# TOXIC POLITICAL POLARIZATION AND THE JUDICIARY

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I am honored to be here today and especially to speak in a lecture series that honors the memory of Judge Robert H. Bork.

We are all indebted to Ed Whelan for his *Confirmation Tales* column. Forgive my self-indulgence in telling you my story. It features Judge Bork in a prominent role.

Although it was far from a pleasant experience, my Senate confirmation experience was smooth sailing compared to the tempestuous proceedings others have endured. For that I am grateful. In fact, I was surprised that I was not asked some hard questions, which in hindsight seem indispensable to the Senate properly performing its constitutional duty to give the president "advice and consent" on his judicial nominations. For example, I should have been asked my views on how a judge ought to interpret the Constitution ("Are you an originalist, a legal realist, a believer in the 'living Constitution'"?), read statutes ("Do you favor Eskridge's 'dynamic' interpretation, or are you a textualist?"), and apply regulations ("Is *Chevron* deference an abdication of the judicial role or a properly deferential response to a delegation of legislative power from the Congress to the executive branch?"). I don't recall a single question along any of those lines. Except one.

That question came early in the process, even before the president had nominated me. I was invited to the White House to interview with Alberto Gonzales, counsel to President Bush, and several of his colleagues in the West Wing. The interview went well, and I was told afterwards that it would be helpful to my chances if I could show that I would have the support of the Republican and Democratic Senate leaders I had worked for as Senate legal counsel, the nonpartisan chief legal officer of the United States Senate. I went immediately to see Senator Orrin Hatch, then the chairman of the Senate Judiciary Committee, who, I was happy to learn, was willing to be an enthusiastic supporter.

Next was a visit with Senator Harry Reid, then the whip of the Democratic conference, who was similarly encouraging. Senator Reid insisted that I meet with Democratic leader Senator Tom Daschle. I had come to know Senator Daschle well during my time as a staffer, and we both respected and liked one another.

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As is often the case when meeting with a busy senator, especially when not part of his planned schedule, I had to wait for a while in his office. Upon learning that I was waiting to see Senator Daschle, his chief of staff kindly invited me into his own office for a pleasant reunion in which we recalled projects we had worked on together. Senator Daschle briefly joined us, greeted me with a warm hug, and voiced pleasure that I was under consideration for an appointment to the D.C. Circuit. It was all very heady stuff.

But there was another person in the room who I did not know personally. He had not been on Senator Daschle's staff while I served the Senate. I did know, however, that he was the architect of the Democrats' strategy to filibuster some of President Bush's judicial nominees, including the nominee whose withdrawal from consideration created an opening for me. (The gray hairs among us will recall that was Miguel Estrada. Yes, I'm what you get when you really want Miguel Estrada on the D. C. Circuit, but Senate Democrats wield the filibuster. In short, I'm an argument for or against the filibuster. Feel free to tell me later and in private which you think I am.)

When Senator Daschle left the room, this staffer started asking me questions to probe who I was. Predictably, he asked me which judge had most shaped my thinking about the law. "John Marshall," I said, assuming that was a safe answer. But that was not the tough question. He added, "*Other* than John Marshall." I paused for a moment. That was the tough question because the answer was Robert Bork, but I hesitated to confess this to the architect of the Democrats' filibuster strategy. Judge Bork was anathema to many progressives. The smoke from his confirmation battle lingered still in Senate hallways.

With more than a little anxiety and imagining that I was about to write my own chapter in *Profiles in Courage*, I mustered strength and answered truthfully: "Judge Bork. I agree with his views about the role of a judge."

There was a slight pause in the conversation. I was certain that I had just thrown away my nomination hopes. But I was wrong. Sensing my anxiety, the staffer assured me that my answer was acceptable. "Don't worry, Tom. We understand that President Bush gets to appoint conservatives to the bench." Emboldened by that response, I declared myself an acolyte of Robert Bork throughout the confirmation process. It must have worked. I was confirmed by a wide margin.

