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## THE DEGRADATION OF CIVIC CHARITY<sup>†</sup>

*Judge Thomas B. Griffith\**

The thesis of Professor Michael Klarman’s Foreword is that Republicans have declared war on democracy. President Trump governs according to an “authoritarian playbook,”<sup>1</sup> while elected Republicans — and Republicans alone — continue their decades-long “assault on democracy.”<sup>2</sup> Meanwhile, the Justices on the Supreme Court “defend[] the interests of the Republican Party,” not because of any principled legal reasoning, but because of their “personal values” and “political calculations.”<sup>3</sup> Republican voters appear in the story only as stereotypes — as a “disappearing white majority,”<sup>4</sup> a “disappearing Christian majority,”<sup>5</sup> and “Neo-Ayn Randians.”<sup>6</sup> These voters, Klarman seems to think, are trapped in a “right-wing media ecosystem,” uncritically accepting talking points from Fox News pundits.<sup>7</sup> Klarman’s solution to preserve democracy is straightforward. Democrats should win the Presidency and the Senate, then “entrench democracy”<sup>8</sup> against future Republican attacks with a series of bold moves: “ignore the constitutional provision mandating two senators for every state”;<sup>9</sup> “create[] new states to expand their advantage in the Senate and the Electoral College”;<sup>10</sup> replace the Electoral College with a direct popular vote;<sup>11</sup> and consider packing new seats on the Supreme Court and the lower federal courts with judges appointed by Democrats.<sup>12</sup> Needless to say, Klarman’s form of “constitutional hardball”<sup>13</sup> would radically reshape our political system.

During oral argument on the D.C. Circuit, my colleague Judy Rogers frequently begins her questions with the phrase, “Just to be clear.” That rhetorical device always caught my attention. It laid the foundation for

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<sup>†</sup> Responding to Michael J. Klarman, *The Supreme Court, 2019 Term — Foreword: The Degradation of American Democracy — And the Court*, 134 HARV. L. REV. 1 (2020).

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<sup>1</sup> Michael J. Klarman, *The Supreme Court, 2019 Term — Foreword: The Degradation of American Democracy — And the Court*, 134 HARV. L. REV. 1, 11 (2020).

<sup>2</sup> *Id.* at 45.

<sup>3</sup> *Id.* at 224.

<sup>4</sup> *Id.* at 107.

<sup>5</sup> *Id.* at 124.

<sup>6</sup> *Id.* at 135.

<sup>7</sup> *Id.* at 161; *see also id.* at 161–64.

<sup>8</sup> *Id.* at 231.

<sup>9</sup> *Id.* at 238; *see also id.* at 238–39.

<sup>10</sup> *Id.* at 238; *see also id.* at 237–38.

<sup>11</sup> *Id.* at 243.

<sup>12</sup> *Id.* at 239–41.

<sup>13</sup> *Id.* at 242; *see also* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004) (coining the term).

a meaningful discussion to follow. Borrowing from Judge Rogers, I begin in like fashion my response to Professor Klarman's diagnosis that American democracy is in a degraded state.

Just to be clear: I am no defender of the status quo. Indeed, as I have written elsewhere and include in almost all of my public remarks these days,<sup>14</sup> I believe that the Republic is in peril on a number of fronts, and I am by no means confident that we will meet Benjamin Franklin's oft-quoted challenge at the close of the Philadelphia Convention to "keep it."<sup>15</sup> But as I see it, the rot that infects our body politic comes less from the parade of Professor Klarman's horrors than from the contempt that 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. And that is unfortunate, for within Klarman's critiques are some proposals that merit serious consideration and debate, if for no other reason than that they are coming from one of the nation's most important legal scholars. But Professor Klarman undermines the force of his arguments by resorting to the very animus of which he accuses others — an animus that is both cause and symptom of the degradation he bemoans.

Now for my own warning: if the Constitution of the United States as we know it is to survive, then we must inculcate the virtue of civic charity.<sup>16</sup> We must seek to understand one another, to treat each other not as enemies but as friends, and to secure justice for all without demonizing and ostracizing those with whom we disagree. Professor Klarman's polemic lacks each of these essential virtues.

I share some of Klarman's concerns about the threats to democracy in our current political moment. For instance, I agree that the Supreme Court erred in *Shelby County v. Holder*<sup>17</sup> by striking down the coverage formula in the Voting Rights Act, which Congress first passed with overwhelming bipartisan support in 1965 to "rid the country of racial discrimination in voting,"<sup>18</sup> then subsequently reenacted on numerous occasions, each time with overwhelming bipartisan support.<sup>19</sup> As the late Justice Ginsburg wrote in her dissent: "When confronting the most

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<sup>14</sup> See, e.g., Thomas B. Griffith, *Civic Charity and the Constitution*, 43 HARV. J.L. & PUB. POL'Y 633 (2020).

<sup>15</sup> *Papers of Dr. James McHenry on the Federal Convention of 1787*, 11 AM. HIST. REV. 595, 618 (1906).

<sup>16</sup> The discussion that follows advances arguments similar to those I made in Griffith, *supra* note 14.

<sup>17</sup> 570 U.S. 529 (2013).

<sup>18</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

<sup>19</sup> *Shelby County*, 570 U.S. at 593 (Ginsburg, J., dissenting); see James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Reauthorization Act of 2006*, 33 J. LEGIS. 205, 206 & n.8 (2007).

constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress' power to act is at its height."<sup>20</sup> For that reason, I proudly joined the D.C. Circuit opinion that upheld the statute.<sup>21</sup> Reversal by the Supreme Court is never pleasant for a Circuit Judge, and when I joined Judge Tatel's opinion to create a majority on the panel, we both knew that was the likely outcome. The Court had signaled its skepticism with the coverage formula in *Northwest Austin Municipal Utility District No. One v. Holder*.<sup>22</sup> Even so, I could not bring myself to strike down the most significant piece of voting rights legislation in the nation's history, an Act that had been repeatedly extended after careful study by overwhelming majorities in Congress and with the backing of Democratic and Republican Presidents. I agree with Klarman that, in striking down that statute, the Court took a crabbed view of the power given to Congress in the Fifteenth Amendment and made it harder to carry out the unfinished work of ensuring that racial minorities are able to exercise the right that preserves all of our other rights: the right to vote.

Like Klarman, I also lament the increasing polarization of the political parties in recent years.<sup>23</sup> Even as late as the 1990s, when I worked as the nonpartisan Senate Legal Counsel, it was not uncommon for Senators to reach across the aisle and work together in good will to solve the nation's problems, even during the impeachment trial of President Clinton.<sup>24</sup> Compromise was considered a sign of success and not a mark of weakness. But today, as many have noted, "our nation is more polarized than it has been at any time since the Civil War."<sup>25</sup> An "outrage industrial complex" — comprising "divisive politicians, screaming heads on television, hateful columnists, angry campus activists," and others — encourages us to think "that the other side is made up of knaves and fools."<sup>26</sup>

Klarman is also right to call out the President's rhetorical attacks on the independent judiciary.<sup>27</sup> It is one thing for a pundit or commentator

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<sup>20</sup> *Shelby County*, 570 U.S. at 566 (Ginsburg, J., dissenting).

<sup>21</sup> *Shelby County v. Holder*, 679 F.3d 848 (D.C. Cir. 2012), *rev'd*, 570 U.S. 529 (2013).

<sup>22</sup> 557 U.S. 193 (2009); *see id.* at 203–05 (suggesting coverage formula raised "serious constitutional questions," *id.* at 204).

