

Civic Charity and the Constitution

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Last year, Amy Chua of Yale Law School published a book titled, *Political Tribes: Group Instinct and the Fate of Nations*.¹ By Professor Chua's account, the idea for the book started as a critique of the failure of American foreign policy to recognize that tribal loyalties were the most important political commitments in Vietnam, Afghanistan, and Iraq. But as Professor Chua studied the role such loyalties played in these countries, she recognized that the United States is itself divided among political tribes.² Of course, Professor Chua is not the first or the only scholar or pundit to point this out.³

I'm neither a scholar nor a pundit, but I am an observer of the American political scene. I've seen the Cold War, the Cuban Missile Crisis, massive demonstrations protesting American involvement in the war in Vietnam, race riots in the wake of the assassination of Martin Luther King, Jr., the assassinations of President Kennedy and his brother Robert, the resignation of Richard Nixon from the presidency, and the impeachment of President Clinton. I mention this to provide some context for the belief that, in my lifetime, the Republic has faced no more serious a challenge to its survival than it faces today from political tribalism.

And I'm not alone in playing the role of Jeremiah. New York University's Jonathan Haidt, whose groundbreaking scholarship helps us better understand the reasons competing groups so often see reality so differently,⁴ is not known as a pessimist. But recently he sounded an ominous alarm: "There is a very good chance," Haidt warned, "that in the next 30 years we will have a catastrophic failure of our

¹ AMY CHUA, *POLITICAL TRIBES: GROUP INSTINCT AND THE FATE OF NATIONS* (2018).

² *Id.* at 166, 177.

³ See, e.g., Arthur C. Brooks, Pres., Am. Enterp. Inst., Commencement Address at Brigham Young University: *More Love, Less Contempt* (Apr. 25, 2019); Arthur C. Brooks, Opinion, *Our Culture of Contempt*, N.Y. TIMES (Mar. 2, 2019); David Brooks, *The Retreat to Tribalism*, N.Y. TIMES (Jan. 1, 2018); BEN SASSE, THEM: WHY WE HATE EACH OTHER — AND HOW TO HEAL (2018); Andrew Sullivan, *Can Our Democracy Survive Tribalism?*, N.Y. MAGAZINE (Sept. 18, 2017); Michael Gerson, Opinion, *Tribalism Triumphs in America*, WASH. POST (Sept. 18, 2017).

⁴ JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012).

democracy.” The reason for his concern? “We just don’t know,” he observed, “what a democracy looks like when you drain all trust out of the system.”⁵

How can we prove Haidt’s gloomy forecast wrong? At the very least, our public debates need more civility. Peter Wehner describes this vital virtue:

Civility has to do with . . . the respect we owe others as . . . fellow human beings. It is both an animating spirit and a mode of discourse. It establishes the limits so we don’t treat opponents as enemies. And it helps inoculate us against one of the unrelenting temptations in politics (and in life more broadly), which is to demonize and dehumanize those who hold views different from our own. . . . [C]ivility, properly understood, advances rigorous arguments for a simple reason: it forecloses *ad hominem* attacks, which is the refuge of sloppy, undisciplined minds.”⁶

But civility is the very *least* we should expect of those in the public square. As Arthur Brooks put it, “If I were to tell you that my wife and I were civil towards one another, you would tell me that we need counseling.”⁷

We must do better. And fortunately, we have a model: in 1787, the Framers set aside their own tribal loyalties in their effort to form a more perfect Union. In a fascinating piece of historical scholarship titled, *The Original Meaning of Civility: Democratic Deliberation at the Philadelphia Constitutional Convention*, Derek Webb describes how the Framers overcame tribalism at the Philadelphia Convention to create the Constitution. Much of what I will say about the Convention is drawn from Webb’s article.⁸ In early July of 1787, the Convention was in a “deplorable state” and faced the very real prospect of failure.⁹ George Washington, Benjamin Franklin, and others feared that

⁵ 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>.

⁶ Peter Wehner, *Civility as a Political Virtue*, ETHICS & PUB. POL’Y CTR. (Dec. 1, 2010), <https://eppc.org/publications/civility-as-a-political-virtue/>.