I became aware of Robert Bork during my first year of law school at UVA. I remember the moment when I pulled Volume 47 of the *Indiana Law Journal* from a shelf in the library and began reading *Neutral Principles and Some First Amendment Problems*.[1] I do not want to make too much of the moment. No heavenly choir or rushing wind accompanied my reading. But I don't want to make too little of it either. I found Judge Bork's approach to the Constitution and to the role of judges in our democratic republic immensely satisfying. In those pages I found, for the first time I can remember, an articulate rebuke to much of what I had been learning in law school about how judges should do their work under the Constitution.

[1] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1 (1971).

Consider this summary of Judge Bork's views, cobbled together from his writings and with some editorial license on my part. It will be familiar. It used to be creedal among conservatives:[2]

> The United States was founded as a Madisonian system, which means that it contains two opposing principles that must be continually reconciled. The first principle is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless some things majorities must not do . . . some areas of life in which the individual must be free of majority rule.
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> In these latter areas, majorities cannot rule, "no matter how democratically [they] decide[] to do [so]. These are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny." The structure of the Constitution places the all-important "function of defining the otherwise irreconcilable principles of majority power and minority freedom in a nonpolitical institution, the federal judiciary." Placing this function with the courts creates "the seeming anomaly of judicial supremacy in a democratic society. If the judiciary really is supreme, able to rule when and as it sees fit, the society is not democratic." For that reason, "[i]t is as important to freedom to confine the judiciary's power to its proper scope as it is to confine that of the President, Congress, or state and local governments. Indeed, it is probably more important, for only courts may not be called to account by the public."
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> Judge Bork relie[d heavily] on the seminal article by Professor Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*,[3] originally delivered as the 1959 Oliver Wendell Holmes Lecture at the Harvard Law School. According to Wechsler, "the deepest problem of our constitutionalism" is laid bare when courts function as a "naked power organ." This occurs when a judge, who is supposed to apply the law, "lets his judgment turn on the immediate result"—that is, whether the outcome advances a cause he personally favors as a citizen. To avoid this problem, Wechsler insists that judges must resolve the cases before them according to "neutral principles—by standards that transcend the case at hand."
>
> Rather than impose their own value determinations, in every case, judges must derive, define, and apply generally applicable neutral principles gleaned from authoritative legal texts.

In short, according to Judge Bork, the structure of the Constitution, which places the lawmaking function with We the People through elected representatives, demands that judges be neutral.

The day after the Senate confirmed my nomination to the D.C. Circuit, I was the happy recipient of many congratulatory messages. One came from a former law partner who had clerked on both the D.C. Circuit and the Supreme Court, and whose judgment I valued. "Tom," he asked, "may I give you some advice about being a judge?" Eager to learn, I anxiously waited to hear what he had to say. "The first day of my clerkship on the D.C. Circuit, my judge told me, 'This is how we go about our work: We learn the facts of the case as best we can, then we think long and hard about the fair outcome, the equitable disposition, the just result. Once we have figured that out, we go find law to support our conclusion.' From what I have observed," said my friend, "that is how most judges go about their work, and rightly so."

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[2] The material in the next four paragraphs are taken from my essay, Thomas B. Griffith, *Was Bork Right About Judges*?, 34 HARV. J.L. & PUB. POL'Y 157, 158–60 (2011).

[3] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

Because the call's purpose was congratulatory and not an invitation to engage in an extended discussion of the role of a judge under the Constitution, I thanked my friend for his counsel, but as I hung up the phone, I took a vow that I would do my best to heed his advice to learn the facts of the case, but never heed his advice to decide cases by my own carefully-developed sense of the common good.

With my friend's experience in mind, I took a different approach to my clerks' first day in chambers. I would hand them a binder of readings. The first entry was 47 *Indiana Law Journal* 1. Something like the first chapter of *Genesis*.

Which brings me to our present moment.