<sup>23</sup> *See* Klarman, *supra* note 1, at 161–64.

<sup>24</sup> *See* PETER BAKER, *THE BREACH: INSIDE THE IMPEACHMENT AND TRIAL OF WILLIAM JEFFERSON CLINTON* (2000).

<sup>25</sup> Arthur C. Brooks, Opinion, *Our Culture of Contempt*, N.Y. TIMES (Mar. 2, 2019), <https://nyti.ms/2Vw3onl> [<https://perma.cc/S55C-RFCP>]. *See generally* AMY CHUA, *POLITICAL TRIBES: GROUP INSTINCT AND THE FATE OF NATIONS* (2018); BEN SASSE, *THEM: WHY WE HATE EACH OTHER — AND HOW TO HEAL* (2018); Amy Chua & Jed Rubenfeld, *The Threat of Tribalism*, THE ATLANTIC (Oct. 2018), <https://www.theatlantic.com/magazine/archive/2018/10/the-threat-of-tribalism/568342/> [<https://perma.cc/7X5K-K3WF>].

<sup>26</sup> Brooks, *supra* note 25.

<sup>27</sup> Klarman, *supra* note 1, at 22–23.

to accuse a judge of violating his oath of office by being partial in his judgments. It is quite another thing to hear such an accusation from the nation's chief magistrate, the officer to whom the Constitution gives the authority to appoint judges. The Chief Justice's immediate and strong rebuke of the President was extraordinary but necessary.<sup>28</sup> Norms matter.

I cannot say that I am hopeful about the future of the Republic. As this Response goes to publication, Senate Republicans and Democrats have waged a pitched battle over Justice Ginsburg's replacement, in sharp contrast to the 96–3 confirmation vote that her nomination garnered.<sup>29</sup> Some Democrats are threatening to retaliate against the appointment of Justice Amy Coney Barrett by “packing” the Supreme Court and lower courts in a Biden Administration.<sup>30</sup> 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 civic charity.

## I.

Start with the Founding. Although at times in the summer of 1787 the Framers faced the prospect of failure, they eventually agreed upon the document that would become our Constitution. In a letter transmitting that draft to the Continental Congress, George Washington attributed

<sup>28</sup> I recently made this same point to the Senate Judiciary Committee in its hearings on the nomination of then–Judge Amy Coney Barrett to be appointed an Associate Justice on the Supreme Court:

Many political leaders . . . assume that a judge will cast her vote based on partisan preference. Such explanations, typically made for short-term political gain, 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. I agree with the Chief Justice. “We do not have Obama judges or Trump judges, Bush judges or Clinton judges,” he said. “What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.” Having served for fifteen years on the D.C. Circuit 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 correctly interpret the law. Justice Kagan made the same point at her confirmation hearing . . . “It’s law all the way down.”

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/8SGQ-66TY>].

<sup>29</sup> Linda Greenhouse, *Senate, 96-3, Easily Affirms Judge Ginsburg as a Justice*, N.Y. TIMES (Aug. 4, 1993), <https://nyti.ms/298RzRE> [<https://perma.cc/43YE-8U9J>].

<sup>30</sup> See, e.g., Charlie Savage, *G.O.P.-Appointed Judges Threaten Democracy, Liberals Seeking Court Expansion Say*, N.Y. TIMES (Oct. 16, 2020), <https://nyti.ms/3lUEo8c> [<https://perma.cc/BK6W-6CWF>].

the Framers' success to a "spirit of amity" and "mutual deference."<sup>31</sup> This "spirit of amity" was a commitment to civic friendship, even among political rivals from widely different geographical backgrounds. That commitment was both expressed in and cemented by the basic 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.<sup>32</sup> And the "mutual deference" to one another required them, sometimes, to make difficult compromises on contentious issues (for example, should the States in Congress be represented equally or on the basis of population?). In short, to inculcate civic friendship — a desire for the best for one's fellow countrymen — the Framers started with the basic building blocks of any relationship. They spent time together, they listened to one another, and they sometimes set aside their political differences for the sake of national unity.

The Constitution that they created presupposes that its citizenry will keep the same commitment to civic charity. The document's Preamble promises "to form a more perfect Union," to unite "We the People" around a shared commitment to secure the "Blessings of Liberty" and "domestic Tranquility."<sup>33</sup> But that ideal requires us to recommit ourselves to the same practice of civic friendship that crafted the document in the first place. At the very least, we need to approach our deliberations with civility. We must be willing to compromise, sometimes over critical matters, if we are to continue this experiment in representative government.<sup>34</sup> We must recognize that we might be wrong; our fellow citizens might be right about what the common good requires, and they

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<sup>31</sup> See Griffith, *supra* note 14, at 635 (quoting Derek A. Webb, *The Original Meaning of Civility: Democratic Deliberation at the Philadelphia Constitutional Convention*, 64 S.C. L. REV. 183, 197 (2012)).

<sup>32</sup> See *id.* at 636.

<sup>33</sup> U.S. CONST. pmb. For a persuasive argument that the Preamble gave force to the Constitution that has been long neglected, see John W. Welch & James A. Heilpern, *Recovering Our Forgotten Preamble*, 91 S. CAL. L. REV. 1021 (2018).

<sup>34</sup> For a discussion, see Griffith, *supra* note 14, at 642 (citing Martha Minow, *Principles or Compromises: Accommodating Gender Equality and Religious Freedom in Multicultural Societies*, in GENDER, RELIGION & FAMILY LAW: THEORIZING CONFLICTS BETWEEN WOMEN'S RIGHTS AND CULTURAL TRADITIONS 3, 12–15 (Lisa Fishbayn Joffe & Sylvia Neil eds., 2013)):

Professor Martha Minow . . . notes that compromise can be seen as a departure from principle. For some, to compromise is to abandon rights and commitments. But as Professor Minow points out, compromise can also allow the type of accommodation that is indispensable in a diverse society. Where possible, Professor Minow argues, both sides should seek convergence and compromise. Instead of striving for total victory, each side should search for ways to accommodate the legitimate concerns of the other. To seek convergence and compromise for the sake of unity is an expression of the civic charity needed to breathe life into the Constitution.

might even change our minds. The canonical expression of this temperament is Judge Learned Hand's speech *The Spirit of Liberty*, given in 1944: "The spirit of liberty is the spirit which is not too sure that it is right . . . which seeks to understand the minds of other men and women."<sup>35</sup> And most of all, we need to see one another as friends — partners in a shared pursuit of the common good — rather than enemies.<sup>36</sup>

This last point, that we must make the choice to see each other as friends and not enemies, is the teaching of some of our greatest American heroes. 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."<sup>37</sup> That idea surfaces again and again in key passages from American scripture. For instance, between Abraham Lincoln's election and inauguration, several southern States voted to secede from the Union and established the Confederate States of America. Yet despite this dire threat to the Union, President Lincoln's First Inaugural Address drew upon the wellspring of civic charity. In the most articulate and now iconic expression of the power of civic charity, the nation's greatest President confronting our moment of greatest peril declared: "We are not enemies, but friends. We must not be enemies."<sup>38</sup> He then pleaded at the close of his speech:

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.<sup>39</sup>

Remarkably, even four years into the bloody civil war, President Lincoln still sought reconciliation and not revenge. After vowing in his Second Inaugural to continue the war for union "until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword," he again expressed the paramount need for reconciliation:

With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the

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<sup>35</sup> Learned Hand, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 189, 190* (Irving Dillard ed., 3d ed. 1960).

<sup>36</sup> See Brooks, *supra* note 25.

