

CURIOUS UNILATERALISM¹

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¹ “When I aided Siegmund,
I acted for you,
for you dared not stand up
to Fricka’s demand.
Then you cast off your own kindred.”

RICHARD WAGNER, *DIE WALKÜRE* 170-73 (Rudolph Sabor trans., Phaidon Press Limited 1997).

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The Roberts Court has struck many constitutional law scholars as something of an enigma. The most recent term added to this impression. Chief Justice Roberts signed on to several momentous decisions that were facially inconsistent with his own earlier jurisprudence on abortion, LGBTQ rights, and immigration rulemaking. Despite this, I argue that the Roberts Court is, in fact, principled and consistent in its legacy decisions.

What lends principled consistency to the Roberts Court is a concept that is typically used only as a slur: unilateralist decision-making. Something important is lost when painting all unilateralism with the same pejorative brush. This blind spot is revealed when focusing on the interplay between (1) the value motivating decision-making and (2) the ability of other constitutional actors to contest it. On this basis, I distinguish between two kinds of unilateralism: (a) curious unilateralism that positively invites others to contest unilateral decisions and (b) illiberal unilateralism which forecloses opportunities meaningfully to do so. The Roberts Court consistently and principledly protects the institutional requirements for curious unilateralism in the current hyper-partisan environment and purposefully avoids policy-driven consistency.

INTRODUCTION

Orin Kerr recently tweeted, “Chief Justice Roberts is the most interesting Justice on the Court right now. But he’s also the one who is hardest to figure out.”² Kerr made his remark in the wake of

² Orin Kerr (@OrinKerr), TWITTER (June 29, 2020, 5:40 PM), <https://twitter.com/OrinKerr/status/1277733828874797057> [<https://perma.cc/D9D6-CRZW>].

Chief Justice Roberts' vote to strike down a Louisiana abortion regulation and uphold precedent from which he himself dissented: *Whole Woman's Health*.³ It also followed a string of rebukes of the Trump administration by the Supreme Court. Yet, as another leading constitutional law scholar turned Twitter influencer, Steve Vladeck, tweeted, Chief Justice Roberts has hardly turned into a moderate.⁴

Curious Unilateralism tries to explain how we can make sense of this conundrum. My core submission is that to understand what the Roberts Court is doing, we need to step back and understand the singularly unilateralist environment in which it finds itself. Such unilateralism can be combative and erode public discourse and constitutional norms, but it can also be curious, deeply deliberative, and supportive of republican governance. Once we understand this unilateralist environment, it becomes clear that the Roberts Court acts to protect curious unilateralism and dispel its combative sibling. In other words, Kerr is right that the Roberts Court decisions mystifyingly "don't fit consistently into advancing left or right politics."⁵ Rather, they live up to Chief Justice Roberts' ambition to umpire the engagement between other constitutional actors.⁶

But to step back, it is reasonably uncontroversial to observe that we live in an age of unilateralism. President Trump proclaimed at the 2016 Republican convention, "I alone can fix it."⁷ His presidency pushes theories of executive power to the unilateral extreme. For instance, he stated, "[w]hen somebody's the president of the United States, the authority is total."⁸ His immediate

³ June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring).

⁴ Steve Vladeck (@steve_vladeck), TWITTER (June 18, 2020, 9:27 AM), https://twitter.com/steve_vladeck/status/1273623457457209344 [<https://perma.cc/9GJF-ASP4>].

⁵ Kerr, *supra* note 2.

⁶ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55-56 (2005) (statement of John G. Roberts, Jr., Nominee to be C.J. of the United States).

⁷ Yoni Appelbaum, *I Alone Can Fix It*, ATLANTIC (July 21, 2016), <https://www.theatlantic.com/politics/archive/2016/07/trump-rnc-speech-alone-fix-it/492557/> [<https://perma.cc/GUW6-5UJT>].

⁸ Charlie Savage, *Trump's Claim of Total Authority in Crisis Is Rejected Across Ideological Lines*, N.Y. TIMES (Apr. 14, 2020),

predecessor in office, President Obama, also was a uniquely unilateralist president whose crowning achievements in immigration and climate policy relied upon executive unilateral action.⁹ Finally, the States continue to challenge federal power and constitutional precedent at almost every turn.¹⁰

The reaction to such unilateralism has been decidedly negative. It is said to erode democratic norms.¹¹ Not only that, this reaction eats away at our Constitutional order with a capital “c” and our constitutional customs with a small “c.”¹²

Adrian Vermeule appeared to confirm these fears in a much-publicized article in *The Atlantic* in March 2020 entitled *Beyond Originalism*.¹³ In this article, Vermeule advocates for the imposition of core Christian moral values by executive action and by Supreme Court adjudication.¹⁴ He submits that these impositions are for the common good, even as he admits that they would violate previously recognized, constitutionally protected liberty interests.¹⁵ In the spirit of truth in advertising, Vermeule coins this new approach to unapologetic unilateralism “illiberal legalism.”¹⁶ Perhaps because Vermeule’s proposal hit such a nerve of existing anxieties about an illiberal authoritarian turn in American law and politics, its unilateralism was immediately and predictably pilloried.¹⁷

<https://www.nytimes.com/2020/04/14/us/politics/trump-total-authority-claim.html>
[<https://perma.cc/M7B5-294Z>].

⁹ K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1699 (2018) (reviewing JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC* (2017)).

¹⁰ See *West Virginia v. EPA*, 136 S. Ct. 1000, 1000 (2016) (mem.); *Texas v. United States*, 945 F.3d 355, 372-73 (5th Cir. 2019), *aff’d*, 136 S. Ct. 2271 (2016) (per curiam); *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2113-2116 (2020) (plurality opinion).

¹¹ See Robert L. Tsai, *Manufactured Emergencies*, 129 YALE L.J. F. 590, 598 (2020).

¹² See Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1450-58 (2018).

¹³ Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020)[*hereinafter* *Vermeule BO*], <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/> [<https://perma.cc/NW7L-34YD>].

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See Lucille E. Nguyen & Bryan L. Frye, *Trolling for Honest Liberalism?*, JURIST (Apr. 11, 2020, 3:42 PM), <https://www.jurist.org/commentary/2020/04/nguyen-frye->

This Article will argue that we, nevertheless, should resist the temptation to reject constitutional unilateralism out of hand. As this Article will argue, unilateralism is the paradigmatic way in which value finds its way into decision-making. Unilateral action nakedly shows the extent to which value overrides traditional republican procedures, and that is precisely why we think ill of unilateralism: it imposes value-based action on affected groups that strongly disagree with both the action taken and the value on which it is based in an undemocratic fashion. Further, unilateralism appears to be bound up in hyper-partisanship and its rejection of calls for public reason as “lamestream” and “fake” on the right, or bound up in systemic racism and economic oppression on the left.¹⁸ When we condemn unilateralism, it is this very purchase of apparently irrational value on decision-making that we seek to reject either as description of how legal decision-making, in fact, does take place in a republican system or how it, in any event, should take place.

But if we unpack unilateralism and understand how unilateralism, value, and contestation are interconnected and respond to each other in pluralist, diverse societies, it turns out that there is much to be said for acting on the basis of values when their demands are particularly urgent. Such actions themselves contribute to and move public discourse as the impact of the Black Lives Matter movement has shown in Minneapolis¹⁹ and the impact of Greta Thunberg has shown in California²⁰—a state that is unilaterally taking on the Trump administration on climate

trolling-for-honest-liberlism/ [https://perma.cc/EAH8-EFTD] (“Unsurprisingly, everyone was horrified. And for good reason!”).

¹⁸ For a discussion of causes and effects of hyper-partisanship on public discourse, see Shelley Welton, *Decarbonization in Democracy*, 67 UCLA L. REV. 56, 75-77 (2020).

¹⁹ See Vanessa Romo, *Minneapolis Council Moves to Defund Police, Establish ‘Holistic’ Public Safety Force*, NAT’L PUB. RADIO (June 26, 2020, 8:14 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/26/884149659/minneapolis-council-moves-to-defund-police-establish-holistic-public-safety-forc> [https://perma.cc/VYP7-287Q].

²⁰ See Tony Barboza, *Greta Thunberg Joins L.A. Climate Strike, Says Wildfires ‘Will Continue to Get Worse’*, L.A. TIMES (Nov. 1, 2019, 5:01 PM), <https://www.latimes.com/california/story/2019-11-01/greta-thunberg-youth-climate-strike-planned-for-friday> [https://perma.cc/GQ7P-LPP2].

change.²¹ Not only that, it is frequently the *contestation* of unilateral action that becomes uniquely powerful. Former Secretary of Defense, General James Mattis, ably demonstrated this much. His rebuke of the Trump administration's use of military forces to clear Black Lives Matter protesters out of Lafayette Square led to an apology from the chairman of the Joint Chiefs of Staff (and likely a change in policy).²²

There is, thus, much to be said for unilateralism and its particular brand of immediate contestation. It highlights the raw value claims of disaffected groups, and it forces immediate engagement with these value claims rather than providing room to avoid them. Certainly, Vermeule's illiberal legalism illustrates that unilateralism is a double-edge sword, but so long as unilateralism can be contained and channeled, unilateralism and value-based decision making remain a desirable core feature of self-governance in highly diverse societies: it allows decision makers to respond to disaffected groups challenging and contesting what is wrong with the dominant public reason paradigm.

To return to the Roberts Court, this means that the courts will have an outsized role to play in any unilateralist understanding of constitutional action. The Court could become Vermeule's unilateralist, illiberal enforcer of a moral vision of American life, or it can protect the space for republican engagement, policing unilateralist overreach when necessary and encouraging further contestation and engagement when possible.

This Article argues that the Roberts Court precisely understands this. In its legacy cases, it typically acts as a safeguard to the proper functioning of unilateralist engagement in the current

²¹ Reuters Staff, *California, 19 Other States, Sue Trump Administration for Weakening Methane Rules*, REUTERS (Sept. 14, 2020, 9:35 AM), <https://www.reuters.com/article/us-usa-climatechange-lawsuit/california-19-other-states-sue-trump-administration-for-weakening-methane-rules-idUSKBN2652EB> [<https://perma.cc/2BUS-SLCL>].

²² Jeffrey Goldberg, *James Mattis Denounces President Trump, Describes Him as a Threat to the Constitution*, ATLANTIC (June 3, 2020), <https://www.theatlantic.com/politics/archive/2020/06/james-mattis-denounces-trump-protests-militarization/612640/> [<https://perma.cc/5KUM-7BJX>]; Ryan Browne et al., *Top General Apologizes for Appearing in Photo-op with Trump After Forceful Removal of Protesters*, CNN (June 11, 2020, 3:58 PM), <https://www.cnn.com/2020/06/11/politics/milley-trump-appearance-mistake/index.html> [<https://perma.cc/M8F7-EHS9>].

constitutional and political environment. It is from this vantage point that one can make sense of the same court deciding *Citizens United* and *Russo*, *Masterpiece Cakeshop* and *Bostock*, *Regents of the University of California* and *Trump v. Hawaii*, and *West Virginia v. EPA* and *National Federation of Independent Business v. Sebelius*. The Roberts Court is not randomly swaying between, say, protecting LGBTQ rights and Dreamers or upholding religious liberty and enforcing a “Muslim ban.” Rather, the Roberts Court is largely deliberate in holding the balance between unilateral action and contestation and thus policing the smooth functioning of deliberative processes in the age of unilateralism.

This Article has six parts. Part I provides a working definition of unilateralism. Part II addresses the traditional counter-strategies to unilateralism and their rejection by the Roberts Court in cases like *Trump v. Hawaii* and *Regents of the University of California*. Part III sketches Vermeule’s defense of unilateralism. Part IV outlines how Vermeule’s critique correctly highlights the limits of a public reason paradigm at the heart of the traditional rejection of unilateralism and demonstrates its applicability to the Roberts Court by reference to the public reason inspired dissents in *Masterpiece Cakeshop* by Justice Ginsburg and in *Bostock* by Justice Alito. Part V argues that Vermeule’s insight, in fact, can be recast in terms of traditional understandings of republican governance going back to classic republican theory. Part VI, then, concludes with an analysis of the legacy cases by the Roberts Court to show this unilateralist paradigm in action.

I. A WORKING DEFINITION OF UNILATERALISM

One of the key submissions of this Article is that unilateralism explains why the Roberts Court acts as it does and, in fact, acts in a manner that is jurisprudentially consistent and praiseworthy. But this begs the question: what is unilateralism? After all, unilateralism is typically used as a negative assessment.²³ One would rarely describe oneself as a unilateralist.²⁴ Rather, we see

²³ See Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201, 1287-93; (2018); David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 952 (2016).

²⁴ The arguable exception to this rule is the Trump administration. See Ashley Parker, *Going It Alone: Trump Increasingly Relies on Unilateral Action to Wield Power*,

and discuss unilateralism when the current hyper-partisan political environment makes it next to impossible to find legislative compromise or consensus.²⁵ This hyper-partisan environment drives one naturally towards unilateralism.²⁶

This Part lays out a rubric of five factors that broadly defines unilateralism for purposes of this Article. This rubric is not yet intended as a normative appraisal of unilateralism. Rather, it seeks to capture what we intuit when we refer to unilateralism or unilateral conduct. It will, then, use two examples to illustrate its point: President Obama's Deferred Action for Childhood Arrivals (DACA) program and President Trump's travel ban. Finally, it will briefly set up how the Roberts Court's decisions to uphold both programs appear facially odd on a partisan scale.

The first feature of unilateralism is that the person acting unilaterally does not consult the formal decision-making bodies that one would expect the person to include in the ordinary course of decision making. In the context of the DACA program, one would have expected that the program would have been part of legislative immigration reform.²⁷ In fact, the substance of DACA was under consideration in the legislative negotiations which ultimately failed.²⁸ Much of the same is true with regard to the travel ban. The policy had been a campaign promise by the Trump administration that received a less than lukewarm reception, even by Republican

WASH. POST (June 11, 2018, 6:50 AM), https://www.washingtonpost.com/politics/going-it-alone-trump-increasingly-relies-on-unilateral-action-to-wield-power/2018/06/11/6124866a-6a80-11e8-bbc5-dc9f3634fa0a_story.html [https://perma.cc/8FMT-N824].

²⁵ See, e.g., Lee Drutman, *America Is Now the Divided Republic the Framers Feared*, ATLANTIC (Jan. 2, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/two-party-system-broke-constitution/604213/> [https://perma.cc/A5E2-W6PM].

²⁶ See Rich Lowry, *The Age of Unilateral Rule*, NAT'L REV. (June 2, 2017, 4:00 AM), <https://www.nationalreview.com/2017/06/donald-trump-paris-agreement-age-unilateral-rule/> [https://perma.cc/9NH5-F725].

²⁷ See Julia Preston, *Young Immigrants Say It's Obama's Time to Act*, N.Y. TIMES (Nov. 30, 2012), <https://www.nytimes.com/2012/12/01/us/dream-act-gives-young-immigrants-a-political-voice.html?searchResultPosition=3> [https://perma.cc/ALY5-JS3N].

²⁸ Lizette Alvarez, *With G.O.P.'s Ear, Rubio Pushes Dream Act Proposal*, N.Y. TIMES (Apr. 26, 2012), <https://www.nytimes.com/2012/04/27/us/politics/with-gops-ear-marco-rubio-pushes-dream-act-proposal.html?searchResultPosition=4> [https://perma.cc/B49A-WXSV].

lawmakers, at the time.²⁹ So, the use of an executive order to push through the travel ban is similarly surprising.³⁰

Second, the person acting unilaterally is typically aware of informal resistance from key stakeholders in those formal decision-making bodies. The decision ultimately not to consult formal decision-making bodies is deeply influenced by the impression that such consultation would, in fact, shoot down the proposed action or decision. The Dream Act proposal did not provide a legislative path that avoided the need for executive action on DACA.³¹ Similarly, as concerns the travel ban, it is highly unlikely that it would have garnered sufficient support to pass as legislation in Congress.³² Unilateral conduct, therefore, is purposefully evasive.

Third, the person acting unilaterally justifies his or her decision by reference to a core value.³³ This core value resonates with the identity and the public morals of the person acting unilaterally. Thus, President Obama justified DACA in terms of the blamelessness and even the merit of Dreamers.³⁴ In doing so, he invoked the twin values of merit and compassion. President Trump justified the travel ban as “[p]rotecting the [n]ation [f]rom [f]oreign [t]errorist [e]ntry.”³⁵ He thus invoked the values of national

²⁹ Jeremy Diamond, *Donald Trump: Ban All Muslim Travel to U.S.*, CNN (Dec. 8, 2015, 4:18 AM), <https://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/index.html> [<https://perma.cc/HYN5-B5GJ>].

³⁰ See Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8977-79 (Jan. 27, 2017).

³¹ See Gerry Mullany, *Rubio Calls Obama's Dream Act Move a 'Short-Term Fix'*, N.Y. TIMES: THE CAUCUS (June 24, 2012, 1:13 PM), <https://thecaucus.blogs.nytimes.com/2012/06/24/rubio-calls-obamas-dream-act-move-a-short-term-fix/?searchResultPosition=4> [<https://perma.cc/J39K-Z6JA>]. See also Russell Berman, *A Risky Immigration Vote for the GOP*, ATLANTIC (Jan. 14, 2015), <https://www.theatlantic.com/politics/archive/2015/01/House-Republicans-Vote-to-Block-Obama-on-Immigration/384513/> [<https://perma.cc/C52D-RWPK>].

³² See Alan Yuhas & Mazin Sidhamed, *Is This a Muslim Ban? Trump's Executive Order Explained*, GUARDIAN (Jan. 31, 2017, 2:28 PM), <https://www.theguardian.com/us-news/2017/jan/28/trump-immigration-ban-syria-muslims-reaction-lawsuits> [<https://perma.cc/5LH4-RR8M>].

³³ See GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION 116 (2012).

³⁴ Office of the Press Secretary, *Remarks by the President on Immigration*, WHITE HOUSE (June 15, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration> [<https://perma.cc/592Z-H2J3>] [hereinafter 2012 Remarks].

³⁵ Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

security as well as ethnic homogeneity (America as a white Christian nation).³⁶

Fourth, the priority of this value in the specific setting is itself contested. It was clear to President Obama contemporaneously to authorizing DACA that he faced stiff opposition to this agenda as representing an “amnesty” for lawbreakers.³⁷ It should have been clear to President Trump contemporaneously to signing the travel ban that he faced stiff opposition to his nativism.³⁸ This opposition viewed the United States as a multi-cultural country defined by civic and economic as opposed to ethnic ties.³⁹ Both actions, in fact, were contested almost immediately in the courts.⁴⁰

Fifth, the person acting unilaterally may affect persons that strongly disagree with the decision.⁴¹ In the context of the travel ban, the first version of the ban affected visa and even Green Card holders.⁴² These immigrants disagreed with the value invoked by President Trump for obvious reasons as is evidenced in the lawsuit they filed.⁴³ The same is true for other civil society actors including most notably the State of Hawai’i.⁴⁴

Although the accusation that a person is acting unilaterally frequently also raises a charge of deceptive dealing, this deception is not a core part of unilateral action. In the context of the travel ban, leading national security figures in the Obama administration filed amicus briefs in court challenges of the travel ban.⁴⁵ These briefs asserted that the stated factual basis for the policy, a national security threat, was simply factually absent.⁴⁶ The point, however, remains that leading members of the White House team behind the

³⁶ See George Hawley, *Ambivalent Nativism: Trump Supporters’ Attitudes Toward Islam and Muslim Immigration*, BROOKINGS (July 24, 2019), <https://www.brookings.edu/research/ambivalent-nativism-trump-supporters-attitudes-toward-islam-and-muslim-immigration/> [<https://perma.cc/X79F-Z465>].

³⁷ 2012 Remarks, *supra* note 34.

³⁸ Yuhas & Sidhamed, *supra* note 32.

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ GRALF-PETER CALLIESS & PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW* 129-131 (2010).

⁴² Yuhas & Sidhamed, *supra* note 32.

⁴³ *Id.*

⁴⁴ *See generally* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

⁴⁵ Brief for Former National Security Officials as Amici Curiae Supporting Respondents at 16, *Trump v. Hawaii*, 138 S. Ct. at 2392 (2018) (No. 17-965).

⁴⁶ *Id.* at 6.

travel ban, likely honestly believe that Muslim immigration to the United States is a security threat.⁴⁷ Such beliefs make them white nationalists.⁴⁸ They do not, however, make them inherently dishonest.

What makes both DACA and the travel ban so interesting for current purposes is that both were reviewed by the Roberts Court: the travel ban was at issue in *Trump v. Hawaii* and the attempted repeal of DACA in *DHS v. Regents of the University of California (Regents)*.⁴⁹ The travel ban at issue in *Trump v. Hawaii* was not the first iteration of the ban but rather a later, significantly diluted version of the earlier ban.⁵⁰ This dilution was a response to earlier court challenges.⁵¹ But even this travel ban directly affected families that hoped to reunite under existing immigration law and were thwarted only by the travel ban.⁵² Even this version of the travel ban, further, was deemed improper by United States Court of Appeals.⁵³ Nevertheless, in *Trump v. Hawaii* the Roberts Court upheld the travel ban as a matter of statutory construction and executive discretion in immigration policy.⁵⁴

Regents on the other hand concerned the attempt by DHS to cancel the DACA program on the basis of a broad determination of its unlawfulness.⁵⁵ The Court deemed that the manner in which DHS sought to undo DACA benefits was “arbitrary and capricious.”⁵⁶

What makes this pair of decisions so interesting is that they prove Kerr’s point in commenting on the *Russo* abortion decision.⁵⁷

⁴⁷ Suzanne Gamboa, *After Stephen Miller’s White Nationalist Views Outed, Latinos Ask, ‘Where’s the GOP Outrage?’*, NBC NEWS (Dec. 7, 2019, 7:58 AM), <https://www.nbcnews.com/news/latino/after-stephen-miller-s-white-nationalist-views-outed-latinos-ask-n1096071> [<https://perma.cc/AA2U-QFJQ>].

⁴⁸ *Id.*

⁴⁹ See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020).

⁵⁰ *Trump*, 138 S. Ct. at 2436-37 (Sotomayor, J., dissenting).

⁵¹ *Id.*

⁵² *Id.* at 2415-17 (majority opinion).

