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THE COURT SHOULD NOT LET POLITICALLY DIVIDED TIMES AFFECT ITS CHOICES AND DECISIONS

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ABSTRACT

The Court should not let politically divided times affect its choices or decisions. Altering the Court's role in politically divided times would require a definition of what qualifies as such an era and a theory of how to act in such times. Almost every era in American history could be deemed a politically divided time. Changing the Court's role in politically divided times is inconsistent with its preeminent role: interpreting and enforcing the Constitution. This role does not change, and should not change, in politically charged moments. Indeed, history shows that the Court cannot know what is likely to lessen divisiveness, and when it has tried, it has gotten it tragically wrong.

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INTRODUCTION

On Friday, January 11, 2019, the Justices met in their private conference to decide the remaining cases to take during the October 2018 Term.[1] There were eight slots open on their April oral argument calendar.[2] The Justices had an amazing array of cases, posing difficult and controversial issues, to choose among.[3]

For example, the Court had on its January 11 conference list the petition for a writ of certiorari in *Regents of the University of California v. U.S. Department of Homeland Security*, concerning whether President Trump violated the law in rescinding the Deferred Action for Childhood Arrivals (DACA) program.[4] The federal district court enjoined President Trump's action, and the Ninth Circuit affirmed.[5]

The January 11 conference list had a number of potential crucial questions concerning LGBT rights. *Bostock v. Clayton County* and *Zarda v. Altitude Express, Inc.* raised the question of whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination "because of ... sex" within the meaning of Title VII of the Civil Rights Act of 1964.[6] The Circuits have split on the question of whether employment discrimination based on sexual orientation is a form of sex discrimination in

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1. *See* Erwin Chemerinsky, *Chemerinsky: A Look Back at the Supreme Court's October 2018 Term*, A.B.A. J. (July 2, 2019, 2:18 PM), http://www.abajournal.com/news/article/chemerinsky-some-gleanings-from-the-october-term-2018 [https://perma.cc/TGV7-LJCU]; Amy Howe, *Eight New Grants, Ginsburg Recovery from Surgery "On Track,"* SCOTUSBLOG (Jan. 11, 2019, 5:32 PM), https://www.scotusblog.com/2019/01/eight-new-grants-ginsburg-recovery-from-surgery-on-track/ [https://perma.cc/2QPQ-P8VK].

2. Howe, *supra* note 1.

3. *Id.*

4. 908 F.3d 476, 486 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019); Department of Homeland Security v. Regents of the University of California, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/department-of-homeland-security-v-regents-of-the-university-of-california/ [https://perma.cc/5KV4-JPWA].

5. Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1048 (N.D. Cal. 2018), *aff'd*, 908 F.3d 476 (9th Cir. 2018).

6. *See* Bostock v. Clayton Cty. Bd. of Comm'rs, No. 17-13801, 2018 U.S. App. LEXIS 12405, at *1 (11th Cir. May 10, 2018) (per curiam), *cert. granted*, 139 S. Ct. 1599 (2019); Zarda v. Altitude Express, Inc., 883 F.3d 100, 107 (2d Cir. 2018) (quoting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2012)), *cert. granted*, 139 S. Ct. 1599 (2019).

violation of federal law.[7] Also, *R.G. and G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission* raised the related question of whether Title VII's prohibition of sex discrimination includes a person's gender identity so as to protect people from discrimination based on their transgender status.[8]

There were three different cases—*Stockman v. Trump*,[9] *Doe 2 v. Trump*,[10] and *Trump v. Karnoski*[11]—which involved the validity of President Trump's Executive Order barring transgender individuals from the military. All three federal district courts enjoined the transgender military ban, and the Trump administration was seeking Supreme Court review before any court of appeals decisions.[12]

The conference list also included *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, which involved the constitutionality of an Indiana law prohibiting abortions performed solely because of the race, sex, or disability of the fetus.[13] The statute also requires facilities to dispose of fetal remains in the same manner as other human remains—by burial or cremation—rather than as medical waste.[14]

The Justices also considered whether to grant review in *New York State Rifle & Pistol Ass'n v. City of New York*.[15] This case involved a New York City law that limits handgun owners to possessing their guns at the address listed on their handgun licenses, with the sole exception of transporting their guns "directly to and from" one of approximately seven "authorized small arms range/shooting club[s],

7. *Compare Bostock*, 2018 U.S. App. LEXIS 12405, at *1-2 (upholding a precedent that Title VII does not prohibit discharging an employee for homosexuality), *with Zarda*, 883 F.3d at 112-13 (holding that discrimination on the basis of sexual orientation is discrimination on the basis of sex under Title VII).

8. *See* 884 F.3d 560, 566-67, 574-75 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019).

9. 331 F. Supp. 3d 990, 993, 1002-03 (C.D. Cal. 2018).

10. 315 F. Supp. 3d 474, 479, 486 (D.D.C. 2018).

11. Karnoski v. Trump, No. C17-1297-MJP, 2017 WL 6311305, at *1, *10 (W.D. Wash. Dec. 11, 2017), *staying preliminary injunction*, 139 S. Ct. 950 (2019).

12. *Stockman*, 331 F. Supp. 3d at 993, 1004 (denying defendants' motion to dissolve preliminary injunction); *Doe 2*, 315 F. Supp. 3d at 479-80, 498 (denying defendants' motion to dissolve preliminary injunction issued in October 2017); *Karnoski*, 2017 WL 6311305, at *10 (granting plaintiffs' motion for a preliminary injunction).