I was not on the campus of Yale Law School in April 1982 for the first event of the Federalist Society, but soon thereafter I became an avid supporter, and over the years have spoken at dozens of chapter events on law school campuses across the nation and on numerous panels at the National Lawyers Convention. I've even done some heavy lifting behind the scenes to protect the Federalist Society. What Leonard Leo and Gene Meyer and others have done to transform the American legal landscape is breathtaking.

But I have some concerns. Back in the day, it was dedication to the idea of Judicial Conservatism that inspired us. We would work ourselves into a frenzy, jumping up and down, arms clad in a circle while chanting "Neutral principles! Neutral principles! Neutral principles!"

Yet, from some of the talks I hear at Federalist Society gatherings these days, I wonder if maybe I stepped out of the room at a key moment and missed the explanation that we would *talk* about neutral principles so long as progressives were in control, but once we got our people on the bench—once we had judges who were political conservatives—we would abandon Judicial Conservatism.

I understand the appeal of "judicial engagement" to pursue one's sense of "the common good," but I'm here to urge us to resist that temptation. You will recognize the following from Professor Vermeule's influential article, "Beyond Originalism."[4]

> [O]riginalism has now outlived its utility, and has become an obstacle to the development of a robust, substantively conservative approach to constitutional law and interpretation. . . . It is now possible to imagine a substantive moral constitutionalism that . . . take[s] as its starting point substantive moral principles that conduce to the common good, principles that [judges] should read into the majestic generalities and ambiguities of the written Constitution. . . .The sweeping generalities and famous ambiguities of our Constitution . . . afford ample space for substantive moral readings that promote peace, justice, abundance, health, and safety.

My friend Chief Judge William Pryor has ably pointed out the danger in this approach.[5] I add my "Amen" to Judge Pryor.

[4] Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (March 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.

[5] *See* William H. Pryor, Jr., *Against Living Common Goodism*, 23 FEDERALIST SOC'Y REV. (April 2022).

It seems that Professor Vermeule's model jurist is not Judge Bork or Justice Scalia, but Justice Douglas. Indeed, Professor Vermeule's "sweeping generalities and famous ambiguities"[6] sounds a lot like Justice Douglas's "penumbras, formed by emanations."[7]

"Common good originalism" is what Judicial Conservatives have been fighting all this time. The only difference between this approach and the Living Constitution espoused by progressives is the political result their proponents seek.

Although I might cheer some of the results that emerge from such an approach, that is not the role of the judge that Judge Bork envisioned or that the Constitution requires. If we're willing to sacrifice principled legal thought for the sake of what is, make no mistake, political expediency, then we've given up the fight for an independent judiciary. We will have encouraged the courts to function as the "naked power organ" Wechsler and Bork warned against and thus will wreak havoc on our democracy.[8]

On those courts where progressives are in the majority (and they will be; the pendulum ever swings), they will quote Professor Vermeule to impose their own vision of the common good based on their own moral principles.

Professor Vermeule's approach reminds me of the oft-quoted colloquy in Robert Bolt's play, *A Man for All Seasons*. (Justice Scalia would quote this to his students at the University of Virginia in a rousing finale of the course.) The gray hairs among us remember the scene.[9] Thomas More's family, spurred on by his zealous future son-in-law Will Roper, urges the arrest of Richard Rich because he is a *bad man*. (Forgive my poor attempt at acting.)

> *Margaret*: Father, that man's bad.
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> *More*: There is no law against that.
>
> *Roper*: There is! God's law!
>
> *More*: Then God can arrest him.
>
> *Alice*: While you talk, he's gone!
>
> *More*: And go he should, if he was the Devil himself, until he broke the law!
>
> *Roper*: So now you'd give the Devil benefit of law!
>
> *More*: Yes. What would you do? Cut a great road through the law to get after the Devil?
>
> *Roper*: I'd cut down every law in England to do that!
>
> *More*: Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.

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[6] Vermeule, *supra* n.4.