⁵³ See *Hawaii v. Trump*, 878 F.3d 662, 673 (9th Cir. 2017), *rev’d*, 138 S. Ct. 2392 (2018).

⁵⁴ *Trump*, 138 S. Ct. at 2408.

⁵⁵ See *generally* *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020).

⁵⁶ *Id.* at 1912.

⁵⁷ See Kerr, *supra* note 2.

It is next to impossible to see a common *political* line between both decisions.⁵⁸ DACA benefits and the travel ban relied upon contradictory values. One would thus have expected a court to act consistently to protect immigrants or to defer to the executive on immigration decisions. It turns out the Court did not act with such political consistency when addressing otherwise unilateral action. So, what is the Roberts Court doing?

In sum, unilateralism can be organized in a five-factor rubric that can helpfully illustrate the problems—and opportunities—created by unilateral conduct. (1) The person acting unilaterally does not consult the formal decision-making bodies that one would expect the person to include in decision making in the ordinary course. (2) The person acting unilaterally is typically aware of informal resistance from key stakeholders. (3) The person acting unilaterally justifies his or her decision by reference to a core value. (4) The invocation of this core value in the particular context is contested. (5) The person acting unilaterally is likely to affect persons that strongly disagree with the decision and contest the applicability of the core value motivating action.

II. UNILATERALISM AS ASSAULT ON REPUBLICAN GOVERNMENT

This section argues that the Roberts Court also is not guided by a traditional distrust of unilateralism founded in the principle of republican government. This principle can be expressed procedurally in terms of checks and balances.⁵⁹ It can also be expressed substantively in terms of ordered liberty.⁶⁰ Had these principles guided the courts' decision making, this section will argue both *Hawaii* and *Regents* should have reached the opposite result. This means that something else must be guiding decision-making.

⁵⁸ *Id.*

⁵⁹ Kim Wehle, *Congress Has Lost Its Power Over Trump*, ATLANTIC (Feb. 4, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/checks-and-balances-trump-has-swept-away/606013/> [<https://perma.cc/GE9R-2DZ5>].

⁶⁰ Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 134 (2011).

Unilateralism is traditionally met with suspicion by both “liberal” and “conservative” legal theorists.⁶¹ Both camps develop a consistent, traditional reason for their critique of unilateralism. Pursuant to predictions by Ackerman, unilateralism has the potential to threaten the republican government.⁶²

While republican government is itself a vague term, one can broadly think of two complementary ways to unpack it. One way focuses on the procedures of republican governance enshrined in the Constitution—checks and balances.⁶³ The other focuses on the substance of what republican government achieves—ordered liberty.⁶⁴ Unilateral conduct by any actor is deeply suspect to either of these two traditional understandings of republican government.

A. *The Procedural Problem of Unilateralism*

Few slogans capture republican governance better than checks and balances.⁶⁵ Republican government separates power between different branches of the government—the legislative power, the executive power, and the judicial power.⁶⁶ In the U.S. context, republican government adds federalism to check and balance federal power.⁶⁷

This perspective focuses on the first element of unilateralism. It appreciates unilateralism as a circumnavigation of ordinarily

⁶¹ See Bradley & Goldsmith, *supra* note 23, at 1209; Harold H. Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L.J. F. 432 *passim* (2018); Ronald J. Krotoszynski, Jr., “A Republic If [We] Can Keep It”: A Prolegomenon on Righting the Ship of State in the Wake of the Trumpian Tempest Democracy and Dysfunction, 98 TEX. L. REV. 539, 542 (2020); BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 5-6 (2010).

⁶² ACKERMAN, *supra* note 61, at 9.

⁶³ Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 297 (1941).

⁶⁴ McDonald v. City of Chicago, 561 U.S. 742, 760 (2010).

⁶⁵ Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 843 (2018); Jamal Greene, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021, 1026 (2005); Stephen E. Gottlieb, *Election Reform and Democratic Objectives—Match or Mismatch?*, 9 YALE L. & POL’Y REV. 205, 227-28 (1991).

⁶⁶ See David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1494-95 (1992).

⁶⁷ David S. Rubenstein, *Administrative Federalism as Separation of Powers*, 72 WASH. & LEE L. REV. 171, 184-86 (2015).

applicable formal decision-making processes.⁶⁸ The other features of unilateralism then highlight why this circumnavigation of ordinary decision-making processes is problematic.

Unilateralism can be a conscious assault on the separation of powers.⁶⁹ When we speak of unilateralism or unilateral conduct, we precisely do not mean the *ordinary* exercise of constitutional powers. We mean that one branch (typically, though not always, the executive) has arrogated to itself more power than what the constitutional balance should afford it.⁷⁰ Unilateralism therefore is inherently corrupt.⁷¹ It undermines the proper functioning of the separation of powers.⁷² The examples above of DACA and the travel ban most directly affect this dimension of unilateralism in that in both instances, the executive used executive orders to circumnavigate Congressional legislation to achieve a policy goal.⁷³

Unilateralism also can be a conscious assault on federalism. When we speak of unilateralism in this context, we typically refer to an encroachment by the federal government on state competencies.⁷⁴ Similarly, we could refer to a facially unusual attempt by states to displace foreign policy priorities of the President and State Department.⁷⁵ In the immigration context discussed above, states such as Hawaii sought to challenge the power of the federal government to set immigration policy—to the point of challenging the travel ban all the way to the United States Supreme Court.⁷⁶ This form of unilateralism, too, is inherently corrupting in much the same way as separation of power

⁶⁸ ACKERMAN, *supra* note 62, at 9.

⁶⁹ *Id.*

⁷⁰ Rich Lowry, Nat'l Review, *Yes, the Supreme Court is Undemocratic*, SALT LAKE TRIB. (July 14, 2018), <https://www.sltrib.com/opinion/commentary/2018/07/13/rich-lowry-yes-supreme/> [<https://perma.cc/X9DQ-MTHB>].

⁷¹ See E. Garrett West, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 194 (2018) (providing historical background).

⁷² Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641, 667-68, 695 (2020).

⁷³ See *supra* Part I.

⁷⁴ See David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1126 (2012).

⁷⁵ Frédéric Gilles Sourgens, *States of Resistance*, 14 DUKE J. CONST. L. & PUB. POL'Y 91, 114-17 (2019).

⁷⁶ See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

unilateralism: it appears to undo the checks and balances between federal government and the states.

The *Regents* decision in particular highlights that this perspective did not inform the Roberts Court.⁷⁷ The Trump administration's justification for the repeal of DACA benefits was that DACA itself was unlawful.⁷⁸ The Trump administration tracked the procedural concern of checks and balances: President Obama did not have the unilateral power to promulgate DACA in the first place.⁷⁹ Consequently, an illegal program cannot give rise to legal rights. Agree with the Trump administration or not, its reasoning certainly captures the logic of procedural requirements of republican government.

What did the Roberts Court do? It did not answer whether DACA was legally promulgated. It reasoned that regardless of this question, the repeal itself was arbitrary and capricious as DHS had discretion over which removal proceedings to pursue.⁸⁰ Cogent though this reasoning is, it is not guided by an overarching goal to protect separation of powers and signal that executive overreach would be called back. Quite the opposite is true—it reached its result despite leaving claims unaddressed that the Obama administration never had the power to pass the program the Trump administration sought to undo.⁸¹ A strong policy in favor of protecting checks and balances should have reached the opposite conclusion and lauded the Trump administration's efforts to reign in past executive abuse.

B. The Substantive Problem of Unilateralism

The second critique of unilateralism is substantive. Few documents capture better what republican government is about than Washington's farewell address: "the benign influence of good laws under a free government."⁸² Washington warned that

⁷⁷ See *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1902-03 (2020).

⁷⁸ *Id.* at 1914-15.

⁷⁹ *Id.* at 1918-19 (Thomas, J., concurring in judgment & dissenting in part).

⁸⁰ *Id.* at 1915 (majority opinion).

⁸¹ *Id.* at 1926 (Thomas, J., concurring in judgment & dissenting in part).

⁸² George Washington, President of the United States, Farewell Address (1796), available at https://avalon.law.yale.edu/18th_century/washing.asp [https://perma.cc/M3AZ-J575].

unilateralism—or unbalancing—“is the customary weapon by which free governments are destroyed.”⁸³ No matter one’s conception of freedom, what Washington meant is reasonably obvious: unilateralism undermines freedom because it interferes in the quiet enjoyment by the citizens of the “happy reward . . . of our mutual cares, labors, and dangers.”⁸⁴ It does so without allowing them a proper voice in decision making. In terms of the Framers, unfree government renders previously free *citizens* under constitutional government into unfree *subjects* of pre-Republican government.⁸⁵ Again, both liberal and conservative authors note this link between unilateralism and the impairment of civic freedom and tyranny.⁸⁶

The substantive critique of unilateralism inverts the perspective of the procedural critique. Rather than focusing on the first feature of unilateralism, it focuses on the fifth. That is, it is concerned with the effect of unilateral decision on those affected by them. Here, the persons affected did not consent to the imposition of the decision. The fact that the processes by which they would have consented were circumnavigated supports this liberty-based complaint.

Civic republican theorists, such as Philip Pettit, explain why such an infringement is problematic. Pettit argues that a person is unfree if they’re subject to another domination.⁸⁷ He further explains that a person is subject to another’s domination when that other person has the power arbitrarily to interfere in one’s affairs.⁸⁸ What makes such a power arbitrary is that one would not in

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Maximilian Koessler, “Subject,” “Citizen,” “National,” and “Permanent Allegiance,” 56 *YALE L.J.* 58, 59 (1946).

⁸⁶ See, e.g., Michael Hirsh, *The Tyrannical Mr. Trump*, *FOREIGN POLY* (Oct. 2, 2019, 3:22 PM), <https://foreignpolicy.com/2019/10/02/the-tyrannical-mr-trump-authoritarian-impeachment-constitutional-crisis/> [<https://perma.cc/52B5-LMVC>]; Julia Azari, *Is Obama a Tyrant or a Weakling?*, *POLITICO MAG.* (June 8, 2014), <https://www.politico.com/magazine/story/2014/06/is-obama-a-tyrant-or-a-weakling-107544> [<https://perma.cc/5FUK-8H88>].

⁸⁷ PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 23 (1997).

⁸⁸ *Id.* at 55, 85.

principle consent to the kind of restrictions that could be imposed on one's own self-interest.⁸⁹

One might, in principle, tolerate the absence of deliberation to the extent that power is not exercised arbitrarily.⁹⁰ However, to the extent that affected persons would precisely not consent to a restriction, the conduct would no longer be consistent with liberty.⁹¹ The imposition of results on the basis of values not shared by those affected by a decision distinctly counts as such arbitrary interference.⁹² Thus, there is a distinct and problematic loss of liberty interests that is distinct from the use of formal deliberation procedures. Therefore, the failure to use these procedures is only a symptom and not the cause of the underlying problem of unilateral decision making in republican government.

The example of the travel ban vividly illustrates this point.⁹³ The loss of liberty interests of those affected by the ban was significant.⁹⁴ It led to the exclusion of persons from the United States who would otherwise have been able to travel or immigrate.⁹⁵ One might quibble whether these persons had a liberty interest before coming to the United States.⁹⁶ But one cannot quibble with the liberty interests of their loved ones and of their communities that counted on their presence.⁹⁷ *Their* liberty interest was negatively affected.

Not only that, the core value supporting the adoption of the policy, the defense of the United States as a Christian nation,⁹⁸

⁸⁹ *Id.* at 55.

⁹⁰ NICO KRISCH, BEYOND CONSTITUTIONALISM, THE PLURALIST STRUCTURE OF POSTNATIONAL LAW 270-75 (2011).

⁹¹ PETTIT, *supra* note 87, at 55.

⁹² *Id.*

⁹³ For a history of the development of the travel ban and its judicial challenge, see *First Amendment—Establishment Clause—Judicial Review of Pretext—Trump v. Hawaii*, 132 HARV. L. REV. ONLINE 327, 327-36 (2018).

⁹⁴ See Frank J. Colucci, *When Structure Fails: Justice Kennedy, Liberty, and Trump v. Hawaii*, 70 HASTINGS L.J. 1141, 1168-69 (2019) (discussing the tension between deference to executive foreign affairs discretion and liberty interests in Justice Kennedy's *Trump* concurrence).

⁹⁵ See *id.* at 1164-65.

⁹⁶ See generally *Kleindienst v. Mandel*, 408 U.S. 753, 754 (1972); Earl M. Maltz, *The Constitution and The Trump Travel Ban*, 22 LEWIS & CLARK L. REV. 391, 406-07 (2018).

⁹⁷ *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018).

⁹⁸ Compare Mark Silk, *Steve Bannon and the Nationalist Roots of Trump's 'Judeo-Christian' Vision*, RELIGION NEWS SERV. (Aug. 11, 2019),

denigrated many non-Christian citizens relying upon the immigration laws of the United States to reunite with loved ones or run a business as quasi-second-class citizens.⁹⁹ The intricacies of executive powers under the Immigration and Naturalization Act simply do not begin to answer why any person should be subjected to such a risk.

Concerns for protecting the value of republican government against unilateral overreach could not have been a leading factor supporting the Roberts Court's decision to uphold the travel ban.¹⁰⁰ Such concerns would have required the opposite result—a protection of ordered liberty. The case instead focused on, and preferred, the statutory arguments and structural concerns about executive foreign affairs powers to even such deeply entrenched liberty interests.¹⁰¹ There is, thus, no way around the premonition that “the benign influence of good laws under a free government” has been compromised.¹⁰² In fact, Justice Kennedy's concurrence in the majority opinion very much evokes this concern.¹⁰³ And it is hard even to read the majority opinion as suggesting that there is anything benign about the Trump administration's use of law to bolster its project.¹⁰⁴ One is thus again left with the question—why? And this question radiates through much of the legacy decisions of the Roberts Court.¹⁰⁵

III. VERMEULE'S DEFENSE OF UNILATERALISM

This section argues that for good or ill, the Roberts Court's course means that it must deal with the core of the unilateralist argument: the third element of value-based decision making. The Roberts Court turned down the opportunity to reject unilateralism

<https://religionnews.com/2019/08/11/our-latest-judeo-christian-civilizational-clash/> [<https://perma.cc/P8YG-4MTV>] (discussing ideological roots of Trumpian nationalism), *with Trump*, 138 S. Ct. at 2429-33 (Breyer, J., dissenting).

⁹⁹ Maltz, *supra* note 96, at 406-07 (discussing why order was challenged under establishment clause).

¹⁰⁰ *Trump*, 138 S. Ct. at 2408-09.

¹⁰¹ Colucci, *supra* note 94, at 1168-69.

¹⁰² George Washington, President of the United States, Farewell Address (1796), *available at* https://avalon.law.yale.edu/18th_century/washing.asp [<https://perma.cc/FCA5-T4HL>].

¹⁰³ *See* Colucci, *supra* note 94, at 1168-69.

¹⁰⁴ *See Trump*, 138 S. Ct. at 2417-18.

¹⁰⁵ *See generally* Kerr, *supra* note 2.

wholesale on republican government grounds as traditionally understood.¹⁰⁶ It therefore cannot but deal with this crucial element of unilateralism head on. That core is the third element of unilateralism: the gravitational pull value exercises on decision making when ordinary constitutional processes would tend to obstruct value-based policymaking. Such an engagement of value-based unilateral decision-making must grapple with by far the most sophisticated defense of unilateralism today—the highly controversial work of Adrian Vermeule.

Vermeule’s defense of unilateralism is famously inflammatory. Vermeule’s most recent essay *Beyond Originalism* amply proves the point. In it, Vermeule builds on his earlier work on strong executive powers to act unilaterally.¹⁰⁷ He now proposes that “government helps direct persons, associations, and society generally toward the common good.”¹⁰⁸ This common good lies in illiberal legalism grounded in substantive moral principles.¹⁰⁹ These moral principles in turn are grounded in Christian (Catholic) reactionary orthodoxy.¹¹⁰ Given this premise in moral value, their implementation may override the objection of those on whom they are imposed.¹¹¹

Vermeule’s current article goes further than his earlier work in arguing for judicial implementation of such unilateralism through constitutional adjudication.¹¹² That is, Vermeule not only argues that the executive should act as *pater patriae*,¹¹³ he also argues that the courts should use constitutional construction to achieve the same moral ends.¹¹⁴ In other words, he advocates a full court press of unilateralism premised entirely upon the pull of

¹⁰⁶ See *supra* Part II.

¹⁰⁷ Vermeule *BO*, *supra* note 13.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See Nate Hochman, *Adrian Vermeule’s Moral Madness*, AM. CONSERVATIVE (Apr. 6, 2020, 12:01 AM), <https://www.theamericanconservative.com/articles/adrian-vermeules-moral-madness/> [<https://perma.cc/39MT-7YY3>]; Andrew T. Walker, *The Problem with Catholic Integralism in One Tweet*, PROVIDENCE (Nov. 27, 2019), <https://providencemag.com/2019/11/problem-catholic-integralism-tweet-adrian-vermeule/> [<https://perma.cc/7K2H-HFXE>].

¹¹¹ Vermeule *BO*, *supra* note 13.

¹¹² See *id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

value—that is the third factor we outlined above in our five-factor rubric of unilateralism.

Vermeule’s work is inspired by Carl Schmitt.¹¹⁵ Carl Schmitt was one of the leading ultra-conservative jurists of 1920s Germany.¹¹⁶ He is most infamous for his full-throated defense of National-Socialist dictatorship in Germany.¹¹⁷ Like Vermeule’s current work, Schmitt was deeply influenced by a particularly authoritarian strain of Catholic theology.¹¹⁸

Schmitt’s critique of the liberal constitutional order in the German Weimar Republic of his day was multifaceted.¹¹⁹ Yet, three strains stand out. The first critique that is to become important is the rejection by Schmitt of fundamental rights.¹²⁰ Schmitt submits that if majoritarian government can be trusted, there should be no need for fundamental rights subject to super-majoritarian constraints.¹²¹ There is only a need for fundamental rights if majoritarian government cannot be trusted to make good decisions.¹²² He thus sets up a dilemma that majoritarian government either should be able fully to espouse whatever value it wishes or that majoritarian government is a flawed form of governance.

Schmitt makes two important provisos. He argues that majoritarian rule is only ever a sensible governance strategy if every person has a reasonable opportunity to be in the majority.¹²³

¹¹⁵ Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1098 (2009) [*hereinafter Vermeule OSAL*]; Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 683-84 (2015) [*hereinafter Vermeule Optimal*]; Eric A. Posner & Adrian Vermeule, *Demystifying Schmitt*, in THE OXFORD HANDBOOK OF CARL SCHMITT 612, 612-24 (Jens Meierhenrich & Oliver Simons eds., 2017).

¹¹⁶ Lars Vinx, *Carl Schmitt*, STAN. ENCYCLOPEDIA PHIL. (Aug. 29, 2019), <https://plato.stanford.edu/entries/schmitt/>.

¹¹⁷ OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 236 (2017).

¹¹⁸ Reinhard Mehring, A “Catholic Layman of German Nationality and Citizenship”?: *Carl Schmitt and the Religiosity of Life*, in THE OXFORD HANDBOOK OF CARL SCHMITT 73, 73-75 (Jens Meierhenrich & Oliver Simons eds., 2017).

¹¹⁹ On the complexity of Schmitt’s argument, see, e.g., David Dyzenhaus, *Constituting the Enemy: A Response to Carl Schmitt*, in MILITANT DEMOCRACY 15, 17-18 (A. Sajó ed. 2004).

¹²⁰ CARL SCHMITT, LEGALITY AND LEGITIMACY 53-61 (1932) (Jeffrey Seitzer, trans., ed. 2004) [*hereinafter SCHMITT LEGALITY*].

¹²¹ *See id.* at 54.

¹²² *See id.*

¹²³ *Id.* at 30.

That is, Schmitt submits that majoritarian government lacks any legitimacy if there are permanent minorities deprived of an opportunity to participate in winning coalitions.¹²⁴ He does not require that each group in fact participate in forming a governing coalition over a certain period of time—the point is structural only.¹²⁵ Yet even in this form, it is of significance for the remainder of our discussion of unilateralism.

He also astutely observes that the introduction of super-majoritarian rules in democratic constitutions are particularly subject to abuse.¹²⁶ Thus, he notes that it is possible for parliamentarians to use appointment processes requiring a simple majority in order to affect interpretations of constraints requiring super-majorities to undo.¹²⁷ The existence of fundamental rights subject to super-majoritarian rules to revise or review thus creates incentives for institutional abuse by gaming majoritarian process to have a super-majoritarian impact.¹²⁸ Given recent battles over confirmations of Supreme Court justices, this point will again become important.¹²⁹

Second, Schmitt centrally argues that all truly political confrontation is an absolute confrontation about values.¹³⁰ It is an absolute confrontation because core values themselves do not permit of compromise.¹³¹ They are adopted wholesale, or not at all.¹³² When two camps adopt values that are at odds with each other, these camps are in a political fight that can only end with the complete extinction of one camp and the final victory of the other.¹³³

¹²⁴ *Id.*

¹²⁵ *Id.* at 31-33.

¹²⁶ *Id.* at 51-53.

¹²⁷ *Id.* at 52-53.

¹²⁸ *Id.* at 53.

¹²⁹ See generally Seung Min Kim et al., *Senate GOP Goes ‘Nuclear’ on Supreme Court Filibuster*, POLITICO (Apr. 6, 2017, 8:59 AM), <https://www.politico.com/story/2017/04/senate-neil-gorsuch-nuclear-option-236937> [<https://perma.cc/Q5QF-THWR>].

¹³⁰ CARL SCHMITT, *DER BEGRIFF DES POLITISCHEN passim* (Hanseatische Verlagsanstalt Hamburg ed., 1933) [*hereinafter* SCHMITT BDP].

¹³¹ *Id.* at 12.

¹³² *Id.* at 11-12.

¹³³ *Id.* at 8.