<sup>37</sup> Michael Gerson, Opinion, *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/HL5U-LY2R>].

<sup>38</sup> Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in *THE AVALON PROJECT*, [https://avalon.law.yale.edu/19th\\_century/lincoln1.asp](https://avalon.law.yale.edu/19th_century/lincoln1.asp) [<https://perma.cc/YZ4V-B7BS>].

<sup>39</sup> *Id.*

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>40</sup>

President Lincoln's greatness, of course, is unparalleled, and it would be vain to think that we could match his magnanimity in the face of such a crisis. But if President Lincoln could plead for union with insurrectionists who would rather make war than stop "wringing their bread from the sweat of other men's faces,"<sup>41</sup> then surely partisans today can seek to preserve this Nation's unity despite their substantial policy differences.

Martin Luther King, Jr., too, drew upon the concept of civic charity. Even as he called out injustice in his *I Have a Dream* speech, he warned his followers "not [to] seek to satisfy [their] thirst for freedom by drinking from the cup of bitterness and hatred."<sup>42</sup> His plea for a "positive peace that is the presence of justice"<sup>43</sup> omitted calls for retaliation or revenge against oppressors. And so the final lines of that famous speech are a call to unity:

When we let freedom ring, when we let it ring from every village and every hamlet, from every state and every city, we will be able to speed up that day when all of God's children, black men and white men, Jews and Gentiles, Protestants and Catholics, will be able to join hands and sing in the words of the old Negro spiritual, "Free at last! Free at last! Thank God Almighty, we are free at last!"<sup>44</sup>

In 1968, a year that more than a few have observed resembles our own time of rancor and division, Robert F. Kennedy announced his candidacy for the presidency by invoking the theme of civic charity. In words that seem a foreign language to the politics of our moment, he declared, "I run for the presidency" so the "United States of America [might] stand for . . . [the] reconciliation of men."<sup>45</sup> Only weeks later, Kennedy mounted a flatbed truck in a Black neighborhood in Indianapolis to deliver the soul-shattering news that Dr. King had been killed by an assassin's bullet.<sup>46</sup> In extemporaneous remarks some have called one of the greatest speeches in American political history,<sup>47</sup> Kennedy once again drew upon the power of civic charity at a tragic moment created by hatred and violence that could have justified anger and retribution:

<sup>40</sup> Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in THE AVALON PROJECT, [https://avalon.law.yale.edu/19th\\_century/lincoln2.asp](https://avalon.law.yale.edu/19th_century/lincoln2.asp) [https://perma.cc/L9VY-449R].

<sup>41</sup> *Id.*

<sup>42</sup> Martin Luther King, Jr., I Have a Dream (Aug. 28, 1963), in THE AVALON PROJECT, [https://avalon.law.yale.edu/20th\\_century/mlk01.asp](https://avalon.law.yale.edu/20th_century/mlk01.asp) [https://perma.cc/H25L-P825].

<sup>43</sup> MARTIN LUTHER KING, JR., *Letter from Birmingham Jail* (Apr. 16, 1963), in WHY WE CAN'T WAIT 77, 84 (1964).

<sup>44</sup> King, *supra* note 42.

<sup>45</sup> David S. Broder, *Senator Enters Presidency Race*, WASH. POST, Mar. 17, 1968, at A1.

<sup>46</sup> See Liam Stack, *When Robert F. Kennedy Told an Indianapolis Crowd of King's Assassination*, N.Y. TIMES (Apr. 4, 2018), <https://nyti.ms/2GxbkC3> [https://perma.cc/MJZ7-5D4Y].

<sup>47</sup> *Id.*

In this difficult day, in this difficult time for the United States, it is perhaps well to ask what kind of a nation we are and what direction we want to move in. For those of you who are Black . . . you can be filled with bitterness, with hatred, and a desire for revenge. We can move in that direction as a country, in great polarization — Black people amongst Black, White people amongst White, filled with hatred toward one another. Or we can make an effort, as Martin Luther King did, to understand and to comprehend, and to replace that violence, that stain of bloodshed that has been spread across our land, with an effort to understand with compassion and love . . . . What we need in the United States is not division . . . , but love and wisdom, and compassion toward one another . . . . So I shall ask you tonight to return home, to say a prayer for the family of Martin Luther King . . . , but more importantly to say a prayer for our own country, which all of us love . . . .<sup>48</sup>

That's the sort of high-minded idealism that has sustained the United States in the past, and is, I believe, critical to establishing a "more perfect Union." We need to rededicate ourselves to the virtue of civic charity and to commit ourselves to the principle that we are not enemies, but friends. Without that commitment, we invite an endless cycle of tit-for-tat political retribution, a race to the bottom that could make this "government of the people, by the people, for the people . . . perish from the earth."<sup>49</sup>

Some push back on calls for civility in American public life, arguing that they are nothing more than yet another device to resist needed change, a strategy by the powerful to keep those on the margins in their place.<sup>50</sup> I disagree. Democracy assumes reasoned discourse among the citizenry, and such discourse requires a sympathetic understanding of another's perspective. Our national charter commits us to the pursuit of "liberty and justice for all," and we must argue over the content of those values. But what of those among us who don't share those values? Are they outside the orbit of civic charity? The examples of Lincoln, King, and Kennedy say no. And if abstract moral reasoning will not make that case sufficiently, prudence will. Contempt is a barrier to persuasion.<sup>51</sup>

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<sup>48</sup> Robert F. Kennedy, Statement on Assassination of Martin Luther King, Jr. (Apr. 4, 1968), in JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, <https://www.jfklibrary.org/learn/about-jfk/the-kennedy-family/robert-f-kennedy/robert-f-kennedy-speeches/statement-on-assassination-of-martin-luther-king-jr-indianapolis-indiana-april-4-1968> [<https://perma.cc/3WBL-WKUN>].

<sup>49</sup> Abraham Lincoln, Gettysburg Address (Nov. 19, 1963), in THE AVALON PROJECT, [https://avalon.law.yale.edu/19th\\_century/gettyb.asp](https://avalon.law.yale.edu/19th_century/gettyb.asp) [<https://perma.cc/47K7-XRWL>].

<sup>50</sup> See, e.g., Michael Hiltzik, *Free Speech, "Civility," and How Universities Are Getting Them Mixed Up*, L.A. TIMES (Sept. 9, 2014, 1:55 PM), <https://www.latimes.com/business/hiltzik/la-fi-mh-free-speech-civility-20140909-column.html> [<https://perma.cc/3LK8-LJUB>].

<sup>51</sup> See generally MICHAEL AUSTIN, WE MUST NOT BE ENEMIES: RESTORING AMERICA'S CIVIC TRADITION (2019); Michael Austin, *When Persuasion Becomes Impossible, Violence Becomes Inevitable: Tocqueville's Culture of Persuasion and the Future of Democracy*, MEDIUM (Aug. 31, 2020), <https://medium.com/discourse/when-persuasion-becomes-impossible-violence-becomes-inevitable-tocquevilles-culture-of-c8f93359963> [<https://perma.cc/6DKB-T4U7>].