[7] *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

[8] Wechsler, *supra* n.3 at 12; *see* Bork, *supra* n.1 at 2.

[9] Robert Bolt, *A Man for All Seasons* 36–38 (1960).

(As an aside, I read this colloquy to my law clerks the day my opinion was released in *House Judiciary Committee v. McGahn*.[10] Look it up. You'll see why I did.)

Years ago, I was honored to moderate the Rosenkrantz Debate at the National Lawyers Convention.[11] The disputants were Hadley Arkes (my dear friend and soulmate in so many ways) and Judge Alex Kozinski. The question was whether judges should use the natural law. Hadley went first and, typically, he was eloquent and hilarious. Judge Kozinski followed. As I recall, his reply was brief. It went something like this: "Hadley, I don't disagree with a single thing that you said about the natural law. I have only one response to your argument that judges use the natural law: Steven Reinhardt! You want to invite Steven Reinhardt to use the natural law in his decisions?" I'm sorry Hadley, but in my view, Judge Kozinski won the debate that day.

The issue isn't whether there is natural law. I'm a Christian. Of course there is. The issue, as Judge Sutton constantly reminds us, is "Who decides?"[12] And the project of Judicial Conservatism, as I have understood it and tried to practice it, has been to keep the scope of the judiciary's power within the confines the Constitution requires so as to preserve democratic values.

But this is not the only threat to Judge Bork's view of the role of the judge. Although my embrace of Judge Bork wasn't a stumbling block to my confirmation in 2005, the times have changed, and now we see a full-throated attack on his approach from progressives. I doubt that my public embrace of Judge Bork would have been given a pass in my confirmation proceedings had I been nominated in 2019 instead of 2004. I witnessed this current hostility time and again as one of the few conservative members of President Biden's Commission on the Supreme Court who made the enterprise "bipartisan." (There were five or six of us out of a group of 36. Some criticized that imbalance. Others noted that conservatives were overrepresented in comparison to the typical faculty lounge.) Repeatedly, I would hear some of my fellow commissioners decry the Roberts Court as "illegitimate." For many it was a mantra that preceded almost every comment. They seemed to subscribe to the view of Michael Klarman in his Foreword to the *Harvard Law Review* issue covering the October 2019 Term of the Supreme Court. He titled his article, without any nuance, "The Degradation of American Democracy—And the Court."[13]

If you haven't read Professor Klarman's article, here's my summary, which was first offered in my response to his Foreword, also published by the *Harvard Law Review*.[14]

Professor Klarman's thesis is that conservatives have declared war on democracy. The Justices on the Supreme Court, he argues, "defend[] the interests of the Republican Party," not because of any principled legal reasoning, but because of their "personal values" and "political calculations."[15] Klarman's solution to preserve democracy is straightforward. Democrats should

[10] 968 F.3d 755, 782 (D.C. Cir. 2020) (Griffith, J., dissenting).

[11] The Federalist Society, *Fifth Annual Rosenkranz Debate: Natural Law and Constitutional Law* (Nov. 17, 2012), https://www.youtube.com/watch?v=uHJqoRwUAf8.

[12] *See generally* JEFFREY S. SUTTON, WHO DECIDES?: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2021).

[13] Michael J. Klarman, *Foreword: The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1, 1 (2020).

[14] Thomas B. Griffith, *The Degradation of Civic Charity*, 134 HARV. L. REV. F. 119 (2020).

