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## On the Perpetuation of Our Constitution and Civic Charity

*Thomas B. Griffith*

**ABSTRACT.** We live in perilous times, where acrimony and contempt poison our republic. But as others have long recognized—from Washington to Lincoln to current observers—there is an antidote: civic charity. It has helped heal our nation in some of our most difficult times; and it can do so again.

### INTRODUCTION<sup>1</sup>

In 1838, Abraham Lincoln was a young man—still too young to serve in the Senate, much less as President—and had recently moved to Springfield, Illinois, from the struggling frontier village of New Salem.<sup>2</sup> A violent mob in St. Louis had recently murdered, by fire, a free Black man.<sup>3</sup> In response to what Lincoln referred to as “that horror-striking scene,” he gave his famous Lyceum Address, or what he titled “The Perpetuation of Our Political Institutions.”<sup>4</sup>

Lincoln began by recounting the good fortune citizens of the United States enjoyed: “the peaceful possession[] of the fairest portion of the earth” and living “under the government of a system of political institutions, conducting more essentially to the ends of civil and religious liberty, than any of which the history

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1. This Essay draws some on two other articles: Thomas B. Griffith, *Civic Charity and the Constitution*, 43 HARV. J.L. & PUB. POL’Y 633 (2020); and Thomas B. Griffith, *The Degradation of Civic Charity*, 134 HARV. L. REV. F. 119 (2020).

2. See DAVID HERBERT DONALD, LINCOLN 58, 66 (1995).

3. *Id.* at 80.

4. Abraham Lincoln, *The Perpetuation of Our Political Institutions*, Address Before the Young Men’s Lyceum of Springfield (January 27, 1838), in 6 J. ABRAHAM LINCOLN ASS’N 6, 7 (1984).

of former times tells us.”<sup>5</sup> Lincoln reminded his listeners that they “toiled not in the acquirement or establishment of them” but were rather “the legal inheritors of these fundamental blessings.”<sup>6</sup>

The Americans of his day had a different task than their forebears: “to transmit these [blessings] . . . to the latest generation that fate shall permit the world to know.”<sup>7</sup> Then came a warning. What was the danger in “faithfully” performing this task of intergenerational transmission of these blessings, he asked? “I answer, if [the danger] ever reach us, it must spring up amongst us. It cannot come from abroad. If destruction be our lot, we must ourselves be its author and finisher. As a nation of freemen, we must live through all time, or die by suicide.”<sup>8</sup> In short, it was not “enemies foreign” but the cancer within that he foresaw as dooming the great American constitutional experiment of “secur[ing] the Blessings of Liberty to ourselves and our Posterity.”<sup>9</sup>

Lincoln was right. Our nation faces constitutional “suicide,” not “destruction” from a foreign foe. We live in a time when people put party above nation, bare majorities ram through contentious and momentous legislation quickly while they still cling to power, and one administration seeks to undo much of the previous administration’s work in a whiplash of policy and law.

But there is an antidote to what ails us: civic charity — “a deliberate decision to set aside personal interests and seek the well-being of others and the nation.”<sup>10</sup> As Yuval Levin writes in his new book, *American Covenant: How the Constitution Unified Our Nation — and Could Again*, the spirit of civic charity “is recoverable now.”<sup>11</sup> Recoverable, because as Matthew Holland and others have shown, we have had crucial moments in our country’s past in which infusions of civic charity helped heal a poisonous national political environment.<sup>12</sup> We desperately need such an infusion again.

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5. *Id.* at 6.

6. *Id.* Lincoln’s rhetoric here echoes *Deuteronomy* 6:10-11, which may have provided him inspiration as he was a diligent student of the Bible and often incorporated it in his speeches and writing.

7. *Id.*

8. *Id.*

9. U.S. CONST. pmb1.

10. Thomas B. Griffith, *Perspective: The Case for Civic Charity*, DESERET NEWS (June 29, 2021, 10:00 PM MDT), <https://www.deseret.com/2021/6/29/22547586/the-case-for-civic-charity-american-history-abraham-lincoln-thomas-jefferson-utah-compromise> [<https://perma.cc/HY5Q-8K7Y>].

11. YUVAL LEVIN, *AMERICAN COVENANT: HOW THE CONSTITUTION UNIFIED OUR NATION — AND COULD AGAIN* 10 (2024).

12. See, e.g., MATTHEW S. HOLLAND, *BONDS OF AFFECTION: CIVIC CHARITY AND THE MAKING OF AMERICA — WINTHROP, JEFFERSON, AND LINCOLN* 2-6 (2007).

Nor is national recovery an impossible task. Writing at the time of our Constitution's birth, James Madison urged in *Federalist No. 14*:

Hearken not to the unnatural voice, which tells you that the people of America, knit together as they are by so many chords of affection, can no longer live together as members of the same family; can no longer continue the mutual guardians of their mutual happiness; can no longer be fellow citizens of one great, respectable, and flourishing [nation].<sup>13</sup>

This Essay fleshes out the dangers that our nation faces at this political moment, namely toxic polarization and partisanship, and proposes a solution – civic charity.

**I. OUR CONSTITUTIONAL DEMOCRATIC REPUBLIC IS IN DANGER BECAUSE OF OUR TOXIC POLITICAL POLARIZATION**

Cancer is not something you ignore, hoping it will go away on its own. It may start off small, but as it grows and metastasizes it reaches a point where it kills its host. Toxic political polarization is the Constitution's cancer. I do not know how far along the metastasis is but I am grimly confident of what will be the final result if this tumor is not removed.

Polarization was a chief concern of the Framers. As Keith Allred has found in his research, fifty-five of the eighty-five papers in the *Federalist*, or sixty-five percent, include a warning about the spirit of party or the problem of faction.<sup>14</sup> James Madison famously warned in *Federalist No. 10* of the pernicious effects of “a factious spirit [which] has tainted our public administrations,” leading to the ills “that our governments are too unstable; that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, not according to the rules of justice, and the rights of the minor party, but by the superior force of an interested and overbearing majority.”<sup>15</sup>

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13. THE FEDERALIST NO. 14, at 66 (James Madison) (George W. Carey & James McClellan eds., 2001).

14. Keith Allred, *Pursuing Mosiah's and Madison's Commonsense Principle in Today's Divided Politics*, 61 BYU STUD. Q. 129, 133 (2022).

15. THE FEDERALIST NO. 10, at 42-43 (James Madison) (George W. Carey & James McClellan eds., 2001).

Similarly, George Washington in his Farewell Address raised the “warnings of a parting friend.”<sup>16</sup> He focused on the “baneful effects of the spirit of party” that “gradually incline the minds of men” toward “security and repose in the absolute power of an individual.”<sup>17</sup> “[A]nd,” he further warned, “sooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation, on the ruins of Public Liberty.”<sup>18</sup> Thus, he observed, “the common and continual mischiefs of the spirit of party are sufficient to make it the interest and duty of a wise people to discourage and restrain it.”<sup>19</sup>

Contemporary observations have reiterated the warnings of Madison and Washington. The esteemed social psychologist Jonathan Haidt, hardly given to apocalyptic pronouncement, sounded a disturbing alarm that “there is a very good chance . . . that in the next 30 years we will have a catastrophic failure of democracy”<sup>20</sup> because “[w]e just don’t know what a democracy looks like when you drain all the trust out of the system.”<sup>21</sup> Former journalist and Republican speechwriter Michael Gerson noted that “[o]ur political system is designed for vigorous disagreement. It is not designed for irreconcilable contempt. Such contempt loosens the ties of citizenship and undermines the idea of patriotism.”<sup>22</sup> Richard N. Haass, the longtime president of the Council on Foreign Relations and a recognized expert on foreign policy, argues that the toxic polarization and dysfunction that besets our politics is the greatest threat to national security, more so than Putin’s aggression or China’s designs.<sup>23</sup>

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16. George Washington, Farewell Address to the People of the United States 5 (Sept. 19, 1796), [https://www.senate.gov/artandhistory/history/resources/pdf/Washingtons\\_Farewell\\_Address.pdf](https://www.senate.gov/artandhistory/history/resources/pdf/Washingtons_Farewell_Address.pdf) [<https://perma.cc/C9WB-8WAU>].

