEGAL HIST. 147, 153–56 (2006) (discussing the Convention practice of starting each day's business with discussion before the Committee of the Whole—a committee consisting of all delegates at the Convention).

134. *Id*. at 174–76.

135. *See id*. at 153–56.

136. *See id*. at 149–52 (rules committee); *id*. at 163–66 (committee of detail).

137. *See id*. at 156–63 (representation in Congress).

138. *See id*. at 167–68 (slavery).

139. *See id.* at 176 (emphasizing that committees played a vital part in formulating rules, compiling and revising resolutions, and advancing compromises on such issues as representation, slavery, rules, and resolutions).

140. *See id*. at 174–76; *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 L.J. 765, 766 (1990) (discussing the Committee in Detail and its process of producing the first draft of the Constitution).

141. *See* Vile, *supra* note 133, at 153–56.

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.[142]

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 the people 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."[143] 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. Rather, it was in the order of political science, regarding which institutional arrangements would most likely lead to the desired ends.[144]

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.[145] Those who spoke out in favor of election by state legislatures—including Sherman, Read, Gerry, Dickenson, and the Pinckneys—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.[146] Gerry, for example, prefaced his defense of indirect election by noting: "Much depends on the mode of election. In England, the

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142. *See id*.

143. MADISON'S NOTES, *supra* note 37, at 196–97 (Elbridge Gerry, June 26, 1787); *see also id*. at 86 (James Madison, June 7, 1787) ("The true question was in what mode the best choice would be made?").

144. For treatment of the distinction between "political philosophy" and "political science" which the delegates would have been familiar with, see John Locke, *Some Thoughts Concerning Reading and Study for a Gentleman, 1703*, *in* THE EDUCATIONAL WRITINGS OF JOHN LOCKE 397, 400 (James L. Axtell ed., 1968) ("Politics contains two 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 men in society."). For scholarly agreement with the claim that their focus was not on political philosophy, see Roche, *supra* note 44, at 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.").

145. *See* MADISON'S NOTES, *supra* note 37, at 73–80 (June 6 deliberations in the Committee of the Whole).

146. *See id*.

people will probably lose their liberty from the smallness of the proportion having a right of suffrage. Our danger arises from the opposite extreme . . . ."[147] 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."[148] According to Madison, it was "[i]nterferences with these were evils which had more perhaps than any thing else, produced this convention. Was it to be supposed that republican liberty could long exist under the abuses of it practised in some of the States."[149] Similarly, Mason also sang the praises of direct election, citing "the advantage of this Form in favor of the rights of the people, in favor of human nature."[150]

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 end. 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 to make wise decisions, whereas state legislators were more likely to select individuals of merit;[151] (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;[152] (3) canvassing the people of an entire state would be impractical and susceptible to corruption;[153] (4) the people should be represented not only individually, but also in their collective capacity as organized in states;[154] and (5) liberty is more happily exercised in small republican settings.[155] 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;[156] (2) including the states in the electoral process would give them greater opportunities for creating mischief in the federal system;[157] (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;[158] (4) representation was more fully achieved when the elected officials were an "exact transcript of the whole Society," looking, feeling, and thinking like their

147. *Id*. at 73 (Elbridge Gerry, June 6, 1787).
148. *Id*. at 76 (James Madison, June 6, 1787).
149. *Id*. (James Madison, June 6, 1787).
150. *Id*. at 75 (George Mason, June 6, 1787).
151. *Id*. at 73 (Charles Pinckney, June 6, 1787).
152. *Id*. at 78 (Charles Cotesworth Pinckney, June 6, 1787).
153. *Id*. (Charles Cotesworth Pinckney, June 6, 1787).
154. *Id*. (William Pierce, June 6, 1787).
155. *Id*. at 75 (Roger Sherman, June 6, 1787).
156. *Id*. at 74 (James Wilson, June 6, 1787).
157. *Id*. at 75 (George Mason, June 6, 1787).
158. *Id*. (George Mason, June 6, 1787).

constituents;[159] 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.[160]

As the above 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 a "short leash," or a large, extended republic in which the absence of virtue is accommodated by a multiplicity of different, contending, and watchful groups, where rulers are given more discretion in their deliberations.[161] This disagreement would later replay itself on a national scale during the ratification debates between the Federalists and the Anti-Federalists.[162] What helped the delegates maintain some civility in the midst of this disagreement, though, 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.[163] They disagreed with each other over questions of political history (did small state legislatures tend to be good for minority rights?[164]) and political science (are elections more likely to be corrupt when carried out on a large scale?[165]), but they agreed upon some of the deeper questions of political philosophy.[166]

The delegates 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."[167] As he put it in *The Idea of Public Reason*:

> [O]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of

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159. *Id*. at 74 (James Wilson, June 6, 1787).