[15] Klarman, *supra* n.13 at 224.

win the Presidency and the Senate, then "entrench democracy"[16] against future Republican attacks with a series of bold moves: "ignore the constitutional provision mandating two senators for every state";[17] "create[] new states to expand their advantage in the Senate and the Electoral College";[18] replace the Electoral College with a direct popular vote;[19] and consider packing new seats on the Supreme Court and the lower federal courts with judges appointed by Democrats.[20] Needless to say, Klarman's form of "constitutional hardball" would radically reshape our political system.[21]

Professor Klarman's attack upon the independence of the judiciary is especially troubling. In his view, it is "probably inevitable" that "[l]iberal and conservative Justices" will not act as neutral arbiters of the law, but will instead "legally rationalize the outcomes they prefer" on controversial issues.[22] In discounting the possibility of an impartial judiciary, in abandoning that ideal, Professor Klarman embraces the unlikeliest of allies. I quote from his article: "One of the truest things President Trump has said in office is that there are 'Obama judges' and 'Trump judges.' Can anyone honestly think differently?"[23]

Actually, I do! Having served alongside judicial appointees of every President from Carter to Trump, I have seen firsthand that judges can and do put aside party and politics in a good faith effort to interpret the law correctly. The judges that I have known and with whom I have worked closely are committed to applying the law and not imposing their political preferences. I am not troubled by the fact that some judges read the *New York Times* instead of the *Wall Street Journal*. Most I know read both. Nor is it helpful to refer to "Republican Justices," a phrase Professor Klarman uses over a dozen times. The historical fact of an appointment by a Republican President did not matter to the Justices who decided *Hamdan v. Rumsfeld*,[24] *Bostock v. Clayton County*,[25] *Obergefell v. Hodges*,[26] or *NFIB v. Sebelius*.[27] (It never mattered to Chief Judge Sutton either.)

It is no doubt cathartic to impugn the motives and the character of judges who have different political or philosophical commitments, but it does great damage to public confidence in the judiciary—the crown jewel of our constitutional institutions.

In the final opinion I wrote, I warned against the dangers of reflexively imputing political positions to judges based on the party of the President who appointed them.

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[16] *Id*. at 231.
[17] *Id*. at 238.
[18] *Id*.
[19] *Id*. at 239–41.
[20] *Id*. at 246–47.
[21] *Id*. at 242.
[22] *Id*. at 230.
[23] *Id*.
[24] 548 U.S. 557 (2006).
[25] 590 U.S. 644 (2020).
[26] 576 U.S. 644 (2015).
[27] 567 U.S. 519 (2012).

The D.C. Circuit, sitting en banc, had voted to deny General Michael Flynn's petition for a writ of mandamus compelling dismissal of the criminal prosecution against him. I joined the majority but wrote separately to emphasize that, despite the media's hyperbolic coverage and the inflammatory descriptions served up by the conflict entrepreneurs of cable, the issue before the court was actually quite narrow and apolitical.[28] We were not asked to decide whether General Flynn's prosecution was justified, nor whether political favoritism played an impermissible role in the government's decision to stop pursuing that prosecution.[29] Instead, we were asked to answer a simple question: Should the court of appeals intervene and grant the government's motion to dismiss before the district court had issued a decision?[30] Following established precedent, we declined to do so.

I wrote to challenge the view that would surely follow by some on cable that this decision was motivated by partisan impulses:

> In cases that attract public attention, it is common for pundits and politicians to frame their commentary in a way that reduces the judicial process to little more than a skirmish in a partisan battle. The party affiliation of the President who appoints a judge becomes an explanation for the judge's real reason for the disposition, and the legal reasoning employed is seen as a cover for the exercise of raw political power. No doubt there will be some who will describe the court's decision today in such terms, but they would be mistaken. [The questions presented] are far removed from the partisan skirmishes of the day. [Their resolution] in this case involves nothing more and nothing less than the application of neutral principles about which reasonable jurists on this court disagree.[31]

(I then cited 47 *Indiana Law Journal* 1 as a somewhat self-indulgent but grateful tip-of-the-hat to the Great Man.)