17. *Id.* at 13-14.

18. *Id.* at 14.

19. *Id.*

20. Paul Kelly, ‘Very Good Chance’ Democracy Is Doomed in America, AUSTRALIAN (July 20, 2019), <https://www.theaustralian.com.au/nation/politics/very-good-chance-democracy-is-doomed-in-america-says-haidt/newsstory/0106ecc1c458a0b5e3844545514a55b5a> [<https://perma.cc/H57S-TXVM>].

21. *Id.*

22. Michael Gerson, *A Primer on Political Reality*, WASH. POST (Feb. 19, 2010), <https://www.washingtonpost.com/wp-dyn/content/article/2010/02/18/AR2010021803414.html> [<https://perma.cc/DFV8-RFT3>].

23. See Peter Baker, *To Foreign Policy Veteran, the Real Danger Is at Home*, N.Y. TIMES (July 1, 2023), <https://www.nytimes.com/2023/07/01/us/politics/richard-haass-biden-trump-foreign-policy.html> [<https://perma.cc/36G2-D6HK>]. For more on polarization in the United States, see Rachel Kleinfeld, *Polarization, Democracy, and Political Violence in the United States: What the Research Says*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Sept. 5, 2023), <https://carnegie>

Just as pouring diesel into a gasoline engine will cause it to stall shortly down the road and suffer extensive, perhaps irreparable, damage, pouring contempt into our constitutional system will do the same. Yet our nation appears to be lined up at the pump, impatient to pour as much contempt into our system as possible. We shouldn't be surprised if the Republic does not get very far before permanently stalling as a result. And yet the institutions upon which the Republic is built are under relentless attack by partisans when instead it should be "a time to build."<sup>24</sup>

Start with the courts. Of the three branches of the federal government, the judiciary used to be the most trusted and approved. As recently as 2020, Gallup found nationwide trust in the judicial branch at 67%, compared to just 43% in the executive and 33% in the legislative branches.<sup>25</sup> But as of the fall of 2023, that trust has plummeted nearly twenty points.<sup>26</sup> The other two branches have seen little to no change in public trust over that same period.<sup>27</sup> Similarly, the U.S. Supreme Court's approval rating in September 2020 was at 66%.<sup>28</sup> By May of 2024, it had plunged to just 39%.<sup>29</sup>

Why this collapse of trust in the federal judiciary and approval of the Court? Sustained attacks on its impartiality play no small role. For example, numerous political, media, and academic figures promoted the narrative that Justice Gorsuch's seat was stolen or illegitimate despite the fact that every element the Constitution required for his appointment was fulfilled.<sup>30</sup> The *Dobbs v. Jackson*

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endowment.org/research/2023/09/polarization-democracy-and-political-violence-in-the-united-states-what-the-research-says [https://perma.cc/SQ3Z-CP38].

24. See YUVAL LEVIN, *A TIME TO BUILD: FROM FAMILY AND COMMUNITY TO CONGRESS AND THE CAMPUS, HOW RECOMMITTING TO OUR INSTITUTIONS CAN REVIVE THE AMERICAN DREAM* 7 (2020).
25. Jeffrey M. Jones, *Trust in Federal Government Branches Continues to Falter*, GALLUP (Oct. 11, 2022), <https://news.gallup.com/poll/402737/trust-federal-government-branches-continues-falter.aspx> [https://perma.cc/7L7D-4LX5].
26. *Trust in Government*, GALLUP, <https://news.gallup.com/poll/5392/trust-government.aspx> [https://perma.cc/Y3UW-7ETX].
27. *Id.*
28. *New Marquette Law School Poll National Survey Finds Approval of U.S. Supreme Court Falls to 39%, Second Lowest Since 2020*, MARQ. UNIV. (May 22, 2024), <https://www.marquette.edu/news-center/2024/new-marquette-law-poll-national-survey-finds-approval-of-supreme-court-falls-to-39.php> [https://perma.cc/C6ZB-SKC4].
29. *Id.*
30. Geoffrey R. Stone, *Sorry Neil Gorsuch. The Supreme Court Vacancy Was Already Filled*, TIME (Feb. 1, 2017, 1:40 AM EST), <https://time.com/4656196/scotus-neil-gorsuch-geoffrey-stone> [https://perma.cc/M27V-MMTF]; Neil Gorsuch, *the Nominee for a Stolen Seat*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/opinion/neil-gorsuch-the-nominee-for-a-stolen-seat.html> [https://perma.cc/44U7-KGFJ]; Steve Benen, *With Gorsuch Confirmed, McConnell Gets Away with Stealing a Seat*, MSNBC (Apr. 7, 2017, 1:01 PM EDT),

*Women's Health Organization*<sup>31</sup> abortion decision experienced the unprecedented leak of a draft opinion, which Chief Justice Roberts referred to as “a singular and egregious breach of trust that is an affront to the Court.”<sup>32</sup> Two years earlier, while the Supreme Court heard arguments in another abortion-law case, then-Senate Minority Leader Chuck Schumer spoke directly to Justices Gorsuch and Kavanaugh, threatening, “I want to tell you, Gorsuch, I want to tell you, Kavanaugh, you have released the whirlwind and *you will pay the price. You won't know what hit you* if you go forward with these awful decisions.”<sup>33</sup> Roberts condemned these remarks, stating that “threatening statements of this sort from the highest levels of government are not only inappropriate, they are dangerous.”<sup>34</sup> Later, a man would show up at Kavanaugh's house in an attempted kidnapping and murder, citing anger at the leaked *Dobbs* opinion.<sup>35</sup>

In a similar attack on the federal judiciary, President Trump referred to “Obama judges,” drawing a rebuke from Chief Justice Roberts, who responded that “[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges,” but rather an “independent judiciary.”<sup>36</sup> The danger of viewing our judges as just politicians in robes is that it undermines confidence in fair treatment by the courts.

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<https://www.msnbc.com/rachel-maddow-show/gorsuch-confirmed-mcconnell-gets-away-stealing-seat-msna979371> [<https://perma.cc/3WKH-T38Y>]; Sid Salter, *Stolen Seat Narrative from Democrats Opposing Gorsuch Is Ironic*, AP NEWS (Feb. 6, 2017, 10:35 AM EST), <https://apnews.com/article/us-supreme-court-d789d27ebcca4d4696a72a6d24e42327> [<https://perma.cc/BB5C-XL8P>].

31. 597 U.S. 215 (2022).

32. U.S. SUP. CT., [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_05-03-22](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_05-03-22) [<https://perma.cc/L5XF-TKVC>].

33. Ian Millhiser, *The Controversy over Chuck Schumer's Attack on Gorsuch and Kavanaugh, Explained*, VOX (Mar. 5, 2020, 11:40 AM EST) (emphasis added), <https://www.vox.com/2020/3/5/21165479/chuck-schumer-neil-gorsuch-brett-kavanaugh-supreme-court-whirlwind-threat> [<https://perma.cc/2KF7-8WJW>].