The importance of civic charity to American democracy should be another area where Professor Klarman and I can agree. Indeed, he championed the idea in the pages of the *Harvard Law Review* almost a decade ago, invoking the example of the late Bill Stuntz, Professor Klarman's colleague and my law school friend and mentor:

[T]he most important lesson I learned from Bill Stuntz . . . is that people who do not see eye to eye politically can still respect, admire, and cherish one another. In our increasingly polarized culture, people of all political stripes are too quick to vilify those with whom they disagree. . . . Through his example, [Professor Stuntz] taught . . . that one should try to understand and empathize with those with whom one disagrees, rather than to demonize them.<sup>52</sup>

As Professor Stuntz knew, a healthy deliberative democracy depends to a large degree on accepting the premise that one's mainstream political opponents are not evil. They are fellow citizens who hold their views in good faith and deserve respect as members of a common political community. That is true even — or perhaps especially — when they disagree about matters of fundamental importance. The entire enterprise of reasoned debate becomes a fool's errand when the mutual presumption of good faith is abandoned: if the other side consists of villains and demons, then there is no reason to persuade them, much less to listen and see if they can persuade you. Political arguments become nothing more than an instrument of political power, and the only sensible objective is to crush the other side.

At times, Professor Klarman's Foreword recognizes the dangers of "extreme political polarization and negative partisanship."<sup>53</sup> He rightly observes that "extreme ideological polarization can also produce personal polarization as congressional representatives whose ideologies are so different from one another's may choose to spend less time together socially, leaving fewer opportunities to lay the groundwork for partnership and compromise in the legislative process."<sup>54</sup> And he presciently warns that, "[w]hen political opponents are perceived as an enemy, dangerous and unscrupulous, people will do just about anything to win, even if it means breaking rules and possibly destroying the entire system."<sup>55</sup> "Democracy," he cautions, "may not be able to survive under such conditions."<sup>56</sup>

Unfortunately, Professor Klarman's Foreword violates the very norms he warns are under attack. Instead of treating political conserva-

<sup>52</sup> Michael J. Klarman, *In Memoriam: William J. Stuntz*, 124 HARV. L. REV. 1844, 1846 (2011).

<sup>53</sup> Klarman, *supra* note 1, at 71.

<sup>54</sup> *Id.* at 155.

<sup>55</sup> *Id.* at 173.

<sup>56</sup> *Id.* at 89.

tives as fellow citizens who have good-faith disagreements about matters of principle, Professor Klarman attacks them as evil autocrats and racists. Invoking “the spirit of . . . resistance,” he “reject[s] the assumption[] that all stories have two sides and all political actors are basically the same.”<sup>57</sup> The real problem with American democracy, we are told, is Republicans — a bunch of “hirelings,”<sup>58</sup> liars,<sup>59</sup> and racists<sup>60</sup> who have “sold [their] soul[s] for political power.”<sup>61</sup> They are filled with “racial and religious resentment, homophobia, sexism, neo-Ayn Randism, climate change denialism, and hostility to democracy.”<sup>62</sup> Because their arguments are not held in good faith, Republicans are not worth taking seriously. I gave up my partisan affiliation when I became a judge, but I was once a Republican and take umbrage at this cartoonish caricature of the party of Lincoln, Eisenhower, Reagan, and Jack Kemp.

And because Professor Klarman believes that Republicans have violated fundamental norms of political behavior, he calls upon Democrats to fight back by throwing more norms onto the bonfire. They should “abolish the filibuster,”<sup>63</sup> “pack” the Supreme Court,<sup>64</sup> scrap the Electoral College as “outmoded,”<sup>65</sup> and “create additional states” that will reliably elect Democratic Senators<sup>66</sup> — or perhaps “simply . . . ignore the constitutional provision mandating two senators for every state as a particularly egregious example of dead-hand control.”<sup>67</sup>

## II.

Professor Klarman’s attack against 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”

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<sup>57</sup> *Id.* at 11.

<sup>58</sup> *Id.* at 96.

<sup>59</sup> *See, e.g., id.* at 161 (referring to Republicans as “the party with a more tenuous commitment to facts and truth”); *id.* at 185 (accusing Republicans of “a decade’s worth of lies perpetuating the myth of voter impersonation fraud”).

<sup>60</sup> *See, e.g., id.* at 5 (“Texas Republicans apparently did not receive Chief Justice Roberts’s memo announcing how much ‘our country has changed’ [since 1965].”); *id.* at 66 (suggesting that Republicans have engaged in “the most comprehensive assault on democratic governance since Jim Crow rule ended in the American South”); *id.* at 237–38 (asserting that racism partially explains why Puerto Rico and the District of Columbia are not states); *id.* at 259 (“President Trump probably would not be President today were it not for the increase in racial resentment ignited by the nation’s first African American President.”).

<sup>61</sup> *Id.* at 84.

<sup>62</sup> *Id.* at 261.

<sup>63</sup> *Id.* at 236, 238.

<sup>64</sup> *Id.* at 247; *see also id.* at 246–48.

<sup>65</sup> *Id.* at 240.

<sup>66</sup> *Id.* at 237.

<sup>67</sup> *Id.* at 238.

on controversial issues.<sup>68</sup> The evidence supports his thesis either way: When the Justices rule against a “progressive” outcome, they are “conjur[ing]” arguments and “concoct[ing] obstacles” to legitimate reforms.<sup>69</sup> But when the Chief Justice votes “against [his] ideological conviction” by “hand[ing] the liberals . . . important victories,” then “the smart money is betting that his concern for the Court’s legitimacy and his own historical reputation [are] the determinative factors.”<sup>70</sup> In discounting the possibility of an impartial judiciary, Professor Klarman thus embraces the unlikeliest of allies: “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?”<sup>71</sup>

As it happens, I do think differently.<sup>72</sup> 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. Contrary to Professor Klarman’s argument, the judges that I have known and with whom I have worked closely are deeply committed to applying the law and not imposing their political preferences. I am not troubled by the fact that some judges read the *Wall Street Journal* instead of the *New York Times*.<sup>73</sup> Most I know read both. Nor do I think it helpful to refer to “Republican Justices,” a phrase Professor Klarman uses over a dozen times.<sup>74</sup> The historical fact of an appointment by a Republican President hardly seemed to matter to the Justices who wrote *Bostock v. Clayton County*,<sup>75</sup> *Obergefell v. Hodges*,<sup>76</sup> *NFIB v. Sebelius*,<sup>77</sup> *Hamdan v. Rumsfeld*,<sup>78</sup> *Roper v. Simmons*,<sup>79</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>80</sup> and *Roe*.<sup>81</sup> Nor can such decisions be written off as cynical attempts to affect the public’s perception of the Court or of the authoring Justices.

It is no doubt cathartic to impugn the motives and the character of politicians and judges who have different political or philosophical commitments, especially during an election year in which Professor

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<sup>68</sup> *Id.* at 230.

<sup>69</sup> *Id.* at 245, 230.

<sup>70</sup> *Id.* at 253.

<sup>71</sup> *Id.* at 230 (footnote omitted).

<sup>72</sup> See, e.g., *In re Flynn*, 973 F.3d 74, 85 (D.C. Cir. 2020) (en banc) (Griffith, J., concurring).

<sup>73</sup> See Klarman, *supra* note 1, at 230.

<sup>74</sup> See, e.g., *id.* at 178, 188, 211.

<sup>75</sup> 140 S. Ct. 1731 (2020) (Gorsuch, J., for the judgment of the Court).

<sup>76</sup> 135 S. Ct. 2584 (2015) (Kennedy, J., for the judgment of the Court).

<sup>77</sup> 567 U.S. 519 (2012) (Roberts, C.J., for the judgment of the Court).

<sup>78</sup> 548 U.S. 557 (2006) (Stevens, J., for the judgment of the Court).

<sup>79</sup> 543 U.S. 551 (2005) (Kennedy, J., for the judgment of the Court).