What I wrote holds true for the vast majority of cases the federal courts hear. Judges may split along ideological lines, sometimes quite predictably, but partisanship is rarely, if ever, the explanation for that division. And where it might be, let's not applaud that departure from the ideal, let's call it out as a mistake. Justice Barrett has taken issue with those who claim that the justices are partisans in robes. Her evidence that they are not? "Read our opinions," she challenges the critics.[32] Inspired by that challenge, I tell my students that I will not listen to their criticism of *Obergefell* (from the Right) or *Dobbs* (from the Left) until they have sworn by affidavit that they have read all of the opinions in the case. Twice. Such a careful reading shows diligent judges struggling with vexing legal issues in good faith. Justice Kennedy was not intent on destroying the traditional family. Nor was Justice Alito seeking to harm women. Each was trying to discover what the law required, and on that reasonable people can disagree.

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[28] *In re: Michael T. Flynn*, 973 F.3d 74, 85 (D. C. Cir. 2020) (Griffith, J. concurring).

[29] *Id*.

[30] *Id*.

[31] *Id*.

[32] *See* Michael R. Blood, *With divisive cases coming, Barrett says 'Read the opinion'*, ASSOCIATED PRESS, Apr. 5, 2022, *available at* https://apnews.com/article/ketanji-brown-jackson-us-supreme-court-amy-coney-barrett-7aa20b34d9a3e133bf1e2e2a899476f2 [https://perma.cc/F359-TWLD].

These cases reveal the hard work that the Justices put into understanding the views of the parties and each other in an effort to reach the correct legal outcome. They demonstrate the Justices' willingness to compromise and to sometimes decide cases more narrowly than they otherwise might for the sake of consensus. And they reveal that, even as the Justices work through difficult and contentious issues, they strive to engage in civil discourse and treat one another with respect. We all know of the relationship of mutual respect and affection between Justices Ginsburg and Scalia. But have we read Justice Thomas's note to Justice Breyer upon his retirement or Justice Kagan's tribute to Chief Justice Roberts last year at the American Law Institute? Do we know about the friendship between Justices Sotomayor and Barrett, which the latter described so movingly at last spring's Rex E. Lee Award luncheon?

Among the American people, the judiciary remains the most respected of the branches of the federal government. Why is that? Might it be because the judiciary is the constitutional institution that engages in reasoned discourse most often? That is a model that Professor Klarman and progressives should embrace and not excoriate.

Just to be clear: I am no Dr. Pangloss. We do not live in the best of all possible worlds. Indeed, as I have written and as I include in almost all of my public remarks these days, I believe that the Republic is in peril on a number of fronts. I decry those who undermine confidence in the administration of our national elections by their baseless claims of fraud and conspiracy. Judge Luttig, Judge McConnell, Ben Ginsberg and I along with other conservatives wrote about this serious threat to the Constitution in our report *Lost, Not Stolen: The Conservative Case that Biden Won and Trump Lost the 2020 Presidential Election*.[33]

In fact, I am not confident that we will meet Benjamin Franklin's oft-quoted challenge at the close of the Philadelphia Convention to "keep" the Republic the delegates had just created. As I see it, the greatest danger to the Republic is not misguided policy proposals but the rot of contempt that infects our body politic and has become the animating spirit of much of our public discourse. On that view of things, Professor Klarman's jeremiad is no cure for the infection that ails the heart of our democracy. Indeed, the tone and manner of his complaint compound the problem.

America's experiment in representative government has faced serious crises before. But the best models of how to navigate treacherous shoals have done so with what Matthew Holland calls "civic charity"—a settled intention to treat our fellow citizens as partners, even as friends, in a common enterprise, not as enemies.[34]

Start with the Philadelphia Convention of 1787 that created the Constitution. In July, the delegates faced the very real prospect of failure. Yet by mid-September, they had produced the charter that would be the basis for our enduring success as a nation. In his letter transmitting the Constitution to Congress, Washington attributed this surprising turn of events—what one

[33] Danforth et al., *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election* (Jul. 2022) (accessible at https://lostnotstolen.org [https://perma.cc/2E86-RQ4H]).