⁷ ARTHUR C. BROOKS, LOVE YOUR ENEMIES: HOW DECENT PEOPLE CAN SAVE AMERICA FROM THE CULTURE OF CONTEMPT 12 (2019).

⁸ These and all subsequent references to the Philadelphia Convention not otherwise cited come from Derek A. Webb, *The Original Meaning of Civility: Democratic Deliberation at the Philadelphia Constitutional Convention*, 64 S.C. L. REV. 183 (2012).

⁹ See Letter from Jared Sparks to James Madison (Mar. 30, 831), https://www.loc.gov/resource/mjm.23_0611_0613/?st=gallery (last accessed Jul. 17, 2019).

“dissolution” of the convention was “hourly to be apprehended.”¹⁰ And yet by mid-September, they had successfully produced the Constitution that would be the basis for our success as a nation. In his letter to Congress proposing the Constitution, Washington attributed this surprising turn of events — what one popular account of the convention called the “Miracle at Philadelphia”¹¹ — to the “spirit of amity, and of that mutual deference . . . which the peculiarity of our political situation rendered indispensable.”¹²

According to Webb, three factors helped create the “spirit of amity [and] mutual deference” that was “indispensable” to the success of the Constitution. First, the delegates were housed in the same city for four months, making informal social interaction unavoidable. They gathered for deliberations Mondays through Saturdays from 10:00 a.m. to 3:00 or 4:00 p.m. Afterwards they would take dinner together at taverns. After dinner, they enjoyed evening tea together. Eventually the delegates formed dinner clubs that were open to delegates from all the states and cut across regional and ideological lines. At several key junctures that summer, Benjamin Franklin threw open the doors of his large home for lavish dinner parties that featured the finest cuisine available, topped off with his special casks of porter. As George Mason wrote to his son, dinner parties at Franklin’s house allowed almost perfect strangers with glowing political resumes from various states to “grow into some acquaintance with each other” and to “form a proper correspondence of sentiments” that would eventually prove to supply the good will needed to craft the Constitution.

Second, the rules of the Convention worked to encourage cooperation. Attendance was mandatory, which meant the delegates were physically present with one another while in session. No one spoke to an empty chamber. And when a delegate held the floor, the rules forbade others from talking or even reading. No official record of votes was kept, and the proceedings were in secret, both of which allowed for an openness to argument and the changing of views.

Third, the Framers were willing to compromise—to set aside their parochial political interests for the sake of a workable constitution. The gloomy forecasts of dissolution and failure were due, in large measure, to the inability of the delegates to resolve the most difficult issue confronting the Convention: should the representation of

¹⁰ Webb, *supra* note 8, at 197 (quoting RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 185 (2009)).

¹¹ CATHERINE DRINKER BOWMAN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787* (1966).

¹² Webb, *supra* note 8 at 197 (citing JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 627 (Adrienne Koch ed., 1966)).

states in Congress be on an equal basis or proportional to their populations? Failure to create a constitution then and there was not an option. So, faced with this fatal stalemate, the delegates made a critical decision: they determined that they would compromise on this central controversy even though they could not be certain in advance what the terms of the compromise would be. Significantly, the terms of what is now known as the Great Compromise were created, in the first instance, by a committee of nine that met in Franklin's home. In other words, small group dynamics would be at play in the setting of a private home. The emphasis was on familiarity and domesticity. Importantly, the committee was composed of carefully selected moderates, not of ideologues.

But I think more went into the "spirit of amity and mutual deference" than can be gleaned from the rules, procedures, and sociality that shaped the work of the Philadelphia Convention of 1787. Upon the retirement of Justice Kennedy from the Supreme Court, Jeffrey Rosen commented, "Kennedy was an idealist, a patriot, and a lover of the Constitution, who believed fervently that *the greatest document of freedom ever written provides a framework for citizens of different perspectives to agree and disagree with each other in civil terms.*"¹³ It is no doubt true that the Constitution creates a framework for debate among citizens and between the branches as they exercise checks and balances on each other. And, as I have already mentioned, civility of debate is a good thing. But I believe that there is something more at work in the success of the 1787 Constitution than creating a framework for a civil debate.