34. Adam Liptak, *John Roberts Condemns Schumer for Saying Justices 'Will Pay the Price' for 'Awful Decisions'*, N.Y. TIMES (Mar. 4, 2020), <https://www.nytimes.com/2020/03/04/us/roberts-schumer-supreme-court.html> [<https://perma.cc/YXS5-2SK3>].

35. *Police Arrest an Armed Man Outside Justice Kavanaugh's House*, NPR (June 8, 2022, 2:20 PM ET), <https://www.npr.org/2022/06/08/1103702099/man-arrested-kavanaugh-house> [<https://perma.cc/M5XS-A67U>]; Ellie Silverman, Dan Morse, Katie Mettler & Devlin Barrett, *Man with Gun Is Arrested Near Brett Kavanaugh's Home, Officials Say*, WASH. POST (June 8, 2022, 7:34 PM EST), <https://www.washingtonpost.com/dc-md-va/2022/06/08/kavanaugh-threat-arrest-justice> [<https://perma.cc/7HKC-EHJP>].

36. Katie Reilly, *President Trump Escalates Attacks on 'Obama Judges' After Rare Rebuke from Chief Justice*, TIME (Nov. 21, 2018, 5:19 PM EST), <https://time.com/5461827/donald-trump-judiciary-chief-justice-john-roberts> [<https://perma.cc/6XXH-8747>].

As I said to the Senate Judiciary Committee when it began hearings on the confirmation of Justice Barrett, accusations that judges will reach certain outcomes because of the party of their appointing president are “typically made for short-term political gain [and] do much harm. They undermine public confidence in an independent judiciary, which is a cornerstone of the rule of law. The rule of law is a fragile possibility that should be more carefully safeguarded by our leaders.”<sup>37</sup> During my service on President Biden’s Commission on the Supreme Court, the most persistent criticism of the Roberts Court from many of my politically progressive colleagues was not limited to the merits of decisions with which they took issue but was a more sweeping argument that the Court was no longer “legitimate.”

Of course, people see the world differently and come from different backgrounds and have had different life experiences, so it is not surprising that there are some differences between judges appointed by presidents from different parties. But these differences are typically about what the law requires and not which policies are preferred. Federal judges seek to understand and apply the law according to the oath they take, which states, “I, \_\_\_\_\_, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as \_\_\_\_\_ under the Constitution and laws of the United States. So help me God.”<sup>38</sup>

Judges take that duty of impartiality seriously. During my fifteen years on the D.C. Circuit, I never once saw my colleagues cast a vote that was partisan. On the contrary, I worked alongside judges who worked hard at being impartial. Justice Breyer reports the same experience during his service on the Supreme Court.<sup>39</sup> And there is evidence to support Breyer’s report. The same term that saw *Dobbs* handed down also yielded unanimity in 48% of the Court’s decisions.<sup>40</sup> Nor was that term an outlier—from the October 2010 through the October 2021 Term, the Justices were unanimous 43% of the time, with some terms

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37. PBS NewsHour, *Thomas Griffith Testifies in Amy Coney Barrett Supreme Court Confirmation Hearing*, YOUTUBE (Oct. 15, 2020) (internal citations omitted), <https://www.youtube.com/watch?v=8Uou-HnxoCQ> [<https://perma.cc/KT4C-KDD6>].

38. *Text of the Oaths of Office for Supreme Court Justices*, U.S. SUP. CT., <https://www.supremecourt.gov/about/oath/textoftheoathsofoffice08-10-2009.pdf> [<https://perma.cc/66EC-3T9C>].

39. Stephen Breyer, *The Supreme Court I Served on Was Made Up of Friends*, N.Y. TIMES (Apr. 3, 2024), <https://www.nytimes.com/2024/04/03/opinion/stephen-breyer-friendship-court.html> [<https://perma.cc/6DCJ-Q4PC>]; see also STEPHEN BREYER, *THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS* (2021) (arguing against the view that Supreme Court justices are simply “politicians in robes”).

40. Michael D. Berry, *The Numbers Reveal a United Supreme Court, and a Few Surprises*, FEDERALIST SOC’Y (Aug. 2, 2023), <https://fedsoc.org/commentary/fedsoc-blog/the-numbers-reveal-a-united-supreme-court-and-a-few-surprises> [<https://perma.cc/7Q7S-WXBZ>].

reaching 60% or higher rates of unanimity.<sup>41</sup> Add on the 8-1 and 7-2 cases, and a supermajority of the time Justices appointed by presidents of differing political parties agree.<sup>42</sup> That would not be the case if the Justices were focused on politics rather than law.

A more recent and high-profile example of this pattern was *Trump v. Anderson*, where Colorado sought to keep the former president off of the 2024 presidential ballot in that state for his role in the January 6, 2021 attack on Congress.<sup>43</sup> Although the Justices expressed differing views on the appropriate rationale and scope of the decision, the Court was unanimous in deciding that the Constitution did not allow Colorado to bar the former president from the ballot.<sup>44</sup> As Justice Barrett noted in her concurrence, “The Court has settled a politically charged issue in the volatile season of a Presidential election . . . . For present purposes, our differences are far less important than our unanimity: All nine Justices agree on the outcome of this case. That is the message Americans should take home.”<sup>45</sup> Of course there are disagreements on the best way to reach the agreed-upon decision, but the fact that there is that much agreement on the ultimate conclusion is significant and should not be downplayed.

Similarly, in the October 2023 Term, the Court unanimously decided a contentious issue related to birth control (holding that pro-life groups did not have standing to challenge a federal agency’s approval of an abortion drug).<sup>46</sup> Likewise, a 2024 case about the seemingly always politically contentious Second Amendment was nearly unanimous (8-1).<sup>47</sup>

Arguments that the Court is not “legitimate” or that judges will rule in a certain way because of the president who appointed them are body blows to public confidence in the judiciary.

Just as damaging to the public’s trust in the institutions that undergird our democracy are the attacks on our election-administration system. For instance, since losing the 2020 election, former President Trump and many of his supporters have continued to claim that he lost due to election fraud. They argue this despite an extensive report by a group of political conservatives, including three

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41. Angie Gou, Ellena Erskine & James Romoser, *STAT PACK for the Supreme Court’s 2021-22 Term*, SCOTUSBLOG (July 1, 2022), <https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf> [<https://perma.cc/C7AT-JPDX>].

42. *Id.*

43. See *Trump v. Anderson*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/trump-v-anderson> [<https://perma.cc/LN7M-4NB6>].

44. *Trump v. Anderson*, 601 U.S. 100, 117 (2024).

45. *Id.* at 118 (Barrett, J., concurring).

46. *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 374 (2024).

47. See *United States v. Rahimi*, 602 U.S. 680, 702 (2024).



former federal court of appeals judges appointed by a Republican president, which I was involved in producing, finding that the 2020 presidential election results were accurate.<sup>48</sup> Trump has fixated on this false claim so much that about thirty percent of Americans believe President Biden's 2020 victory was illegitimate.<sup>49</sup> Allegiance to that false claim has become a litmus test for many in the leadership of the Republican Party, including Trump. That shockingly high percentage, if it continues from election to election, will eventually destroy all trust in elections in our country.