<sup>80</sup> 505 U.S. 833 (1992) (O’Connor, Kennedy & Souter, JJ., for the judgment of the Court).

<sup>81</sup> 410 U.S. 113 (1973) (Blackmun, J., for the judgment of the Court).

Klarman's rooting interests are clear.<sup>82</sup> But if political polarization and negative partisanship are the disease, there is no cure to be found in Professor Klarman's prescriptions.

In one of my last opinions on the bench, I warned against the dangers of reflexively imputing political positions to judges based on the party of the President who appointed them. 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.<sup>83</sup> I joined the majority but wrote separately to emphasize that, despite the media's hyperbolic coverage, the actual issue before the court was narrow and apolitical. 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. 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?<sup>84</sup> We declined to do so.<sup>85</sup>

I wrote to rebut the view that this decision was motivated by partisan impulses. As I explained:

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.<sup>86</sup>

That statement 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 on a collegial court.<sup>87</sup> The view that judges are little more than politicians in disguise is hardly new, but it seems to have taken a stronger hold over portions of the media and the legal academy in recent

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<sup>82</sup> See, e.g., Klarman, *supra* note 1, at 231 ("The best way to defend democracy from Republican assaults and President Trump's authoritarian bent is to defeat President Trump's reelection bid, elect Democratic majorities, and then seek to entrench democracy.")

<sup>83</sup> *In re Flynn*, 973 F.3d 74, 77 (D.C. Cir. 2020) (en banc) (per curiam).

<sup>84</sup> *Id.* at 77–78.

<sup>85</sup> *Id.* at 78.

<sup>86</sup> *Id.* at 85 (Griffith, J., concurring).

<sup>87</sup> See, e.g., Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1902 (2009); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1652–62 (2003).

years.<sup>88</sup> Yet most Americans share my view. A recent survey found that nearly two-thirds of Americans believe that Supreme Court Justices base their decisions primarily on the law, not on politics.<sup>89</sup>

Why? Perhaps because the judiciary seems to be the constitutional institution that engages in reasoned discourse most often and most persuasively, it is a model that Professor Klarman should embrace and not excoriate. Witness how the Justices aligned themselves in some of the most politically divisive cases in the most recent Term. Though one Term will not sway skeptics who are already convinced that the Court is a thoroughly political actor, October Term 2019 demonstrates the Court's ongoing commitment to civility, compromise, and principled decisionmaking. For all the "traditional" 5–4 decisions, the Justices resolved many high-profile cases with 6–3 or 7–2 majorities, frequently crossing ideological lines. 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 civic charity.

Start with one of the most explicitly "political" cases of the Term: *Trump v. Mazars USA, LLP*.<sup>90</sup> *Mazars* pitted a Republican President against a Democratic House of Representatives in a dispute over President Trump's personal financial records. Yet the Court did not split along "political" lines. Far from it. Seven Justices — Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, Kagan, Gorsuch, and Kavanaugh — signed on to a single opinion. Neither the President nor the House prevailed in full. The Court rejected the President's proposed standard for assessing a congressional subpoena as too "demanding" for a case in which the President did not assert executive privilege.<sup>91</sup>

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<sup>88</sup> See, e.g., Richard L. Hasen, *The Supreme Court's Pro-partisanship Turn*, 109 GEO. L.J. ONLINE 50, 50 (2020); Alex Pareene, *Supreme Court Justices Are Politicians, Too*, NEW REPUBLIC: THE SOAPBOX (Oct. 14, 2020), <https://newrepublic.com/article/159744/amy-coney-barrett-conservative-judges-politicians> [<https://perma.cc/7VN4-L9WR>].

<sup>89</sup> CHARLES H. FRANKLIN, MARQ. UNIV. L. SCH., PUBLIC VIEWS OF THE SUPREME COURT 12–13 (2019), <https://law.marquette.edu/poll/wp-content/uploads/2019/10/MULawPollSupremeCourtReportOct2019.pdf> [<https://perma.cc/JBY7-DN57>].

<sup>90</sup> 140 S. Ct. 2019 (2020). The Court itself recognized the political nature of the dispute, explaining that "disputes over congressional demands for presidential documents" had historically been "hashed out in the hurly-burly, the give-and-take of the political process." *Id.* at 2029 (quoting *Executive Privilege — Secrecy in Government: Hearings on S. 2170, S. 2378, and S. 2420 Before the Subcomm. on Intergovernmental Rels. of the S. Comm. on Gov't Operations*, 94th Cong. 87 (1975) (statement of Antonin Scalia, Assistant Att'y Gen., Office of Legal Counsel)) (internal quotation marks omitted).

<sup>91</sup> *Id.* at 2032.

At the same time, the Court rejected the House's efforts to treat this case like any other subpoena dispute, explaining that this view ignored the "significant" separation-of-powers concerns at stake in a case involving the President's personal records.<sup>92</sup> Ultimately, the Court struck a middle ground between the parties' proposals, laying out several factors for the courts of appeals to consider on remand. For a case that could have had a significant effect on the 2020 election, the Court's near-unanimity belies Klarman's thesis that the Justices simply vote to advance their respective parties.

The companion case of *Trump v. Vance*,<sup>93</sup> which concerned a criminal subpoena issued by the New York County District Attorney's Office seeking many of the same records, reinforces this point. Although the case produced three opinions, the Justices reached unanimous agreement on two core principles. As Justice Kavanaugh explained: "The Court unanimously conclude[d] that a President does not possess absolute immunity from a state criminal subpoena, but also unanimously agree[d] that [the] case should be remanded to the District Court, where the President [could] raise constitutional and legal objections to the subpoena as appropriate."<sup>94</sup>

*Mazars* and *Vance* demonstrate the Justices' willingness to vote against the President who appointed them when the law demands it. Justices Gorsuch and Kavanaugh each owed their seats on the Court to President Trump. Nevertheless, they each voted against his claims of absolute immunity and a "demanding" standard for review of congressional subpoenas. The "liberal" Justices too voted against the immediate political interests of the Democratic Party. As commentators recognized, the timing of the remand in *Mazars* meant that the Democratic House and the public were unlikely to see the President's financial records prior to the 2020 election.<sup>95</sup>

*Bostock v. Clayton County*<sup>96</sup> represents another decision from this past Term in which the Justices appointed by Republican presidents demonstrated a willingness to vote against their assumed political views. *Bostock* presented the question of whether Title VII, which prohibits discrimination "on the basis of sex," protected employees from discrimination on the basis of sexual orientation or gender identity.<sup>97</sup> Six Justices — the Chief Justice and Justices Ginsburg, Breyer, Sotomayor,

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<sup>92</sup> *Id.* at 2033.

<sup>93</sup> 140 S. Ct. 2412 (2020).

<sup>94</sup> *Id.* at 2431 (Kavanaugh, J., concurring in the judgment).

<sup>95</sup> See, e.g., Josh Chafetz, Opinion, *Don't Be Fooled, Trump Is a Winner in the Supreme Court Tax Case*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/opinion/trump-taxes-supreme-court.html> [<https://perma.cc/4HYQ-KPP9>].

<sup>96</sup> 140 S. Ct. 1731 (2020).

<sup>97</sup> *Id.* at 1731, 1738.