Schmitt submits that pluralist states following rule of law models merely paralyze such political engagement.¹³⁴ Implicit in his assessment is the desirability to throw off the yoke of paralysis.¹³⁵ He thus submits that contestation in its pure form is preferable as the more natural form of engagement to rule of law based democratic constitutionalism. This engagement further cannot be encapsulated in legal terms. It is purely premised in the full engagement of value.¹³⁶

It is in this context that Schmitt argues finally that, in the end, the Weimar constitution was not majoritarian.¹³⁷ Rather, Schmitt argues that power lies in the ultimate ability to decide or give orders.¹³⁸ This power to decide in an emergency gave absolute power to the President.¹³⁹ Therefore, the President was always able to cast off the constraints of law and rule with absolute power.¹⁴⁰ Whether the President's rule was good was not a question of its lawfulness. That question is nonsensical as power cannot be dissolved into debate—it simply is.¹⁴¹ Rather, the question is whether the power is put to use to defend the right value or virtue as paternalistic leader of his national family.¹⁴²

Vermeule's argument borrows much from Schmitt. Vermeule's insistence on the absolute power of political decisionmakers is inherent in *Beyond Originalism*.¹⁴³ This absolute power is simply the power to do what is right at all times.¹⁴⁴ And what is right is a question of value and not of law.¹⁴⁵ One can further recognize Schmitt's ideas of a political fight to extinction in Vermeule. There is no compromising, no yielding, when one truly defends a political

¹³⁴ *Id.* at 25.

¹³⁵ *Id.*

¹³⁶ *Id.* at 32-33.

¹³⁷ SCHMITT LEGALITY, *supra* note 120, at 67.

¹³⁸ CARL SCHMITT, POLITISCHE THEOLOGIE 71 (2d. ed., 1934) [*hereinafter* SCHMITT THEOLOGIE].

¹³⁹ CARL SCHMITT, DIE DIKTATUR (1928); JOSEPH W. BENDERSKY, CARL SCHMITT: THEORIST FOR THE REICH 33 (2014).

¹⁴⁰ BENDERSKY, *supra* note 139, at 31-33.

¹⁴¹ SCHMITT THEOLOGIE, *supra* note 138, at 80-84.

¹⁴² *Id.* at 42-46.

¹⁴³ *See generally* Vermeule *BO*, *supra* note 13.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

value.¹⁴⁶ There is therefore no need for liberal niceties but only for illiberal constraint for the common good.¹⁴⁷ In a political fight, the end not only excuses the means, it fully justifies them.¹⁴⁸

Vermeule further draws expressly on Schmitt in dealing with the question of emergency in earlier writing.¹⁴⁹ There, Vermeule argues that the absolute power to decide in the face of emergency is unconstrained.¹⁵⁰ By Schmitt's logic, this means that the executive, in particular, always has an absolute and unconstrained power to act.¹⁵¹ The caveat—as his work now clearly states—is that the power to act depends upon the value to be defended.¹⁵² And this value can only be the extreme version of itself as a political fight admits of no compromises.¹⁵³

At first glance, Vermeule's argument has little to do with the Roberts Court. After all, as discussed in Part I, a distinguishing mark of the Roberts Court is that it refuses to make value-based decisions. Before *Russo*, one would have been wrong to view Chief Justice Roberts as a defender of abortion rights as he dissented from the *Whole Woman's Health* decision, which struck down essentially the same law restricting abortion access in Texas.¹⁵⁴ Before *Bostock*, one would have been met with skepticism if one had argued that Justice Gorsuch was an ally of the LGBTQ movement.¹⁵⁵ Yet, Chief Justice Roberts was the key vote in *Russo*, striking down Louisiana's law restricting abortion access.¹⁵⁶ Moreover, Justice Gorsuch wrote the majority opinion in *Bostock*, which determined that discrimination against LGBTQ persons is unlawful under Title VII of the 1964 Civil Rights Act.¹⁵⁷

¹⁴⁶ See generally *id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See Vermeule *OSAL*, *supra* note 115, at 1142-43.

¹⁵⁰ *Id.* at 1101.

¹⁵¹ See SCHMITT THEOLOGIE, *supra* note 138, at 42-46, 80-84.

¹⁵² Vermeule *BO*, *supra* note 13.

¹⁵³ SCHMITT BDP, *supra* note 130, at 12.

¹⁵⁴ *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2330 (2016) (Alito, J., dissenting) (Roberts, C.J., joining).

¹⁵⁵ Peter Manus, *Justice Gorsuch's Crusade: The Inviolable Power of Religion*, 28 B.U. PUB. INT. L.J. 195, 211 (2019).

¹⁵⁶ *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2133 (2020) (plurality opinion).

¹⁵⁷ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1736 (2020).

However, first glances can be deceiving. The first problem with brushing off the relevance of Vermeule's analysis is that a super-majority of the Court is in fact aligning with partisan values. Justices Ginsburg, Sotomayor, Kagan, Alito, and Thomas at least are typically found right where you would expect them to stand as a matter of value commitments.¹⁵⁸ In fact, it is Chief Justice Roberts alone who seems in most cases to moderate away from Vermeule's model of constitutional adjudication.¹⁵⁹ Thus, Vermeule may have the dynamics right even if these dynamics do not openly show at this point.

Second, one of the key points Vermeule makes might even apply to Chief Justice Roberts. Vermeule argues that the Court must exercise a form of *ragion di stato*.¹⁶⁰ This slogan is typically associated with Machiavelli.¹⁶¹ However, as Vermeule argues, "despite the connotations that have become attached to its name," it is properly categorized as part of a broader tradition.¹⁶² That tradition is civic republicanism.¹⁶³ In this vein, it has a particularly institutionalist bend on preserving republican institutions against turmoil feel.¹⁶⁴ The Chief Justice may very well act for the legitimacy of his institution.¹⁶⁵ Thus, he may also be driven by a kind of Vermeulian *ragion di stato*—be it on a more subtle level.

Finally, while the piece has been invariably pilloried since its initial publication in March 2020, both the critique itself and our reaction to the Court's jurisprudence proves Vermeule's point.¹⁶⁶

¹⁵⁸ Amelia Thomson-DeVeaux, *The Supreme Court Might Have Three Swing Justices Now*, FIVETHIRTYEIGHT (July 2, 2019, 6:00 AM), <https://fivethirtyeight.com/features/the-supreme-court-might-have-three-swing-justices-now/> [<https://perma.cc/97KG-LBSK>].

¹⁵⁹ Adam Liptak, *John Roberts Was Already Chief Justice. But Now It's His Court*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/06/30/us/john-roberts-supreme-court.html> [<https://perma.cc/4N47-JLT4>].

¹⁶⁰ Vermeule *BO*, *supra* note 13.

¹⁶¹ FRIEDRICH MEINECKE, MACHIAVELLISM: THE DOCTRINE OF RAISON D'ÉTAT AND ITS PLACE IN MODERN HISTORY 117 (Douglas Scott trans., ed. 1998).

¹⁶² Vermeule *BO*, *supra* note 13.

¹⁶³ See THOMAS POOLE, REASON OF STATE: LAW, PREROGATIVE, EMPIRE 63 (2015).

¹⁶⁴ MITCHELL DEAN, GOVERNMENTALITY: POWER AND RULE IN MODERN SOCIETY 105 (2010).

¹⁶⁵ Or Bassok, *The Court Cannot Hold*, 30 J.L. & POL. 1, 39 (2014).

¹⁶⁶ James Chappel, *Nudging Towards Theocracy: Adrian Vermeule's War on Liberalism*, DISSENT (Spring 2020) <https://www.dissentmagazine.org/article/nudging-towards-theocracy> [<https://perma.cc/7V82-C4YS>]; Matt Ford, *The Emerging Right-Wing Vision of Constitutional Authoritarianism*, NEW REPUBLIC (Apr. 2, 2020),

Thus, one of the most cogent responses to Vermeule notes that it is the illiberalism and authoritarianism in Vermeule that proves problematic, not his lofty theoretical argument.¹⁶⁷ Therefore, we should not argue with him on a theoretical, abstract level but on a concrete one about the specifics that are at issue to unmask him.¹⁶⁸

However, this simply proves Vermeule's point. Vermeule's key move is to argue that the appeal to value is far more important than constitutional decision-making procedure or the liberty interest of those affected by value-based decisions.¹⁶⁹ He thus hones in on the third factor in the unilateralism rubric. Unilateralism is always justified by reference to, and is grounded in, value. If our disagreement with him is value-based, we have no value-neutral basis to contest his point. Accordingly, we prove his point.

The initial reactions to *Russo*, *Bostock*, and *Regents* also rather make the same point. Tweets by Vladeck and Kerr immediately looked to the political explanation as the obvious point of reference.¹⁷⁰ Both expressed mild surprise that this political explanation did not hold true.¹⁷¹ Therefore, our own reaction to the Court neatly makes Vermeule's point—we expect the Court simply to act on the basis of value.¹⁷² We no longer expect that the Court can actually lay claim to a theory of republican neutrality of some sort. If I want to argue, as I do, that this impression is incorrect in important respects, it is imperative to find a cogent theoretical response to Vermeule that accepts his unilateralist starting point.

IV. A BREAKDOWN OF PUBLIC REASON

This Part argues that the traditional republican ideal of neutrality is public reason. It lays out that there are two accounts of public reason, one substantive and one procedural. It submits that the Roberts Court does not generally follow either, even in

<https://newrepublic.com/article/157132/emerging-right-wing-vision-constitutional-authoritarianism> [<https://perma.cc/4YN7-QT7Z>].

¹⁶⁷ Rick Hills, *Picking the Best Fight with Adrian Vermeule*, PRAWFSBLAWG (Apr. 5, 2020, 6:34 PM), <https://prawfsblawg.blogs.com/prawfsblawg/2020/04/picking-the-best-way-to-argue-with-adrian-vermeule.html> [<https://perma.cc/9MJB-6EW2>].

¹⁶⁸ *Id.*

¹⁶⁹ See *Vermeule BO*, *supra* note 13.

¹⁷⁰ Kerr, *supra* note 2; Vladeck, *supra* note 4.

¹⁷¹ See Kerr, *supra* note 2; Vladeck, *supra* note 4.

¹⁷² See *Vermeule BO*, *supra* note 13.

cases that on their facts appear to bear more than a passing resemblance to each other, such as *Masterpiece Cakeshop* and *Bostock*. The Part shows that there is a theoretical reason for this apparent inconsistency on the part of the Roberts Court: public reason of either stripe requires a reasonably homogenous understanding of political norms and values. The current environment is precisely one in which such a reasonably homogeneous understanding is eroding.

The key assumption that underlies the leading American and European theories of government is that public discourse is carried out in a common, neutral, civic language in which claims are made and presented.¹⁷³ This assumption is of foundational constitutional importance. One of the most important warnings issued by the Framers concerns the rule of faction.¹⁷⁴ The rule of faction mobilizes the power of groups.¹⁷⁵ These groups usurp the government by forcing its levers to achieve results that help that group but are injurious to the common good.¹⁷⁶ What brings such factionalism to heel is public reason in civic discourse.¹⁷⁷ Cass Sunstein's early work is among the best modern defenses of such a conception of civic discourse as a deliberative form of engagement as opposed to interest-group power-based bargaining.¹⁷⁸ It is *this* assumption that Vermeule and Schmitt attack.

A. *Two Accounts of Public Reason*

In order to understand this attack, it is first necessary to unpack how such public reason could work. There are two ways in which one might understand public reason. The first is substantive. This is the manner in which John Rawls, the arguably most influential English language political theorist of the 20th century,

¹⁷³ Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEO. L.J. 109, 133-34 (2018) (discussing need for common deliberative idioms in U.S. constitutional context going back to *Federalist No. 10*).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See generally Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 30 (1985); see also PETTIT, *supra* note 87, at 188-89 (discussing Sunstein).

understood it.¹⁷⁹ Rawls' two main works are *A Theory of Justice* (1971) and *Political Liberalism* (1993).¹⁸⁰ Relevant for current purposes, Rawls draws a distinction between contingent facts that provide us with a sense of personal identity and our ability to make rational decisions.¹⁸¹ He surmises that one can meaningfully talk about justice in terms that are divorced from one's own personal lot in life.¹⁸² In fact, Rawls submits that this is the only way to talk about justice as any reference to one's own position is likely to import self-interested biases.¹⁸³

Rawls' definition is substantive. He submits that we must step behind a veil of ignorance that deprives us of any knowledge of our future position in society.¹⁸⁴ Rawls includes our personal moral commitments in the things we give up when we step behind the veil of ignorance.¹⁸⁵ Once behind the veil of ignorance reason will guide us to justice; the test is whether we would be willing to live in society even on its worst-off rung.¹⁸⁶ Rawls posits that this form of substantive civic rationality can lift us beyond the interest of faction by taking factional interests out of the equation entirely and focusing on a substantive ideal of justice in its stead.¹⁸⁷

This understanding of rationality is rather demanding and came under attack for positing a kind of moral theory of its own.¹⁸⁸ The veil-of-ignorance tool begs the question it wants to solve—it does not tell us about justice, as such. It only tells about justice under the conditions it creates. Rawls does not allow for this starting point to be contested by other moral theories.¹⁸⁹ He simply assumes that he got his own value right and that all else will follow.

¹⁷⁹ KATRINA FORRESTER, IN THE SHADOW OF JUSTICE: POSTWAR LIBERALISM AND THE REMAKING OF POLITICAL PHILOSOPHY ix-x (2019).

¹⁸⁰ JOHN RAWLS, A THEORY OF JUSTICE (1971) [*hereinafter* RAWLS JUSTICE]; JOHN RAWLS, POLITICAL LIBERALISM (1993); JOHN RAWLS, POLITICAL LIBERALISM (Expanded ed., 2005) [*hereinafter* RAWLS LIBERALISM]

¹⁸¹ RAWLS JUSTICE, *supra* note 180, at 136-37.

¹⁸² *Id.* at 137.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 144.

¹⁸⁶ *Id.* at 144-45.

¹⁸⁷ *Id.* at 140, 144.

¹⁸⁸ For a discussion of these critiques of liberal neutrality in Rawls, see Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 ETHICS 883 (1989).

¹⁸⁹ ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 288-92 (2013).

Such a substantive understanding of neutrality is susceptible to the kind of attack Vermeule and Schmitt would launch. All Vermeule and Schmitt must do is to claim that the choice of values that define the outer boundaries of public reason is itself a political value choice.¹⁹⁰ Or, in Vermeule's case, that his view of the common good is morally superior to any rival.¹⁹¹ Once they make this move, it does not matter whether they are correct. They have now turned the question of substantive civic rationality into the kind of all out political fight public reason sought to avoid: substantive public reason does not work to resolve conflicts between value-based starting points. It simply assumes the way the problem in the way it sets its premises.

Rawls, to his credit, sought to soften his stance in *Political Liberalism* to address this sort of criticism.¹⁹² He now casts public reason in terms of the establishment of an overlapping consensus between what he calls different comprehensive moral theories (virtue ethics, Catholicism, Kantian ethics, etc.).¹⁹³ We can now answer Schmitt and Vermeule by saying that the starting points of our ideal of justice are very much contestable within a paradigm of public reason.¹⁹⁴ But by insisting on consensus, civic discourse can still maintain neutrality between comprehensive theories as it does not allow a single factional interest to define what counts as the common good.¹⁹⁵ Private values that are not shared in such an overlapping consensus remain private.¹⁹⁶ Values that are shared on the other hand are the kind of common values that suitably can be incorporated in political argument.¹⁹⁷

But this substantive conception, too, shows significant cracks at closer inspections. Rawls' softer stance makes an important assumption: overlapping consensus is possible.¹⁹⁸ For this to hold

¹⁹⁰ This move is deeply Nietzschean. See FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS & ECCE HOMO (Walter Kauffmann trans., 2010). For the influence of Nietzsche on Schmitt, see JOHN P. MCCORMICK, CARL SCHMITT'S CRITIQUE OF LIBERALISM AGAINST POLITICS AS TECHNOLOGY 83-87 (1997).

¹⁹¹ Vermeule *BO*, *supra* note 13.

¹⁹² See RAWLS LIBERALISM, *supra* note 180, at xvii.

¹⁹³ *Id.* at 157.

¹⁹⁴ See *id.* at 157-58.

¹⁹⁵ *Id.* at 205.

¹⁹⁶ See *id.* at 201 (distinguishing private from political society).

¹⁹⁷ *Id.* at 157.

¹⁹⁸ *Id.* at 160.

true, all relevant moral theories must in fact share in a smallest common denominator or common rationality. An outlier refusing to join a consensus got their own comprehensive moral theory wrong by failing to understand this common rationality. It can therefore be ignored. In Rawls' words, "we look for a consensus of *reasonable* (as opposed to unreasonable or irrational) comprehensive doctrines."¹⁹⁹ But what makes a comprehensive doctrine reasonable? The core assumption in *Political Liberalism* appears to be that a comprehensive doctrine is reasonable if it is compatible with the rationality behind the veil of ignorance in early Rawls.

This understanding of public reason has found its way into recent constitutional jurisprudence. Justice Ginsburg's dissent in *Masterpiece Cakeshop* is one example of such an understanding of substantive public reason in action.²⁰⁰ The case concerned the refusal by a bakery to bake a wedding cake for a wedding between two men, Charlie Craig and Dave Mullins, on religious grounds.²⁰¹ Craig and Mullins filed a complaint under the Colorado Anti-Discrimination Act with the Colorado Human Rights Commission (CHRC), and the CHRC determined that the refusal by the shop violated the act.²⁰² A 7-2 majority narrowly ruled that the CHRC violated Jack Phillips First Amendment Rights by not acting with "the religious neutrality that the Constitution requires."²⁰³ One of the bases for the majority's conclusion was the difference in treatment afforded other establishments to refuse particularly religious requests for cakes.²⁰⁴

Justice Ginsburg's dissent is a masterclass in substantive public reason. It argues forcefully that the refusal by other bakers was absolutely reasonable whereas Phillips' refusal to provide a wedding cake was not.²⁰⁵ She describes the designs requested in the other cases in detail: the cake designs in question requested that the baker "include an image of two groomsmen, holding hands, with

¹⁹⁹ *Id.* at 140 (emphasis added).

²⁰⁰ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1748 (2018) (Ginsburg, J., dissenting).

²⁰¹ *Id.* at 1723 (majority opinion).

²⁰² *Id.*

²⁰³ *Id.* at 1724.

²⁰⁴ *Id.* at 1730.

²⁰⁵ *Id.* at 1748-49 (Ginsburg, J., dissenting).

a red 'X' over the image.”²⁰⁶ Further, one of the cakes was to include the quote “God hates sin” and “Homosexuality is a detestable sin.”²⁰⁷ She then goes on to argue that the “other bakeries declined to make cakes where their objection to the product was due to the demeaning message the requested product would literally display.”²⁰⁸ On the other hand, Phillips refused to provide a cake to Craig and Mullins when “the offensiveness of the product was determined solely by the identity of the customer requesting it.”²⁰⁹ The religious belief that selling a cake one would sell to others to this particular couple solely on the basis of their personal characteristics is unreasonable. The moral objection actively to demeaning others through craftsmanship is quite another matter.

Philosophy students who were exposed to the trolley problem will immediately recognize Justice Ginsburg’s distinction.²¹⁰ Justice Ginsburg draws a distinction between consequence (service benefiting a particular person) and engaging in action (baking a cake with a particular design).²¹¹ This distinction is already consistent with the starting point of substantive public reason—a sense of a substantive definition of personal duty or deontology.²¹²

What is more, it also implies another distinction: moral or religious beliefs that are purely consequentialist are substantively unreasonable. I have no protected right to religious free exercise in such circumstances because the religious exercise I wish to make is inconsistent with public reason. It is excludable as irrational from the creation of an overlapping consensus. It is only reasonable to hold out a religious reason for refusal to serve a person *in a certain way* to the extent that the *specific actions* one would be asked to perform in themselves would violate a sense of personal duty.²¹³ This is what distinguishes reasonable moral beliefs not actively to disparage LGBTQ persons from unreasonable moral beliefs that one may not serve LGBTQ persons in exactly the same way one

²⁰⁶ *Id.* at 1749.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 1750-51.

²⁰⁹ *Id.* at 1750.

²¹⁰ See MICHAEL J. SANDEL, JUSTICE: WHAT’S THE RIGHT THING TO DO? 21-22 (2009).

²¹¹ See *Masterpiece Cakeshop*, 138 S. Ct. at 1750-5151 (Ginsburg, J., dissenting).

²¹² SANDEL, *supra* note 210, at 22-23.

²¹³ See *Masterpiece Cakeshop*, 138 S. Ct. at 1750-51 (Ginsburg, J., dissenting).

would heterosexual persons.²¹⁴ As the fact that Justice Ginsburg wrote in dissent shows, the Roberts Court's majority did not follow this line of reasoning on that particular occasion—and does not in fact consistently do so on other occasions.

The second way to understand public reason is communicative or procedural. This is the view of likely the most influential political theorist of the 20th Century alongside Rawls, Jürgen Habermas.²¹⁵ Though Habermas has been a prolifically prodigious scholar, he is best known for his two volume *The Theory of Communicative Action* (first German edition, 1981) and, in legal academia, *Between Facts and Norms* (first German edition, 1992).²¹⁶ The main theme of Habermas' work is discourse ethics. Discourse ethics posits that social order rests on the ability to establish the validity of different claims inter-subjectively in a rational manner.²¹⁷ That is, we have a means to communicate our claims with each other in a way that will make sense even if our claims are divorced from our own personal life experiences and values.²¹⁸ Habermas thus again seeks to establish a neutral means for civic discourse that could serve as a bedrock against Vermeule's and Schmitt's unilateralism.

Habermas' thought differs in important respects from Rawls'.²¹⁹ Rather than assuming a robust substantive rationality as a bedrock for political judgment, Habermas accepts the critical and sociological insight that much we consider rational is inherently a social construct moored in value judgments.²²⁰ Habermas nevertheless holds on to a thought similar to Rawls' that we must exclude certain kind of factional interests from public

²¹⁴ See *id.*

²¹⁵ See James Bohman & William Rehg, *Jürgen Habermas*, STAN. ENCYC. PHILOSOPHY (Aug. 4, 2014), <https://plato.stanford.edu/entries/habermas/> [<https://perma.cc/4P7G-WRV5>].

²¹⁶ JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, REASON AND THE RATIONALIZATION OF SOCIETY (Thomas McCarthy, trans. 1984)) [*hereinafter* HABERMAS, TCA1]; JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON (Thomas McCarthy, trans. 1983)) [*hereinafter* HABERMAS, TCA2]; JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996)) [*hereinafter* HABERMAS, BFN].