[34] *See* MATTHEW S. HOLLAND, BONDS OF AFFECTION: CIVIC CHARITY AND THE MAKING OF AMERICA: WINTHROP, JEFFERSON, AND LINCOLN (2007).

popular account of the convention called the "Miracle at Philadelphia"[35]—to the "spirit of amity, and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable."[36]

Derek Webb does a deep dive into the meaning of Washington's explanation in his article, *The Original Meaning of Civility: Democratic Deliberation at the Philadelphia Constitutional Convention*.[37] According to Webb, this "spirit of amity" was a commitment to civic friendship, even among political rivals from widely different geographical backgrounds.[38] That commitment was expressed in the practices of the convention. For instance, the Framers regularly dined together in Philadelphia's taverns, and they carefully designed their deliberative processes so that they would listen to one another: attendance was mandatory, and while a delegate held the floor, the rules barred side conversations and even reading.[39] And the "mutual deference" to one another and the "concession" they practiced led to difficult compromises on contentious issues.[40] The "miracle of Philadelphia" was not a *deus ex machina*. It came about only because people made an effort to understand one another and were willing to give up some things they valued *for the sake of unity*.

The Constitution they created calls upon us to commit ourselves to the same principle—compromise for the sake of unity—that created the Union in the first place.

At the very least, we need to approach our deliberations with civility. But I believe the Constitution requires even more. As Arthur Brooks wryly observes, "Tell people, 'My spouse and I are civil to each other,' and they'll tell you to get counseling."[41]

We must be willing to compromise, even and especially over critical matters, if we are to continue this experiment in representative government. As Yuval Levin notes, "The American Constitution is intended to create . . . common ground."[42] Its structure compels "Americans to be a little more accommodating of one another. . . . It gives us practical experience in living and acting together."[43]

The Constitution calls upon us to develop a temperament that doesn't come naturally to most of us: humility. We must recognize that we *might* be wrong about what the common good requires, and that and our fellow citizens *might* be right. The canonical expression of this constitutional temperament is Judge Learned Hand's speech *The Spirit of Liberty*, given in 1944:

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[35] CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787 (1969).

[36] Quoted in James Madison, *Notes of Debates in the Federal Convention of 1787* (Adrienne Koch ed., 1984), at 627.

[37] 64 S.C. L. REV. 183 (2012).

[38] *Id*. at 197.

[39] *Id*. at 192.

[40] *Id*. at 197 (quotation omitted).

[41] ARTHUR C. BROOKS, LOVE YOUR ENEMIES: HOW DECENT PEOPLE CAN SAVE AMERICA FROM THE CULTURE OF CONTEMPT 12 (2019).

[42] Yuval Levin, *The Constitution and National Unity*, NAT'L REV. (Sept. 16, 2022) (emphasis omitted), https://www.nationalreview.com/2022/09/the-constitution-and-national-unity-go-together/ [https://perma.cc/7558-JM77].

[43] *Id*.

"The spirit of liberty is the spirit which is not too sure that it is right . . . which seeks to understand the mind of other men and women." And most important of all, we need to see one another as friends—partners in a shared pursuit of the common good—rather than enemies.

That we must make the choice to see each other as friends and not enemies, is the teaching not only of the great religious traditions, but of some of our greatest American heroes. Michael Gerson observed: "The heroes of America are heroes of unity. Our 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."[44]

That idea surfaces again and again in key passages from American scripture. Winthrop on the *Arbella*, Jefferson's First Inaugural, King on the steps of the Lincoln Memorial, Obama's Red State/Blue State speech. Most famously, at the moment of the greatest peril to our national unity, Lincoln implored, "We are not enemies, but friends. We must not be enemies. Though passion may have strained it must not break our bonds of affection."[45]

This high-minded idealism has sustained the United States in the past, and is, I believe, *needed* to pursue a "more perfect Union." We must rededicate ourselves to the virtue of civic charity and commit ourselves to the view that we are not enemies, but friends. Without that commitment, this "government of the people, by the people, for the people *shall* . . . perish from the earth."[46]