Kagan, and Gorsuch — concluded that it did.<sup>98</sup> Justice Gorsuch wrote the opinion for the majority, finding that the ordinary public meaning of Title VII compelled that result.<sup>99</sup> The principal debate between the majority and dissent was not one of politics but of methodology — how should the statutory term “sex” be interpreted?<sup>100</sup> The majority argued that discrimination on the basis of sexual orientation was discrimination on the basis of “sex” under the statute’s plain meaning, because it involved treating a man attracted to men differently than a woman attracted to men.<sup>101</sup> The dissent disagreed, arguing that “sex” and “sexual orientation” were different concepts<sup>102</sup> and that the Congress that enacted Title VII would not have understood it to cover discrimination on the basis of sexual orientation or gender identity.<sup>103</sup> Such debates over interpretive methodology are common among the Justices, and as *Bostock* demonstrates, those debates do not map cleanly on to the party of the Presidents that appointed the Justices.

*Bostock* also demonstrates the Justices’ willingness to decide cases more narrowly to maintain consensus. Just as the *Mazars* majority left the application of its multifactor test to the lower courts in the first instance, the *Bostock* majority left to another day some of the case’s more contentious questions, including Title VII’s application to “sex-segregated bathrooms, locker rooms, and dress codes.”<sup>104</sup> By doing so, the Justices were able to focus on the case at hand and leave more divisive issues to future suits.

*Ramos v. Louisiana*<sup>105</sup> provides a final case study from this last Term. That case concerned the question of whether the Sixth Amendment right to a jury trial, incorporated against the States through the Fourteenth Amendment, required unanimous jury verdicts in state prosecutions.<sup>106</sup> *Ramos* is particularly telling in that it featured cross-ideological coalitions in both the majority and the dissent. Six Justices — Justices Thomas, Ginsburg, Breyer, Sotomayor, Gorsuch, and Kavanaugh — held that the Sixth Amendment did require unanimity.<sup>107</sup> To reach that result, the Justices had to contend with two prior cases — *Apodaca v. Oregon*<sup>108</sup> and *Johnson v. Louisiana*<sup>109</sup> — which together held that the

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<sup>98</sup> *Id.* at 1736.

<sup>99</sup> *See id.* at 1738, 1741.

<sup>100</sup> *See id.* at 1739.

<sup>101</sup> *Id.* at 1741.

<sup>102</sup> *Id.* at 1758 (Alito, J., dissenting).

<sup>103</sup> *Id.* at 1774.

<sup>104</sup> *Id.* at 1753 (majority opinion).

<sup>105</sup> 140 S. Ct. 1390 (2020).

<sup>106</sup> *See id.* at 1390.

<sup>107</sup> *See id.* at 1390, 1397.

<sup>108</sup> 406 U.S. 404 (1972).

<sup>109</sup> 406 U.S. 356 (1972).

Sixth Amendment did not require unanimous verdicts at the state level but did at the federal level.<sup>110</sup> The remaining three Justices — the Chief Justice and Justices Alito and Kagan — would have adhered to that precedent rather than revisiting and revising it.<sup>111</sup>

As with the prior cases, *Ramos* reveals the Justices grappling with a fundamentally legal question: When does the doctrine of stare decisis demand adherence to precedent? The majority pointed out that *Apodaca* and *Johnson* were badly fractured decisions.<sup>112</sup> Four Justices on the *Apodaca* Court would have held that the Sixth Amendment requires unanimity in both federal and state prosecutions; four would have held the opposite.<sup>113</sup> The last — Justice Powell — thought that the Sixth Amendment required unanimity at the federal level but not the state level, based on his theory of how the Fourteenth Amendment incorporated the Bill of Rights against the states.<sup>114</sup> In the *Ramos* majority's view, these cases produced splintered opinions, resulting in poorly reasoned precedent that was inconsistent with the Court's later case law.<sup>115</sup> But the dissent thought that this precedent should not be so quickly cast aside, especially in light of the States' reliance interests in that precedent and their potential need to retry numerous criminal defendants who had been convicted by nonunanimous juries.<sup>116</sup> The debate over stare decisis was so significant that several Justices in the majority wrote separately to further explain their positions.<sup>117</sup> This level of concern with precedent cannot be squared with Professor Klarman's assertions that the Justices do not feel bound by the Court's prior case law.<sup>118</sup>

I call attention to *Ramos* not only for its interesting lineup and discussion of stare decisis but also because it provides a rare window into the Court's approach to civil discourse. For a decision that was outwardly one of the Term's less controversial major cases, *Ramos* provoked some of the Term's most heated rhetoric.<sup>119</sup> Part of the majority's

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<sup>110</sup> See *Ramos*, 140 S. Ct. at 1397–98 (describing the holdings and vote breakdowns in *Apodaca* and *Johnson*).

<sup>111</sup> See *id.* at 1425 (Alito, J., dissenting).

<sup>112</sup> See *id.* at 1397–98 (majority opinion).

<sup>113</sup> *Id.* at 1397–98; see also *Apodaca*, 406 U.S. at 410; *id.* at 414–15 (Stewart, J., dissenting); *Johnson*, 406 U.S. at 382–83, 391–93 (Douglas, J., dissenting).

<sup>114</sup> *Ramos*, 140 S. Ct. at 1398; see also *Johnson*, 406 U.S. at 371 (Powell, J., concurring).

<sup>115</sup> See *Ramos*, 140 S. Ct. at 1399.

<sup>116</sup> See *id.* at 1432, 1438 (Alito, J., dissenting).

<sup>117</sup> See *id.* at 1408 (Sotomayor, J., concurring in part); *id.* at 1410 (Kavanaugh, J., concurring in part); *id.* at 1420–21 (Thomas, J., concurring in the judgment).

<sup>118</sup> Klarman, *supra* note 1, at 226–27.

<sup>119</sup> See, e.g., Mark Joseph Stern, *Everyone Is Mad at Elena Kagan*, SLATE (Apr. 22, 2020, 2:46 PM), <https://slate.com/news-and-politics/2020/04/elena-kagan-supreme-court-conservatives-precident.html> [https://perma.cc/3E3N-3SL4] (noting that the dissent “accused the majority of ‘contributing to the worst current trends’ by favoring ‘*ad hominem* rhetoric’ over ‘rational and civil discourse’” (internal citations omitted)).



rationale for rejecting Louisiana's and Oregon's laws permitting non-unanimous jury verdicts was the laws' "racist origins."<sup>120</sup> As Justice Gorsuch explained, the laws "sought to undermine African-American participation on juries" by diluting it and rendering it "meaningless."<sup>121</sup> The dissenting Justices took issue with the majority's reasoning, noting that Louisiana and Oregon had recently reenacted their laws, which were supported by nondiscriminatory reasons like increasing judicial efficiency and minimizing the risk of hung juries.<sup>122</sup> More interestingly for our purposes, Justice Alito also took issue with the "rhetoric with which the majority [saw] fit to begin its opinion."<sup>123</sup> Reasonable people of good will can disagree about the extent to which a reenacted law's discriminatory origins should affect its constitutionality. My point is not to come down on either side of that debate. But I think there is much truth in Justice Alito's broader statement, joined by the Chief Justice and Justice Kagan, that "[t]oo much public discourse today is sullied by ad hominem rhetoric . . . [The Court] should set an example of rational and civil discourse instead of contributing to the worst current trends."<sup>124</sup>

Most of the time, setting an example of rational and civil discourse is exactly what the Court does. For this, we should give the Justices credit. *Mazars*, *Vance*, *Bostock*, and *Ramos* provide a few case studies, but they are far from the only politically salient cases decided last Term that support my thesis. Indeed, the Court saw a number of cross-ideological coalitions in cases involving issues as contentious as religion, criminal justice, and reproductive healthcare. In *Our Lady of Guadalupe School v. Morrissey-Berru*,<sup>125</sup> for example, the Court voted 7–2 to apply the ministerial exception to school teachers.<sup>126</sup> And in *Kahler v. Kansas*,<sup>127</sup> the Court voted 6–3 to uphold Kansas's insanity test against a Due Process Clause objection.<sup>128</sup> Finally, in *Little Sisters of the Poor v. Pennsylvania*,<sup>129</sup> seven Justices voted to uphold the Health Resources and Services Administration's authority to exempt religious employers from the Affordable Care Act's contraceptive-coverage mandate.<sup>130</sup> Contrary to Klarman's suggestions, October Term 2019 does not reveal

<sup>120</sup> *Ramos*, 140 S. Ct. at 1417–19 (Kavanaugh, J., concurring); see also *id.* at 1394 (majority opinion).