²¹⁷ See Bohman & Rehg, *supra* note 215.

²¹⁸ See *id.*

²¹⁹ For Rawls' discussion of Habermas, see RAWLS LIBERALISM, *supra* note 180, at 372-434.

²²⁰ See HABERMAS, TCA1, *supra* note 216, at 130.

discourse. Habermas argues that this is possible because one can step out of and analyze these socially constructed forms of rationality *rationally*. Sociologists and anthropologists can only observe social constructs by participating in them. But when sociologists and anthropologists observe social constructs they maintain a rational distance that allows them to assess these social constructs.²²¹ Rationality thus can create the distance needed to operate across and between social constructs.

To this end, Habermas argues that there is a difference between strategic rationality or action on the one hand and communicative action on the other.²²² He submits that when we act strategically, we are goal-oriented.²²³ Communication in this context is what Habermas calls perlocutionary—“with an orientation to success.”²²⁴ A lawyer would call this kind of speech advocacy—or, if the lawyer is classically inclined, rhetoric. We use speech to bring others to align their conduct with our purposes by whatever means at hand to do so.

Habermas contrasts such strategic rationality with communicative rationality or action.²²⁵ In communicative action, we seek to convince the other of the validity of our claims.²²⁶ In the public setting, the goal of such communicative action is to arrive at policies to which all could agree as a matter of rational discourse under their own specific circumstances.²²⁷ We thus are forced to abstract from our own personal preferences and make arguments that hold true for the good of all in society.²²⁸ And not only that, we must do so in a manner that will in fact communicate with a person that does not hold our own personal preferences.²²⁹

Logically, Habermas’ position again requires us to create a kind of neutral, public language.²³⁰ And this neutral, public

²²¹ *See id.* at 110.

²²² *See* HABERMAS, TCA2, *supra* note 216, at 69-70.

²²³ *See* HABERMAS, TCA1, *supra* note 216, at 288-95.

²²⁴ *Id.* at 289.

²²⁵ *See id.* at 99-101.

²²⁶ *See id.* at 278.

²²⁷ *See* HABERMAS, BFN, *supra* note 216, at 107-08.

²²⁸ *See* HABERMAS, TCA1, *supra* note 216, at 275-7878.

²²⁹ *See id.*

²³⁰ *See id.* at 315-1818.

language is again rational.²³¹ We must find a way to communicate with each other across our different personal experiences and value attachments.²³² To do so, we must use language that advances neutral claims—neutral in the sense that claims are verifiable irrespective of the personal preference and value attachment of speaker and listener. Once this language has been created, it must be deployed towards a common purpose—communicative action.²³³ But this common purpose, too, must be neutral and rational rather than personal or parochial.²³⁴

This understanding of public reason, too, has found its way into recent constitutional jurisprudence. Justice Alito’s dissent in *Bostock* is one example of such an understanding of procedural public reason in action. *Bostock* involved three plaintiffs in consolidated proceedings.²³⁵ Gerald Bostock, a successful child welfare advocate, was subjected by his employer, Clayton County, Georgia, to disparaging comments shortly after playing in a gay recreational softball league and eventually fired for conduct unbecoming of a county employee.²³⁶ Donald Zarda “worked as a skydiving instructor at Altitude Express in New York. After several seasons with the company, Mr. Zarda mentioned that he was gay and, days later, was fired.”²³⁷ Aimee Stephens worked at a funeral home.²³⁸ She presented as male when she was first employed but later was diagnosed with gender dysphoria.²³⁹ After receiving her diagnosis, Ms. Stephens informed her employer that “she planned to ‘live and work full-time as a woman’” and was fired.²⁴⁰ All three plaintiffs brought claims under Title VII of the 1964 Civil Rights Act alleging discrimination on the basis of sex.²⁴¹ The majority opinion written by Justice Gorsuch, discussed in more detail later on, held that all three cases involved discrimination on the basis of

²³¹ *See id.* at 396-99.]

²³² *See id.* at 342-43.

²³³ *See id.*

²³⁴ *See id.*

²³⁵ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1737-38 (2020).

²³⁶ *Id.*

²³⁷ *Id.* at 1738.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

sex employing a rationale that is eerily similar to Justice Ginsburg's *Masterpiece Cakeshop* dissent.²⁴²

Justice Alito in *Bostock* plays the part of Justice Ginsburg in *Masterpiece Cakeshop*—the defender of a particular conception of public reason.²⁴³ Justice Alito's approach is procedural. He argues that the interpretation of Title VII upon which the majority relies is an illicit judicial amendment of the Act.²⁴⁴ Justice Alito reasons that a contemporary audience in 1964 would not have understood that Title VII would include within the scope of discrimination on the basis of sex the discrimination against persons on the basis of sexual orientation.²⁴⁵

This argument closely mirrors the concern of procedural public reason. Public reason communicates a claim or argument only to the extent that an audience member can in fact understand the argument or validity claim. Procedural public reason is audience driven. Justice Alito reasons that two original audiences of Title VII in 1964 could not possibly have advanced the validity claim at issue in *Bostock*. The legislators drafting Title VII would not have understood that they extended protections to such cases.²⁴⁶ Further, the general public would not have agreed with such an extension in any event.²⁴⁷ Thus, the reading of Title VII of the *Bostock* majority is inconsistent with procedural public reason because it does not reflect a validity claim that was advanced or understood to have been advanced as part of the public discourse that led to the adoption of Title VII. This means that further deliberation in which such a validity claim is actually entertained would be needed to support the majority's result. The fact that Justice Alito writes in dissent shows that the Court did not then—and does not generally or consistently—employ a procedural understanding of public reason, either.

Finally, the juxtaposition of the dissents in *Masterpiece Cakeshop* and *Bostock* shows that the Roberts Court does not

²⁴² See *id.* at 1754. See also *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1748 (2018) (Ginsburg, J., dissenting).

²⁴³ *Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting). See also *Masterpiece Cakeshop*, 138 S. Ct. at 1748 (Ginsburg, J., dissenting).

²⁴⁴ *Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting).

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 1757.

²⁴⁷ *Id.* at 1755.

appear to have a particular allegiance to any one understanding of public reason or any one particular substantive value. *Masterpiece Cakeshop* sides with religious freedom over LGBTQ rights.²⁴⁸ *Bostock* embraces LGBTQ rights.²⁴⁹ The fact that both cases can co-exist—and both cases are at the core of the Roberts Courts’ legacy cases with Chief Justice Roberts in the majority thus again highlights the puzzle that the jurisprudence of the Roberts Court presents.

B. *The Conditions for Public Reason*

In light of this deeply inconsistent use of public reason paradigms by the Roberts Court we should be curious: what conditions must be obtained for public reason to work? The theoretical discussion in the previous section allows us to venture a guess. We have seen that public rationality in both Rawls and Habermas plays a gatekeeping function. Rawlsian substantive public reason allows us to dispense with moral viewpoints because they are substantively irrational—think Justice Ginsburg’s analysis of Phillips’ religious beliefs to avoid baking a wedding cake for a gay couple at all costs.²⁵⁰ In Habermas’ theory, such a contribution is wrongfooted because it raises a factional claim or grievance rather than an attempt to convince through neutral communicative action—think Justice Alito’s analysis of the lack of contemporaneous intent to include sexual orientation in Title VII of the 1964 Civil Rights Act and the consequently factional amendment of the statute by the *Bostock* majority.²⁵¹

What must be the case for such a society to accept the gatekeeping role of public reason? Public reason certainly works if a broad social consensus on permissible values and acceptable arguments already exists. When such a consensus exists, everyone or nearly everyone would intuitively exclaim “but you simply cannot say that!” when a person made an inappropriate

²⁴⁸ *Masterpiece Cakeshop*, 138 S. Ct. at 1723-24.

²⁴⁹ *Bostock*, 140 S. Ct. at 1754.

²⁵⁰ See generally RAWLS LIBERALISM, *supra* note 180, at 140; *Masterpiece Cakeshop*, 138 S. Ct. at 1750-51.

²⁵¹ HABERMAS TCA1, *supra* note 216, at 275-8, 286-7; *Bostock*, 140 S. Ct. at 1757-58 (Alito, J., dissenting).

contribution to a conversation.²⁵² There is a social rule of recognition in society what may be said in public discourse or what not.²⁵³ Or, as European constitutional theorists put in the context of normative clashes between different legal orders in Europe, only contributions that follow the communicative structure of a relevant social system will in fact be anything but noise in the conversation.²⁵⁴ These, broadly speaking, are the constitutional norms, small “c.”²⁵⁵

What Vermeule, and even more so Schmitt, hit upon is that such public reason fails when a society becomes truly heterogenous.²⁵⁶ This failure of a common rationality has in fact already been the subject of European constitutional pluralist literature. In that context, the conditions which brought about the strain on a common form of public reason is the proliferation of legal regimes (national courts, European Court of Justice, European Court of Human Rights) and the struggle between these different regimes.

One of the most influential theories supporting this European constitutional pluralism is systems theory.²⁵⁷ According to systems theory, social systems are internally closed and grow according to fully internally determined rules.²⁵⁸ Importantly, these social systems cannot communicate with each other. Anything external to a social system is simply environment or data point.²⁵⁹ The social system reacts to this data point. But it does not communicate with it but simply grows self-referentially according to its own internal rules.²⁶⁰ European pluralists have argued that the regime proliferation in European public law has in fact formed multiple

²⁵² See 1 HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 26 (1992).

²⁵³ HERBERT LIONEL ADOLPHUS HART, THE CONCEPT OF LAW 108-110 (Joseph Raz et al. eds., 3d ed. 2012).

²⁵⁴ See TEUBNER, *supra* note 33, at 140-41.

²⁵⁵ *Id.*; David S. Rubenstein, *Self-Help Structuralism*, 95 B.U. L. REV. 1619, 1627 (2015); David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 27 (2014).

²⁵⁶ SCHMITT LEGALITY, *supra* note 120, at 30-40, 43.

²⁵⁷ TEUBNER, *supra* note 33, at 116, 140-41.

²⁵⁸ NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 41 (Klaus Ziegert, trans. 2004).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

social systems that affect each other but do not integrated each other's point of view into a coherent whole.²⁶¹

It is not necessary to engage with the more arcane sociological literature on systems theory to see the intuitive point these scholars are making. Instead, think of “red” and “blue” social media feeds.²⁶² These feeds act very much like social systems. They *react* to events as external stimuli from the environment. But looking at red and blue feeds one would not know that they are dealing with the same event. These feeds are almost completely self-referential.²⁶³ And in many instances, one needs to be a long-term participant to even understand what a particular post means. Teubner—and the systems theory on which he relies—argues that we all live in our own sealed social media feeds and that these feeds make it impossible to truly act together.

We now, therefore, have an explanation why public reason fails in the absence of strong cultural homogeneity or hegemony. In such instances, procedural public reason fails because the heterogenous constituent parts of society do not in fact communicate with each other. They are alien. And reading a twitter-feed from the “other side” drives home this point. One frequently finds puzzled questions whether persons from the other feed inhabit the same reality as oneself. Similarly, substantive public reason fails because there is no overlapping consensus. It is not possible to exclude a certain moral position as irrational in any meaningful way: that position is too intensely part of political life to suffer exclusion without first turning discourse into a Schmittian political battle of all against all.

C. Consequences for our Appraisal of the Roberts Court

We can draw five preliminary conclusions from this theoretical discussion for the Roberts Court. First, we should, on the whole, not be surprised that the Roberts Court does not follow a particular public reason paradigm. The very conditions for public reason

²⁶¹ See TEUBNER, *supra* note 33, at 116, 140-41; see also NICO KRISCH, BEYOND CONSTITUTIONALISM, THE PLURALIST STRUCTURE OF POSTNATIONAL LAW 274-75 (2011).

²⁶² *Blue Feed, Red Feed*, WALL ST. J. (Aug. 19, 2019), <https://graphics.wsj.com/blue-feed-red-feed/> [https://perma.cc/8FXN-49M5].

²⁶³ Dar Meshi et al., *The Emerging Neuroscience of Social Media*, 19 TRENDS COG. SCI. 771, 774 (2015).

appear to be eroding in the current hyper-partisan environment and have in fact been eroding for much of the Roberts Court's tenure.²⁶⁴ We can therefore see the pair of *Masterpiece Cakeshop* and *Bostock* as symptoms of a larger phenomenon.

Second, we can now better understand why the Roberts Court is so puzzling. Chief Justice Roberts is an absolute anomaly. He is not defined by a red feed or blue feed perspective. He, in fact, reaches substantive results that are in strong facial tension with each other. Thus, he had the benefit of earning a stinging dissenting rebuke by both Justices Ginsburg and Alito in *Masterpiece Cakeshop* and *Bostock* respectively.

Third, this means that the Roberts Court—or at least its Chief Justice—continues to look for a replacement for public reason. He is looking for a means to create engagement even when public reason fails and unilateralism abounds. And he does so without any particular regard for traditional paradigms of public reason to achieve this goal. There is no clear public-reason guided methodology to his court or opinions.

But fourth, we now enter dangerous territory. The Roberts Court is clearly permissive of unilateralist action and does not uphold strong, traditional, republican-government inspired protections. The Roberts Court also clearly cannot rely upon an ideal of public reason to justify this departure. It has parted ways with not one but two traditional checks on excessive unilateralism. One might wonder whether the Roberts Court can at all pull of the feat of returning to some other theory of neutrality to bring coherence and justification to its jurisprudence.

Finally, the consequence of failure in providing such a justification would prove Vermeule's point. The Roberts Court is simply acting to preserve its own power and legitimacy to act when it cares to act. It is a political operator keeping its powder dry for the right moment to act. In the words of one recent opinions column,

²⁶⁴ See Dakota S. Rudesill, *Hyper-Partisanship and the Law: Framing the Debate*, 10 GEO. J.L. & PUB. POL'Y 343, 343 (2012) (noting hyper-partisan conditions since 2007); *Bush Picks John Roberts to be Chief Justice, Replacing Rehnquist*, N.Y. TIMES (Sept. 5, 2005), <https://www.nytimes.com/2005/09/05/world/americas/bush-picks-john-roberts-to-be-chief-justice-replacing.html> [<https://perma.cc/ZX3Q-6QGX>].

“Justice Roberts plays the long game.”²⁶⁵ It would have no methodological claim to neutrality or legitimacy and is simply another actor in the larger political game that is currently afoot.

V. REDEEMING UNILATERALISM

This Part argues that a unilateralist framework consistent with broad republican values remains possible. It outlines the value of such a framework. It further theorizes what conditions must obtain for it to function.

A. *Why Unilateralism?*

We, and the Roberts Court, are not facing a particularly unique crisis for republican governance. Quite to the contrary, as an historical matter, the point of democratic and republican government in the Western tradition has always been to balance and check factional interests.²⁶⁶ It has never been to eliminate them.²⁶⁷

This starting point is of immense importance when responding to the insights of unilateralism. Democratic and republican government was always and will always remain largely in tune with unilateralism. Unilateralism therefore is not a danger to democratic and republican government. It is very much a part of its everyday life.

This insight assists us in re-assessing the procedural and substantive checks of constitutional government discussed above more carefully. As outlined above, unilateral conduct fits in a five-factor rubric: (1) failure to consult relevant formal decision-making bodies; (2) awareness of informal resistance from key stakeholders; (3) justification by reference to a core value; (4) contestation of the invocation of this core value; and (5) negative impact on affect persons contesting the applicability of the core value in question.

We have seen that the third element of unilateralism has pride of place. It motivates value-based decision-making. And it risks

²⁶⁵ Lawrence Freedman, *Justice Roberts Plays the Long Game*, HILL (July 6, 2020, 10:00 AM), <https://thehill.com/opinion/judiciary/505965-justice-roberts-plays-the-long-game> [<https://perma.cc/L2RZ-JXTX>].

²⁶⁶ See J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION passim* (revised ed. 2003).

²⁶⁷ *Id.*

slipping into authoritarianism. To respond to authoritarian unilateralism, we, therefore, must find a justification for it to explain why such unilateralism should be tolerated, at all.

Why is it so tempting to make personal, value-based decisions in a public forum? The question almost answers itself. This kind of decision-making allows me to feel a particularly close connection to my political community. In an extreme circumstance, my political community would completely overlap with my personal belief system. My community would, therefore, fully reflect my identity. As I become aware of this overlap, I would therefore strongly identify with this group. What is more, as a group, we would be able more fully to implement our personal values together than we could our own as there are distinct efficiencies of scale in guarding against outside interference in our beliefs. This in turn would strengthen my identity as I can now fully belong to that particular group. The mechanism is mutually reinforcing.

Outside of the political context, we see very little wrong with this particular mechanism. It is the mechanism that supports almost every voluntary association. For example, if I say “I am Catholic,” I communicate that I belong to a group that together can practice a common faith.²⁶⁸ We can pool resources to educate each other and our children.²⁶⁹ And we can also pool our resources through charities that do good works consistent with our beliefs in our community.²⁷⁰ Value and identity are enmeshed in group membership. And in our private lives, we think this is a good thing.

Given the strengths of such bonds of belonging in our private lives, it should become apparent why it is intuitive to wish to bring the same mechanism to our public lives, as well. The benefit of bringing personal values into our public deliberations is to contribute *fully* to public debate. The allegiance to my political

²⁶⁸ Archbishop Daniel Pilarczyk, *Being Catholic: Professing and Practicing the Catholic Faith*, ARCHDIOCESE OF CINCINNATI (Feb. 21, 2012), <http://www.catholiccincinnati.org/34602/being-catholic-professing-and-practicing-the-catholic-faith/> [https://perma.cc/5CST-T4CY].

²⁶⁹ *Catholic Education*, U.S. CONFERENCE OF CATHOLIC BISHOPS, <http://www.usccb.org/beliefs-and-teachings/how-we-teach/catholic-education/index.cfm> [https://perma.cc/9CAC-YBCF] (last visited Oct. 19, 2020).

²⁷⁰ *Our History*, CATHOLIC CHARITIES USA, <https://www.catholiccharitiesusa.org/about-us/history/> [https://perma.cc/W2JR-A8B7] (last visited Oct. 19, 2020).

community makes far more strenuous demands than my allegiance to a voluntary private association. It has the power to affect me in far more significant ways by sending me to prison for disobedience or demand I lay down my life in its defense.²⁷¹ It stands to reason that I should want a community with such significant power over me at least to hear me if not to reflect my personal values.

The demands that one speak only through public reason in public discourse deprives us of that part of our identity. It means that we must shelve our own comprehensive value demands for the benefit of demands with which one disagrees—and sometimes on a fundamental basis.²⁷² And it does so without giving one an opportunity even to voice one's most important moral contributions in public debate.²⁷³ That is, these personal moral contributions do not fit in the idealized idiom of public discourse.²⁷⁴ So I must find a different, watered-down version to make my point.²⁷⁵

It is not difficult to see why such a demand is problematic. It is an exercise in partial self-denial. My public rationality must override my inner-most held private beliefs. It subordinates my moral claims to the moral claims of an abstract community. This community in turn by design cannot share my inner-most held private beliefs.

Again, the Roberts Court provides an immediate example applying precisely this intuition in the *Hobby Lobby*, *Zubik* and, most recently, the *Little Sisters of the Poor* decisions.²⁷⁶ These cases concerned the question whether religious organizations and closely held corporations could opt out of the mandate to provide coverage for contraceptives as part of their health insurance plans under the ACA and later regulations implementing it on religious grounds.²⁷⁷ Such an objection to make available health insurance plans that

²⁷¹ *Naturalization Oath of Allegiance to the United States of America*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, <https://www.uscis.gov/us-citizenship/naturalization-test/naturalization-oath-allegiance-united-states-america> [https://perma.cc/74V7-DRNC] (last visited Oct. 19, 2020).

²⁷² See *supra* Part IV.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014); *Zubik v. Burwell*, 578 U.S. 932 (2016); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

²⁷⁷ See, e.g., *Little Sisters of the Poor*, 140 S. Ct. at 2372-73.

would include access to contraceptives is utterly inconsistent with public reason if only because such contraceptives are not only prescribed for the purpose of preventing pregnancies.²⁷⁸ But this public reason rejoinder simply does not address the genuine moral objection of the *Little Sisters of the Poor* and other similar organizations. They must have—and were given—the opportunity to submit arguments on the basis of their inner-most held religious beliefs and thus not to subordinate their moral demands to those of society as a whole. The Roberts Court precisely takes such arguments seriously and allows them to become part and parcel of public and constitutional discourse even though they are personal and, yes, parochial.

One could say with the Roberts Court that, everything else being equal, it would be *irrational* to wish to join such a community demanding me to self-censor given the choice.²⁷⁹ To the contrary, it would on the whole be rational to choose a community of like-minded persons sharing in one's own values. In fact, this is what made the American colonies, and later the United States, attractive to generations of immigrants from the Mayflower onwards who voluntarily came to North America.²⁸⁰ Joining such communities would allow one to approximate, as much as possible, private reasoning and public rationality simply by eliminating the likelihood of dissent.²⁸¹ It would also narrow the gap between personal and public values.

Such a community would itself create potential issues, however. I myself would have to be reasonably sure that I do not change my mind about my values at some point in the future. That is, the community would only reflect my values so long as I continue to hold them. If I change my mind, my community would not automatically change with me. Rather, I would become the outlier. And now I would be constrained to live in a community with whose

²⁷⁸ *Managing Menstruation with Hormonal Contraceptives*, CHILD. HOSP. PHILA. (Nov. 19, 2019), <https://www.chop.edu/news/health-tip/managing-menstruation-hormonal-contraceptives> [<https://perma.cc/2RWB-GPYQ>].

²⁷⁹ See PETTIT, *supra* note 87, at 55.

²⁸⁰ T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 B.Y.U. L. REV. 419, 443-445 (2004).