A healthy deliberative democracy depends to a large degree on accepting the premise that one's political opponents are not evil. They are fellow citizens who hold their views in good faith and deserve respect, especially when we disagree about matters of fundamental importance. The enterprise of reasoned debate which the Framers of the Constitution knew was required to "keep" the Republic they had created becomes a fool's errand when the presumption of good faith is abandoned and the other side consists of villains and demons. In that world, there is no reason to persuade, much less to listen. Arguments become nothing more than an instrument of political power, and the only sensible objective is to crush the other side. That is why it is so troubling that in our current political moment contempt has replaced disagreement. NYU's social psychologist Jonathan Haidt warns, "[T]here is a very good chance that . . . we will have a catastrophic failure of [American] democracy. . . . We just don't know what a democracy looks like when you drain all trust out of the system."[47] I fear this is where we are today.

To an American nation deeply divided by toxic political polarization, former Utah Supreme Court Justice Dallin Oaks recently offered the most elegant explanation I have seen of what is required for citizens to heal this divide. "On contested issues," he urged, "we should seek to

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[44] Michael Gerson, *A primer on political reality*, WASHINGTON POST (Feb. 19, 2010), https://www.washingtonpost.com/archive/opinions/2010/02/19/a-primer-on-political-reality/8e95f6cb-12f4-4c45-9214-d3bbdda882d0/ [https://perma.cc/C5MM-W6L4].

[45] Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) (accessible at https://avalon.law.yale.edu/19th_century/lincoln1.asp).

[46] Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) (accessible at https://www.loc.gov/resource/rbpe.24404500/?st=text).

[47] Paul Kelly, *'Very good chance' democracy is doomed in America, says Haidt*, THE AUSTRALIAN (July 20, 2019), https://www.theaustralian.com.au/nation/politics/very-good-chance-democracy-is-doomed-in-america-says-haidt/news-story/0106ec1c458a0b5e3844545514a55b5a [https://perma.cc/4U8T-ZYKB].

moderate and to unify."[48] In that straightforward and simple directive, Oaks captured the animating spirit that created the Constitution in 1787 and is necessary for its survival.

What does it mean to "support and defend" the Constitution in this environment? At the very least, it means that we will "support and defend" the rights protected by the Constitution and the structures of government it created. And on those counts, there is no group I know of that is more dedicated to those ends than the Federalist Society. But to "support and defend" means *much more* than that. It means that we will "support and defend" the values that gave life to the process by which the Constitution was created. In Washington's words: "the spirit of amity and of that mutual deference and concession that the peculiarity of our political situation renders indispensable."

Shortly after I joined the D. C. Circuit, I was invited to attend a Heritage Foundation event that honored Judge Bork. I readily accepted. Only later did I learn that I was expected to sing for my meal. Not literally, but I was asked to give a toast to Judge Bork. Many of you are well versed in giving toasts. I'm not. I'm a tee-totaler. Who asks a tee-totaler to give a toast? Ed Meese does. It was a risky decision and I was nervous, not only because I was unfamiliar with the genre, but because Judge Bork would be sitting at the head table.

I will close my remarks with the words I used to conclude that toast:

> When I sit as a member of the D. C. Circuit, I pull my robe from a locker across a narrow aisle from a locker that bears a brass name plate that says "Bork." Then, I walk into a courtroom in which a Rembrandt-like portrait of Judge Bork hangs. He is watching -- a brooding omnipresence. I am still an acolyte.

May God bless the memory of Robert Bork. And may God bless you and the *United* States of America.

[48] *See* Peggy Fletcher Stack, *U.S. in a 'perilous moment'—Legal experts debate LDS leader Dallin Oaks' talk on the Constitution*, THE SALT LAKE TRIBUNE (Jun. 20, 2021), https://www.sltrib.com/religion/2021/06/20/us-perilous-moment-legal/ [https://perma.cc/LA2K-P4C9].