That thing is an ardent desire for union, for civic friendship, for community. Akhil Amar of Yale Law School asserts, rightly I think, that the most *fundamental liberty* guaranteed by the Constitution, is the right of We, the People to make the rules by which society is governed through our politically accountable representatives.¹⁴ I agree, but my point is a different one. I believe that the most *fundamental impulse* that created the Constitution in the summer of 1787 was the yearning for union. The preamble announces that the purpose of the Constitution is "to form a more perfect Union."¹⁵ In other words, the Constitution assumes the coming together of a people who want to create a community. And not just in neighborhoods, villages, towns, counties or states, but on a continent. And not just with people of their own race, religion, background, class, or viewpoint. The Constitution creates a structure of governance that can allow for human flourishing, but without this desire to unite, the Constitution cannot create a national community in which that flourishing will occur. Without this desire to unite, the Constitution is form without substance.

¹³ Jeffrey Rosen, *The Justice Who Believed in America*, ATLANTIC (Jun. 27, 2018) (emphasis added).

¹⁴ AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 10 (2005).

¹⁵ U.S. CONST. pmbl.

When we take an oath to uphold the Constitution, we commit to work for unity; we make a solemn pledge that we will not be agents of division. This vow to work for national unity is more than gauzy sentimentality. It is more than a call for civility in our public discourse. Instead, it is a studied and determined choice to work at union, and, as we learn from the example of the delegates at the Philadelphia Convention, that requires compromise. The Constitution was created in the first instance by delegates who determined that they would compromise some of their dearly held views for the sake of union. To me, the truly remarkable element of that dynamic is that the Philadelphia delegates determined that they would compromise *before* they knew what the compromise would be. They valued national unity over their own particular views. Is that the key to the way forward during this time of division?

The delegates' impulse to place community above individual preferences tapped into a deep strain of the American experience. In his book, *Bonds of Affection: Civic Charity and the Making of America—Winthrop, Jefferson and Lincoln*, Matthew Holland calls this element of our national DNA “civic charity” and highlights four moments in our history when the exercise of this virtue helped shape the country we hope America will yet be.¹⁶

In the Spring of 1630, John Winthrop, the newly elected governor of the Massachusetts Bay Colony, gave a sermon aboard the ship *Arbella*. Praised by scholars as the “Ur-text of American literature,” Winthrop called upon the members of the colony to live with each other “in the bonds of brotherly affection. . . . We must uphold a familiar commerce together in all meekness, gentleness, patience, and liberality. We must delight in each other, make each others' conditions our own, rejoice together, mourn together, labor and suffer together, always having before our eyes our commission and community in the work.”¹⁷ In this appeal, Winthrop “established a national mythos that human beings are social beings, dependent upon other social beings not just to survive but to flourish.”¹⁸

In March 1801, following what many consider the ugliest campaign for the most consequential presidential election in the nation's history – “the first real test of whether American national power could be transferred without violent resistance beforehand or

¹⁶ Unless noted otherwise, the following discussion on John Winthrop, Thomas Jefferson's Inaugural Address, the Civil War, and Lincoln's Inaugural Address come largely from MATTHEW HOLLAND, *BONDS OF AFFECTION: CIVIC CHARITY AND THE MAKING OF AMERICA* (2007).

¹⁷ *Id.* at 242 (quoting John Winthrop, *A Model of Christian Charity* (1630)).

¹⁸ *Id.*

bitter retribution afterwards”¹⁹ – the victorious Thomas Jefferson gave his First Inaugural Address, his “most developed and revealing public statement concerning the foundational ideals of American politics.”²⁰ The bitter election contest “gave Jefferson pause to consider a different threat to the verities of 1776 than those he saw in Federalist policy. Now undermining successful self-rule was what Jefferson considered a dangerous lack of love among American citizens.”²¹ Famously, Jefferson declared, “We are all Republicans; we are all Federalists.”²² Less famously, but more importantly, he continued, “Let us then, fellow citizens, unite with one heart and one mind. Let us restore to social intercourse that harmony and affection without which liberty, and even life itself, are but dreary things.”²³ In a letter written just weeks later, Jefferson recognized, “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.”²⁴

On the eve of the Civil War, with the Republic facing an existential crisis, Abraham Lincoln delivered his First Inaugural Address, a last-ditch effort to preserve the Union that had been created by the Constitution. In words and phrases that have surely become American scripture, our greatest President declared, “We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory, stretching from every battlefield and patriot grave to every living heart and hearthstone all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.”²⁵ Tragically, Lincoln’s plea for unity failed. War came, and we live with its consequences to this day.