13. 888 F.3d 300, 302 (7th Cir. 2018).

14. IND. CODE §§ 16-34-3-4, 16-41-16-4(d), 16-41-16-5, 16-41-16-7.6 (2019).

15. 883 F.3d 45, 51 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (2019).

unloaded, and in a locked container, the ammunition to be carried separately."[16]

The conference list also included *Morris County Board of Chosen Freeholders v. Freedom from Religion Foundation* and *Presbyterian Church in Morristown v. Freedom from Religion Foundation*.[17] The New Jersey Supreme Court unanimously ruled that Morris County, New Jersey, violated the New Jersey Constitution when the County provided public funds for the preservation of historic buildings for restoration of churches.[18] In 2017, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court held that a state violated free exercise of religion when the state refused to provide parochial schools funds for surfacing playgrounds when the same money was available to secular private schools.[19] The question is whether this analysis extends to money for historic preservation.[20]

The Supreme Court took *none* of these cases on January 11.[21] None were heard in October Term 2018.[22] The conclusion is inescapable that the Court made a deliberate choice to stay away from the most divisive, controversial issues. In light of the bruising confirmation fight over the nomination of Brett Kavanaugh, it seems obvious that the Court decided to have a lower profile this Term.

In fact, the most high-profile, controversial cases of the term were ones the Court had little choice but to hear. *Rucho v. Common Cause*—which involved whether federal courts can hear challenges to partisan gerrymandering—had been decided by a three-judge federal district court.[23] The Supreme Court is obligated to take such cases when appellate review is requested.[24] In *Department of Commerce v. New York*—which involved whether the Commerce Department could include a question about citizenship on the

16. *Id.* at 53 (quoting 38 RCNY § 5-23(a)(3)).

17. 181 A.3d 992 (N.J. 2018), *cert. denied*, 139 S. Ct. 909 (2019). I should disclose that I was counsel for the Respondent, Freedom from Religion Foundation, in this case in the Supreme Court.

18. *Id.* at 994.

19. 137 S. Ct. 2012, 2024 (2017).

20. *Freedom from Religion Found.*, 181 A.3d at 994.

21. *See* Howe, *supra* note 1.

22. *2018-2019 Term*, OYEZ, https://www.oyez.org/cases/2018 [https://perma.cc/Q78G-RQNT].

23. Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

24. 28 U.S.C. § 1253 (2012).

census—the government told the Court that the census forms had to be printed by June 30, 2019, and the Court therefore took the case even before review in the court of appeals.[25]

Assuming I am correct that the Justices decided to avoid divisive issues whenever possible in October Term 2018, the Court seriously erred. The Court abdicates its role in the system of separation of powers when it fails to hear and decide important issues of federal law, including constitutional questions. A crucial responsibility of the Court is to give guidance to lower courts, to legislatures, and to litigants as to the law. The Court does not do this when it chooses to avoid the hard cases.

Moreover, the Court's inaction has an unintended consequence: the Court took many of these cases for the next term and they will be decided in the spring of 2020, in the midst of a presidential election campaign. The Court subsequently granted certiorari in cases mentioned above—such as those involving DACA,[26] sexual orientation discrimination in employment,[27] discrimination against transgender individuals in employment,[28] and the New York City ordinance regulating guns outside the home.[29] These cases are scheduled to be heard in October Term 2019.[30] The Court obviously will not succeed in its quest for a lower profile.

My thesis is that the Court should not let politically divided times affect its choices or decisions. I make three points. First, altering the Court's role in politically divided times would require a definition of what qualifies as such an era and a theory of how to act in such times. Such a definition and theory are elusive. Indeed, almost

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25. Dep't of Commerce v. New York, 139 S. Ct. 2551, 2561, 2565 (2019); Erwin Chemerinsky, *How the Roberts Court Could Alter the Administrative State*, A.B.A. J. (Sept. 4, 2019, 6:00 AM), http://www.abajournal.com/news/article/chemerinsky-the-roberts-court-could-alter-the-administrative-state [https://perma.cc/6RAW-VH9R].

26. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 139 S. Ct. 2779 (2019).

27. Bostock v. Clayton County, 139 S. Ct. 1599 (2019); Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599 (2019).

28. R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (2019).

29. N.Y. State Rifle & Pistol Ass'n v. City of New York, 139 S. Ct. 939 (2019).

30. *See, e.g.*, *Supreme Court of the United States October Term 2019: For the Session Beginning November 4, 2019*, SUP. CT., https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalNovember2019.pdf [https://perma.cc/Y4BU-A342]; *Supreme Court of the United States October Term 2019: For the Session Beginning October 7, 2019*, SUP. CT., https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalOctober2019.pdf [https://perma.cc/X8GX-7JS2].

every era in American history could be deemed a politically divided time.[31] Second, changing the Court's role in politically divided times is inconsistent with its preeminent role: interpreting and enforcing the Constitution.[32] This role does not change, and should not change, in politically charged moments. Third, history shows that the Court cannot know what is likely to lessen divisiveness, and when it has tried, it has gotten it tragically wrong.[33]

I, of course, do not deny that inevitably the Justices are affected by the society in which they live. My point is that the Court should not try to manage those times by altering its behavior because of partisan divisions within society, even at a time like now when there is enormous ideological polarization.