<sup>121</sup> *Id.* at 1394.

<sup>122</sup> *Id.* at 1426 (Alito, J., dissenting).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> 140 S. Ct. 2049 (2020).

<sup>126</sup> See *id.* at 2055.

<sup>127</sup> 140 S. Ct. 1021 (2020).

<sup>128</sup> See *id.* at 1024–25.

<sup>129</sup> 140 S. Ct. 2367 (2020).

<sup>130</sup> See *id.* at 2373.

a fractured court rife with partisan battles.<sup>131</sup> Instead, it reveals a Court of nine smart, conscientious, and civil jurists who are working hard to get to the best view of the law.

Of course, federal judges and even Supreme Court Justices may not always live up to this ideal. But the fallibility of human nature is no reason to give up on the norms of civility, compromise, and reasoned decisionmaking. To accept that judges are — or should be — little more than “junior-varsity politicians”<sup>132</sup> is to invite increasing polarization and endlessly escalating fights over judicial nominations. Everyone is better off when judges understand that their duty is “to say what the law is,”<sup>133</sup> not what they think it ought to be.

### III.

Though the Supreme Court’s practice of reasoned discourse shows that it is far outpacing the political branches in modeling democratic values,<sup>134</sup> that does not mean that the Court couldn’t do a better job furthering those values. Despite Professor Klarman’s suggestion, that work shouldn’t be done by political operatives aiming to pack the Court for partisan gain,<sup>135</sup> to the contrary, it ought to be done by the Court itself. And in my view, it could be done if the Court further committed itself to the principles of “judicial minimalism” that it has long proclaimed.<sup>136</sup>

As Professor Cass Sunstein has noted, “the democratic argument for minimalism invokes the need for prudence, social adaptation over time, and humility in the face of limited judicial capacities and competence.”<sup>137</sup> Minimalism operates as a “cardinal principle of judicial restraint,” reminding judges that “if it is not necessary to decide more, it is necessary not to decide more.”<sup>138</sup> Adopting minimalism as a jurist means recognizing that judges are not legislators or policymakers and are limited by the facts of the particular disputes brought before them.<sup>139</sup> By tailoring decisions to those issues, judges “grant[] a certain latitude

<sup>131</sup> See Klarman, *supra* note 1, at 178–79.

<sup>132</sup> Lincoln Caplan, *A Workable Democracy*, HARV. MAG., Mar.–Apr. 2017, at 49, 49, <https://harvardmagazine.com/sites/default/files/pdf/2017/03-pdfs/0317-48.pdf> [<https://perma.cc/K472-6EQ2>] (quoting Justice Breyer).

<sup>133</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>134</sup> See, e.g., MICHAEL A. WEBER, CONG. RSCH. SERV., R45344, GLOBAL TRENDS IN DEMOCRACY: BACKGROUND, U.S. POLICY, AND ISSUES FOR CONGRESS 23 (2018).

<sup>135</sup> Klarman, *supra* note 1, at 246–47.

<sup>136</sup> See Robert Anderson IV, *Measuring Meta-Doctrine: An Empirical Assessment of Judicial Minimalism in the Supreme Court*, 32 HARV. J.L. & PUB. POL’Y 1045, 1045 (2009).

<sup>137</sup> Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 20 (1996).

<sup>138</sup> *PDK Lab’ys, Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).

<sup>139</sup> See Sunstein, *supra* note 137, at 20.

to other branches of government by allowing the democratic process to adapt to future developments, to produce mutually advantageous compromises, and to add new information and perspectives to legal problems.”<sup>140</sup>

While minimalism may take several forms, Sunstein’s conception suggests that minimalist judges will decide a case both “narrowly” and “shallowly.”<sup>141</sup> A narrow decision addresses only the facts and issue before the court, declining to opine on hypothetical cases that may be implicated.<sup>142</sup> A recent example of this type of decisionmaking is *Flowers v. Mississippi*,<sup>143</sup> in which the Court reversed Curtis Flowers’s murder conviction based on his challenge to the prosecutor’s peremptory strikes of black jurors.<sup>144</sup> The Court detailed the particular and unusual factual circumstances at issue — including that Flowers was tried six times, that the State struck forty-one of the forty-two black prospective jurors across the six trials, and that the State engaged in disparate questioning and treatment of black and white prospective jurors.<sup>145</sup> Based on these facts, and emphasizing that the decision “break[s] no new legal ground,” the Court reversed the conviction, declining to decide whether any single factor alone would require reversal.<sup>146</sup> In noting these limitations, the Court narrowed the applicability of its decision in future cases.

A shallow decision likewise avoids broad reasoning, but it does so by declining to provide a theoretical basis for the result, enabling a court to reach a decision despite disagreements as to the reason for the outcome.<sup>147</sup> An example here might be the Court’s initial decision in *Fisher v. University of Texas at Austin*,<sup>148</sup> vacating and remanding the Fifth Circuit’s decision upholding the university’s race-based affirmative action plan.<sup>149</sup> By limiting the decision to whether the lower court applied strict scrutiny correctly, the Court achieved greater consensus in a 7–1 opinion.<sup>150</sup> The later iteration of this case revealed divisions on the deeper question of whether the plan could satisfy that standard.<sup>151</sup> Similarly, the Court issued a consensus per curiam opinion in *Zubik v. Burwell*<sup>152</sup> by expressing no view on the merits of the religious nonprofits’ challenge to the contraceptive mandate in the Affordable Care

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<sup>140</sup> *Id.* at 19.

<sup>141</sup> *Id.* at 23.

<sup>142</sup> *See id.*

<sup>143</sup> 139 S. Ct. 2228 (2019).

<sup>144</sup> *See id.* at 2235.

<sup>145</sup> *See id.*

<sup>146</sup> *Id.* at 2251.

<sup>147</sup> *See* Sunstein, *supra* note 137, at 20.

<sup>148</sup> 570 U.S. 297 (2013).

<sup>149</sup> *See id.* at 303.

<sup>150</sup> *See id.* at 299.

<sup>151</sup> *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2204 (2016).

<sup>152</sup> 136 S. Ct. 1557 (2016).