160. *Id*. at 77 (James Madison, June 6, 1787).

161. *See supra* notes 151–60 and accompanying text.

162. *See generally* Michael P. Zuckert, *The Political Science of James Madison*, *in* HISTORY OF AMERICAN POLITICAL THOUGHT 149–66 (Bryan-Paul Frost & Jeffrey Sikkenga eds., 2003) (describing the differences between the "short-leash" republicanism of the Anti-Federalists with the "long-leash" republicanism of Madison and the Federalists).

163. HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 16 & n.7 (Murray Dry ed., 1981) (observing that even the Anti-Federalists, despite their many disagreements with the Federalists, agreed with their Federalist counterparts on the first principles of political philosophy: "The Anti-Federalists are liberals—reluctant and traditional, indeed—in the decisive sense that they see the end of government as the security of individual liberty, not the promotion of virtue or the fostering of some organic common good.").

164. *See supra* note 155 and accompanying text.

165. *See supra* note 158 and accompanying text.

166. *See supra* note 163 and accompanying text.

167. Rawls, *supra* note 111, at 97.

> 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.[168]

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.[169]

At a more important level, however, 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 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. Instead of merely shouting at each other or talking past each other, given their common starting point, the two sides were able to have a rational argument, based in evidence and common sense, about whether their institutional proposals were sensible means to achieving common ends. Although 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—by sincerely appealing to the first principles of their interlocutors, the delegates were able to speak a common language, thereby showing 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. For instance, 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.[170]

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168. *Id*. at 96–97.

169. *Id*. at 110 (providing 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).

170. *See, e.g.*, MADISON'S NOTES, *supra* note 37, at 154–55 (Oliver Ellsworth, Edmund Randolph, John Lansing, June 20, 1787) (discussing whether to amend or depart from the Articles

While Benjamin Franklin was the likely spiritual and emotional leader of the Convention, 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.[171]

At this stage, the Convention most needed 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 was going 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, the delegates had just the kind of expert they needed; he had spent months prior to the Convention reading from "two trunkloads of books that Jefferson had sent him from Paris" about the "history of 'ancient & modern confederacies.'"[172]

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. Discussions did, nonetheless, occasionally become heated and contested,[173] but the

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of Confederation); *id*. at 58–59 (Pierce Butler, June 2, 1787) (discussing the number of executives); *id*. at 143 (James Madison, June 19, 1787) (offering examples of ancient and modern confederacies and the factors that led to their dissolution).

171. 1 1787: DRAFTING THE U.S. CONSTITUTION 35 (Wilbourn E. Benton ed., 1986), *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).

172. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 42 (1996) (quoting James Madison, *Notes on Ancient and Modern Confederacies* (1786), *in* 9 THE PAPERS OF JAMES MADISON 3, 4 (Robert A. Rutland & William M.E. Rachal eds., 1975)).

173. *See supra* notes 100–03 and accompanying text.

framework of civility that guided their forum-like deliberations at least helped provide some ballast against the all-too-common tendency for public debates to break down into uncivil shouting matches and willful contestations of personality.

IV. 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.[174] On this occasion, the characteristics of civility that had prevailed in the mode of the forum—open-minded, expert-driven, and public deliberation—were either unavailing or even positively harmful to the proceedings. When topics that directly touched upon sensitive economic and political interests[175] or foundational issues of justice[176] were on the table, as opposed to the more abstract questions of constitutional design,[177] 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 on the conscious sacrifice of interests or principles to avoid the status quo ante, privately conducted negotiations as opposed to outright public debates on 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 and 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, per

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174. *See* MADISON'S NOTES, *supra* note 37, at 201–313.

175. *See, e.g.*, *id*. at 226–27 (Benjamin Franklin, June 30, 1787) (noting that the smaller states viewed proportional representation to be a threat to their political, or liberty, interests, while larger states viewed proposals for equal representation as a threat to their economic, or monetary, interests).

176. *See* RAKOVE, *supra* note 172, at 66 (discussing how large and small states attempted to frame the issue of representation in terms of justice and security).