I. WHAT ARE "POLITICALLY CHARGED MOMENTS" AND WHAT TO DO ABOUT THEM?

This Symposium focuses on "The Role of Courts in Politically Charged Moments." The question is whether this role should change at such times. But this raises a threshold question: What are "politically charged moments?" If the role of the courts is different at such times, it is essential to have a definition of when they exist. I know of no such definition and, even if there were such a definition, I am skeptical whether it would be possible to know if it was met at the time of the determination. I think it is very hard to assess one's own times. Would a politically charged moment be determined by the closeness of the most recent presidential election? Would it be ascertained by whether the President and Congress are controlled by the same political party (which would mean that the first two years of the Trump administration would not be deemed a politically charged time)? Or is it a matter of public opinion polls on key issues? But then what issues, and what would be the standard for divisiveness?

Looking back, when have there not been politically charged moments in American history? Certainly, early American history was politically charged as reflected in the enactment of the Alien and

31. *See infra* Part I.
32. *See infra* Part II.
33. *See infra* Part III.

Sedition Acts of 1798 and the divisive presidential election of 1800, which was decided by the House of Representatives.[34] The country was deeply divided over the issue of slavery in the nineteenth century before the Civil War. In the years after the Civil War, there was the impeachment of President Andrew Johnson and Reconstruction, which certainly made that time a "politically charged moment."[35]

The first part of the twentieth century saw a divisive debate over whether the United States should participate in World War I. It also was a time of great disagreement over the role of the government in protecting workers and consumers; during this period of time, known as the *Lochner* era, the Court struck down over 200 progressive federal, state, and local laws.[36] There was an intense debate over the role of the federal judiciary.[37] During the 1930s, the crisis of the Great Depression occurred and tensions arose when the Supreme Court struck down key New Deal legislation.[38]

In the late 1940s and the early 1950s, the McCarthy era saw tensions over the Communist threat and what should be done about it. The 1950s and the 1960s were a time of civil rights activism and massive resistance. The 1960s and the 1970s saw the country deeply divided over the Vietnam War. In the 1980s, President Ronald Reagan's effort to remake government in a vastly more conservative direction caused division. The 1990s saw the impeachment of President Bill Clinton.

The presidential election of 2000 reflected a deeply divided country and an election effectively decided by the Supreme Court.[39]

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34. *See* 9 ANNALS OF CONG. 3739-42, 3744-46, 3753-54, 3776-77 (1798); *Creating the United States: Election of 1800*, LIBR. CONGRESS, https://www.loc.gov/exhibits/creating-the-united-states/election-of-1800.html [https://perma.cc/FJU4-Q3JY].

35. *The Impeachment of Andrew Johnson (1868) President of the United States*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Johnson.htm [https://perma.cc/ASL9-5E7B].

36. *See* Sujit Choudhry, *The* Lochner *Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1, 4-5 (2004).

37. *See* 2 FED. JUDICIAL CTR., DEBATES ON THE FEDERAL JUDICIARY: A DOCUMENTARY HISTORY 1-6 (Daniel S. Holt ed. 2013), https://www.fjc.gov/sites/default/files/2014/Debates-Federal-Judiciary-Vol-II.pdf [https://perma.cc/PKC8-JHES].

38. *See*, *e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935).

39. Thomas E. Mann, *Reflections on the 2000 U.S. Presidential Election*, BROOKINGS (Jan. 1, 2001), https://www.brookings.edu/articles/reflections-on-the-2000-u-s-presidential-election/ [https://perma.cc/SN2H-H2NE]; Frank Newport, *President-Elect Bush Faces Politically*

After September 11, 2001, the country was split over the invasion of Iraq, Guantanamo, and the actions of the Bush administration in combatting terrorism. And no one would deny the political divisions during the Obama and Trump administrations.

My point obviously is not a detailed review of any of this history. It just is to say that virtually any moment in American history could have been regarded at that time as politically charged. There then seems little point in defining a special role for the Court at these times.

But if somehow "politically charged times" could be meaningfully defined, and if it were possible to know when they exist, there still would be the question of what that should mean in terms of the judicial role. Should it affect the cases the Court takes? Should it affect how the Court decides cases? Perhaps the instinct is that the Court should be more "minimalist" at these times, playing less of a role and deciding matters more narrowly.[40] But why assume that is better for the country? There is an underlying assumption that the Court should do less at politically charged moments, but why believe that?

I feel that I am the ungracious guest asked to speak at a Symposium on the role of the courts in politically charged moments and then questioning its very premise.

II. THE COURT'S ROLE DOES NOT CHANGE IN POLITICALLY CHARGED TIMES

Considering whether to change the role of the federal courts inherently requires defining their role. My view is that the preeminent purpose of the federal courts is to enforce the United States Constitution. Legal doctrines and principles should be directed toward allowing the federal courts to fulfill this mission, including in politically charged moments. I believe that Chief Justice John Marshall got it exactly right in *Marbury v. Madison*:

Divided Nation, but Relatively Few Americans Are Angry or Bitter over Election Outcome, GALLUP (Dec. 18, 2000), https://news.gallup.com/poll/2200/presidentelect-bush-faces-politically-divided-nation-relatively.aspx [https://perma.cc/VQE6-8YKX].