Four years later, with victory over the Confederacy near at hand, Lincoln’s Second Inaugural Address launched his ambitious project to reconstruct a nation torn asunder by war. His remarks at that moment, in the wake of an unparalleled national tragedy and on the cusp of a moment filled with promise, have been described as “without precedent in the civil history of the world,” giving voice to “a generosity so grand and unexpected as to nearly defy human comprehension.”²⁶ Another piece of

¹⁹ *Id.* at 142

²⁰ *Id.* at 136.

²¹ *Id.* at 138.

²² Thomas Jefferson, First Inaugural Address (Mar. 4, 1801).

²³ *Id.*

²⁴ HOLLAND, *supra* note 17, at 138 (quoting letter from Thomas Jefferson to Elbridge Gerry (March 29, 1801)).

²⁵ *Id.* at 169 (quoting Abraham Lincoln, First Inaugural Address of Abraham Lincoln (March 4, 1861)).

²⁶ *Id.* at 222-23.

American scripture: “With malice toward none, with charity for all, with firmness in the right . . . let us strive to . . . bind up the nation’s wounds”²⁷

As Professor Amar points out, the unity Lincoln sought after the Civil War differed from the unity he had envisioned before the Civil War.²⁸ In an address delivered a mere four days before his assassination, Lincoln pressed for the extension of the franchise to black men.²⁹ According to Amar, “[t]his was an important transformation in Lincoln’s view of the Union. For a Union aims to unite not just territory, or states, but also persons—flesh and blood human beings. Lincoln’s early vision was of an ultimate Union that would largely be of, by, and for whites; after getting their freedom, blacks would be encouraged to move elsewhere—say, Africa or Central America. But the experience of the Civil War itself, and the bravery exhibited by black soldiers, helped persuade Lincoln to embrace a more inclusive conception of the Union, bringing together not merely different regions but also different races.”³⁰

What then of our current moment? How strong are our “bonds of affection”? The Constitution’s form of government not only allows spirited disagreement, but requires it. But the Constitution cannot withstand a citizenry whose debates are filled with contempt for one another. As Michael Gerson observes, “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.”³¹

The Constitution anticipates instead a citizenship whose “bonds of affection” cross regional, religious, racial, and ideological boundaries. For the Constitution to succeed, We, the People must unite to create a society based on shared values. We will disagree over the content of those values—What is equality? What is liberty?—but we must, in the words of the Declaration of Independence, “mutually pledge”³² to stay together even as we debate their meaning. We must carry out those arguments in the “spirit of amity and mutual deference.” Perhaps most important of all, we must compromise so that we can accommodate others for the sake of union. In my view, that is the most fundamental principle underlying the workings of the Constitution. Without that commitment, this Constitution—*our* Constitution—will fail.

²⁷ Abraham Lincoln, Second Inaugural Address (March 4, 1865).

²⁸ Akhil Reed Amar, *Abraham Lincoln and the American Union*, 2001 U. ILL. L. REV. 1109, 1132 (2001).

²⁹ Abraham Lincoln, Last Public Address (April 11, 1865).

³⁰ Amar, *supra* note 25.

³¹ Michael Gerson, Opinion, *A Primer on Political Reality*, WASH. POST (Feb. 19, 2010).

³² THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776).