177. *See, e.g.*, MADISON'S NOTES, *supra* note 37, at 95–97 (William Paterson, June 9, 1787) (discussing the differences between a confederacy and a nation).

se, but by temporarily "bracketing" them, focusing instead on 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 values 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 the Senate, Franklin 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.[178]

Noting that the controversy turned on issues of fundamental interest—the liberties of small states and the wealth of large states—Franklin essentially conceded that no tidy intellectual resolution would be forthcoming.[179] 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 were not going to assuage the small states.[180] Likewise, Luther Martin's citations of Vattel in defense of state sovereignty were not going to budge the large states.[181] One side, the other side, neither side, or both sides, would simply have to cede something. Since the first two possibilities looked increasingly unlikely—representatives from the small and large states had 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."[182] 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.

Benjamin Franklin would again employ the language and ideals of shared "sacrifice" in his speech on the final day of the Convention. After the Constitution was read aloud,[183] Franklin said: "Thus I consent, Sir, to this

178. *Id*. at 226–27 (Benjamin Franklin, June 30, 1787).
179. *See id*. (Benjamin Franklin, June 30, 1787).
180. *See* RAKOVE, *supra* note 172, at 42.
181. *See* MADISON'S NOTES, *supra* note 37, at 202–03 (Luther Martin, June 27, 1787).
182. *Id*. at 227 (Benjamin Franklin, June 30, 1787).
183. *Id*. at 652.

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."[184] Franklin, like many of the delegates, had his doubts about certain portions of the new arrangement.[185] Nevertheless, he was willing to "sacrifice" his concerns so that a constitution of some description could be proposed and ratified.[186]

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 or principles or both. Oliver Ellsworth of Connecticut argued that the delegates reconcile themselves to being "half-way" men.[187] He thought that they should seek out a middle ground along the lines of the Connecticut compromise—in which representation in the House would be proportional and representation in the Senate would be equal—since the alternative to "doing half the good we could" was doing nothing.[188] According to Ellsworth:

> We were 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 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.[189]

Elbridge Gerry of Massachusetts made a similar point, emphasizing 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.[190] In the words of Gerry:

> 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

184. *Id*. at 654 (Benjamin Franklin, Sept. 17, 1787).

185. *See id*. at 653 (Benjamin Franklin, Sept. 17, 1787) (expressing concerns over the proposed compromise on state representation); *see, e.g.*, *id.* at 656 (Gouverneur Morris, Sept. 17, 1787) (same).

186. *See id*. at 654 (Benjamin Franklin, Sept. 17, 1787).

187. *Id*. at 219 (Oliver Ellsworth, June 29, 1787).

188. *See id*. (Oliver Ellsworth, June 29, 1787).

189. *Id*. at 218–19 (Oliver Ellsworth, June 29, 1787).

190. *See id*. at 236–37 (Elbridge Gerry, July 2, 1787).

> 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.[191]

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 would have to be 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.[192] Many delegates remained adamantly opposed to compromise,[193] insisting that the Convention instead continue to publicly debate the issue on its merits.[194] The trouble with this approach, however, was that the debate over equal versus proportional representation in Congress, unlike the debates over broad constitutional design, was marked by a persistently interminable quality.[195] 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.[196]

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

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191. *Id*. (Elbridge Gerry, July 2, 1787).

192. *See, e.g.*, *id*. at 232 (Charles Cotesworth Pinckney, July 2, 1787) (proposing to send the issue of the method of determining state representation in the Senate to a committee for resolution); *id*. at 236 (James Madison, July 2, 1787) (opposing Charles Cotesworth Pinckney's proposal to send the issue to a committee for resolution, noting that any compromise could just as easily be proposed and discussed in the full Convention).

193. *See, e.g.*, *id*. at 229 (Gunning Bedford, June 30, 1787) (stating that "there was no middle way" between equal and proportional representation); *id*. at 238 (Elbridge Gerry, July 5, 1787) (discussing that even in a committee on the matter, the delegates were unable to agree on a solution to the issue of representation).

194. *See, e.g.*, *id*. at 236 (James Madison, July 2, 1787) (expressing opposition to referring the matter to a committee because he felt it "would neither shorten the discussion, nor influence the decision of the House").

195. *See, e.g.*, BEEMAN, *supra* note 50, at 157 (noting that the differences between the views of the large and small states on the state representation issue created a "division [that] simply would not go away").

196. *See id*. at 163 (calling the debates over representation "the most confusing, contentious, and unproductive of the summer").