40. *Cf.* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT ix (1999).

the Constitution exists to limit government, and the limits are meaningful only if they are enforced.[41] Enforcement often will not happen without the judiciary. Therefore, the most important role of the federal courts should be seen as enforcing the Constitution.

More generally, the very existence of federal courts embodies a crucial choice about their role in enforcing the Constitution.[42] Under the Articles of Confederation, there were neither federal courts nor a federal judicial power.[43] Article III of the Constitution created the Supreme Court and authorized the creation of the lower federal courts because of a belief that the enforcement of federal law could not be left exclusively to the state judiciaries.[44] Congress created the lower federal courts in 1789, and they have existed ever since, because the Supreme Court by itself does not have the capacity to review all state court decisions.[45] Since their creation, federal courts have existed, above all, to enforce federal law, and the most important federal law is the Constitution.

Nor can we rely on voluntary compliance from the other branches and levels of government.[46] Far too often, legislators and officials have a strong incentive not to comply with the Constitution. These situations, which often involve the most vulnerable in society, are where the federal judiciary is most needed.

More generally, if not for the federal courts, what is to stop the Congress or the President from enacting a law that is unconstitutional but politically expedient? What, other than the drastic remedy of impeachment, is to stop the President from pursuing

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41. 5 U.S. (1 Cranch) 137, 176-78 (1803).

42. There is an endless debate among academics, and even Justices, as to whether there is parity between federal courts and state courts. *See, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105-06 (1977). For a review of the literature in the debate over parity, see generally Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988). The choice to create federal courts in 1789 reflected a view that some matters should not be left exclusively to state courts with federal court review only in the United States Supreme Court.

43. ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE 8 (2017).

44. *Id.*

45. *Id.*

46. There are those who argue that this is sufficient and that judicial review should be eliminated. *See, e.g.*, JAMES MACGREGOR BURNS, PACKING THE COURT 254-55 (2009); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 127-28 (1999).

unconstitutional policies when they are politically popular?[47] And as we saw with regard to the impeachment proceedings against President Trump, the requirement of a two-thirds vote in the Senate for removal makes this an empty threat. Often there is no one, other than the courts, to deter wrongdoing and compensate those injured by constitutional violations.[48]

Most dramatically, those without political power have nowhere to turn except the judiciary for the protection of their constitutional rights. The reality is that participants in the political process have little incentive to be responsive to the constitutional rights of prisoners, or criminal defendants, or those who are not citizens.[49]

These individuals lack political power—they do not give money to political candidates, they generally are prohibited from voting, they are unpopular and often unsympathetic. When is the last time a legislature acted to expand the rights of prisoners or criminal defendants? In the competition for scarce dollars, legislatures have every political incentive to spend as little as possible on prisoners. Politicians compete to sound tough on crime, not to expand defendants' rights. Yet, how much worse might it be if politicians and prison officials knew that no court would review the constitutionality of their actions?

Admittedly, the Supreme Court has a less than stellar record of protecting these individuals' rights, but there is no doubt that judicial review has provided protections for criminal defendants and dramatically improved conditions for countless prison inmates abandoned by the political process. Although these are obvious examples, the nature of democracy is that the elected branches of government are often insensitive to the rights of those who lack political influence.[50]

This view of the federal judiciary derives from the purpose of the Constitution itself. My agreement with *Marbury v. Madison* ultimately is based on my belief that the written Constitution exists to be the supreme law of the land and to limit what everyone in

47. CHEMERINSKY, *supra* note 43, at 9.

48. *Id.*

49. Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1463 (2017).

50. CHEMERINSKY, *supra* note 43, at 9.

government, at all levels, can do.[51] Judicial review is based on the premise that society is better off having an institution largely insulated from majoritarian politics, the federal judiciary, give meaning to and enforce the Constitution.

Harvard Law Professor Laurence Tribe powerfully asked: "[W]hy [would] a nation that rests legality on the consent of the governed ... choose to constitute its political life in terms of commitments to an original agreement—made by the people, binding on their children, and deliberately structured so as to be difficult to change[?]"[52]

It is hardly original or profound to answer this question by observing that the framers deliberately made the Constitution very difficult to change as a way of preventing tyranny of the majority and protecting the rights of the minority from oppression by social majorities. If the structure of government were placed in a statute, the urge to create dictatorial powers in times of crisis might be irresistible. If individual liberties were protected only by statutes, a tyrannical government could overrule them. If terms of office were specified in a statute rather than in the Constitution, those in power could alter the rules to remain in office.[53]

Thus the Constitution represents society's attempt to tie its own hands, to limit its ability to fall prey to weaknesses that might harm or undermine its most cherished values. History teaches that under the passions of the moment, people may sacrifice even the most basic principles of liberty and justice. The Constitution is society's attempt to protect itself from itself. It enumerates basic values—regular elections, separation of powers, individual rights, equality—and makes departure very difficult. In large part, the decision to be governed by the Constitution is animated by fear that a political majority could gain control of government and disenfranchise and perhaps persecute the minority. Compared to all other laws, the Constitution is uniquely difficult to amend or alter, precisely to ensure that the limits it sets are not easily changed.[54]

Accordingly, in deciding who should be the authoritative interpreter of the Constitution, the answer is the branch of government

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51. *Id.* at 9-10.
52. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 10 (2d ed. 1988).
53. CHEMERINSKY, *supra* note 43, at 10.
54. *Id.*

that can best enforce the Constitution's limits against the desires of political majorities. By this criterion, the federal judiciary is the obvious choice. It is the institution most insulated from political pressures.[55] Article III of the Constitution provides that federal court judges have life tenure unless impeached, and that their salary may not be decreased during their terms of office. Unlike legislators or the president, they never face reelection.[56] Also, the judiciary has no need to respond to those who can vote or give money in elections.