Act.<sup>153</sup> The Court instead remanded the case to allow the parties to “arrive at an approach going forward that accommodates petitioners’ religious exercise while at the same time ensuring that women covered by petitioners’ health plans receive full and equal health coverage, including contraceptive coverage.”<sup>154</sup>

Minimalism has also been associated with deference to political decisionmakers — a theory of decisionmaking associated with Professor James Bradley Thayer, who believed courts should overturn congressional constitutional judgments only where Congress has “not merely made a mistake, but [has] made a very clear one.”<sup>155</sup> Few jurists — if any — appear to adopt this theory in full. But interpretive canons such as the canon of constitutional avoidance are consistent with its underpinnings.<sup>156</sup> For example, in his opinion in *NFIB v. Sebelius*,<sup>157</sup> Chief Justice Roberts explained that the Affordable Care Act “reads more naturally as a command to buy insurance than as a tax,” but that “it is only because we have a duty to construe a statute to save it, if fairly possible, that [the mandate] can be interpreted as a tax.”<sup>158</sup>

For my purposes, these conceptions serve as three different axes of minimalism, each of which can contribute to promoting democracy. Narrow decisions avoid cutting off democratic experimentation and prejudging factual circumstances that have not yet arisen.<sup>159</sup> Shallow decisions foster greater common ground and consensus among judges, allowing political actors to continue to work to resolve points of disagreement.<sup>160</sup> And congressional deference recognizes Congress as a coequal branch with elected representatives who are also responsible for upholding the Constitution and should be assumed to take that responsibility seriously.<sup>161</sup>

Certainly, the Supreme Court is not consistently minimalist across any one of these axes, let alone all of them. But it is worth noting that, for the majority of cases that Klarman criticizes — as well as in decisions that may be controversial to those who do not share his political leanings — political solutions remain possible, as the Court itself sought to highlight. For all its mistakes in *Shelby County v. Holder*, which failed to defer to Congress’s constitutional judgment in an area of core con-

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<sup>153</sup> See *id.* at 1560.

<sup>154</sup> *Id.* (internal quotation marks and citation omitted).

<sup>155</sup> James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

<sup>156</sup> See Sunstein, *supra* note 137, at 21.

<sup>157</sup> 567 U.S. 519 (2012) (opinion of Roberts, C.J.).

<sup>158</sup> *Id.* at 574.

<sup>159</sup> See Sunstein, *supra* note 137, at 15.

<sup>160</sup> See *id.* at 20.

<sup>161</sup> See *id.* at 11–12.

gressional authority and relied on a novel theory of “equal state sovereignty” that is hardly shallow, the Court did operate more narrowly than it might have in invalidating the Voting Rights Act’s coverage formula, but not its preclearance requirements.<sup>162</sup> In so doing, the Court noted that “Congress may draft another formula based on current conditions.”<sup>163</sup> Similarly, in *Rucho v. Common Cause*,<sup>164</sup> in holding that claims of partisan gerrymandering present political questions, the Court noted that the conclusion does not “condemn complaints about districting to echo into a void,” because other actors, including States, can “actively address the issue on a number of fronts.”<sup>165</sup> And in considering agency decisions rescinding DACA<sup>166</sup> and adding a citizenship question to the census,<sup>167</sup> the Court did not address the substance of the decisions, invalidating them only because of the Administration’s failure to comply with the democracy-promoting requirements of reasoned decisionmaking.<sup>168</sup>

This is not to say that the adoption of judicial minimalism will lead to correct results. It is not a substantive theory of decisionmaking.<sup>169</sup> It is more of an instinct born of the realization that, under the separation of powers, the judiciary must stay out of the lawmakers’ lane.<sup>170</sup> And it has the added benefit of limiting the effect of any judicial errors and allowing for continued discussion among democratically accountable bodies.<sup>171</sup> Importantly, judicial minimalism strengthens democratic values without requiring court packing, unfaithful readings of the Constitution’s text, or an unlikely constitutional amendment.

#### IV.

Professor Klarman is right to sound an alarm that American democracy is in danger. The causes of our predicament are many and the symptoms are worrisome. President Trump displays an ignorance of the Constitution and its norms, which, wittingly or not, he attacks on an almost daily basis.<sup>172</sup> The Congress is unable to achieve consensus or

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<sup>162</sup> See *id.* at 557.

<sup>163</sup> *Id.*

<sup>164</sup> 139 S. Ct. 2484 (2019).

<sup>165</sup> *Id.* at 2507.

<sup>166</sup> *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

<sup>167</sup> *Dep’t of Com. v. New York*, 139 S. Ct. 2551 (2019).

<sup>168</sup> See *Regents*, 140 S. Ct. at 1901, 1916; *Dep’t of Com.*, 139 S. Ct. at 2575–76.

<sup>169</sup> See Sunstein, *supra* note 137, at 97 (defining constitutional law as a “mixture of substantive theory and institutional constraint”).

<sup>170</sup> See *id.* at 8 n.8, 101.

<sup>171</sup> See *id.* at 99.

<sup>172</sup> See, e.g., Corey Brettschneider, *Trump vs. the Constitution: A Guide*, POLITICO MAG. (Aug. 4, 2016), <https://www.politico.com/magazine/story/2016/08/2016-donald-trump-constitution-guide-unconstitutional-freedom-liberty-khan-214139> [https://perma.cc/F3F5-LFDD].

even compromise on how best to meet a range of pressing challenges, and its members fill the cable shows with invective, not argument.<sup>173</sup> Increasingly the work of the judiciary is thought of by our elected officials as mere politics dressed up in robes and adorned with legal argument that hides the real reasoning that drives the outcomes.<sup>174</sup> The citizenry is divided into camps that too often look at others with contempt and fear.<sup>175</sup> Surely this cannot be “the more perfect Union” to which the Framers of the Constitution, Lincoln, and King aspired.<sup>176</sup>

Perhaps we are simply discovering that the task they set for the nation is too large, that it is simply not possible to create a continental republic with a citizenry drawn from so many diverse cultures that is committed to liberty and justice for all. Jonathan Haidt reminds us that the “human mind is prepared for tribalism.”<sup>177</sup> And as I have written elsewhere, “[a] multicultural democracy is not a natural condition for us. . . . At best, it is a fragile possibility.”<sup>178</sup> But it is a fragile possibility worth protecting. The American experiment in constitutional democracy — a democracy that has gradually brought more and more of the people into full participation in the political community<sup>179</sup> — has been an invaluable font of freedom and prosperity for We the People. I am not confident that such a nation can survive even with our best efforts, but I am confident that it cannot be done without the civic charity that is wanting in Professor Klarman’s call for change.

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<sup>173</sup> See, e.g., Paul Kane, *Congress Deeply Unpopular Again as Gridlock on Coronavirus Relief Has Real-Life Consequences*, WASH. POST (Aug. 1, 2020, 7:00 AM), [https://www.washingtonpost.com/powerpost/congress-deeply-unpopular-again-as-gridlock-on-coronavirus-relief-has-real-life-consequences/2020/07/31/6d2f10c4-d36a-11ea-8c55-61e7fa5e82ab\\_story.html](https://www.washingtonpost.com/powerpost/congress-deeply-unpopular-again-as-gridlock-on-coronavirus-relief-has-real-life-consequences/2020/07/31/6d2f10c4-d36a-11ea-8c55-61e7fa5e82ab_story.html) [<https://perma.cc/KU7B-NCGY>].

<sup>174</sup> See, e.g., David Russell, *Politicization in the Federal Judiciary and Its Effect on the Federal Judicial Function*, N.Y.U. J. LEGIS. & PUB. POL’Y QUORUM 21, 26 (2018).

<sup>175</sup> See, e.g., *Partisanship and Political Animosity in 2016*, PEW RSCH. CTR. (June 22, 2016), <http://pewrsr.ch/28MsFTR> [<https://perma.cc/27GV-USNN>].

<sup>176</sup> U.S. CONST. pmb1.

<sup>177</sup> GREG LUKIANOFF & JONATHAN HAIDT, *THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE* 58 (2018).

<sup>178</sup> Griffith, *supra* note 14, at 643.

<sup>179</sup> See, e.g., U.S. CONST. amends. XIII, XIV, XV, XIX.