Though varying in intensity and frequency, remarks that undermine confidence in the outcomes of our elections have crossed party lines. A defeated Hillary Clinton referred to the 2016 presidential election as “stolen”<sup>50</sup> and to President Trump as an “illegitimate” president.<sup>51</sup> After the 2000 election, Hillary Clinton and then-Democratic National Committee Chair Terry McAuliffe claimed that the election had been “stolen” or “taken away” from Vice President Gore,<sup>52</sup> even though a *New York Times* analysis determined that if the recount had been completed in Florida, under the most likely way it would have been conducted, George W. Bush would have still won in 2000.<sup>53</sup> Thus, while

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48. Zach Schonfeld, *Conservative Group Finds ‘Absolutely No Evidence of Widespread Fraud’ in 2020 Election*, HILL (July 14, 2022, 3:46 PM ET), <https://thehill.com/homenews/campaign/3559758-conservative-group-finds-absolutely-no-evidence-of-widespread-fraud-in-2020-election> [<https://perma.cc/B3QH-2FVD>].
49. *National Poll January 2024 Toplines & Crosstabs*, UNIV. MASS. AMHERST (Feb. 16, 2024), <https://www.umass.edu/political-science/about/reports/january-16-2024> [<https://perma.cc/6MFS-39MA>]; *Poll Results*, WASH. POST & UNIV. MD. CTR. FOR DEMOCRACY & CIVIC ENGAGEMENT (Dec. 2023), <https://www.washingtonpost.com/documents/1f428bba-56ee-4800-bood-7fd1b0004627.pdf> [<https://perma.cc/A2HM-SA7J>]; Linley Sanders & Jonathan J. Cooper, *Americans Are Divided Along Party Lines over Trump’s Actions in Election Cases, AP-NORC Poll Shows*, AP NEWS (Aug. 16, 2023, 5:31 PM EST), <https://apnews.com/article/trump-indictment-poll-georgia-elections-b6140eed88b3153e41dbf9e008d5a21b> [<https://perma.cc/2DAG-WHT9>]; *NATIONAL: Most Say Fundamental Rights Under Threat*, MONMOUTH UNIV. (June 20, 2023), [https://www.monmouth.edu/polling-institute/documents/monmouthpoll\\_us\\_062023.pdf](https://www.monmouth.edu/polling-institute/documents/monmouthpoll_us_062023.pdf) [<https://perma.cc/E7J9-KZZ8>].
50. Fox Business, *Hillary Clinton Says the 2016 Election Was ‘Stolen’ from Her*, YOUTUBE (May 7, 2019), [https://www.youtube.com/watch?v=77i\\_pC3lp04](https://www.youtube.com/watch?v=77i_pC3lp04) [<https://perma.cc/9QF7-U62W>].
51. Colby Itkowitz, *Hillary Clinton: Trump Is an ‘Illegitimate President,’* WASH. POST (Sept. 26, 2019, 5:03 PM EDT), [https://www.washingtonpost.com/politics/hillary-clinton-trump-is-an-illegitimate-president/2019/09/26/29195d5a-e099-11e9-b199-f638bf2c340f\\_story.html](https://www.washingtonpost.com/politics/hillary-clinton-trump-is-an-illegitimate-president/2019/09/26/29195d5a-e099-11e9-b199-f638bf2c340f_story.html) [<https://perma.cc/KMV9-YY2N>].
52. *Democratic Youth Training: Fundraising*, C-SPAN, at 7:18 (July 24, 2004), <https://www.c-span.org/video/?182870-1/democratic-youth-training-fundraising> [<https://perma.cc/4YX9-383Q>].
53. Ford Fessenden & John M. Broder, *Examining the Vote: The Overview; Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote*, N.Y. TIMES (Nov. 12, 2001),

different in degree from President Trump, such remarks are not different in kind, and even isolated remarks discrediting the legitimacy of our elections have corrosive effects on our shared faith in the democratic process.

Whether in reference to a court decision or an election, we should be on guard against the impulse to conclude that a result is not legitimate simply because we disagree with its outcome. That kind of thinking is tempting because it allows us to avoid the hard work of persuasion and compromise that the Constitution requires.

As Arthur Brooks observed, we live in an age dominated and driven by the “outrage industrial complex,” composed of “divisive politicians, screaming heads on television, hateful columnists, angry campus activists,” and the like, who encourage us to believe “that the other side is made up of knaves and fools.”<sup>54</sup> It is not surprising, then, that many have observed that “our nation is more polarized than it has been at any time since the Civil War.”<sup>55</sup>

Tragedy of national proportions will only result, as it has in the past, when we fail to give way to what Lincoln labeled the “better angels of our nature.”<sup>56</sup> But what exactly does that phrase mean?

## II. THE CURE IS CIVIC CHARITY

The Constitution is not a machine that runs by itself. Madison recognized this when he wrote that the “primary control on the government” in our system is “a dependence on the people.”<sup>57</sup> The people, in other words, are the most important bulwark of democratic liberty. And what is required at this fraught moment? Civic charity.

As Matthew Holland observes, civic charity’s “horizontal dimension . . . calls for a generous and forgiving affection among citizens at the same time that it

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<https://www.nytimes.com/2001/11/12/us/examining-vote-overview-study-disputed-florida-ballots-finds-justices-did-not.html> [<https://perma.cc/4EU9-7GTP>].

54. Arthur C. Brooks, Opinion, *Our Culture of Contempt*, N.Y. TIMES (Mar. 2, 2019), <https://nyti.ms/2Vw3onl> [<https://perma.cc/C8QE-WNS5>].

55. *Id.*; see also AMY CHUA, POLITICAL TRIBES: GROUP INSTINCT AND THE FATE OF NATIONS (2018) (discussing the prevalence of tribal divisions in modern America); BEN SASSE, THEM: WHY WE HATE EACH OTHER — AND HOW TO HEAL (2018) (same); Amy Chua & Jed Rubenfeld, *The Threat of Tribalism*, ATLANTIC (Oct. 15, 2018), <https://www.theatlantic.com/magazine/archive/2018/10/the-threat-of-tribalism/568342> [<https://perma.cc/RVY2-E747>] (same).

56. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in THE WRITINGS OF ABRAHAM LINCOLN 324, 332 (Steven B. Smith ed., 2012).

57. THE FEDERALIST NO. 51, at 269 (James Madison) (George W. Carey & James McClellan eds., 2001).

recognizes and vigorously protects the individual as an inherently free being.”<sup>58</sup> And as Yuval Levin argues, we can again experience that “spirit of amity” that Washington described, “not by abandoning the factional and party differences that appropriately shape our politics but by engaging in that politics in ways informed by common premises and a common sense of gratitude.”<sup>59</sup>

A. *The Constitution Is Rooted in Civic Charity and Compromise*

Our Constitution would never have been created in the first place without compromise. There was a multitude of competing interests and differing viewpoints represented at the Convention. Large states and small states, Northern states and Southern states, shipping states and farming states. And at first, it appeared that the differences were just too great for the delegates to reach consensus. In early July of 1787, George Washington and Robert Morris were “much dejected at that they deemed the deplorable state of things in the convention.”<sup>60</sup> Jared Sparks observed 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.”<sup>61</sup>

Yet just two and a half months later, George Washington transmitted the finished Constitution to the Continental Congress. One popular history describes what happened as the “Miracle at Philadelphia.”<sup>62</sup> While many believe in miracles, people think of them as events that defy rational explanation. Yet we know exactly how consensus was reached in Philadelphia. George Washington told us in the letter he wrote to the Continental Congress transmitting the finished Constitution on September 17, 1787: “[T]he Constitution, which we now present, is the result of a spirit of amity, and of that mutual deference and

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58. HOLLAND, *supra* note 12, at 13. He also argues that civic charity has a vertical dimension, which “calls for a public recognition of and gratitude for a God of judgment and providence even as it respects and helps establish a constitutionally robust pluralism, including a substantial degree of separation of church and state.” *Id.*

59. LEVIN, *supra* note 11, at 10.

60. Letter from Jared Sparks to James Madison (Mar. 30, 1831), NAT’L ARCHIVES FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/99-02-02-2315> [<https://perma.cc/YM26-8FBD>].