Furthermore, the method of federal judicial selection reinforces its antimajoritarian character. Unlike the House of Representatives, whose members are elected at the same time, or the Senate, where one-third of the members are chosen in each election, the Court's members are appointed one at a time, as vacancies arise. No single administration is generally able to appoint a majority of the Court or the federal judiciary. The result is that the Court reflects many political views, not just the one that dominates at a particular time.[57]

Thus the primary reason for having federal courts—the Supreme Court and the lower federal courts—is to enforce the Constitution against the will of the majority.[58] This is especially important with regard to the protection of minorities—whether they are political, religious, racial, or sexual orientation minorities.

This role does not change in politically charged moments. Moreover, enforcing the Constitution is inherently likely to heighten divisions in society. When the Court protects minorities, it often will anger the majority by invalidating actions it has taken.[59] Enforcing separation of powers and checks and balances often will mean striking down actions that the government—and the social majority—wants to take.[60] If anything, politically charged times—assuming they could be defined—might justify a larger, not a lesser, role for

55. *Id.*

56. *Id.*; *see* U.S. CONST. art. III § 1.

57. CHEMERINSKY, *supra* note 43, at 10.

58. *Id.*

59. *See* WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS OF JUDICIAL REVIEW 101-02 (2000).

60. *Id.* at 101.

the judiciary. In these times, the political process might be least protective of those with minority views.

The Court simply cannot perform its central missions of upholding the Constitution and protecting minorities if it refrains, or does less, at politically divided moments.

III. THE CAUTION OF HISTORY

I do not believe that the Court can know, at any moment in time, what is likely to be divisive or what is likely to be healing. History shows that when the Court has tried, it often has gotten it wrong and made what, in hindsight, come to be regarded as tragic mistakes. Consider a few examples.

A. Dred Scott v. Sandford

In *Dred Scott v. Sandford*, the Court faced a narrow question: could a slave sue based on diversity of citizenship?[61] Dred Scott, a slave owned in Missouri by John Emerson, was taken into Illinois, a free state.[62] After Emerson died, Scott was owned by John Sandford, a resident of New York.[63] Scott sued Sandford in federal court, basing jurisdiction on diversity of citizenship, and claimed that his residence in Illinois made him a free person.[64]

The United States Supreme Court ruled against Scott in a decision that fills over 200 pages in the *United States Reports*. The Supreme Court held that slaves were not citizens and thus could not invoke federal court diversity of citizenship jurisdiction.[65] The Court explained that when the Constitution was ratified, slaves were considered "as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them."[66] The Court reviewed the laws that

61. Scott v. Sandford, 60 U.S. (19 How.) 393, 400 (1857).
62. *Id.* at 431.
63. *Id.* at 458.
64. *Id.* at 452.
65. *Id.* at 426-27.
66. *Id.* at 404-405.

existed in 1787 and concluded that a "perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery."[67] The Court said that slaves were not citizens, even if born in the United States, and thus could not sue as citizens in the federal courts.[68]

Even though the Court concluded that it lacked jurisdiction to hear Scott's suit, it went further and declared the Missouri Compromise unconstitutional.[69] The Supreme Court ruled that Congress could not grant citizenship to slaves or their descendants; this would be a taking of property from slave owners without due process or just compensation.[70] The Court concluded:

> [T]he right of property in a slave is distinctly and expressly affirmed in the Constitution.... [I]t is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void.[71]

The Court said that Scott therefore was not made free by being taken into Illinois, and that his status on return to Missouri was to be determined by Missouri law.

The Supreme Court undoubtedly thought that it was resolving the controversy over slavery in *Dred Scott v. Sandford*. As Justice Scalia said: Chief Justice Taney "had thought himself call[ing] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution."[72] The decision had exactly the opposite of its intended effect. The ruling became the focal point in the debate over slavery and, by striking down the Missouri Compromise, the decision helped to precipitate the Civil War.[73]

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67. *Id.* at 409.
68. *Id.* at 411.
69. *Id.* at 452.
70. *Id.* at 450.
71. *Id.* at 451-52.
72. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting) (alteration in original) (internal quotations omitted).
73. For example, the famous Lincoln-Douglas debates involved extended arguments about the Dred Scott decision and its meaning. For an excellent discussion of this, see DAVID

The Court clearly was reacting to an intensely politically charged time. It thought that it could resolve the issue of slavery once and for all. Its attempt to do so was tragically wrong and should caution against thinking that special judicial reactions to politically charged moments is desirable.