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.[197] 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 & free."[198] Similarly, 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.[199] As he put it,

> 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 Governments. From these alone he could derive the greatest happiness he expects in this life. His happiness depends on their existence, as much as a new born infant on its mother for nourishment. If this reasoning was not satisfactory, he had nothing to add that could be so.[200]

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."[201] And in one of the more fiery moments of the entire summer, Gunning Bedford of Delaware suggested that the small states would not accept union on any terms other than equal representation.[202] Going further, Bedford asserted that, 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

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197. *See id.* at 156 (citing *Proceedings of Committee of the Whole House, May 30–June 19*, *in* 1 FARRAND'S RECORDS, *supra* note 21, at 201–02).

198. *See* MADISON'S NOTES, *supra* note 37, at 202 (Luther Martin, June 27, 1787).

199. *See id.* at 230 (Oliver Ellsworth, June 30, 1787).

200. *Id.* (Oliver Ellsworth, June 30, 1787).

201. *Id.* at 291 (Jonathan Dayton, July 14, 1787).

202. *See id.* at 230 (Gunning Bedford, June 30, 1787).

hand and do them justice."[203] 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.[204] 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, & which if admitted must infuse mortality into a Constitution which we wished to last forever."[205] Hamilton hammered away at this fundamental principle as well. Noting first that states are merely "a collection of individual men," Hamilton framed the inquiry in terms of "which ought we to respect most, the rights of the people composing them, or of the artificial beings resulting from the composition."[206] Wilson also weighed in 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 second as in the first branch. If the Government be not laid on this foundation, it can be neither solid nor lasting. Any other principle will be local, confined & temporary.[207]

Further, 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: "This Country must be united. If persuasion does not unite it, the sword will."[208] 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 of the summer, observed in the midst of the debate that the argument was necessarily interminable.[209] As he put it,

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203. *Id*. (Gunning Bedford, June 30, 1787).
204. *See id*. at 221 (James Wilson, June 30, 1787).
205. *Id*. at 214 (James Madison, June 29, 1787).
206. *Id*. at 215 (Alexander Hamilton, June 29, 1787).
207. *Id*. at 221 (James Wilson, June 30, 1787).
208. *Id*. at 241 (Gouverneur Morris, July 5, 1787).
209. *See id*. at 211 (William Samuel Johnson, June 29, 1787).

> 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.[210]

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 at the famous old lady/young girl optical illusion, each insist that it is decidedly "just the old lady" or "just the young girl." When viewed from one perspective, the states were, indeed, mere administrative collections of real persons.[211] But, when looked at from another perspective, the states were societies in their own right.[212] 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. Therefore, 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 of Congress. 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*.[213]

Other delegates also sensed the fruitlessness of further public deliberation and the need for some kind of compromise along the lines suggested by Johnson.[214] Hence, on July 2, Charles Cotesworth Pinckney of South Carolina proposed that a committee be formed to consider this more quietly, without the verbal pyrotechnics of the more outspoken members.[215] Roger Sherman of Connecticut agreed, saying that the usefulness of public debate had simply been

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210. *Id*. (William Samuel Johnson, June 29, 1787).

211. *See supra* notes 204–08 and accompanying text.

212. *See supra* notes 198–203 and accompanying text.

213. MADISON'S NOTES, *supra* note 37, at 211 (William Samuel Johnson, June 29, 1787).

214. *See* BEEMAN, *supra* note 50, at 188 (citing *Proceedings of Convention, June 19–July 13*, *in* 1 FARRAND'S RECORDS, *supra* note 21, at 511–16).

215. *See* MADISON'S NOTES, *supra* note 37, at 232 (Charles Cotesworth Pinckney, July 2, 1787).

tapped out.[216] According to Sherman, the Convention was "now at a full stop," although "nobody he supposed meant that we should break up without doing something."[217] Hugh Williamson of North Carolina similarly observed: "If we do not concede on both sides, our business must soon be at an end."[218] Williamson also approved of the commitment of the matter to a committee, "supposing that as the Committee would be a smaller body, a compromise would be pursued with more coolness."[219] 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.[220]

By July 5, the Committee had completed its work.[221] 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, perhaps most important, ample liquor" flowed more freely, the eleven members of the committee hammered out a compromise deal.[222] 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.[223] Franklin proposed a package deal in which the House would be proportional—using the formula of 40,000:1 that had been presented in the original Virginia plan—and the Senate would have equal votes from all the states.[224] 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.[225] This was the deal ultimately presented to the Convention on July 5 and ratified by the full Convention on July 16 in a narrow vote of five states to four.[226]