²⁸¹ See *id.* (noting the banishment of Jesuits virulent anti-Catholic policies in the American colonies).

values I disagree and with whose values I see myself confronted every day or face the consequences.²⁸²

The best solution therefore would be if I were able to participate fully in public discourse without necessarily being in a society that is sufficiently homogenous to impose any one moral conception completely. This would allow me to voice my inner-most beliefs as a reason for public action. I could further join together with others to form coalitions around dovetailing interests—I may belong to a group that cares about social issues more than economic issues. Others may belong to a group that cares more about economic issues than social issues. These two groups could join together to increase their respective preferred agenda at the cost of carrying the preferred agenda of one's partner.²⁸³

Yet, in such an environment, I would also be protected against reprisals if I were to change my mind. I could continue to speak my mind and hope to convert others.²⁸⁴ There is enough dissent to keep discourse alive and require compromise as nobody can have everything all the time. In any event, I could join another coalition that champions my newly preferred value as my new political home.²⁸⁵

In other words, the heterogeneous make-up of society itself, so corrosive to ideals of public reason, would continue to provide the kinds of protections typically provided in liberal political thought by fundamental constitutional rights.²⁸⁶ But it would do so not in the hope of bringing about an overlapping consensus of political

²⁸² *See id.*

²⁸³ This is, in fact, how much of U.S. national politics functions. *See* Julia Azari, *Trump May Bring a Republican Recalibration, Not a Realignment*, FIVETHIRTYEIGHT (Sept. 7, 2016), <https://fivethirtyeight.com/features/trump-may-bring-a-republican-recalibration-not-a-realignment/> [<https://perma.cc/TC76-9E8K>] (discussing historical winning electoral coalitions).

²⁸⁴ George Conway may be one such current day example. Jane Recker, *Kellyanne and George Conway's Weird, Fascinating, and Maybe Perfectly Healthy Marriage: Charted*, WASHINGTONIAN (May 14, 2020), <https://www.washingtonian.com/2020/05/14/kellyanne-conway-george-conway-weird-fascinating-and-maybe-perfectly-healthy-marriage-charted/> [<https://perma.cc/V76C-6QKF>].

²⁸⁵ *See* Jonathan Shorman, *Bollier Launches U.S. Senate Campaign After 2018 Switch from Republican to Democrat*, WICHITA EAGLE (Oct. 16, 2019, 12:50 PM), <https://www.kansas.com/news/politics-government/article236250078.html#storylink=cpy> [(providing just one such example).

²⁸⁶ RAWLS LIBERALISM, *supra* note 180, at 158-160.

values.²⁸⁷ It would do so in the hope of continuing to align the person and public values of the members of the commonwealth.

This understanding of the role of value in government is in fact the choice made in republican and democratic societies. Public discourse never was in fact premised in an amoral, truly public idiom.²⁸⁸ It always reflected the fully-fledged moral commitments of citizens and decision-makers alike.²⁸⁹ Law, in turn, is therefore ill equipped to constrain these moral commitments in the public square. Vermeule is correct when he reasons that morality is not a tool for lawyers and judges, as Dworkin would have had us believe.²⁹⁰ It is truly the other way around: law is a means to implement deeply-held moral value commitments in public life.²⁹¹

This analysis of the third factor of unilateralism has significant ramifications for unilateralism as a whole. If the analysis so far is correct, it follows that there is a decided risk for ordinary governance processes when the moral stakes are particularly high. Personal moral commitments may demand that one act consistently with such values and override the ordinary strictures of constitutional governance. That is to say that there are certain kinds of policy choices in which the third element in our unilateralism rubric, commitment to value, would tend to bring about the first. Imagine that one has the power to save the lives of thousands of people by ordering an air strike against the military of a foreign power butchering its own citizens, but that one lacks Congressional approval for such a use of military force and is unlikely to receive it. Does one act? Several U.S. Presidents have answered in the affirmative and invoked core values in defense of their more than arguably unconstitutional conduct.²⁹²

There is thus a price for admitting private moral commitments to become part of public discourse and public action. The personal morality of decision-makers can trump constitutional power and

²⁸⁷ *Id.*

²⁸⁸ *Vermeule BO*, *supra* note 13.

²⁸⁹ *Id.*

²⁹⁰ *Id.*; *see also* RONALD DWORKIN, *LAW'S EMPIRE* 397-99 (1986).

²⁹¹ *Vermeule BO*, *supra* note 13.

²⁹² *See* David Greenberg, *Syria Will Stain Obama's Legacy Forever*, FOREIGN POL'Y (Dec. 29, 2016), <https://foreignpolicy.com/2016/12/29/obama-never-understood-how-history-works/> [<https://perma.cc/HWA4-RWWL>] (condemning President Obama's decision not to intervene militarily in Syria without Congressional authorization).

public rationality. It creates the very conditions for unilateralism as Vermeule and Schmitt rightly point out.²⁹³

But is it a price worth paying? The answer very much depends on the manner in which deliberation would continue to proceed in the face of a risk of unilateral decision-making. If I risk majoritarian dictatorship and significant suppression of my core beliefs for the benefit of others, the answer is almost certainly “no.”²⁹⁴ Our current political experience shows us how slim the difference between being the majority in power and the minority on the outside is: a few thousand votes in Wisconsin and Michigan or a few hundred votes in Dade and Broward County, Florida.²⁹⁵ I therefore cannot take comfort in being a member of the winning coalition ahead of time. Centrally, what cannot happen is for one group to take to violence to cement a hold on power when these votes swing the other way.²⁹⁶ If the price for the full-throated use of moral commitments is the violent attempt to overthrow republican institutions, the game is not worth the candle.²⁹⁷

If, however, there is a manner to at least forestall the risk of such quasi-majoritarian dictatorship, the price looks worth paying. The alternative paradigm of public reason would impose a constant form of self-censorship. As already discussed in the previous Part, one example of why such self-censorship is problematic is the

²⁹³ Vermeule *BO*, *supra* note 13; SCHMITT *THEOLOGIE*, *supra* note 138, at 76-80.

²⁹⁴ SCHMITT *LEGALITY*, *supra* note 120, at 35.

²⁹⁵ Tim Meko et al., *How Trump Won the Presidency with Razor-Thin Margins in Swing States*, WASH. POST (Nov. 11, 2016), <https://www.washingtonpost.com/graphics/politics/2016-election/swing-state-margins/> [<https://perma.cc/HX96-YDJU>]; Ron Elving, *The Florida Recount Of 2000: A Nightmare That Goes On Haunting*, NAT'L PUB. RADIO (Nov. 12, 2018, 5:00 AM), <https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting> [<https://perma.cc/4JLZ-FVHD>].

²⁹⁶ See generally Tim Meko et al., *The Political Winds in the U.S. Are Swirling*, WASH. POST (Dec. 15, 2020, 2:49 PM), <https://www.washingtonpost.com/graphics/2020/elections/electorate-changes-2016-election-vs-2020/> [<https://perma.cc/Z9KW-PRM3>].

²⁹⁷ See Larry Buchanan et al., *How a Pro-Trump Mob Stormed the U.S. Capitol*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/interactive/2021/01/06/us/trump-mob-capitol-building.html> [<https://perma.cc/6J55-3JSD>]; Carlie Porterfield, *George W. Bush Deplores U.S. Capitol Siege, Blames Attack On 'Falsehoods And False Hopes'*, FORBES (Jan. 6, 2021, 7:17 PM), <https://www.forbes.com/sites/carlieporterfield/2021/01/06/george-w-bush-deplores-us-capitol-siege-blames-falsehoods-and-false-hopes-for-attack/?sh=380cf26b6c64> [<https://perma.cc/8VG2-R9QW>].

potential for structural oppression of marginalized groups within a public reason paradigm.²⁹⁸ As noted by Corey Robin, atmospheres of fear and oppression have in fact led to significant self-censorship in the guise of complying with the demands of authoritative expectations.²⁹⁹ Self-censorship re-enforces the oppressive nature of the dominant paradigm by making the true complaints of marginalization and oppression a point of near public taboo.³⁰⁰

Unilateralism—an opening of public reason to full-throated comprehensive value claims and a paradigm shift away from communicative action to advocacy and activist action—therefore has true virtues. These virtues could inure to the potential benefit of marginalized groups that suffer the structural consequences of narrow public reason paradigms. These public reason paradigms are necessarily acculturated to the expectations of the dominant social groups.³⁰¹ To overcome such structural consequences is of necessity to look beyond public reason.

This is not to say that unilateralism does not also have vices. Quite the opposite is true. It risks excess and worse still capture of governance processes. Such capture in turn can make marginalized

²⁹⁸ See *supra* Part IV.

²⁹⁹ Corey Robin, *Beware of Self-Censorship*, NEW REPUBLIC (Feb. 7, 2017), <https://newrepublic.com/article/140458/beware-self-censorship> [<https://perma.cc/FD3R-4NTJ>].

³⁰⁰ See generally Karen D. Pyke, *What Is Internalized Racial Oppression and Why Don't We Study It? Acknowledging Racism's Hidden Injuries*, 53 SOCIOLOGICAL PERSPECTIVES 551 (2010).

³⁰¹ Compare Kristen Bialik, *For the Fifth Time in a Row, the New Congress is the Most Racially and Ethnically Diverse Ever*, PEW RES. (Feb. 8, 2019), <https://www.pewresearch.org/fact-tank/2019/02/08/for-the-fifth-time-in-a-row-the-new-congress-is-the-most-racially-and-ethnically-diverse-ever/> [<https://perma.cc/7WUP-CJNU>] (“More than one-in-five voting members (22%) of the U.S. House of Representatives and Senate are racial or ethnic minorities, making the 116th Congress the most racially and ethnically diverse in history.”), with Danielle Root et al., *Building a More Inclusive Federal Judiciary*, CTR. AM. PROGRESS (Oct. 3, 2019, 8:15 AM), <https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/> [<https://perma.cc/KD7T-AC92>] (80% of federal judges are white); *Race/Ethnicity of College Faculty*, NAT'L CTR. EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=61> [<https://perma.cc/RQU6-9943>] (“full-time faculty in degree-granting postsecondary institutions in fall 2018,” are 76% white); *Percentage Distribution of Population in the United States in 2016 and 2060, by Race and Hispanic Origin*, STATISTICA (Jan. 28, 2020), <https://www.statista.com/statistics/270272/percentage-of-us-population-by-ethnicities/> [<https://perma.cc/4587-RNX4>] (non-Hispanic white population in the U.S. is 61.27%).

groups even worse off and subject them to arbitrary and constant violence of even greater intensity and scope. In fact, Vermeule's demand for respect for authority tends to highlight tropes that are closely linked to oppression.³⁰² Public reason was also a means to seek to limit these excesses of capture and factionalism even as it has oppressive qualities of its own.

But Vermeule's and Schmitt's most powerful point remains that we would want to act with full moral agency in our public life.³⁰³ This entails the risk that, from the position of public reason at least, we will abuse our public position in order to further our moral principles. To borrow another phrase coined by Vermeule, the response to this risk does not have to be the elimination of such a risk of abuse of power. Rather, it can be a question of finding an "optimal abuse of power."³⁰⁴ Such optimal abuse of power would allow significant space for unilateral moral agency in the decision-making by public officials without upending that public life completely.³⁰⁵

B. Unilateralism and Deliberation

How then can unilateralism still co-exist with republican deliberation? How can we strive to have an optimal system for abuse of power in Vermeule's terms without completely giving up the security of republican government? The choice so far appears to be between eliminating decisions by reference to core values on the one hand or suffering the consequences of Vermeulian authoritarianism and abuse of power on the other. As both are reasonably unpalatable solutions, it is worthwhile to explore a different way out from the dilemma.

The starting point for such an analysis is that republican constitutions very much had such scenarios in mind. The model for "republican" constitutions is Rome and its "Republic" (or literally

³⁰² See Vermeule *BO*, *supra* note 13; Jonathan Rauch, *It's George Wallace's World Now*, ATLANTIC (Apr. 26, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/george-wallace-donald-trump/607336/> [<https://perma.cc/S25F-CWQQ>].

³⁰³ *E.g.*, Vermeule *BO*, *supra* note 13.

³⁰⁴ Vermeule *Optimal*, *supra* note 115, at 673.

³⁰⁵ *Id.* at 675.

“commonwealth”).³⁰⁶ The classical problem for “republican” government was stability of governance structures.³⁰⁷ Greek cities in particular had seen the usurpation of self-government by tyrants on a regular basis.³⁰⁸ These tyrants were able to unhinge the democratic or aristocratic constitutions of the relevant city-state from within.³⁰⁹ What made Rome so special and worthy of emulation was that it was stable and able to halt the degeneration of self-governance into tyrannical rule.³¹⁰

Both classical and Renaissance authors rely on a common theory that explains why Rome was so successful: mixed government.³¹¹ This theory was popularized by the Greek historian Polybius.³¹² Polybius wrote about Rome and its constitutional history at the height of its Republican government, 220 to 146 BC.³¹³ Polybius argued that Rome was uniquely successful as a self-governing state because Rome balanced all three known forms of government—democracy, aristocracy, and kingship—against each other.³¹⁴ Its popular assembly (and the office of the Tribune of the Plebs) were democratic institutions.³¹⁵ The Senate was an aristocratic institution.³¹⁶ And the consuls represented the power of kingship.³¹⁷

Importantly, Roman constitutional practice relied heavily upon finely-tuned veto powers by multiple actors to countermand unilateral conduct by others unilaterally in turn. That is, consuls had the power of veto over the Senate.³¹⁸ And the Tribune of the

³⁰⁶ See André Munro, *Republic*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/republic-government> [<https://perma.cc/6EDQ-NDG9>] (last visited Oct. 19, 2020).

³⁰⁷ See POCOCK, *supra* note 266, at 197.

³⁰⁸ RAPHAEL SEALEY, *A HISTORY OF GREEK CITY STATES, CA. 770-338 B.C.* at 48-65 (1976).

³⁰⁹ See P.J. RHODES, *THE GREEK CITY STATES, A SOURCE BOOK* 48 (2d ed. 2007) (discussing the Athenian experience under Pisistratus).

³¹⁰ See POCOCK, *supra* note 266, at 189.

³¹¹ See *id.* at 67.

³¹² See *id.* at 77.

³¹³ POLYBIUS, *THE HISTORIES* (Robin Waterfield trans. 2010).

³¹⁴ See *id.* at 378-385.

³¹⁵ See *id.* at 382.

³¹⁶ See *id.* at 381-82.

³¹⁷ See *id.* at 378-80.

³¹⁸ See ANDREW LINTOTT, *THE CONSTITUTION OF THE ROMAN REPUBLIC* 84 (1999).

Plebs had veto power over Senatorial and magisterial decrees.³¹⁹ The point was not that a constitutional power base could not move unilaterally (say by consular decree)—it very much could and frequently did in order to draw a reaction such as the use of a veto.³²⁰ The point was that each constitutional power base had the ability to stop unilateral action by another setting up long-term, stable, negotiated settlements of otherwise hyper-partisan questions of their day such as the right of the plebs (lower class) in the constitutional balance.³²¹

Just as importantly for today's context, the unilateral conduct of each of the different branches of government was frequently motivated by factional interest. That is, the Tribune would act for the good of the plebs exclusively, etc.³²² There was a safety valve for each of the different constitutional power bases to make itself heard fully even if this initial use of political power based in apparently factional interest. But this safety valve would inevitably fail to carry the day due to the constraints put in place in the Roman constitution by other counterbalancing safety valves retained by other power bases.

It is this model of republicanism that evolved in the Renaissance in Italy and made its way to England and the American colonies.³²³ This form of republicanism considered it paramount to check and balance power against power.³²⁴ It precisely did not believe that any one power was able to rule stably and in an enlightened manner for long.³²⁵ The exercise of public reason by the entire voting population therefore was a kind of ideal—but one that these theorists full-well knew was too fickle to support the weight of a republic for long.³²⁶ Republican theorists from Polybius in Rome to Harrington in England to Hamilton and

³¹⁹ See 2:1 THEODOR MOMMSEN, *RÖMISCHES STAATSRECHT* 266-272 (1874).

³²⁰ See LINTOTT, *supra* note 318, at 84.

³²¹ See *id.* at 205-13.

³²² See *id.* at 208.

³²³ See POCOCK, *supra* note 266, *passim*; DAVID J. BEDERMAN, *THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION: PREVAILING WISDOM KINDLE LOC* 115/9604 (2008) ("at stake in the revival of the ancient tradition of government in the constitutional debates of 1787 and today is nothing less than a common vision of republican government").

³²⁴ See POLYBIUS, *supra* note 313, at 378-385.

³²⁵ See *id.*

³²⁶ See *id.*

Madison in the United States therefore very much understood that counterbalancing unilateral conduct was part and parcel of republican governance.³²⁷ If it were not, there would be no need for checks and balances, after all.

This point is non-trivial. Checks and balances *respond* to potential abuses of power. They do not just *prevent* them. Legislative action in response to perceived executive overreach and judicial action in reviewing both is, therefore, part of the safety mechanism built into the republican system. In each of these instances, the response itself is likely to appear unilateralist. Legislative action to curtail the power of the President to launch even a single air strike unilaterally arguably interferes with the constitutional power of the President to execute his or her power as Commander in Chief.³²⁸ Gestures in that direction responded to the use of force by President Trump to kill a high-ranking Iranian government official, General Soleimani, on a visit to Iraq.³²⁹ The concept of judicial review itself could have smacked contemporary observers of *Marbury v. Madison* as a unilateral arrogation of power by the Supreme Court.³³⁰ In fact, this quintessential U.S. republican institution remains contentious to this day as both undemocratic and unilateralist.³³¹ Further, the use of signing statements of legislation by the President was and is seen as a unilateral overreach of executive power.³³² Finally, states have the ability to countermand federal policy, adding one more powerful potential restraint on unilateralism.³³³

³²⁷ POCOCK, *supra* note 266, *passim*.

³²⁸ See Claudia Grisales, *Senate Approves Legislation to Limit President's War Powers Against Iran*, NAT'L PUB. RADIO (Feb. 13, 2020, 2:49 PM), <https://www.npr.org/2020/02/13/805594383/senate-approves-legislation-to-limit-presidents-war-powers-against-iran> [<https://perma.cc/2KA2-PAD9>].

³²⁹ Emily Stewart, *Democrats Warn of the Dangers of the Dangers of War While Republicans Fall in Line after the Killing of Iran's Qassem Soleimani*, VOX (Jan. 3, 2020, 11:44 AM), <https://www.vox.com/policy-and-politics/2020/1/3/21047994/iran-general-soleimani-killed-response-congress-democrats> [<https://perma.cc/3AB5-87SL>].

³³⁰ See Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1038-39 (1997).

³³¹ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 *passim* (2006).

³³² See Neil Kinkopf, *Signing Statements and Statutory Interpretation in the Bush Administration*, 16 WM. & MARY BILL RTS. J. 307, 308 (2007).

³³³ See generally Sourgens, *supra* note 75, at 162-67.

The use of unilateral powers to defend core values by different actors within the constitutional structure therefore should not be seen in isolation or frozen in amber. Rather, unilateral actions are *dynamic*. They interact with each other as action and reaction across branches of government and up and down the federalism division of powers.

What is more, they are *intended* to interact with each other in this way.³³⁴ This interaction is what makes republican government republican: responsive checks and balances is an idea which lends an ability to adapt to new circumstances by allowing each constitutional actor the power to act unilaterally and long-term constitutional stability by allowing other constitutional actors to check such a foray and counterbalance it.³³⁵ Over time and as a whole, they form the guardrails within which the most significant powers of state are actually exercised.³³⁶ This means that viewed in context, unilateral decisions are not something to be avoided; they are an integral and necessary part of such constitutive processes.

The question remains—how is this sort of governance deliberative or constructive? One of Schmitt's (and Vermeule's) key points was that public value-clashes are *not* deliberative.³³⁷ Rather, they are a battle between values that only end when one value has been vanquished.³³⁸ The constitutional pluralist literature tends to support the same conclusion. To recall, theorists such as Teubner submit that different social systems clash within constitutional governance frameworks.³³⁹ Like red and blue twitter feeds, these social systems do not engage each other or seek to communicate with each other.³⁴⁰ To the contrary, they only appear to compete with each other in much the same way suggested by Schmitt (and Vermeule).³⁴¹

So far, the discussion of unilateralism seems to support this analysis. There is no neutral common denominator in which such political clashes could be resolved. One candidate would have been

³³⁴ See POLYBIUS, *supra* note 313, at 378-385.

³³⁵ See *id.*

³³⁶ See Pozen, *supra* note 255, at 27.

³³⁷ SCHMITT BDP, *supra* note 130, at 15; Vermeule OSAL, *supra* note 115, at 1142-49.

³³⁸ SCHMITT BDP, *supra* note 130, at 15.

³³⁹ TEUBNER, *supra* note 33, at 116, 140-41.

³⁴⁰ See *supra* Part I.

³⁴¹ SCHMITT BDP, *supra* note 130, at 15; Vermeule OSAL, *supra* note 115, 1142-49.

public reason. But for the reasons outlined above, unilateralism and public reason are precisely inconsistent with each other.

How then are these checks and balances mobilized constructively? To answer this question, we can begin with an intuitive hypothesis. Habermas posited that discourse in a broad sense falls into two categories: strategic action and communicative action.³⁴² As discussed above, unilateralism is not communicative action. It thus stands to reason that unilateralism relies on strategic action. It also stands to reason that the immediate response to unilateralism in turn is also strategic: constituencies affected by unilateral conduct engage in advocacy and activism.

Let us posit that this is the case. How does advocacy and activism work? Advocacy and activism in part seek to build a coalition that is effectively able to defeat unilateral conduct by a rival officeholder with competing value commitments and constituencies. This coalition building is intuitively strategic and political.

This sort of strategic conduct fits well in our five-factor rubric of unilateral conduct. Unilateral action relied upon a core value to justify (factor 3). We already posited the need for unilateral action: the value in question is in fact heavily contested (factor 4). Unilateral action therefore is likely to cause unilateral reaction to operationalize contestation. Activism and advocacy are an obvious means to contest the unilateral decision.

Importantly, a value can be contested on multiple different bases presenting the opportunity for strategic coalition building. I do not have to convince others that my value is correct. I just need to give them a reason to join me in opposing unilateral conduct. This reality has become idiomatic—after all, politics makes strange bedfellows.

But once this strategic conduct is implemented, it changes its character because of the new context. Per our fourth factor of unilateral conduct (contestation of value), strategic conduct by a coalition opposing a unilateral decision premised upon the applicability of a core value to a set of policy problems contests the applicability of that value. Strategic action is simply an effective means to do so.

³⁴² See *supra* Part IV.