B. The Slaughter-House Cases

Another example of the Court trying to manage a politically divisive time and getting it wrong was in the *Slaughter-House Cases*. The issue before the Court was a narrow one: whether a state-granted monopoly in operating a slaughterhouse violated the recently enacted Thirteenth or Fourteenth Amendments.[74] Rather than resolving that limited issue, the Court saw itself as giving broad pronouncements on the meaning of these provisions. The Court, at the outset of its opinion, declared:

> This court is thus called upon for the first time to give construction to these articles. We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members.... Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.[75]

The case came to the Court just seven years after the end of the Civil War, in the midst of Reconstruction, and certainly at a politically charged moment.[76] Likely as a result, the Supreme Court felt the need to narrowly construe all of the provisions of the recently enacted amendments.[77] The Court said that the purpose of the

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ZAREFSKY, LINCOLN DOUGLAS AND SLAVERY: IN THE CRUCIBLE OF PUBLIC DEBATE 51-53 (1990).

74. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 58-59 (1873).

75. *Id.* at 67-68.

76. *See* James K. Hogue, *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment*, 6 CIV. WAR BOOK REV. 1, 1, 3 (2004).

77. *See id.* at 1-2.

Thirteenth and Fourteenth Amendments was solely to protect former slaves.[78] Justice Miller wrote that:

> [t]he most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times ... [that there was] one pervading purpose found in them all[:] ... the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[79]

The Court proceeded to interpret each provision very narrowly and solely to achieve this limited goal. For example, the Court said that the Equal Protection Clause only was meant to protect blacks and offered the prediction that "[w]e doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[80]

The Court rejected the notion of substantive due process entirely. Substantive due process is the principle that the government's deprivation of a person's life, liberty, or property must be justified by a sufficient purpose.[81] The Court declared, with no elaboration or explanation, that

> it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.[82]

Perhaps most importantly, the Court interpreted the Privileges and Immunities Clause in a way that essentially read that provision out of the Constitution.[83] Specifically, the Court held that the

78. *See Slaughter-House Cases*, 83 U.S. at 71.
79. *Id.* at 67, 71.
80. *Id.* at 81.
81. *See* U.S. CONST. amend. XIV, § 1; Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997).
82. *Slaughter-House Cases*, 83 U.S. at 80-81.
83. *See id.* at 74-77.

Privileges and Immunities Clause was not meant to protect individuals from state government actions and was not meant to be a basis for federal courts to invalidate state laws.[84] Justice Miller wrote:

> [S]uch a construction ... would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment.... We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.[85]

Indeed, the Court was explicit that "privileges and immunities ... are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government."[86] The Privileges and Immunities Clause was rendered a nullity by the *Slaughter-House Cases*, and it largely has been ever since.[87] Professor Edward Corwin remarked that "[u]nique among constitutional provisions, the privileges and immunities clause of the Fourteenth Amendment enjoys the distinction of having been rendered a 'practical nullity' by a single decision of the Supreme Court rendered within five years after its ratification."[88]

Reacting to a politically charged moment, the Court chose to rule very broadly when it could have narrowly interpreted the newly enacted amendments. The result was to greatly restrict, and even nullify, many of these provisions.

C. Naim v. Naim

Dred Scott v. Sandford and the *Slaughter-House Cases* are examples of the Supreme Court reacting to politically charged moments

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84. *See id.* at 77-78.

85. *Id.* at 78.

86. *Id.*

87. *See* LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 965 (Edward S. Corwin ed., 1953).

88. *Id.*

by doing too much. *Naim v. Naim* shows the dangers of the Court reacting to politically divisive times by doing too little.

From the beginning of American history, many states had anti-miscegenation laws. It was not until 1967, 180 years into American history and almost exactly a century after the adoption of the Fourteenth Amendment, that the Court in *Loving v. Virginia* finally declared laws prohibiting interracial marriage unconstitutional.[89] *Loving* did not come until thirteen years after *Brown v. Board of Education* and not until after Congress had passed the Civil Rights Act of 1964 and the Voting Rights Act of 1965.[90]

The Court had the opportunity to invalidate antimiscegenation laws much earlier in *Naim v. Naim* in 1956.[91] The case involved a Chinese man and a white woman.[92] They had been married in North Carolina.[93] She sought to have the marriage annulled in Virginia on the grounds of the Virginia Racial Integrity Act of 1924,[94] the same law invalidated in *Loving*.[95] The Virginia Supreme Court upheld the Virginia law[96] and the United States Supreme Court denied review.[97] The United States Supreme Court declared: "The decision of the Supreme Court of Appeals of Virginia of January 18, 1956 ... leaves the case devoid of a properly presented federal question."[98] In other words, the Court said that there was no substantial federal question presented by a state law prohibiting interracial marriage.

That, of course, was nonsense in 1956, as it was over a decade later in 1967. The case presented a major issue with regard to equal protection; it was the very issue that the Court resolved in *Loving v. Virginia* a decade later. The Court had no hesitation then in recognizing the very important federal question presented. Indeed, the

89. 388 U.S. 1, 2 (1967); *see also* Erwin Chemerinsky, Loving v. Virginia: *A Triumph and a Failure of the Supreme Court*, 25 VA. J. SOC. POL'Y & L. 259, 264 (2018).

90. Chemerinsky, *supra* note 89, at 264; *see Jim Crow to Civil Rights in Virginia*, VA. MUSEUM OF HIST. & CULTURE (2019), https://www.virginiahistory.org/collections-and-resources/virginia-history-explorer/jim-crow-civil-rights-virginia [https://perma.cc/79JP-QGF3].

91. 350 U.S. 985, 985 (1956).

92. Naim v. Naim, 87 S.E.2d 749, 750 (Va. 1955).

93. *Id.*

94. *See id.* at 750-51.