Commenting on one such debate over the meaning of equality and liberty — today’s clash between needed antidiscrimination laws and cherished religious liberty — Martha Minow, the former dean of Harvard Law School, notes that compromise can be seen as departure from principle. For some, to compromise is to abandon rights and commitments. But as Dean Minow points out, compromise can also allow the type of accommodation that is indispensable in a diverse society. Where possible, Minow argues, both sides should seek convergence and compromise, where neither seeks total victory but rather finds ways to accommodate the legitimate concerns of the other.³³ To seek convergence and compromise for the sake of unity is, I believe, an expression of the civic charity needed to give life and meaning to our Constitution. Late in his life, Jefferson observed, “a government held together by the bands of reason requires much compromise of opinion” and that “a great deal of indulgence is necessary to strengthen the habits of harmony and fraternity.”³⁴ “Much compromise of opinion,” and “habits of harmony and fraternity” are expressions of the “spirit of amity [and] mutual deference” that created the Constitution. Washington thought it was “indispensable” in the summer of 1787. Surely it is “indispensable” today.

Professor Chua is optimistic that we can overcome the tribal politics that currently beset us.³⁵ I am sorry to say that I am not. Never before has a people tried to create a nation made up of so many differing tribes willing to put aside emblems of their identity in order to pursue a common good.³⁶ The task is daunting. Christian scripture speaks of a time when every nation, kindred, tongue, and people will be united, but that is in a vision of a distant future under very different and extraordinary circumstances.³⁷ Perhaps what we are trying to accomplish simply isn’t possible absent those circumstances. As Jonathan Haidt points out, “the human mind is prepared for tribalism.”³⁸ We are “deeply intuitive creatures whose gut feelings drive strategic

³³ Martha Minow, *Principles or Compromises: Accommodating Gender Equality and Religious Freedom*, in *GENDER, RELIGION, AND FAMILY LAW: THEORIZING CONFLICTS BETWEEN WOMEN’S RIGHTS AND CULTURAL TRADITIONS* 3, 12-15 (2013).

³⁴ Letter from Thomas Jefferson to Edward Livingston (Apr. 4, 1824), https://www.loc.gov/resource/mtj1.054_0441_0443/?st=gallery (last accessed Jul. 18, 2019).

³⁵ Ezra Klein Show, *Amy Chua on How Tribalism is Tearing America Apart* (Feb. 26, 2018), <https://www.stitcher.com/podcast/the-ezra-klein-show/e/53473176?autoplay=true>.

³⁶ *Id.*

³⁷ Revelation 7:9.

³⁸ Kelly, *supra* note 5.

reasoning.”³⁹ A multicultural democracy is not a natural condition for us. At best it is a fragile possibility.⁴⁰

Fragile, yes. Very fragile. And our political leaders, the stewards of our Constitution and its norms, our pundits, and our citizenry must keep that in mind. Always.

When he announced his candidacy for the presidency in 1968, Robert F. Kennedy announced: “I want the United States to stand for the reconciliation of men.”⁴¹ In his translation of the New Testament, William Tyndale used the word “reconciliation” to translate the Greek word “katallassō,” which means “a change from enmity to friendship”⁴² or “a means through which harmony is restored.”⁴³ But sometimes he used a newly created word to express the concept: “atonement” or “at-one-ment.”⁴⁴

With wisdom, Benjamin Franklin cautioned his fellow delegates to the Philadelphia Convention that it would take hard work to “keep” the Republic they had just created.⁴⁵ That hard work requires civic charity, now more than ever.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ ROBERT F. KENNEDY, PRESIDENTIAL CAMPAIGN BROCHURE (1968).

⁴² AN INTERMEDIATE GREEK-ENGLISH LEXICON: FOUNDED UPON THE SEVENTH EDITION OF LIDDELL AND SCOTT'S GREEK-ENGLISH LEXICON 410 (1889).

⁴³ WATSON E. MILLS, MERCER DICTIONARY OF THE BIBLE 75 (Roger Aubrey Bullard et al. eds., 1990).

⁴⁴ See W.R COOPER, THE NEW TESTAMENT: 1526 TYNDALE BIBLE, ORIGINAL SPELLING EDITION (David Daniell ed., 2000).

⁴⁵ James McHenry, *Papers on the Federal Convention of 1787*, 11 AM. HIST. REV. 491, 618 (1906).