The contestation of value, however, is not solely strategic conduct. True, if viewed in isolation, the conduct in question is nakedly strategic (advocacy/activism). But once it is placed in context, it is implicitly *communicative*. It responds to the original unilateral decision.

Such a strategic response also has a lot more communicative content than a simple “no.” It communicates that the *extent* to which the value motivating unilateral conduct is contested by identifying the constituencies contesting the value. It is meaningful that Senator Mitt Romney marched with protesters in Washington, D.C. and said “Black lives matter” after President Trump had other protesters dispersed with tear gas in Lafayette Park and took a picture holding a Bible with a military escort in front of St. John’s Church. Senator Romney’s actions are an extraordinary rebuke of a sitting president from his own party.³⁴³ The creation of a coalition that spans from Congresswoman Alexandria Ocasio-Cortez (D-NY) to Senator Elizabeth Warren (D-Mass.) to Senator Romney (R-Utah) communicates a lot in its own right.³⁴⁴

Strategic conduct also communicates the *intensity* with which these constituencies are willing to contest the value in question. Senator Romney could have made a statement that avoided the words “Black lives matter.” For example, the statement by the American Society of International Law did not use the phrase “Black lives matter.”³⁴⁵ Context, again, indicates not just the extent of contestation, but also that the American Society of International Law and Senator Romney are both part of the same coalition. It also

³⁴³ See Alexander Bolton, *Romney Challenges Trump with Black Lives Matter March*, HILL (June 9, 2020, 6:00 AM), <https://thehill.com/homenews/senate/501766-romney-challenges-trump-with-black-lives-matter-march> [<https://perma.cc/5JVH-DJC7>].

³⁴⁴ Max Benwell, *Gushers? Witches? And . . . Mitt Romney? The Surprise Coalition Backing Black Lives Matter*, GUARDIAN (June 11, 2020, 12:12 PM), <https://www.theguardian.com/us-news/2020/jun/11/black-lives-matter-surprise-supporters-mitt-romney-gushers-elmo> [<https://perma.cc/5GRL-PLQW>].

³⁴⁵ See Statement by President Catherine Amirfar Regarding Racial Violence and Injustice in the United States, AM. SOC’Y INT’L LAW (June 3, 2020), https://www.asil.org/sites/default/files/pdfs/ASIL_Statement_Racial_Violence.pdf [<https://perma.cc/S7BM-SKM4>]. The Society was in a delicate position as it has many members in government and provides valuable resources to those members. See Government Attorneys, AM. SOC’Y INT’L LAW, <https://www.asil.org/community/government-attorneys> [<https://perma.cc/V8Q5-FBQW>]. The Society therefore likely had to make difficult decisions of how to express outrage while safeguarding members from potential retaliation.

communicates the intensity with which it is felt—Senator Romney went further than a centrist learned society. This, too, communicates a great deal by the strategic choices made by key actors in political decision-making.

Finally, when viewed in this dynamic context, it becomes apparent that strategic communication is intensely *curious*. The point of advocacy and activism is to achieve a particular outcome.³⁴⁶ Given that strategic action looks to the extent of support and the intensity of support, it stands to reason that the goal of advocacy is to increase both as much as possible. This means the measure of strategic action is its efficacy to achieve both a broadening of one's power base and an intensification of that support within one's power base.³⁴⁷

Advocates rarely choose their audiences. For example, lawyers advocate before judges or juries that they only had a limited hand in choosing. Civic advocacy is similar in that advocates rarely choose the society in which they advocate. They may make strategic choices about which sub-segment of the population to reach out to first etc. But the audience is demographically set.

Convincing people works best if one tailors one's arguments to the natural inclinations of one's audience.³⁴⁸ Persons are likely to act consistently with their implicit biases.³⁴⁹ They are, on the whole, unlikely to act inconsistently with those biases unless they are given a reason to see their own bias and disapprove of this bias.³⁵⁰

³⁴⁶ See *Monitoring and Evaluating Advocacy: Companion to the Advocacy Toolkit*, UNICEF, http://www.unicefinemergencies.com/downloads/eresource/docs/3.1%20Media%20and%20Communications/Advocacy_M&EToolkit_Companion.pdf [<https://perma.cc/GL82-XR35>].

³⁴⁷ Compare Nate Cohn, *Trump's Electoral College Edge Could Grow in 2020, Rewarding Polarizing Campaign*, N.Y. TIMES: THE UPSHOT (July 19, 2019), <https://www.nytimes.com/2019/07/19/upshot/trump-electoral-college-edge.html> [<https://perma.cc/3MBY-U68T>] (focusing on intensity), with Nate Silver, *Trump's Base Isn't Enough*, FIVETHIRTYEIGHT (Nov. 20, 2018, 12:05 PM), <https://fivethirtyeight.com/features/trumps-base-isnt-enough/> [<https://perma.cc/K9F8-56BW>] [(focusing on breadth)].

³⁴⁸ CHRISTOPHER W. TINDALE, *THE PHILOSOPHY OF ARGUMENT AND AUDIENCE RECEPTION* 27 (2015).

³⁴⁹ Dayna Bowen Matthew, *Legal Battles Against Discrimination in Healthcare*, in *THE OXFORD HANDBOOK OF U.S. HEALTH LAW* 167, 176 (I. Glenn Cohen et al. eds., 2017).

³⁵⁰ See *id.*

Implicit biases, in turn, are value-laden.³⁵¹ This naturally requires an advocate to seek out to understand implicit biases—and their value-anchor—across different groups and target them specifically.³⁵²

In systems theoretic terms, successful advocacy requires one to understand which kind of environmental stimulus will bring about a certain response within a social system.³⁵³ What must I say or show in order to elicit a certain specific response from our red or blue twitter-feeds?³⁵⁴ Strategic action does not openly communicate across social systems. (That would be a matter of definitional impossibility.)³⁵⁵ Rather, strategic action aligns responses across social systems. As this strategic alignment is intentionally brought about, it is in fact *implicitly* communicative in a way that express communication could not be.

To put this in technical terms, perlocutionary speech is able to transmit and align validity claims between different social systems.³⁵⁶ Because perlocutionary speech seeks results, it accepts social systems and implicit biases as it finds them. Not only that, it is curious about them better to utilize them in persuasion.³⁵⁷ Because of this acceptance of value of structures in the audience, perlocutionary speech is able to overcome the self-referential closure within external social systems.³⁵⁸ It does so by utilizing shared experiences in the relevant group in an unexpected yet internally cognizable way.³⁵⁹ It is exactly the perlocutionary force—its appeal to value—that can overcome communicative barriers in a way that public reason cannot.

We can now see that to say unilateralism is anti-deliberative does not capture the whole picture. Unilateralism just leads to a

³⁵¹ Cristina M. Gonzalez et al., *How to Make or Break Implicit Bias Instruction: Implications for Curriculum Development*, 93 ACAD. MED. 74, 75 (2018).

³⁵² TINDALE, *supra* note 348, at 27.

³⁵³ TEUBNER, *supra* note 33, at 140-41.

³⁵⁴ See *supra* Part I.

³⁵⁵ 1 NIKLAS LUHMANN, THEORY OF SOCIETY 63 (Rhodes Barrett trans., 2012).

³⁵⁶ See HABERMAS TCA1, *supra* note 216, at 288-95 (drawing the distinction between perlocutionary and communicative speech).

³⁵⁷ TINDALE, *supra* note 348, at 27.

³⁵⁸ See LUHMANN, *supra* note 258, at 49-68 (discussing the concept of closure of social systems).

³⁵⁹ TINDALE, *supra* note 348, at 186 (using the rhetoric of President Obama as an example).

different kind of deliberation: unilateralist conduct mobilizes the contest of values at the core of unilateral decision-making *directly* and immediately. It does not filter this contestation through a common public rationality idiom or value.

But this direct mobilization nevertheless continues to function as *deliberation*. Like deliberation, it allows one to test the ability of different values to command winning coalitions over time. And it allows for a modulation of different responses that can either increase the coalition in opposition of unilateral conduct or reduce its willingness to coalesce. This direct form of mobilization further remains intensely curious, other-regarding and engaging across different social groups in order to increase the share of mind (and policy impact) of one's own coalition. Unilateralism, therefore, is deliberative in the sense that it finds means to contest unilateral decisions. And it does so in a manner that is open-minded and curious about the motivations of other-situated persons.

What is more, the strategic nature of unilateral conduct in context allows for eventual compromises. Coalitions form not because they agree in all points with each other. They form because they can negotiate over intensities of their desired outcomes to arrive at a policy they can live with. Coalition building, therefore, is less demanding than public reason in that it allows one to make imperfect choices. These imperfect choices present significantly greater room for agreement than public reason would: it allows for the formation of reasonably broad coalitions over time to support policy responses to new environmental, social, and economic conditions that provide each member of the coalition a means to recognize their value as reflected in the broader constitutional process.

The interaction on such a value-based plane therefore does not destroy deliberation. It instead embraces and understands that meaningfully moral choice in our public lives is just that—a moral choice for each of us.³⁶⁰ Strategic action—advocacy and activism—is able to change our appreciation of moral choices.³⁶¹ By placing

³⁶⁰ See HAL BRANDS & CHARLES EDEL, *THE LESSONS OF TRAGEDY: STATECRAFT AND WORLD ORDER* 15 (2019); MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* xx (rev. ed. 2001).

³⁶¹ It is in this context that tragedy formed part of civic education in Athens. See BRANDS & EDEL, *supra* note 360, at 12.

moral action in context, it allows us to see the intensely moral claims of others against us.³⁶² So long as this process remains deliberative—so long as it does not become unstable and turns into Schmitt’s political war of all against all—it is thus something to be welcomed rather than rejected.³⁶³ The next Part will outline how liberty interests must motivate checks and balances and the final Part will outline a response on its face to Vermeule’s constitutional adjudication framework.

C. *Unilateralism and Non-Domination*

The last factor of unilateral action remains the elephant in the room. Unilateral action by definition will affect significant liberty interests of persons who do not share the underlying value motivating the action in question. In fact, Vermeule argues that it should—that unilateral action should override liberty interests to re-educate citizens to make morally better choices.³⁶⁴

To defend unilateralism, we therefore have to answer three related questions. First, is a unilateralist infringement of liberty interests defensible, at all. Second, if the answer to the first question is “yes” under what conditions is such an infringement defensible? Finally, do these limitations allow us to challenge Vermeule’s illiberal legalism within the confines of unilateral action itself?

To begin with, it is possible to advance a value-neutral argument in favor of unilateralism even in the face of a loss of liberty interests—be it one that will require significant limitation. This argument starts from an intuitive premise: to be human is to have deeply held value attachments. We all experience these value attachments on a regular basis. These value-attachments intuitively make non-trivial demands of us. To hold a value is to be willing to go to extraordinary lengths to see it implemented, even if doing so comes at grave personal risk. Persons marching in the civil rights movement are a clear example of such dedication—their

³⁶² See Myles Burnyeat, *Enthymeme: Aristotle on the Rationality of Rhetoric*, in *ESSAYS ON ARISTOTLE’S RHETORIC* 88-115 (Amelie Rorty ed. 1996).

³⁶³ See generally Jacob Als Thomsen, *Carl Schmitt—The Hobbesian Of The 20th Century?*, 20 *SOCIAL THOUGHT & RES.* 5 (1997).

³⁶⁴ Vermeule *BO*, *supra* note 13.

engagement came at the risk of grave physical injury and death.³⁶⁵ They incurred this risk because of the inherent value of the civil rights movement.³⁶⁶

It does not go too far to say that our moral value attachments define us as people. If someone asks us, “what are you about?” we intuitively understand that the question is about these value attachments. We would accept “friendship” or “justice” as an answer.³⁶⁷ We would not accept “eating pizza”—at least without significant explanation. This again makes sense. Our value attachments are what causes us to put ourselves at the greatest amount of risk.³⁶⁸ This is only rational if denying these value attachments is worse than incurring the risk of loss that following their command entails. And if that is true then our moral attachments must go a long way towards defining us.

If it is true that every human being has deeply held value attachments, and if it is also true that these value attachments are non-trivial and in fact morally defining, any society which would require us to deny these value attachments is inherently suspect. If I know that human beings hold value attachments and how they work, I should not agree to live in a society that demands such extreme self-deprivation all things considered so long as an alternative is available. It is therefore *not* arbitrary to choose to live in a society in which I can be subject to decisions and actions by others to which I did not consent and that nevertheless deeply affect me.³⁶⁹ I understand that value makes such demands and that I would wish to live according to my own values. All things being equal, I must permit others to do unto me as I would do unto them.³⁷⁰

³⁶⁵ See, e.g., Clara Bingham, *How Civil Rights Activists Risked Their Lives to Change America in 'Freedom Summer'*, GUARDIAN (July 1, 2016, 7:58 AM), <https://www.theguardian.com/books/2016/jul/01/civil-rights-america-1960s-activists-voting-rights-vietnam> [<https://perma.cc/R4W7-TE3L>].

³⁶⁶ See JOHN LEWIS, *WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT* 76-77 (1998).

³⁶⁷ See MACINTYRE, *supra* note 189, at 223-24.

³⁶⁸ See *id.*

³⁶⁹ See PETTIT, *supra* note 87, at 52-58 (arguing that a state's power becomes arbitrary when it reflects the views of the agents implementing policy rather than those who are affected).

³⁷⁰ See PETTIT, *supra* note 87, at 55.

There is an obvious limitation that should be apparent from the first four factors of unilateral action discussed above. It is only rational for me to tolerate the imposition by others of their values on me if I have a meaningful way to contest what they are doing to me. As Schmitt noted, the ability in principle to see one's value reflected in government is a necessary condition to supporting deliberative government.³⁷¹ To put Schmitt's point another way, if I risk being deprived of the ability to contest value-based unilateral decisions, there is no meaningful guarantee for me to live my own values. This means that I should in principle only agree to live under conditions in which contestation is open to me.³⁷² Further, my ability to contest must be meaningful. And as no one group is in a permanent majority in a truly heterogenous society, I must in principle have the time and the means available to me to coalition build.³⁷³

This insight is at the heart of Schmitt's own thinking on legitimacy and lawfulness and means that there are certain infringements on liberty interests that would not be tolerable. Such intolerable infringements would undermine the conditions under which one is willing to suffer the imposition of the values of others on oneself.³⁷⁴ What I cannot tolerate losing is the loss of my ability to see my own values reflected in policy in turn and in due time.³⁷⁵

This means that unilateral conduct should never be able to deprive me of basic civil rights. These rights are an absolute necessity in order to build coalitions for strategic action to contest unilateral decisions with which I do not agree. I must be able to advocate and be an activist to contest unilateral actions with which I disagree. This ability meaningfully to advocate through one's moral activism is at the heart of civil rights.³⁷⁶ Unilateral actions therefore cannot take away these rights without also destroying the deliberative mechanism discussed above. Using Schmitt's rubric of majoritarian legitimacy, the limitation of political rights through unilateral action is meaningfully different from other policies.

³⁷¹ SCHMITT LEGALITY, *supra* note 120, at 30-40.

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ PETTIT, *supra* note 87, at 55.

³⁷⁵ SCHMITT LEGALITY, *supra* note 120, at 30-40.

³⁷⁶ Akhil Reed Amar, *The First Amendment's Firstness*, 47 U.C. DAVIS L. REV. 1015, 1022, 1025 (2014).

Political rights are the conditions *sine qua non* of my political participation in a pluralist society allowing unilateralist decision-making.

Perhaps more controversially, unilateral conduct should also never be able seriously to impair basic social, economic, and cultural rights. I must be able to maintain my moral identity as a person to advocate.³⁷⁷ This moral identity must imbue me with equal dignity in order to build a coalition with others against a policy with which I disagree.³⁷⁸ This dignity interest is bound up with social, economic, and cultural rights.³⁷⁹ This means that my social, economic, and cultural rights cannot be infringed in such a manner as to make me a second-class person even if I hold all formal political rights of citizenship.³⁸⁰ In such a position, I would simply not be able to find others with whom I could build a coalition. I would be shunned out of the exercise of my political rights.

So long as these conditions are maintained, however, it is indeed rational for me to agree to a paradigm of unilateral action as outlined above. The infringement on my liberty interest is tolerable because it allows me to act in political discourse with my full moral weight. I may defend my moral beliefs and even act on the basis of these beliefs when I know that what I do will be contested. To demand otherwise is to demand amoral action. And this demand is worse than the alternative given what we know about moral conduct. In fact, it is precisely to allow for this moral agency that republican constitutions include checks and balances to allow for ready contestation and pragmatic compromise building in the first place.

We therefore can answer unilateral illiberalism *within* a unilateralist frame.³⁸¹ A value-based analytic toolkit is certainly correct in espousing value-based decision-making.³⁸² It is, however, precisely incorrect in suggesting that a republican government can

³⁷⁷ See MACINTYRE, *supra* note 189, at 223-24.

³⁷⁸ See JAMES R. MAY & ERIN DALY, *ADVANCED INTRODUCTION TO HUMAN DIGNITY AND LAW* 118-24 (2020).

³⁷⁹ DIANE DESIERTO, *PUBLIC POLICY IN INTERNATIONAL ECONOMIC LAW: THE ICESCR IN TRADE, FINANCE, AND INVESTMENT* 30 (2015).

³⁸⁰ See *id.* at 123.

³⁸¹ See Vermeule *BO*, *supra* note 13 (advocating for common good constitutional interpretation as a substitute for originalism and left-liberal constitutionalism).

³⁸² *Id.*

allow such a unilateralism to turn illiberal.³⁸³ The deliberative framework providing the opportunity for value-based, unilateral decision-making in a republican constitution does so if and only if it guarantees the political and cultural rights of its citizens. While some infringements of liberty interests are thus broadly acceptable, the all-out imposition of illiberalism or illiberal legalism is not.

VI. CURIOUS UNILATERALISM AND THE ROBERTS COURT

This Part outlines that the understanding of unilateralism developed so far allows us better to understand the jurisprudence of the Roberts Court. It argues that the Roberts Court in fact in most instances has followed a framework of decision-making that follows curious unilateralism. Curious unilateralism explains how the Roberts Court can make claims to neutrality even when it does not follow strong versions of republican government or public reason. Curious unilateralism finally also permits one to appraise and engage instances in which the Roberts Court may well have gone too far and provides means to correct course within the Roberts Court's own frame.

The starting point for this understanding is that judicial action is meaningfully different from that of other constitutional actors. Many scholars from both the right and the left deal with this problem under the moniker of a democracy deficit.³⁸⁴ The unilateralism rubric developed in this article allows one to approach the question from a helpfully different angle.

The key point developed so far is that the ability to contest decisions is the key protection against illiberalism. But contestation of judicial decisions is meaningfully different from contesting actions by other constitutional actors. Judicial review means that the judiciary again gets to review and override attempts by others to contest judicial decisions. I can contest executive action by the President by petitioning Congress and going to court. It is *not* possible to contest unilateral action by the courts by petitioning Congress and the President in the same way.³⁸⁵

³⁸³ *Id.*

³⁸⁴ For a comparative historical analysis, see Dieter Grimm, *Constitutional Adjudication and Democracy*, 33 *ISR. L. REV.* 193, 212-14 (1999); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 *VA. L. REV.* 1617, 1622 (1997).

³⁸⁵ See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

The only plausible contestation of court decisions is to change the composition of the Court.³⁸⁶ Constitutional amendments are notoriously difficult or impossible to achieve.³⁸⁷ So there is little alternative but to turn the Court into a political body. Or, to return to Schmitt's criticism of super-majoritarian rules, the problem is that the simple confirmation of a Supreme Court justice by the Senate has broad ramification that cannot be undone with a similar majority operating in the ordinary course.³⁸⁸

To overcome this problem, the Roberts Court is looking precisely to ideals of contestation to guide its decision-making. The contestation-based solution developed here will draw on the work of a scholar frequently associated with the republican tradition, Cass Sunstein.³⁸⁹ But it will do so with a twist—namely applying this ideal in a unilateralist frame of mind that is not guided by a strong ideal of public reason but rather by the conditions of hyper-partisan heterogenous pluralism in which the Roberts Court finds itself.

A. *Judicial Minimalism*

The first doctrine to increase the space for contestation is the doctrine of judicial minimalism.³⁹⁰ Such minimalism leaves as much as possible to be decided by civic contestation rather than resolving questions by adjudicative fiat. As this section will argue,

³⁸⁶ See Jesse Byrnes, *Trump: Republicans 'Have No Choice' but to Vote for Me*, HILL (July 28, 2016, 10:07 PM), <https://thehill.com/blogs/blog-briefing-room/news/289716-trump-republicans-have-to-vote-for-me-because-of-supreme-court> [https://perma.cc/GC65-T942] (“If you really like Donald Trump, that’s great, but if you don’t, you have to vote for me anyway. You know why? Supreme Court judges, Supreme Court judges,” Trump said at a rally in Cedar Rapids, Iowa.”).

³⁸⁷ See Jonathan L. Marshfield, *Amendment Creep*, 115 MICH. L. REV. 215, 246 (2016) (“Indeed, it is now practically impossible to amend the Constitution. Thus, it seems disingenuous to suggest that any significant amount of constitutional change should occur through Article V.”).

³⁸⁸ See SCHMITT LEGALITY, *supra* note 120, at 58.

³⁸⁹ See generally Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

³⁹⁰ Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 377-86 (2006) [*hereinafter* Sunstein *Minimalism*].

judicial minimalism is one of the core principles guiding the Roberts Court.³⁹¹

Justice Brandeis articulated the doctrine of judicial minimalism in his concurrence in *Ashwander v. TVA*.³⁹² Such judicial minimalism historically broke into seven distinct principles. First, the Court will not provide advisory opinions.³⁹³ Second, any constitutional question must be ripe for adjudication.³⁹⁴ Third, any constitutional question will be answered on the narrowest grounds possible to resolve the underlying dispute.³⁹⁵ Fourth, the Court will reach a question of constitutionality only as a matter of last resort.³⁹⁶ Fifth, the person advancing a constitutional question must in fact have standing to raise it and the point must not be moot.³⁹⁷ Sixth, a person may be constitutionally estopped from challenging a statute from which that person has previously benefited.³⁹⁸ And finally, the Court will adopt the construction of any statute that will make it unnecessary to reach a constitutional issue.³⁹⁹

Though there are exceptions, judicial minimalism is one of the hallmarks of the Roberts Court.⁴⁰⁰ One example of such judicial minimalism is *Bond v. United States*.⁴⁰¹ *Bond* involved the federal prosecution of a person for violation of a treaty norm as codified into United States law, the Chemical Weapons Convention Implementation Act.⁴⁰² The underlying facts of the case sound more like a telenovela than a war crime. As any such story, it begins with the infidelity of one Mr. Bond. Upon finding out about the infidelity, Mr. Bond's wife, Carol Bond, set out to poison Mr. Bond's

³⁹¹ See Perry L. Moriearty, *Implementing Proportionality*, 50 U.C. DAVIS L. REV. 961, 1013 (2017) (noting "a number of commentators have argued that judicial minimalism is a hallmark of the Roberts Court").