95. *See* 388 U.S. at 2, 4.

96. *See Naim*, 87 S.E.2d at 756.

97. *See* Naim v. Naim, 350 U.S. 985, 985 (1956).

98. *Id.*

Court already had declared in 1942 in *Skinner v. Oklahoma* that marriage is "one of the basic civil rights."[99] The denial of equal protection and the racism of the Virginia law was apparent from its very title: The Racial Integrity Act.

Quite importantly, the case arose under the Supreme Court's mandatory jurisdiction. The Court was obligated to take the case under the jurisdictional statutes that existed at the time.[100] The Court could not simply deny certiorari; it had to declare the fiction of the lack of a substantial federal question.

The Court simply did not want to deal with the issue.[101] Justice Tom Clark has been widely attributed as saying "[o]ne bombshell at a time is enough."[102] The Court felt that the country was not ready for it to declare unconstitutional laws prohibiting interracial marriage.[103] It was reacting to its perception of what was a politically divisive time over race by choosing to avoid a constitutional question of great significance.

But if one thinks that it was unimaginable for a court to declare an antimiscegenation statute unconstitutional in 1956, it is important to remember that the California Supreme Court did exactly that eight years earlier.[104] In declaring unconstitutional a longstanding California law prohibiting interracial marriage, the California Supreme Court concluded that the statute violated the equal protection of the laws clause of the United States Constitution by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups.[105] The United States Supreme Court could have—and should have—done the same thing in *Naim v. Naim*.

By not doing this, the Court made a huge mistake in not declaring the Virginia law unconstitutional in 1956 when the issue was before it in *Naim v. Naim*.[106]

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99. Chemerinsky, *supra* note 89, at 264-65; *see* 316 U.S. 535, 541 (1942).

100. Chemerinsky, *supra* note 89, at 265; *see* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 321 (2004).

101. *See* KLARMAN, *supra* note 100, at 321.

102. Richard Delgado, Naim v. Naim, 12 NEV. L.J. 525, 526 (2012).

103. *See* KLARMAN, *supra* note 100, at 321.

104. Chemerinsky, *supra* note 89, at 265 (quoting Perez v. Sharp, 32 Cal. 2d 731-32 (1948)).

105. *Id.*; *Perez*, 32 Cal. 2d at 731-32.

106. Chemerinsky, *supra* note 89, at 265; *see* Naim v. Naim, 350 U.S. 985, 985 (1956).

First, this was the Court abdicating its proper role. The Court's role was to decide whether the Virginia law prohibiting interracial marriage denied equal protection, not to determine whether it would please the country or upset people. The importance of the issue made it incumbent on the Court to decide the question presented—and to declare the Virginia law unconstitutional as a clear denial of equal protection.[107] As Professor Richard Delgado observed: "For if whites and nonwhites cannot marry and make lives together, what does it matter if they can attend the same movie theater or swim in the same public pool? The prohibition of intermarriage would seem to violate *Brown*'s mandate as glaringly as any other."[108] I strongly disagree with those who praise the "passive virtues" of the Court avoiding difficult issues.[109]

As discussed in Part II, the Court's preeminent role is to enforce the Constitution and if a law violates equal protection to say so, whatever the public reaction.[110] The Court abandons this role when it tailors its review and rulings to avoid controversy in politically charged moments.

Second, I am skeptical that invalidating the Virginia law in *Naim v. Naim* would have intensified the massive resistance to the Court's desegregation orders. The reality is that Southern states did everything they possibly could to avoid desegregation. To be sure, many Southerners would have seen invalidating laws prohibiting interracial marriages as another blow to their segregationist beliefs.[111] Also, there was an important difference between a decision striking down the Virginia law and the rulings about school desegregation.[112] If a person opposed interracial marriage, he or she could choose not to marry someone of a different race. But school desegregation orders were involuntary.[113] I think this helps to explain why there was such relatively quick acceptance of marriage equality for gays and lesbians. Allowing gays and lesbians to marry did not impose

107. Chemerinsky, *supra* note 89, at 265; *see* Naim v. Naim, 87 S.E.2d 749, 751 (Va. 1955).

108. Delgado, *supra* note 102, at 525.

109. Chemerinsky, *supra* note 89, at 265. This phrase comes from a famous law review article, Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40 (1961).

110. Chemerinsky, *supra* note 89, at 265; *see supra* Part II.

111. Chemerinsky, *supra* note 89, at 266; *see* KLARMAN, *supra* note 100, at 320-21.

112. Chemerinsky, *supra* note 89, at 266.

113. *See, e.g.*, Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955).

the slightest burden on anyone else.[114] As I often remarked in arguing for marriage equality: if someone does not like same-sex marriage, they should not marry someone of the same sex. But it was not a reason to keep others from doing so.

Third, enormous positive benefits would have been gained if the Court had declared the Virginia law unconstitutional in *Naim v. Naim*. The Court would have provided what was missing in *Brown*: a clear statement that laws based on an assumption of racial superiority violate equal protection. There also would have been great social benefits to this.[115] As Professor Delgado observed:

> If they were a devoted couple, they would be forced to live together without the benefit of marriage, to conceal their relationship from others much of the time, and, probably, refrain from having children. They were not the only ones to lose out. Society did, as well. It missed the opportunity to see twelve years worth of mixed-race couples and their children at schools, on sidewalks, in markets, and in the many ordinary interactions of life. It lost the opportunity, multiplied many times, to see how normal interracial friendship can be.[116]

I thus come to the same conclusion as Professor Delgado: *Naim v. Naim* was not a prudent exercise in judicial discretion, but a timid act that misjudged the judicial role. Emanating from a court that ought to be in the business of enforcing the Constitution—and not waiting until it is safe or convenient to do so—it was a jurisprudential error.[117] I believe that it was an error entirely borne of the Court trying to manage a politically charged moment.