61. *Id.*

62. See CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787* (1966).

concession which the peculiarity of our political situation rendered indispensable.”<sup>63</sup> What had happened to transform animosity into amity in such a short time? At least four things.

First, Gouverneur Morris, upon learning of the “deplorable state” of the Convention after returning to Philadelphia from some travel, the next day gave an impassioned speech to the Convention in which he “spoke with such eloquence and power on the necessity of union, of partial sacrifices, [and] temperate discussion, that he effected a change in the feelings of the members.”<sup>64</sup> Thus, leaders’ actions and words matter. We need political and cultural leaders of our day to follow Morris’s exhortation and work for “union” by agreeing to “partial sacrifices” and engaging in “temperate discussion.”<sup>65</sup>

Second, the Convention’s rules required the delegates to pay attention to and respect each other.<sup>66</sup> For example, when a delegate held the floor, others were prohibited from even reading, much less talking.<sup>67</sup> Additionally, attendance was mandatory, meaning that unlike what is often the case with Congress today, no one was speaking to an empty chamber.<sup>68</sup> Finally, the Convention operated under strict prohibitions against divulging what was being said or keeping an official record of each delegate’s votes, enabling people to be open to others’ arguments and even to change their minds.<sup>69</sup> These rules assumed that when a small group of people listened to one another in private they might change their views, and that was a very good thing.

Third, unlike the phenomenon we see in Congress today – almost no socializing across the aisle between members who frequently spend only Tuesdays through Thursdays in Washington – the Convention attendees didn’t just do their work and then avoid each other after hours.<sup>70</sup> Rather, when work was done, they would dine and take evening tea together.<sup>71</sup> This led to dinner clubs that

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63. George Washington, *Letter Transmitting the Proposed Constitution from the Federal Convention to the Confederation Congress* (Sept. 17, 1787), reprinted in GEORGE ANASTAPLO, *THE CONSTITUTION OF 1787: A COMMENTARY* 283, 284 (1989).

64. Letter from Jared Sparks to James Madison, *supra* note 60.

65. *Id.*

66. This and the next two phenomena observed are adopted from Derek A. Webb, *The Original Meaning of Civility: Democratic Deliberation at the Philadelphia Constitutional Convention*, 64 S.C. L. REV. 183, 194-95 (2012).

67. *Id.* at 194.

68. *Id.* at 195.

69. *Id.*

70. *Id.* at 192.

71. *Id.*

formed across regional and ideological lines and interests.<sup>72</sup> Benjamin Franklin personally opened his home to fellow delegates for dinner (with liberal access to his premium casks of porter).<sup>73</sup> Delegates also “physically housed themselves up with each other for four months in the relatively small city of Philadelphia,” “stay[ing] in many of the same boardinghouses, taverns, and private homes.”<sup>74</sup> This after-hours camaraderie resulted in the delegates “grow[ing] into some acquaintance with each other” and “form[ing] a proper correspondence of sentiments” that proved vital in reaching consensus.<sup>75</sup> The Convention delegates had thus applied a timeworn principle: it is hard to despise those with whom you socialize. And while perhaps members of Congress may not board together today, they can be intentional about seeking opportunities to socialize with members of the other party, away from the distorting effect of cameras and microphones, such as at private dinners.

Fourth, as Washington would write in his transmittal letter, the delegates learned to “ke[ep] steadily in [their] view, that which appear[ed] to [them] the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence.”<sup>76</sup> So, for instance, a committee formed of enough moderates “to move them towards the center” gathered at Franklin’s home because, as one member observed, “[i]f we do not concede on both sides, our business must soon be at an end”; the committee exhibited “a desire to seek out grounds for possible conciliation” and hammered out a compromise that arguably saved the Convention and the Constitution.<sup>77</sup> Thus, Washington observed, “[t]his important consideration, seriously and deeply impressed on our minds, led each State in the Convention to be less rigid on points of inferior magnitude, than might have been otherwise expected.”<sup>78</sup> No one got everything they wanted in order for everyone to get the one thing they needed: a Constitution.

In fact, it is ironic but telling that James Madison and Alexander Hamilton rarely succeeded in getting the Convention to adopt their ideas. They lost the debate on the majority of proposals they put forth, sometimes resoundingly.<sup>79</sup>

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72. *Id.*

73. *Id.* at 193.

74. *Id.* at 192.

75. Letter from George Mason to George Mason, Jr. (May 20, 1787), reprinted in 3 RECORDS OF THE FEDERAL CONVENTION 22, 23 (Max Farrand ed., 1911).

76. Washington, *supra* note 63, at 284.

77. Webb, *supra* note 66, at 216, 218.

78. *Id.*

79. See, e.g., Stephen B. Presser, *If the Framers Despaired, Should We?*, 22 FEDERALIST SOC’Y REV. 128, 132 (2021) (“O]f the 71 proposals Madison put forward at the Constitutional Convention,

But that didn't cause them to torpedo the process or fight against ratification. Rather, after the Convention they worked together, despite having seen the Constitution turn out so differently than they wanted, to try and persuade state ratifying conventions—especially in New York—to adopt that document through their now-famous writings in *The Federalist*. They were citizens first, not sore losers.

Not only was the Constitution founded on compromise and born of persuasion, but it was also designed to facilitate such. For example, dividing Congress into separate houses with differing lengths of service—and at the Founding, differing methods of selection—is a structural feature designed to promote reason over passion and to require compromise. As Alexander Hamilton put it in *Federalist No. 70*, “The differences of opinion, and the jarrings of parties” in Congress “often promote deliberation and circumspection; and serve to check excesses in the majority.”<sup>80</sup>

As Yuval Levin argues, the Constitution “was designed with an exceptionally sophisticated grasp of the nature of political division and diversity, and it aims to create—and not just to occupy—common ground in our society.”<sup>81</sup> That is why Levin sees the Constitution not as the source of our problems but as the solution.<sup>82</sup> After all, one of its purposes was to provide “a framework for union and for solidarity.”<sup>83</sup>

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he lost on 40 of them.”); Steven A. Kohnke, *Can Congress Do That? An Analysis of the Federal Prohibition on Marijuana Possession*, 19 MISS. COLL. L. REV. 381, 384 (1999) (quoting 1 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: STRUGGLES FOR POWER AND GOVERNMENTAL ACCOUNTABILITY 444 (1991) (“In specifically enumerating legislative powers, the Constitutional Convention rejected Alexander Hamilton’s proposal that Congress have the ‘power to pass all laws which they shall judge necessary to the common defense and general welfare of the Union.’” (quoting Alexander Hamilton in RECORDS OF THE FEDERAL CONVENTION 617, 627 (Max Farrand ed., 1911))); RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 169 (2009) (observing that Hamilton’s proposal for a muscular presidency “was greeted with a deafening silence” and that “Hamilton’s views strayed so far from mainstream republican principles that they appeared not to merit a response. In fact, no one even rose to dispute them” and “none of [the Framers] was prepared to create the sort of ‘elected monarch’ envisioned by Hamilton”); Michael W. McConnell, *What Would Hamilton Do?*, 35 HARV. J.L. & PUB. POL’Y 259, 270 (2012) (observing that “at the Constitutional Convention, Hamilton advocated a plan that would have reduced the States to mere administrative units of a unitary state—a proposal that attracted almost no support from other delegates” (citations omitted)).