³⁹² See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341-56 (1936) (Brandeis, J., concurring).

³⁹³ *Id.* at 346.

³⁹⁴ *Id.* at 346-47.

³⁹⁵ *Id.* at 347.

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.* at 348.

³⁹⁹ *Id.*

⁴⁰⁰ See Moriearty, *supra* note 391, at 1013.

⁴⁰¹ See *Bond v. United States*, 572 U.S. 844 (2014).

⁴⁰² *Id.* at 848-49.

mistress.⁴⁰³ To do so, Carol Bond ordered chemicals on Amazon and stole others from her employer; she then coated a door handle and mailbox with the chemicals in question.⁴⁰⁴ Carol Bond was unsuccessful in killing the mistress but still found herself charged with a federal crime under the Chemical Weapons Convention.⁴⁰⁵ Ms. Bond argued that the Convention could not be applied to her conduct on a constitutional basis under the Tenth Amendment.⁴⁰⁶ Her argument, therefore, set up a federalism testcase on treaty powers that stood to test precedent established in *Missouri v. Holland*, which provided Congress had the authority to implement treaties in domestic law under the necessary and proper clause even if it would lack authority to pass similar legislation absent the conclusion of a treaty.⁴⁰⁷

Chief Justice Roberts, writing for the majority, did not, in fact, reach this constitutional issue. Rather, he construed the implementing statute (as opposed to the treaty norm) as not reaching Ms. Bond's conduct.⁴⁰⁸ That is, it read the statute as applying to different conduct altogether from Ms. Bond's use of chemicals in a domestic dispute.⁴⁰⁹ It, therefore, left unanswered whether an implementation act of the Chemical Weapons Convention could have reached the conduct at issue.⁴¹⁰ It ruled that the particular implementation act did not.⁴¹¹

The *Bond* decision has been the subject of heated criticism. It has been accused of tacitly overruling the earlier decision in *Missouri v. Holland*.⁴¹² While a careful analysis of this point is beyond the scope of this Article, what should be clear from our discussion so far is that the Court did not prevent the constitutional actors in the underlying federalism conflict to continue the contestation of any core value involved. That is, Congress would

⁴⁰³ *Id.* at 852.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* at 852-53.

⁴⁰⁶ *Id.* at 853.

⁴⁰⁷ *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

⁴⁰⁸ *See Bond*, 572 U.S. at 856-66.

⁴⁰⁹ *Id.* at 856.

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at 866.

⁴¹² MICHAEL J. GLENNON & ROBERT D. SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY 186 (2016).

remain at liberty to pass a *new* implementation act that more clearly covers conduct such as the one at issue in *Bond*.⁴¹³ And states (and individuals) continue to have the ability to contest the applicability of specific federal laws implementing treaties as not displacing their regulatory authority.⁴¹⁴ The Court, therefore, leaves the issue open for further contestation and strategic coalition building rather than providing a definitive answer on the underlying constitutional question.

Another more recent decision arguably exhibiting similar minimalist traits is *Bostock v. Clayton County*.⁴¹⁵ We already discussed Justice Alito's dissent and its reliance on procedural public reason above. The majority decision therefore is instructive to see how the Roberts Court's minimalism differs from procedural public reason.

Justice Gorsuch writing for a majority, including Chief Justice Roberts, painstakingly interpreted Title VII of the 1964 Civil Rights Act "in accord with the ordinary public meaning of its terms at the time of its enactment."⁴¹⁶ The relevant statutory formulation makes it "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex" ⁴¹⁷ Justice Gorsuch reasoned that "as this Court has previously explained, 'the ordinary meaning of "because of" is "by reason of" or "on account of."'"⁴¹⁸ This, in turn, simply incorporated a but-for causation standard.⁴¹⁹ This but for standard applied to discrimination or difference in treatment. Consequently, "taken together, an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII."⁴²⁰

⁴¹³ See *Bond*, 572 U.S. at 856-66.

⁴¹⁴ *Id.*

⁴¹⁵ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

⁴¹⁶ *Id.* at 1738.

⁴¹⁷ *Id.* (quoting 42 U.S.C. § 2000e-2(a)(1)).

⁴¹⁸ *Id.* at 1739 (*Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013)).

⁴¹⁹ *Id.* (citations omitted).

⁴²⁰ *Id.* at 1740.

Justice Gorsuch concluded with regard to the case at hand that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”⁴²¹ In the context of homosexual persons, an employer would not discharge a female employee for entering into a relationship with a man but does discharge a male employee for doing the same thing.⁴²² In the context of transgender persons, “if the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.”⁴²³

It is, in fact, Justice Alito’s dissent which highlights the minimalist trait of the decision. Justice Alito in arguing against the majority opinion observes that “despite the important differences between the Fourteenth Amendment and Title VII, the Court’s decision may exert a gravitational pull in constitutional cases.”⁴²⁴ Specifically, “[u]nder our precedents, the Equal Protection Clause prohibits sex-based discrimination unless a ‘heightened’ standard of review is met.”⁴²⁵ Consequently, “[b]y equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court’s decision will be cited as a ground for subjecting all three forms of discrimination to the same exacting standard of review.”⁴²⁶

Justice Alito’s procedural public-reason-based argument here has minimalism backwards. The decision precisely avoids any equal protection-based Fourteenth Amendment challenge of similar behavior at issue in *Bostock*. As Title VII of the Civil Rights Act of 1964 already protects LGBTQ employees, it is not necessary to determine what *constitutional* protections such employees might have been entitled to in the absence of statutory protections. In fact, an avowedly textualist statutory construction precisely does not pass on matters of constitutional principle at all.⁴²⁷ Following Justice Alito’s procedural public reason approach would have forced

⁴²¹ *Id.* at 1741.

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.* at 1783 (Alito, J., dissenting).

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.* at 1749-50 (majority opinion).

a constitutional question. Answering it would have placed the Court on shaky ground as any answer would have negatively affected contestation of a question that remains hotly contested judging even only by the Court's own recent docket.

Bostock's minimalism thus differs from procedural public reason in terms of its perspective. Procedural public reason concerns a specific submission or argument and its place in a sequence of communicative action. It is backwards looking: What did the audience understand when an argument was made? In contrast, minimalism is forward looking: It creates space for future advocacy, activism, and engagement. It does not pronounce on constitutional rights or legal principles; it merely addresses a specific statutory text. Such a reading is minimalist precisely because it leaves it to other actors like Congress to set or alter the scope of relevant protections in the first instance.⁴²⁸ It comports with curious unilateralism because it returns contentious identity and value questions to ordinary contestation by the other constitutional actors. It thereby allows curious unilateralism to proceed apace.

B. Precedent

Obviously, there will be a time when judicial minimalism will run out. Some disputes squarely raise constitutional questions. The first means available to the Court to answer them without risking foreclosing contestation is following precedent.

From the perspective of curious unilateralism, there are two reasons to look first to precedent when answering constitutional questions. First, precedent creates reliance interests about how coalitions are allowed to form support for particular values or to contest certain kinds of decisions.⁴²⁹

Coalition building depends upon understanding what strategic behavior is permissible and what strategic behavior is not. One can therefore understand what kind of policies can be the subject of logrolling (you vote for me on the farm bill and I vote for you on

⁴²⁸ Sunstein *Minimalism*, *supra* note 390, at 377-86.

⁴²⁹ See Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2386 (1993) (discussing the importance of direct and indirect reliance interests before the Warren Court).

health care).⁴³⁰ One can also understand what kind of policies are not the subject of logrolling (you vote for me on the farm bill and I vote for you on the bill expanding libel laws aimed at Fox News).⁴³¹ And one can also understand what kind of conduct is permissible (if you switch your position to support Medicare for All, I will endorse you) and what kind of conduct is not permissible (I will pay you \$1 million in cash to vote to repeal the Affordable Care Act.)⁴³² In giving rise to such reliance interests, precedent defines the space within which contestation can occur even in a unilateralist paradigm.⁴³³

Obviously, precedent is not written in stone.⁴³⁴ Rather, reliance interests change with the times.⁴³⁵ An expectation that precedent will hold when the circumstances in which it was announced no longer obtain is unreasonable.⁴³⁶ It misses something inherently important about how current circumstances require an adjustment to an earlier equilibrium point.⁴³⁷ Even then, however, precedent is the starting point for a fact-driven engagement of constitutional argumentation.

Second, hueing close to precedent limits the temptation for judges themselves to act in defense of core values. The core values which judges wish to defend must already be filtered through the lens of precedent. This tempers the extent to which judges are able to act. They are not unconstrained to implement their own values as Vermeule would have us believe.⁴³⁸ They are, in fact, hamstrung by the web of past decisions reached by their peers over time.

The relationship between the Roberts Court and precedent has been complicated. Chief Justice Roberts in particular provides a strong defense of precedent and stare decisis in terms that resonate

⁴³⁰ William N. Eskridge, Jr. & John Ferejohn, *Virtual Logrolling: How the Court, Congress, and the States Multiply Rights*, 68 S. CAL. L. REV. 1545, 1560 (1995).

⁴³¹ See generally *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁴³² See *Evans v. United States*, 504 U.S. 255, 268 (1992).

⁴³³ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-55 (1992).

⁴³⁴ *Id.* at 854.

⁴³⁵ See *id.* at 854-55.

⁴³⁶ *Id.*

⁴³⁷ See Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 482-87 (2011).

⁴³⁸ Vermeule *BO*, *supra* note 13.

with the discussion so far. He noted during his confirmation hearings:

Judges have to have the humility to recognize that they operate within a system of precedent shaped by other judges equally striving to live up to the judicial oath, and judges have to have modesty to be open in the decisional process to the considered views of their colleagues on the bench.⁴³⁹

This is largely consistent with the constraints against judicial unilateralism.

Russo is the most recent affirmation of this view of precedent by the Roberts Court.⁴⁴⁰ *Russo* concerned a Louisiana law requiring abortion providers to adhere to medical practice guidelines such as requiring that doctors performing abortions have admitting privileges at nearby hospitals.⁴⁴¹ The law at issue in *Russo* was almost identical to a Texas law, which the Supreme Court struck down in its 2016 *Whole Woman's Health* decision as imposing impermissible burdens on the constitutional right of women to have abortion access.⁴⁴² Chief Justice Roberts joined a dissent by Justice Alito from *Whole Woman's Health*.⁴⁴³ *Russo* is a plurality decision with Justice Breyer writing for the Court on behalf of himself and Justices Ginsburg, Sotomayor, and Kagan.⁴⁴⁴ The deciding vote was Chief Justice Roberts' concurring opinion.⁴⁴⁵ In his concurrence, Chief Justice Roberts stated, "I joined the dissent in *Whole Woman's Health* and continue to believe that the case was wrongly decided."⁴⁴⁶ He nevertheless confirmed *Whole Woman's Health*

⁴³⁹ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be C.J. of the United States), <https://www.govinfo.gov/content/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf> [

⁴⁴⁰ *See* *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (plurality opinion).

⁴⁴¹ *Id.* at 2113 (The law required "any doctor who performs abortions to hold 'active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services.'").

⁴⁴² *Id.* at 2112-13.

⁴⁴³ *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2330-53 (Alito, J., dissenting).

⁴⁴⁴ *See Russo*, 140 S. Ct. at 2111.

⁴⁴⁵ *Id.* at 2133 (Roberts, C.J., concurring).

⁴⁴⁶ *Id.*

because “[t]he legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike.”⁴⁴⁷ He explained “[t]he Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana’s law cannot stand under our precedents.”⁴⁴⁸ This is perhaps the strongest stand for *stare decisis* in a high-profile case by the Roberts Court.

Notably, however, the Roberts Court has also undone precedent in ways that should be scrutinized.⁴⁴⁹ Two decisions in particular stand out. The first notable decision is *Citizens United v. Federal Election Commission*.⁴⁵⁰ In *Citizens United*, a majority of the Court allowed organizations to make far more significant contributions to electoral campaigns than previously permitted.⁴⁵¹ *Citizens United* overruled two earlier Supreme Court decisions, *Austin v. Michigan Chamber of Commerce* (1990) and *McConnell v. Federal Election Commission* (2003).⁴⁵² *Austin* “had held that political speech may be banned based on the speaker’s corporate identity.”⁴⁵³ *McConnell*, in turn, relied upon *Austin* to limit electioneering communications.⁴⁵⁴

Citizens United overruled *Austin* on the grounds that “*Austin* was a significant departure from ancient First Amendment principles.”⁴⁵⁵ Central to *Citizens United* is the idea that *Austin* was wrong the day it was decided—that it created an artifice to *itself* overrule prior precedent on an illegitimate basis.⁴⁵⁶ The *Citizens United* majority noted that this contrivance was the notion that “preventing ‘the corrosive and distorting effects of immense

⁴⁴⁷ *Id.* at 2134.

⁴⁴⁸ *Id.*

⁴⁴⁹ See Adam Feldman, *Empirical SCOTUS: The Strength of Precedent is in the Justices’ Actions, Not Words*, SCOTUSBLOG (Nov. 28, 2018, 2:11 pm), <https://www.scotusblog.com/2018/11/empirical-scotus-the-strength-of-precedent-is-in-the-justices-actions-not-words/> [<https://perma.cc/7RMJ-9WXZ>].

⁴⁵⁰ See *Citizens United v. FEC*, 558 U.S. 310 (2010).

⁴⁵¹ *Id.* at 319.

⁴⁵² *Id.*

⁴⁵³ *Id.*; see also *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

⁴⁵⁴ *Citizens United*, 558 U.S. at 319; see also *McConnell v. FEC*, 540 U.S. 93, 203-09 (2003).

⁴⁵⁵ *Citizens United*, 558 U.S. at 319 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 490 (2007) (Scalia, J., concurring)).

⁴⁵⁶ *Id.* at 348.

aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."⁴⁵⁷ The *Citizens United* majority cast itself as the protector of precedent against impermissible First Amendment heresy.

Importantly, *Citizens United* did not seek to adapt precedent to new factual circumstances.⁴⁵⁸ Nor did it conclude that the earlier precedent was practically unworkable.⁴⁵⁹ Rather, the *Citizens United* majority squarely announced a new constitutional rule. And it did so on the basis of contesting a value—namely that the notion that too much money in politics distorts politics. *Citizens United* acted in a classically unilateralist manner. It disagreed with a value espoused by an earlier court and replaced that value with its own under the cover of constitutional adjudication.

Further, the Roberts Court also recently pushed aggressively towards loosening the constraints of stare decisis in *Franchise Tax Board of California v. Hyatt*.⁴⁶⁰ The case involved whether a state could be sued by a private individual “in the courts of a different state” without its consent.⁴⁶¹ The *Hyatt* Court overruled its earlier 1979 precedent established in *Nevada v. Hall*, which submitted states to such suits.⁴⁶²

The *Hyatt* Court justified its departure from *Hall*, and reasoned “*Hall* is contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution.”⁴⁶³ It then made clear that “[s]tare decisis does not compel continued adherence to this erroneous precedent.”⁴⁶⁴

Contemporaneous observers such as Leah Litman immediately identified the true target of the decision: overruling

⁴⁵⁷ *Id.* (quoting *Austin*, 494 U.S. at 660).

⁴⁵⁸ *Id.* at 319.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019).

⁴⁶¹ *Id.* at 1490.

⁴⁶² *Id.*; see also *Nevada v. Hall*, 440 U.S. 410 (1979), overruled by *Hyatt*, 139 S. Ct. 1485.

⁴⁶³ *Hyatt*, 139 S. Ct. at 1492.

⁴⁶⁴ *Id.*

Roe v. Wade.⁴⁶⁵ “Constitutional design,” in other words, is about introducing value into constitutional decision-making.⁴⁶⁶ While *Russo* ultimately did not accept the invitation to overrule *Roe*, the author of *Hyatt* and dissenter in *Russo*, Justice Thomas, made clear in his *Russo* dissent that *Hyatt* was written with just such an overruling of *Roe* in mind.⁴⁶⁷

It is important that *Hyatt*’s justification has much in common with *Citizens United*. Both cases asserted that the precedent it overruled was wrong at the time it was decided. Both cases do so on the basis of a particular view of constitutional design that nakedly disagrees with the view expressed in precedent. Both cases do not look at the traditional factors when stare decisis might be overruled.

Both cases use unilateralist powers to upset precedent by means of constitutional adjudication. They do precisely what courts in the ordinary course should not do if they wish to support republican government in a framework of heated unilateral contestation such as the one in which the Roberts Court finds itself. In other words, here the Roberts Court has acted in a way that is proto-Vermeulian—it places its own value over those of its predecessors in ways that seriously upsets reliance interests.

But before judging the Roberts Court too harshly, one should observe that the Roberts Court is not acting in a vacuum. *Citizens United* is an answer to perceived earlier unilateralism in *Austin*: Justice Kennedy, joined by Justice O’Connor, and Justice Scalia wrote dissents when *Austin* was first decided.⁴⁶⁸ Justice Kennedy, writing for the majority in *Citizens United*, thus can honestly hold on to the idea that *Austin* was incorrectly decided and a dangerous departure from precedent on day one—he in fact said so.⁴⁶⁹

⁴⁶⁵ *Id.* Leah Litman, *Supreme Court Liberals Raise Alarm Bells About Roe v. Wade*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/opinion/roe-supreme-court.html?searchResultPosition=1> [<https://perma.cc/2LCY-L8NE>].

⁴⁶⁶ *Hyatt*, 139 S. Ct. at 1492.

⁴⁶⁷ *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2150-53 (2020) (Thomas, J., dissenting).

⁴⁶⁸ *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 679 (1990) (Scalia, J., dissenting); *id.* at 695 (Kennedy, J., dissenting) (noting Justices O’Connor and Scalia joined Justice Kennedy’s dissent).

⁴⁶⁹ *Id.* at 695-96 (Kennedy, J., dissenting) (condemning the majority as “value-laden, content-based speech suppression that permits some nonprofit corporate groups, but not others, to engage in political speech.”).

Further, *Hyatt's* unilateralism barely disguises that it responds to the *Roe* Court.⁴⁷⁰ The *Roe* decision unlike any other has steadily fueled a movement judicially to contest a constitutional right to abortions for decades.⁴⁷¹ It was a deciding factor in the formation of the Federalist Society.⁴⁷² It is the backbone for judicial appointments since the Reagan administration.⁴⁷³ And it was a key reason that President Donald Trump was able to convince religious conservatives to join his strategic coalition against Secretary Clinton.⁴⁷⁴

Roe, and to a lesser extent *Austin*, themselves vividly show the danger of judicial unilateralism. It is too easy to criticize *Citizens United* and *Hyatt* for their strategic disregard of precedent. *Citizens United* expressly is a judicial *contestation* of unilateral action in (perceived) disregard of precedent in *Austin* and confirmed in *McConnell*.⁴⁷⁵ If it is true that *Hyatt* is an attempted first step to overturning *Casey* and *Roe*, *Hyatt*, too, is part of a judicial *contestation* of unilateral value decisions made in *Roe* and confirmed in *Casey*.⁴⁷⁶

The case pairs of *Citizens United* and *Austin*, and *Hyatt* and *Roe/Casey*, appear to confront us with a dilemma: how do you respond to and contest unilateral constitutional adjudication once it has taken place? Problematically, to contest unilateralist precedent by overturning it is the first step down a slippery slope to place one's own moral values above those of prior courts. But not to overturn prior unilateralist constitutional adjudications turns them into a *fait accompli*. It would increase the moral hazard for

⁴⁷⁰ See Litman, *supra* note 465.

⁴⁷¹ Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2071-72 (2011).

⁴⁷² Michael Kruse, *The Weekend at Yale That Changed American Politics*, POLITICO MAG. (Oct. 2018), <https://www.politico.com/magazine/story/2018/08/27/federalist-society-yale-history-conservative-law-court-219608> [<https://perma.cc/5ZZE-8R4Y>].

⁴⁷³ *Ronald Reagan's Big Impact on the Supreme Court*, NAT'L CONST. CTR.: CONST. DAILY (Feb. 6, 2017), <https://constitutioncenter.org/blog/ronald-reagans-big-impact-on-the-supreme-court> [<https://perma.cc/8HXM-3KJ8>].

⁴⁷⁴ Jane Coaston, *Polling Data Shows Republicans Turned out for Trump in 2016 Because of the Supreme Court*, VOX (June 29, 2018, 10:00 AM), <https://www.vox.com/2018/6/29/17511088/scotus-2016-election-poll-trump-republicans-kennedy-retire> [<https://perma.cc/3ECU-YLR5>].

⁴⁷⁵ *Citizens United v. FEC*, 558 U.S. 310, 318-19 (2010).

⁴⁷⁶ See Litman, *supra* note 465.

judges to make permanent law consistent with their own moral views, knowing that their pronouncements are beyond legal or political review. Plainly, there must be a safety valve for the contestation of constitutional adjudication.

It is thus too easy to respond to *Citizens United* and *Hyatt* that two wrongs don't make a right. For curious unilateralism to work, courts must be able to get their hands dirty and participate in contestation. With all due respect to Sunstein and Waldron, courts will face instances in which they will have to disregard minimalism and to disregard precedent and engage in full-throated judicial review to play their part in republican government. But how can they do so without bringing down the entire edifice and turn the Supreme Court into the kind of Vermeulian Lord Protector entitled to legislate morality for a generation or more? How can judicial contestation fulfill its role as a check while not standing beyond contestation itself? The next two sections will address this question.