Dred Scott, the *Slaughter-House Cases*, and *Naim v. Naim* all illustrate the great dangers when the Court tries to manage politically charged moments. The Court simply cannot know enough about the reaction at the time or the course of history to ensure that it will make the "right" choices. By contrast, I think of instances where the Court did not let the political tensions of the time affect its decisions. The most obvious example is *Brown v. Board of*

114. Chemerinsky, *supra* note 89, at 266.
115. *Id.*; *see* Delgado, *supra* note 102, at 527.
116. Delgado, *supra* note 102, at 527; *see* Chemerinsky, *supra* note 89, at 266.
117. Chemerinsky, *supra* note 89, at 266; *see* Delgado, *supra* note 102, at 531.

Education.[118] The Court's decision was as divisive as any in American history, unleashing massive resistance to desegregation.[119] But it also is regarded as one of the Court's shining moments when the Court fulfilled its central role of enforcing the Constitution and protecting minorities.[120] The United States would have been far worse off if the Court had avoided the issue because it was inherently highly controversial.

Another example is the *Pentagon Papers* case, *New York Times Co. v. United States*.[121] The *New York Times*, and then the *Washington Post*, published excerpts from a top secret, 47-volume Defense Department history of the Vietnam War.[122] The United States government sought federal court injunctions precluding publication on national security grounds.[123] The federal district courts refused to issue such orders.[124] The Court of Appeals for the District of Columbia affirmed,[125] while the Second Circuit remanded and continued the stay.[126] The case proceeded quickly: just eighteen days elapsed from the first article in *The New York Times* until the decision in the Supreme Court.[127] The Supreme Court held, by a 6-to-3 margin, that a court order stopping publication violated the First Amendment.[128]

The case certainly came at a politically charged time. The Vietnam War was deeply divisive and enormously controversial.

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118. 347 U.S. 483 (1954).

119. *See The Southern Manifesto and "Massive Resistance" to Brown*, NAACP (2019), https://www.naacpldf.org/ldf-celebrates-60th-anniversary-brown-v-board-education/southern-manifesto-massive-resistance-brown/ [https://perma.cc/SFF4-QCFG].

120. *See* Constance Baker Motley, *The Historical Setting of* Brown *and Its Impact on the Supreme Court's Decision*, 61 FORDHAM L. REV. 9, 9 (1992).

121. 403 U.S. 713 (1971) (per curiam).

122. *See* John Cary Sims, *Triangulating the Boundaries of* Pentagon Papers, 2 WM. & MARY BILL RTS. J. 341, 355 (1993); Douglas Martin, *Gerald Gold, Editor on the Pentagon Papers, Dies at 85*, N.Y. TIMES (Aug. 3, 2012), https://www.nytimes.com/2012/08/03/business/media/gerald-gold-times-editor-on-the-pentagon-papers-is-dead-at-85.html [https://perma.cc/RJ5L-CTYH].

123. *See N.Y. Times*, 403 U.S. at 714.

124. *See* United States v. N.Y. Times Co., 328 F. Supp. 324, 331 (S.D.N.Y. 1971).

125. *See* United States v. Wash. Post Co., 446 F.2d 1327, 1327 (D.C. Cir. 1971).

126. *See* United States v. N.Y. Times Co., 444 F.2d 544, 544 (2d Cir. 1971) (per curiam).

127. *See N.Y. Times*, 403 U.S. at 713; Sims, *supra* note 122, at 355.

128. *See N.Y. Times*, 403 U.S. at 714, 752.

Yet, in hindsight, the *Pentagon Papers* case is regarded as a huge triumph for the First Amendment and the Constitution.[129]

Of course, finally, it should be noted that sometimes the Court cannot anticipate when its decisions will be divisive. *Roe v. Wade* was a 7-2 decision.[130] It did not draw substantial political attention and opposition until 1980, when Republicans sought to elicit support from Evangelical voters.[131]

My point is that history shows that the Court engages in a fool's errand when it tries to adapt its decisions to manage politically charged moments. The Court is in no position to know what to do or what the long-term effects of its actions will be. Sometimes the Court's decisions will lessen social divisions, sometimes exacerbate them. But even if the Court could know the consequences in handing down decisions (and it cannot), that should not affect what cases it takes or how it decides them.

CONCLUSION

This Symposium asks the question of what the role of the courts should be in politically charged moments. My answer is that its preeminent role should be the exact same at all times: enforcing the Constitution. The Court's choices and decisions should not be altered by a desire to react to a politically divided time. Undoubtedly, sometimes the Court will exacerbate social tensions and sometimes it will lessen them. The reality is that the Court cannot effectively manage politically charged moments—even if they could be defined—and should not try. It should take and decide cases solely based on its best view of the law.

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129. *See* Sims, *supra* note 122, at 350.

130. 410 U.S. 113, 115 (1973).

131. *See, e.g.*, Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2079 (2011).