80. THE FEDERALIST NO. 70, at 365 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

81. LEVIN, *supra* note 11, at 2.

82. See *id.* at 4.

83. *Id.*

Of course, as Levin notes, that does not mean “our Constitution is perfect or that its flaws should be shrouded or ignored.”<sup>84</sup> But “the self-evident truths to which our country has been often imperfectly dedicated from the start remain as true as ever” and “the Constitution has enabled us to work toward governing ourselves accordingly (and increasingly so in some important respects).”<sup>85</sup> Thus, “the hard work involved in its preservation, improvement, and repair is, therefore, worth our best efforts.”<sup>86</sup>

It is highly significant that the first purpose given in the Constitution’s preamble as to why “We the People” “ordain[ed] and establish[ed]” the Constitution was “to form a more perfect union.”<sup>87</sup> With union, the rest—justice, domestic tranquility, common defense, general welfare, and the blessing of liberty—become possible. To achieve this union, there must be give and take; we must take a generous view of our fellow citizens and their views. As Lincoln pled, “We are not enemies, but friends. We must not be enemies. Though passion may be strained, it must not break our bonds of affection.”<sup>88</sup> As Dallin Oaks, former justice of the Utah Supreme Court and University of Chicago law professor, recently observed, for our constitutional system to succeed, “[o]n contested issues, we should seek to moderate and unify.”<sup>89</sup> That is the price of rent in our pluralistic constitutional democratic republic. And under the opposite approach—a zero-sum mentality where compromise is anathema—the Constitution and the nation ultimately lose.

### B. *Models to Draw Upon*

We have great examples of this in our nation’s past. As Michael Gerson observed, America’s heroes are “heroes of unity.”<sup>90</sup> He contrasts William Lloyd Garrison and Abraham Lincoln’s quite different responses to slavery: Garrison

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84. *Id.* at 8.

85. *Id.* at 9.

86. *Id.*

87. U.S. CONST. pmb.1.

88. Lincoln, *supra* note 56, at 332.

89. Dallin H. Oaks, *Perspective: Our Inspired Constitution*, DESERET NEWS (July 30, 2021, 10:00 PM MDT), <https://www.deseret.com/2021/6/30/22555833/perspective-our-inspired-constitution-god-divine-inspiration-mormon-latter-day-saints-politics> [<https://perma.cc/Z4PZ-3E7Y>]; see also David F. Levi & Dallin H. Oaks, *Faith in Law*, 103 JUDICATURE no. 1, 2023, at 63 (reporting an interview with Oaks).

90. Michael Gerson, Opinion, *A Primer on Political Reality*, WASH. POST (Feb. 18, 2010, 7:00 PM EST), <https://www.washingtonpost.com/archive/opinions/2010/02/19/a-primer-on-political-reality/8e95f6cb-12f4-4c45-9214-d3bbdda882do> [<https://perma.cc/VQ7E-TTCC>].

sought Northern secession, while Lincoln sought national union.<sup>91</sup> Or consider how Malcolm X and Martin Luther King, Jr. diverged in dealing with the continuing evils of segregation and racism, particularly before Malcolm's break with Elijah Muhammad and his transformative trip to Mecca. Whereas "Malcolm X initially found the American tradition fundamentally corrupt," King "found vast resources of reform with that tradition."<sup>92</sup> Ultimately, Lincoln's and King's approaches strengthened the nation.

Hence, when civil officers and naturalized citizens promise, by oath, to "support and defend the Constitution . . . against all enemies, foreign and domestic," they are promising to avoid derision and contempt for their fellow citizens and to work for reconciliation and unity.<sup>93</sup> As President Ronald Reagan asked in his first inaugural address, "How can we love our country and not love our countrymen . . . ?"<sup>94</sup>

In considering how we can carry on our arguments with reasoned discourse devoid of the cancer of contempt, we might look to the model of the U.S. Supreme Court. The Justices vigorously disagree over the law. Yet, as explained in a recent interview I conducted with Justices Sotomayor and Barrett—who join the same opinion just thirty-eight percent of the time<sup>95</sup>—the Justices are still collegial, even friends.<sup>96</sup> Sotomayor explained:

There are so many, many things that you can do to bring the temperature down and to have you functioning together as a group to getting something done that has a benefit in the law, and so for me collegiality is at the center of our ability to work together and to work together in a way where when we disagree our pens are sharp. But on a personal level, we never translate that into our relationships with one another.<sup>97</sup>

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91. *Id.*

92. *Id.*

93. *Naturalization Oath of Allegiance to the United States of America*, U.S. CITIZENSHIP IMMIGR. SERVS. (July 5, 2020), <https://www.uscis.gov/citizenship/learn-about-citizenship/the-naturalization-interview-and-test/naturalization-oath-of-allegiance-to-the-united-states-of-america> [<https://perma.cc/PZW5-Q5BS>]; 5 U.S.C. § 3331 (2018).

94. President Ronald Reagan, Inaugural Address (Jan. 20, 1981), <https://www.reaganlibrary.gov/archives/speech/inaugural-address-1981> [<https://perma.cc/6NLT-ZNWW>].

95. Angie Gou, Ellena Erskine & James Romoser, *Stat Pack for the Supreme Court's 2021-22 Term*, SCOTUSBLOG 15 (July 1, 2022), <https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSBlog-Final-STAT-PACK-OT2021.pdf> [<https://perma.cc/C7AT-JPDX>].

96. National Governors Association, *How to Disagree Agreeably—2024 Winter Meeting*, YOUTUBE, at 32:33 (Feb. 24, 2024), <https://www.youtube.com/watch?v=S4sBvZVqsHE> [<https://perma.cc/2AXX-QG7P>].

97. *Id.* at 32:33.



For example, the Justices regularly have lunch together where talking about Court business is not allowed;<sup>98</sup> they sometimes do other social activities together, such as watching a movie.<sup>99</sup> Similarly, the most junior Justice throws a party for the newest Justice to welcome them into the court family.<sup>100</sup> Justice Barrett observed that “for collegiality you have to spend time together because you have to know one another . . . and I think it’s a lot easier to demonize someone or to resent someone when you’re not interacting with them in flesh and blood on a regular basis.”<sup>101</sup> Of course, “collegiality isn’t going to make you change your principles,” Barrett further noted, “but there’s a way to have disagreement and to meet each other where it is possible to meet.”<sup>102</sup>

Justice Sotomayor recounted some advice she received from Justice Souter, whom she replaced on the Court. He told her that he was initially very frustrated that he couldn’t convince his colleagues of his view of the Constitution, but “at a certain point [he] realized . . . that they are as passionate about the Constitution, about our laws, about our democracy as [he was]. We are all people of good faith. We may disagree on what the best answer is for those values but it’s never from bad faith.”<sup>103</sup> And realizing that eased Souter’s tension “tremendously.”<sup>104</sup>

Similarly, the Justices take turns at their conferences in an ordered manner to express their views on a case without interrupting each other so that everyone can express their views, with sometimes a little time for more open discussion and follow up, before taking a vote on a case.<sup>105</sup> Likewise, of course, majority and dissenting opinions will be shared and revised in multiple rounds before being released to the public. Thus, through formal and informal institutional procedures and social activities, the Court, much like the Constitutional Convention, provides an environment where collegiality is fostered.

In response to the conversation by Justices Sotomayor and Barrett, retired Justice Breyer echoed similar themes in a recent *New York Times* op-ed, titled “The Supreme Court I Served on Was Made Up of Friends.”<sup>106</sup> Breyer observed

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98. Leslie Poster, *Justices Share How Food Feeds Supreme Court Civility*, NAT’L MUSEUM AM. HIST. (June 8, 2016), <https://americanhistory.si.edu/explore/stories/justices-share-how-food-feeds-supreme-court-civility> [<https://perma.cc/C2UT-78WQ>].