The committee managed to successfully complete its work, thanks in part to the presence of enough moderates on the committee to move them towards the center.[227] 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 figures.[228]

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216. *See id.* (Roger Sherman, July 2, 1787).
217. *Id.* (Roger Sherman, July 2, 1787).
218. *Id.* at 236 (Hugh Williamson, July 2, 1787).
219. *Id.* (Hugh Williamson, July 2, 1787).
220. BEEMAN, *supra* note 50, at 189.
221. *See* MADISON'S NOTES, *supra* note 37, at 237.
222. BEEMAN, *supra* note 50, at 200–01.
223. *Id.* (citing *Proceedings of Convention, June 19–July 13*, *in* 1 FARRAND'S RECORDS, *supra* note 21, at 526).
224. *Id.* at 201 (citing *Proceedings of Convention, June 19–July 13*, *in* 1 FARRAND'S RECORDS, *supra* note 21, at 526).
225. *Id.* (citing *Proceedings of Convention, June 19–July 13*, *in* 1 FARRAND'S RECORDS, *supra* note 21, at 526).
226. *See* MADISON'S NOTES, *supra* note 37, at 237–38, 297.
227. *See* Roche, *supra* note 44, at 803.
228. *See id.* at 809.

Despite his reputation as the "father of the Constitution,"[229] Madison bitterly opposed the "Great Compromise" to the very end.[230] He rejected Johnson's suggestion that the issue was one of perspective, insisting rather that the states could not accurately be seen as "political societies" in the sense in which the small states believed.[231] Madison also 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.[232] In the end, when the committee proposed its package deal, he opposed it in the strongest terms, noting:

> [T]he 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.[233]

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 proposed its compromise, 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.[234]

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, the debate involved too fundamental an issue of justice for one to be willing to compromise. In short, they refused to acknowledge that the rules of the market, rather than the forum, should prevail in this instance.

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229. Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 WM. & MARY Q. 215, 215 & n.1 (1979).

230. *See* Roche, *supra* note 44, at 804; *see also* Hobson, *supra* note 229, at 215–16 (noting how, despite the familiar image of Madison as "Father of the Constitution," Madison was defeated on two critical votes regarding representation and the negative on state laws).

231. *See* MADISON'S NOTES, *supra* note 37, at 213 (James Madison, June 29, 1787).

232. *Id*. at 236 (James Madison, July 2, 1787).

233. *Id*. at 239 (James Madison, July 5, 1787).

234. *Id*. at 254 (James Wilson, July 7, 1787).

But the members who made up the committee, and who ultimately voted for its proposal, did not lack this touch.[235] 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 grounds for possible conciliation.[236] 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.'"[237] The conciliating temper of Franklin "was more valuable at this juncture than Wilson's logical genius, or Morris' acerbic wit."[238]

Thus, by explicitly and even artfully calling for compromise and concession, by shifting from the mode of public deliberation to private negotiation, and by 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 amidst considerable disagreement.

V. 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. We have also grown ever more intrigued by the example of the founding generation and what relevance, if any, their thoughts and deeds may continue to have today. Typically, however, these topics are treated in separate kinds of conversation. This Essay has suggested that the very process that led to the creation of the Constitution may offer some insight into how democratic deliberation, at least for a summer in 1787, happened to play out and work so well.

First, it shows the importance of the often neglected virtue of civic friendship. By establishing a "correspondence of sentiments"[239] 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—as well as in their intellectual, political, or sectional rivals—a common humanity that underlied their differences. Charles Cotesworth Pinckney of South Carolina,

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235. *See* BEEMAN, *supra* note 50, at 200.

236. *Id*.

237. Roche, *supra* note 44, at 809.

238. *Id*.

239. BEEMAN, *supra* note 50, at 53 (quoting Letter from George Mason to George Mason, Jr. (May 20, 1787), *in* 3 FARRAND'S RECORDS, *supra* note 21, at 23) (internal quotation marks omitted).

for instance, noted that he had undergone a change of heart 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."[240] 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 both sides basically agreed on 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, it illustrates that, in those cases where fundamental agreement is lacking, but where 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, 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 separate 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 refer 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—particularly in the context of today's legislative assemblies, where incivility, polarization, ad hominem argumentation, and gridlock are 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.

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240. *See* MADISON'S NOTES, *supra* note 37, at 548 (Charles Cotesworth Pinckney, Aug. 29, 1787).

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