99. *Id.* at 31:40.

100. *Id.* at 34:28.

101. *Id.* at 33:45.

102. *Id.* at 35:52.

103. *Id.* at 36:39.

104. *Id.* at 37:08.

105. *Id.* at 21:50-24:02.

106. Stephen Breyer, Opinion, *The Supreme Court I Served on Was Made Up of Friends*, N.Y. TIMES (Apr. 3, 2024), <https://www.nytimes.com/2024/04/03/opinion/stephen-breyer-friendship-court.html> [<https://perma.cc/332S-5XEW>].

that “[c]onsiderable disagreements on professional matters among the Supreme Court justices, important as they are, remain professional, not personal. The members of the court can and do get along well personally.”<sup>107</sup> He noted the formal mechanism, mentioned above, of everyone getting to speak in conference before anyone spoke a second time.<sup>108</sup> He pointed to the social interactions, such as playing bridge together with their spouses and Justices Ginsburg and Scalia attending the opera together.<sup>109</sup> Likewise, Breyer described how he and Scalia would talk to audiences together about the Court and the law: “It was obvious to those audiences that while we did not share basic views about how to interpret difficult statutory and constitutional phrases, we were friends.”<sup>110</sup> And Breyer reported that he never heard an angry voice or “snide or personal remarks” made in conference in his twenty-eight years on the Court.<sup>111</sup>

### C. *Interpersonal Unity and Disagreement*

Perhaps the Supreme Court seems too distant a model for the average American. Consider a more familiar example from Harvard Professor Danielle Allen describing how she learned to embrace pluralism. She recalled debates between her politically far-left aunt, a Bay Area lesbian and one-time candidate for office from the Peace and Freedom Party, and her father, a Reagan Republican, university professor, and one-time U.S. Senate candidate from Southern California.<sup>112</sup> Allen described how “they would just get into the most incredible debates over our dinner table, back and forth . . . my dad arguing for market liberties and civic virtues and my aunt arguing for public sector investment in every segment of society and experiments in living.”<sup>113</sup> And Allen recalled that as she watched these debates, two things stood out to her: (1) they shared a common purpose (empowering people), but disagreed about the “how”; and (2) even though “they went at these ideas with such ferocity, . . . it was the ideas they were going at, not each other as human beings.”<sup>114</sup>

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. BYU Speeches, *How to Be a Confident Pluralist / Danielle Allen / 2024*, YOUTUBE, at 4:56-5:40 (May 3, 2024), [https://www.youtube.com/watch?v=n7sr9ZAp7OA&t=1s&ab\\_channel=BYUSpeeches](https://www.youtube.com/watch?v=n7sr9ZAp7OA&t=1s&ab_channel=BYUSpeeches) [<https://perma.cc/YT35-BEDW>].

113. *Id.* at 5:17-5:54.

114. *Id.* at 6:08-6:52.

Her aunt and her father taught her what it meant to be a citizen in a pluralist society: to be “somebody who is confident in their own values, but also committed to the project of pluralism, to the projects of free self-government . . . through constitutional democracy.”<sup>115</sup> And she offered five recommendations for gaining such confidence in a world with contrasting and competing views:

1. Reflection.
2. Commitment to the institutional processes by which we negotiate our differences: constitutional democracy and nonviolence.
3. Commitment to compromise.
4. Commitment to listening over speaking.
5. Protecting and preserving human dignity.<sup>116</sup>

Allen’s recommendations draw on the work of John Inazu, who wrote in his important book, *Confident Pluralism: Surviving and Thriving Through Deep Difference*, that “[c]onfident pluralism argues that we can, and we must, learn to live with each other in spite of our deep differences.”<sup>117</sup> Inazu argues that confident pluralism requires (1) “a tolerance for dissent”; (2) “a skepticism of government orthodoxy”; and (3) “a willingness to endure strange and even offensive ways of life.”<sup>118</sup> This is a deep type of confidence that is not threatened by others; confidence that feels threatened by differences is usually only superficial confidence that masks insecurity. And, ironically, we can at least have unity over this commitment to heterodoxy, even if we are not necessarily united on many things.

Cass Sunstein provides a powerful example of such a commitment outside of politics and law in his tribute to Nobel Prize-winning economist Daniel Kahneman, “who insisted on the value of working with those with whom we disagree.”<sup>119</sup> Sunstein recounts how Kahneman, who passed away earlier this year at age ninety, displayed “his enthusiasm for collaborating with his intellectual adversaries” just a few years ago when he reached out to a scholar who had published an article finding the exact opposite of what Kahneman had found a decade before in a study about happiness and income.<sup>120</sup> Kahneman wanted to

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<sup>115.</sup> *Id.* at 13:47.

<sup>116.</sup> *Id.* at 14:06-15:06.

<sup>117.</sup> JOHN INAZU, *CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE* 125 (2016).

<sup>118.</sup> *Id.*

<sup>119.</sup> Cass R. Sunstein, *The Nobel Winner Who Liked to Collaborate with His Adversaries*, N.Y. TIMES (Apr. 1, 2024), <https://www.nytimes.com/2024/04/01/opinion/nobel-daniel-kahneman-collaboration.html> [<https://perma.cc/7L8K-JEEH>].

<sup>120.</sup> *Id.*

know whether he had missed something or whether this new study was wrong.<sup>121</sup> In what he called “adversarial collaboration,” the two scholars found they were both partially correct and partially wrong, leading to a more nuanced understanding of the phenomena.<sup>122</sup>

As these examples show, unity is not the same as agreement.<sup>123</sup> We don’t trust any decision that hasn’t first been tested by argument, whether that decision is revealed by the Supreme Court, the executive or legislative branches, or the leader of our local congregation. As Yuval Levin points out, unity does not suppose agreement, and “disagreement does not foreclose the possibility of unity.”<sup>124</sup> So “[a] more unified society would not always disagree *less*, but it would disagree *better*—that is, more constructively and with an eye to how different priorities and goals can be accommodated.”<sup>125</sup> Hence, former Justice Oakes’s call to moderation and unity is similar to Levin’s call for more constructive disagreement and unity. Our Constitution sets up a system that mitigates majority rule to protect minorities by requiring bargaining and accommodation before law is enacted. We agree to be part of that process of bargaining and accommodation. For our constitutional democratic republic to work, we are not required to check our differing views, values, and experiences at the door, but we are required to check our contempt for one another.

Harvard Law Professor Martha Minow put it another way: “Work against injustice; don’t demonize your enemies.”<sup>126</sup> Minow asks, “Can both of these views be right?”<sup>127</sup> She answers, “yes, and indeed, urgently so.”<sup>128</sup> And how to do this? She urges, among other things, that we “mak[e] inviolable respect for individuals as political equals and bolster[] the architecture securing nonviolent assent amid ongoing disagreements.”<sup>129</sup>

*The New York Times* recently highlighted a modest step toward putting these principles in practice—an initiative called One Small Step.<sup>130</sup> The initiative, created by the history project StoryCorps, has a simple premise: two people of

121. *Id.*

122. *Id.*

123. See LEVIN, *supra* note 11, at 3.

124. *Id.*

125. *Id.* (emphasis added).

126. Martha Minow, *Justice in Divided Societies*, 4 AM. J.L. & EQUAL. 402, 403 (2024).

127. *Id.*

128. *Id.*

129. *Id.*

130. Joseph Bernstein, *A Republican and a Democrat Sit Across from Each Other. There’s No Punchline.*, N.Y. TIMES (Sept. 22, 2024), <https://www.nytimes.com/2024/09/22/style/storycorps-partisan-divide-election.html> [<https://perma.cc/5XC6-AJVQ>].

opposing politics sit in a room and chat with a moderator, with one simple instruction—“to have a conversation about anything except politics.”<sup>131</sup> After doing so, an eighty-five-year-old former local chair of the Republican Party and toilet-paper salesman and a sixty-eight-year-old former president of a local chapter of the NAACP and newspaper owner found they had something in common: “They liked each other.”<sup>132</sup> That is an important first step—to recognize not just the humanity, but the goodness, in those we are inclined to view as our political opponents.

Is civic charity sure to cure the political cancer that plagues us? No. With apologies to Churchill, it is the “worst form” of healing a nation, “except for all those other forms that have been tried from time to time.”<sup>133</sup> What is the alternative? Fighting fire with fire will not turn down the temperature but rather will just lead to a deadlier conflagration.

Nor do I naively believe that everyone will respond to civic charity. But for the large political middle in this country who want things to calm down, civic charity will be a welcome balm. And for the political extremes, at the very least civic charity means that there will be less poking of the bear. This is why comments about the other that use terms like “basket of deplorables”<sup>134</sup> or “cling[ing] to guns or religion or antipathy toward people who aren’t like them”<sup>135</sup> or “takers” who will “never [be] convince[d] [that] they should take personal responsibility and care for their lives”<sup>136</sup> are so damaging. That does not mean one has to agree with others or to compromise on one’s views, but it is the way we go about disagreeing and expressing ourselves. We have to take the personal, ad hominem attacks out of our politics. Tim Shriver’s Dignity Index provides a practical tool to help gauge our own rhetoric and alter it in constructive ways.<sup>137</sup> And at least by disagreeing better with one another and displaying

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131. *Id.*

132. *Id.*

133. *The Worst Form of Government*, INT’L CHURCHILL SOC’Y, <https://winstonchurchill.org/resources/quotes/the-worst-form-of-government> [<https://perma.cc/3LAT-SAEZ>].

134. Katie Reilly, *Read Hillary Clinton’s ‘Basket of Deplorables’ Remarks About Donald Trump Supporters*, TIME (Sept. 10, 2016), <https://time.com/4486502/hillary-clinton-basket-of-deplorables-transcript> [<https://perma.cc/P2XT-GS78>].

135. Ben Smith, *Obama on Small-Town Pa.: Clinging to Religion, Guns, Xenophobia*, POLITICO (Apr. 11, 2008, 3:30 PM EDT), <https://www.politico.com/blogs/ben-smith/2008/04/obama-on-small-town-pa-clinging-to-religion-guns-xenophobia-007737> [<https://perma.cc/T7YH-23LC>].

136. Ezra Klein, *Romney’s Theory of the “Taker Class,” and Why It Matters*, WASH. POST (Sept. 17, 2012), <https://www.washingtonpost.com/news/wonk/wp/2012/09/17/romneys-theory-of-the-taker-class-and-why-it-matters> [<https://perma.cc/4GW3-JYTH>].

137. THE DIGNITY INDEX, <https://www.dignity.us> [<https://perma.cc/67CU-F3P4>].

civic charity we give our country a fighting chance to break the cycle of vengeance and retribution.

We have to give civic charity a try, including ramping up civic charity in response to increased incivility and even violence. Those who break the law should face the consequences of their actions – there is no place in a society ordered on the rule of law for violence and mobs. And while civic charity may not stop violent political acts midstream, it has the potential to prevent future ones by removing the sparks that lead to such violence.

Civic charity is more than just the style of politics – there has to be real substance behind it. We’ve all known those who say seemingly civil things, but behind that veneer conceal coldness or hatred. We must not just limit our civic charity to civility, though that is a start. We must also remember the charity element. For this grand experiment in republican self-rule to work, we cannot hate our fellow Americans. We can passionately disagree over the scope and application of our nation’s two founding ideas – liberty and equality – but we cannot hate each other. And, in the end, we may have to figure out what we’re willing to give up (and what we’re not) in this pluralistic society where, like a family or relationship, no one gets their way on everything (or even most things).

#### CONCLUSION: GROUNDS FOR HOPE

Despite the threat toxic partisanship poses, there is reason for hope. As Matthew Holland observes, some of the most eloquent calls for unity have come at times of maximum peril caused by polarization. For instance, the election of 1800 was one of the most rancorous in American history. Bitter political divisions plagued the country, and it was the first real transfer of power in the presidency the country had experienced.<sup>138</sup> Further, the Constitution was only a dozen years old, with no guarantee that it would survive into adulthood. But Thomas Jefferson, the victor from the Democratic-Republican Party, did not perceive his Federalist Party opponents as the chief threat to the nation; rather, as Holland has noted, “[n]ow undermining successful self-rule was what Jefferson considered a dangerous lack of love among American citizens.”<sup>139</sup> In his first inaugural address, Jefferson declared, “We are all Republicans, we are all Federalists.”<sup>140</sup> And he urged, “Let us, then, fellow-citizens, unite with one heart and one mind. Let us restore the social intercourse that harmony and affection without which

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138. See MATTHEW S. HOLLAND, *BONDS OF AFFECTION: CIVIC CHARITY AND THE MAKING OF AMERICA – WINTHROP, JEFFERSON, AND LINCOLN* 142 (2007).

139. *Id.* at 138.

140. *Thomas Jefferson First Inaugural Address*, AVALON PROJECT, [https://avalon.law.yale.edu/19th\\_century/jefinau1.asp](https://avalon.law.yale.edu/19th_century/jefinau1.asp) [<https://perma.cc/EUU6-J9NL>].

liberty and even life itself are but dreary things.”<sup>141</sup> A few weeks later, showing his priorities as President, Jefferson wrote in a letter, “It will be a great blessing to our country if we can once more restore harmony and social love among its citizens. I confess, as to myself, it is almost the first object of my heart, and one to which I would sacrifice everything but principle.”<sup>142</sup>

On the verge of civil war sixty years later, Abraham Lincoln pled with his fellow countrymen, “We are not enemies, but friends. We must not be enemies. Though passion may have strained it must not break our bonds of affection.”<sup>143</sup> Sadly, his pleas went unheeded. “[A]nd the war came.”<sup>144</sup> Still, after four years of brutal fighting and destruction, on the eve of victory, Lincoln in his Second Inaugural Address rejected triumphalism and sounded instead the notes of reconciliation:

With malice toward none, with charity for all . . . let us strive on . . . to bind up the nation’s wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.<sup>145</sup>

Those are the notes we must play again today as though the fate of the Constitution depended on it – because it does.

*Judge (Ret.) Thomas B. Griffith (D.C. Circuit) is a Fellow with Brigham Young University’s Wheatley Institute, Lecturer on Law at Harvard and Stanford, and Special Counsel at Hunton Andrews Kurth LLP.*

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<sup>141.</sup> *Id.*

<sup>142.</sup> HOLLAND, *supra* note 138, at 138.

<sup>143.</sup> *First Inaugural Address of Abraham Lincoln*, AVALON PROJECT, [https://avalon.law.yale.edu/19th\\_century/lincoln1.asp](https://avalon.law.yale.edu/19th_century/lincoln1.asp) [<https://perma.cc/7G4C-RQQP>].

<sup>144.</sup> *Second Inaugural Address of Abraham Lincoln*, AVALON PROJECT, [https://avalon.law.yale.edu/19th\\_century/lincoln2.asp](https://avalon.law.yale.edu/19th_century/lincoln2.asp) [<https://perma.cc/MSM2-JUXC>].

<sup>145.</sup> *Id.*