C. Increase Contestatory Opportunity

The key premise of unilateralism as a constituent component of a republican form of government is that unilateral action and the value that is invoked to defend it are in fact contestable. The point is that groups must be able to join together as part of strategic conduct in order to countermand unilateral action elsewhere. This strategic engagement between different value-based communities was at the heart of deliberation when ordinary deliberative processes have ground to a political halt.

The engagement between different groups using unilateral means to protect core values is going to push existing legal authorizations to act to new limits. The legal justification for unilateral conduct will typically rest on novel interpretations of existing statutory assignments of authority. This novel interpretation is necessitated by the first factor of our unilateral action rubric: one would typically expect that the decision not be taken unilaterally in the first place but submitted to a formal deliberative process. Circumventing this process requires a novel theory of why such action is permissible in the first place under existing statutory law.

This means that it is highly likely that unilateral action will be challenged in the courts as overstepping the original legal

authorization to act. There will not be any clear precedent supporting the use of unilateral power. This will create incentives for affected parties to seek to enjoin the application of the new decision. There is every reason to test the new theory and no reason to suppose that a challenge may not be successful.

The role of the courts in the first instance is to minimize constitutional conflict and thus to focus on the narrow statutory grants of authority. The canons of judicial minimalism would in the first place attempt to avoid questions of constitutional authority.⁴⁷⁷ They will look for ways to interpret the underlying statute to determine that the branch of government challenging unilateral conduct in fact has already ceded the relevant authority to the other or that it acquiesced in a curtailment of whatever constitutional authority it might have had.

Importantly, courts mindful of their role in policing unilateral conduct by other constitutional actors may have to act facially inconsistently with their own prior determinations. Doing so may be the only way to provide an opportunity for reasonable contestation of unilateral actions by others—particularly the federal executive. The Roberts Court has acted with great finesse to provide room for such contestation.

One such recent example is *Regents*.⁴⁷⁸ The case involved an attempt by the Trump administration to undo the Obama administration Deferred Action for Childhood Arrivals (DACA) program by rescinding the original memorandum pursuant to which DACA had been put into place as allegedly unlawful.⁴⁷⁹ The case is the second time that the Supreme Court was asked to address controversial Obama administration immigration policies. The first such case was *United States v. Texas*. In that case, Texas challenged Deferred Action for Parents of Americans (DAPA).⁴⁸⁰ The United States Court of Appeals for the Fifth Circuit sided with Texas and struck down DAPA.⁴⁸¹ The Supreme Court split evenly 4-4, thus affirming the Fifth Circuit.⁴⁸²

⁴⁷⁷ Sunstein *Minimalism*, *supra* note 390, at 377-86.

⁴⁷⁸ *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

⁴⁷⁹ *Id.* at 1901-02.

⁴⁸⁰ *Texas v. United States*, 809 F.3d 134, 149 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016) (per curiam).

⁴⁸¹ *Id.* at 181-86.

⁴⁸² *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (per curiam).

The *Regents* majority, led by Chief Justice Roberts, saved DACA in some facial tension with *United States v. Texas*. Scholarship assessing the potential outcome of the litigation after oral argument noted that “[s]ome Justices suggested that the concerns about [DACA] illegality standing alone might suffice to sustain the agency’s decision, given the Court’s earlier decision striking down the DAPA and expanded DACA programs.”⁴⁸³ While such scholarship expressed hope that the Court may “put some bite into the APA’s rational relation test, particularly by considering the administration’s failure to weigh the DACA beneficiaries’ reliance interests, the rescission could be overturned on statutory grounds,” it remained mindful of the tension with earlier decisions if the Court were to protect DACA beneficiaries.⁴⁸⁴

Specifically, *Regents* concluded that DACA set up a system of a quasi-adjudicatory grant of deferred action for beneficiaries.⁴⁸⁵ Contrary to the Trump administration’s position, DACA was not a non-enforcement policy and in fact “was the very opposite of a refusal to act.”⁴⁸⁶ Further, even assuming that DACA had been promulgated in violation of law, the Department of Homeland Security continued to have discretion to decline to institute proceedings, terminate proceedings, or remove individuals.⁴⁸⁷ This discretion was consistent with DACA.⁴⁸⁸ Consequently, a rescission of DACA would require reasons other than the general lawfulness of the program, reasons which were notably absent.⁴⁸⁹ Thus, the decision ending DACA was “arbitrary and capricious.”⁴⁹⁰

⁴⁸³ Rachel F. Moran, *Dreamers Interrupted: The Case of the Rescission of the Program of Deferred Action for Childhood Arrivals*, 53 U.C. DAVIS L. REV. 1905, 1940 (2020).

⁴⁸⁴ *Id.* at 1939.

⁴⁸⁵ *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912-13 (2020).

⁴⁸⁶ *Id.* at 1906.

⁴⁸⁷ *Id.* at 1911-12.

⁴⁸⁸ *See id.* at 1912 (“In short, the Attorney General neither addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy. Thus, removing benefits eligibility while continuing forbearance remained squarely within the discretion of Acting Secretary Duke, who was responsible for ‘[e]stablishing national immigration enforcement policies and priorities.’ But Duke’s memo offers no reason for terminating forbearance.”) (citation omitted).

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

The decision was very careful to thread a needle that granted significant potential powers to the executive under statute, here the Immigration and Nationality Act (INA). In fact, the decision did not rule on the lawfulness of DACA, at all.⁴⁹¹ Rather, it only dealt with the implementation powers under DACA whether or not the policy of DACA was lawful.⁴⁹² And, it required an engagement of those powers under the Administrative Procedures Act to undo any prior program that had relied upon such powers.⁴⁹³ It supported an expansive view of *potentially* delegated powers so as to avoid broader questions regarding the meaning of the statute as such or the constitutional powers of the president in the immigration realm.

The *Regents* decision therefore protects the maximum space for contestation. It did not pass on the legality of DACA. Instead, it focused on administrative procedures. This extraordinarily narrow focus of its decision allows the executive to institute its policy following appropriate administrative procedures—and thus be subject to administrative contestation.⁴⁹⁴ The tension with *United States v. Texas* thus is not a threat by any means to a stable contestatory space.⁴⁹⁵

The *Trump v. Mazars USA, LLP*⁴⁹⁶ decision makes this point even more express. The case concerned the enforceability of Congressional subpoenas for the President's personal papers. The Court held that both Congress and the President exaggerated their respective powers to obtain or shield the documents in question.⁴⁹⁷ It noted that there were significant separation of powers issues at play that had hitherto been resolved in the “hurly-burly” of political engagement.⁴⁹⁸ A judicial enforcement of subpoenas risked “eroding . . . deeply embedded traditional way[s]” of governing.⁴⁹⁹ It therefore sent the parties back to the drawing board to exchange afresh,

⁴⁹¹ *Id.* at 1910.

⁴⁹² *Id.* at 1910-12.

⁴⁹³ *Id.* at 1911.

⁴⁹⁴ *Id.* at 1911-15.

⁴⁹⁵ *See* *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (per curiam).

⁴⁹⁶ *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020).

⁴⁹⁷ *Id.* at 2030-31.

⁴⁹⁸ *Id.* at 2029.

⁴⁹⁹ *Id.* at 2035.

following a “balanced approach” that takes into account the respective reliance interests of the branches at issue.⁵⁰⁰

The Roberts Court applied similar finesse in its earlier procedural decision in *West Virginia v. EPA*.⁵⁰¹ The decision stayed implementation the Clean Power Plan, the Obama administration’s most sweeping climate regulations, until judicial challenges to the rule could be resolved.⁵⁰² This stay in itself was “unprecedented.”⁵⁰³ In fact, commentators assumed that the decision foreshadowed a very “[tough] bench” at the Supreme Court.⁵⁰⁴

This conclusion may overread the *West Virginia* case. The Clean Power Plan significantly pushed the statutory environmental regime to allow the administration greater regulatory authority.⁵⁰⁵ The rule consequently was immediately challenged.⁵⁰⁶ This was a severe blow to climate policy and compliance by the United States with its international legal climate obligations.⁵⁰⁷

From a perspective of contestation, following precedent that would have allowed the rule to go into effect pending judicial challenge would have led to a potential forfeiture by those most interested in contesting the rule. One of the pragmatic effects of the Clean Power Plan would have been a requirement to change United States energy infrastructures and a closure of old coal-fired power plants in particular.⁵⁰⁸ These businesses and their employees would have had the clearest interest to contest the rule to protect their own livelihood. Once the economic landscape and U.S. energy infrastructure has been altered, there is a weakening of the preconditions for contestation.

⁵⁰⁰ *Id.*

⁵⁰¹ *West Virginia v. EPA*, 136 S. Ct. 1000, 1000 (2016) (mem.).

⁵⁰² *See id.*

⁵⁰³ Gabriel Pacyniak, *Making the Most of Cooperative Federalism: What the Clean Power Plan Has Already Achieved*, 29 GEO. ENVTL. L. REV. 301, 304 (2017).

⁵⁰⁴ *Id.*

⁵⁰⁵ *See* Jody Freeman, *The Uncomfortable Convergence of Energy and Environmental Law*, 41 HARV. ENVTL. L. REV. 339, 413 (2017) (“the final Clean Power Plan was unquestionably creative and ambitious”).

⁵⁰⁶ *See West Virginia v. EPA*, CLIMATE CHANGE LITIGATION DATABASE (Sept. 17, 2019), <http://climatecasechart.com/case/west-virginia-v-epa/> [<https://perma.cc/9JBY-D78V>].

⁵⁰⁷ Pacyniak, *supra* note 503, at 303-04.

⁵⁰⁸ Freeman, *supra* note 505, at 410.

The point thus is not necessarily outcome oriented (climate vs. economy) as initial scholarship suggested.⁵⁰⁹ It may have been a decision to avoid forfeiture and maintain civic contestation. The overarching point is that the Court may very well have to depart from precedent in order to protect continued civic engagement. Such departure from precedent would be justified and required in order to allow contestation to continue. The Roberts Court so far has been willing to be mindful of this role as the challenge to the Obama administration's Clean Power Plan and the Trump administration's attempted rescission of DACA has shown.

This understanding of increasing contestatory space may also explain the extraordinary step by Chief Justice Roberts to “save” the Affordable Care Act (ACA) in *National Federation of Independent Business v. Sebelius*.⁵¹⁰ To provide context, what hung in the balance in the case was whether people might be able to purchase health insurance through exchanges set up pursuant to the Affordable Care Act, and particularly whether people with pre-existing conditions could do so. Like *Regents* and *West Virginia*, the case involved tangible benefits—access to health care versus ability to remain in the United States versus ability to continue operating coal-fired powerplants. And like *Regents* and *West Virginia*, the measure at issue was a political lightning rod—ACA versus DACA versus the Clean Power Plan.

Chief Justice Roberts held that Congress did not have the power to pass the key piece of the ACA, the individual mandate, under the commerce clause.⁵¹¹ He reasoned that “[t]he power to *regulate* commerce presupposes the existence of commercial activity to be regulated. If the power to ‘regulate’ something included the power to create it, many of the provisions in the Constitution would be superfluous.”⁵¹² He went on that the individual mandate “does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.”⁵¹³

⁵⁰⁹ Pacyniak, *supra* note 503, at 304.

⁵¹⁰ Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

⁵¹¹ *Id.* at 550.

⁵¹² *Id.*

⁵¹³ *Id.* at 552.

Chief Justice Roberts nevertheless upheld the mandate under the taxing power.⁵¹⁴ He noted that the Court had adopted a “functional approach” to taxation, meaning that it was irrelevant that the mandate was facially enforced through a penalty rather than a tax.⁵¹⁵ Chief Justice Roberts further found that the penalty in fact met the hallmarks of a tax under such a functional analysis.⁵¹⁶

The decision in essence is a case like *West Virginia*, only in reverse. It kept debate alive by allowing the federal government a continued—if smaller—place in regulating healthcare markets. The decision gave a greater role to all constitutional actors involved than they might otherwise have enjoyed. Congress and the federal government had limited powers to affect healthcare markets and thus needed to work with states to achieve their policy goals fully. But the States, too, could not rid themselves so easily of the role of Congress and the federal government: they could continue to exercise their taxation power to provide healthcare options to previously uninsured persons. The decision increased the space for contestation by protecting the interests of those most immediately affected by a negative decision and by increasing the number of constitutional actors with overlapping competences in politically charged questions.

D. Increase Space for Contestation

The discussion in the last Part has shown that the proper scope for unilateral judicial action in a curious or republican unilateralist paradigm is to increase the space for contestation. The discussion of both *Regents* and *West Virginia v. EPA* has shown how statutory construction can be put to such a use. *Regents*, in particular, showed how statutory construction can be judicially minimalist in the sense of avoiding constitutional adjudication.⁵¹⁷ It even was able to avoid arriving at a final interpretation of the scope of the relevant statute.⁵¹⁸ It rather focused on the administrative process in which

⁵¹⁴ *Id.* at 575.

⁵¹⁵ *Id.* at 565-66.

⁵¹⁶ *Id.* at 566-75.

⁵¹⁷ See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1911 (2020).

⁵¹⁸ *Id.*

contestation was to take place and found that process wanting.⁵¹⁹ As *West Virginia v. EPA* showed, it also provide an incentive for stakeholders to broaden coalitions through continued contestation by preventing a stakeholder to create pragmatically irreversible facts on the ground through unilateral conduct.⁵²⁰ The decisions in both instances showed not so much a care for a particular value or a particular outcome. They simply helped contestation along and policed the manner of engagement between the stakeholders.

What emerges from this discussion is that the inherent value defended by the Court when the Court acts unilaterally is contestation. Contestation is the key value of republicanism itself.⁵²¹ It is of particular importance in the context of a unilateralist paradigm as opposed to a communicative action or strong public rationality paradigm. As discussed above, it is only when contestation and change are a realistic possibility that one would agree to live in a society that may—for a period of time—impose alien values through unilateral action on one's own life.

When the Court acted unilaterally by altering precedent or acting in an unexpected manner in the discussion so far, it did so to protect and expand the space for contestation of unilateral executive action. The dominant value protected by the Court so far has not been to achieve a particular outcome. It has been to safeguard a process.

This procedural concern was not lost on immediate commentators on the *Regents* decision. For example, Steve Vladeck tweeted: "It's not that Chief Justice Roberts is a closet progressive. He's not. It's that the Trump administration is really bad at administrative law."⁵²² We can now expand this point to say it's not that the Roberts Court (in its legacy decisions, at least) is progressive. It's not. It's that it cares about appropriate room and time for contestation of unilateral (executive) conduct.

This observation must carry forward to constitutional adjudication, as such. As Greene in his famous article, *The Anticanon*, has shown, constitutional adjudication is inherently

⁵¹⁹ *Id.* at 1910-13.

⁵²⁰ *See West Virginia v. EPA*, 136 S. Ct. 1000, 1000 (2016).

⁵²¹ Pettit, *supra* note 87, at 47-48.

⁵²² Vladeck, *supra* note 4.

bound up in value.⁵²³ We can now add that in some instances, the very existence of an *Anticanon* shows us that there are decisions that require later revision.⁵²⁴ And we can further add from our earlier discussion of the role of precedent in the Roberts Court that cases do not need to be part of an *Anticanon* to trigger strong judicial contestation—contestation can occur when an earlier court makes a value-based departure from precedent.

What has emerged from the discussion so far is this: when the Court acts unilaterally to alter course in constitutional adjudication, it must also increase opportunities for contestation in political society, broadly conceived. To illustrate this point, consider the following thought experiment. The organization of your society depends upon the ability of each meaningfully to group together with others to contest decisions reached by others. Different institutions have the ability to extend their power unilaterally to implement their respective value preferences. One actor has the ability to avoid ready contestation when it extends its power unilaterally. Under what circumstances could you allow that actor to do so?

The answer to this thought experiment intuitively is: only when that actor through its unilateral action increases the spaces for contestation in society. It may be true that this decision—the decision to extend the space within which contestation is possible—cannot itself be contested. But that is not problematic. The decision in fact supports contestation and extends it. To oppose such a decision would therefore act to minimize contestation and coalition building in society. To oppose such unilateral action in the name of the ability to contest unilateral action therefore would be paradoxical and self-defeating. The unilateral action by our constitutional actor did in fact increase the ability to contest unilateral decision-making society-wide.

There are two key arguments in favor of this solution to the thought experiment, one of which is value-based, the other pragmatic. As a matter of value, such unilateral action would deprive other actors of the ability to avoid contestation of their decisions. It provides an important check on other branches of

⁵²³ See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 380, 460-63 (2011); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735-36 (1995).

⁵²⁴ Greene, *supra* note 523, at 460-63.

government. When courts act in this fashion they espouse a value that is itself at the core of republican government.

This answer of course is only convincing to the extent one already believes in republican government. Yet, there are also pragmatic reasons to support it. Assume that the courts do not act in this manner and allow the successful suppression of contestation. What is the result? For the reasons outlined above, Schmitt would correctly suggest that we are entering a political battle of all against all with no holds barred.⁵²⁵ One need not be a student of Hobbes to understand that any reasonable means to prevent such a political battle of all against all is desirable to provide stability and tranquility to one's political society.⁵²⁶ Pragmatically, therefore, acting to prevent a slide into a Hobbesian state of nature is pragmatically desirable, whether one believes in republican government or not.

We can now test whether the decisions discussed above can be justified in light of the new matrix. That is, how do *Citizens United* and *Hyatt* (as a precursor to an attack on *Roe*) fare? Do they increase the space for civic contestation or not?

In the context of *Austin* and *Citizens United*, the value conflict concerned political speech.⁵²⁷ *Austin* permitted constraints on political speech because it deemed that certain kinds of political speech—moneyed corporate political speech—distorted the ability of ordinary citizens to participate in governance and have their contestation heard.⁵²⁸

Austin's concern—and its departure from the earlier precedent articulated in the dissenting opinions by Justices Scalia and Kennedy—sounds in liberty interests.⁵²⁹ It seeks to expand the realistic ability of ordinary people to be heard in political discourse and make their contestation known. It is therefore possible to defend *Austin* as a departure from precedent in a manner that is

⁵²⁵ SCHMITT BDP, *supra* note 130, at 33.

⁵²⁶ See generally THOMAS HOBBS, *LEVIATHAN* (Richard Tuck ed., Cambridge U. Press rev. student ed. 1996).

⁵²⁷ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990); *Citizens United v. FEC*, 558 U.S. 310, 318-19 (2010).

⁵²⁸ *Austin*, 494 U.S. at 660.

⁵²⁹ *Id.*; see also *id.* at 679 (Scalia, J., dissenting); *id.* at 695-96 (Kennedy, J., dissenting).

inherently consistent with the unilateralist paradigm. Judicial action does not shut down contestation—it facilitates it.

How about *Citizens United*? *Citizens United*, too, can be cast in terms that expand contestation. The concern to protect all forms of political speech regardless of the speaker on its face seeks to increase contestation rather than to decrease it.⁵³⁰ It wants to provide an outlet for contestation.⁵³¹ It does not pre-judge who may speak but protects political speech without discriminating on any basis whatsoever. This ideal, too, is defensible—and was indeed defended—in terms of increasing contestation.

What now becomes apparent is that there are different ways to resolve the same underlying constitutional question while also increasing contestation. *Austin* and *Citizens United* are at odds with each other.⁵³² But both can be cast as increasing contestation of ideas in their own right.

One could say that both cases stake out opposite extremes of unilateral judicial intervention by constitutional adjudication. *Both* decisions can present a coherent case for departing from precedent. Both decisions can justify such a departure by reference to increased contestation by either increasing speech or increasing the quality of speech by blocking distortion of speech by money.

Which path to take is a question of what kind of contestation one values. And judges are entitled to differ from each other on such questions. And they are entitled to act on their differences. Precedent can be changed in many different directions to support many different values—so long as a chief value served is contestation.

What about *Roe v. Wade* after *Hyatt* and *Russo* then? The first question is about *Roe* itself. Assuming that *Roe* itself departed from received constitutional meaning at the time it was decided, could *Roe*'s departure be justified in terms of increasing contestation? The answer is a resounding yes. Such a justification would follow *Austin* in certain respects. It would focus on the quality and equality of political speech across society.

⁵³⁰ See *Citizens United*, 558 U.S. at 319.

⁵³¹ See *id.*

⁵³² See *id.*

Criminalizing abortion disproportionately affects women.⁵³³ Women must carry an unwanted pregnancy to term. Women lose on educational and professional opportunities.⁵³⁴ Women suffer trauma. Women suffer stigma. To borrow from *Austin*, such a stigmatization of one group distorts women's place in society.⁵³⁵ It impairs their enjoyment of social, economic, and cultural rights in society. It also distorts their ability to exercise political rights as equals with men in society—to build coalitions and make demands as equals.

This means that the decision in *Roe* could certainly be justified in terms of increasing the participation in civic discourse of those most negatively affected by prior law. Such a departure from constitutional expectations or precedent therefore facially is defensible in the context of unilateralism. It meaningfully extends the rights instrumental in full participation in civic deliberation and contestation. Like *Austin*, *Roe* thus is about the quality of the liberty interest of those most directly affected by the decision. In *Austin*, the quality of the liberty interest was that of securing relative equality for “ordinary citizens” in public political discourse.⁵³⁶ In *Roe*, it was about the quality of the liberty interest of women in advocating for their right fully to participate in public discourse in more than theory.⁵³⁷

How then should one view the move by *Hyatt* after *Russo*? To begin with, *Hyatt* advocated the wholesale replacement of precedent on grounds of constitutional design.⁵³⁸ *Russo* did not (yet) follow this invitation. That does not mean, however, that *Hyatt* is not a notice of intent to keep contesting *Roe* and *Casey*.

The first contestation-based defense one could make for a slow retrenchment on abortion rights (be it one that has announced an

⁵³³ Danielle Renwick, ‘I Went to Bed Hungry’: Being Denied an Abortion Can Lead to Financial Turmoil, *GUARDIAN* (June 20, 2020), <https://www.theguardian.com/world/2020/jun/20/abortion-denied-debt-bankruptcy-eviction> [<https://perma.cc/UN4U-ZLHC>].

⁵³⁴ Anna Bernstein & Kelly M. Jones, *The Economic Effects of Abortion Access: A Review of the Evidence*, INST. FOR WOMEN'S POL'Y RES. (July 18, 2019), https://iwpr.org/wp-content/uploads/2020/07/B379_Abortion-Access_rfinal.pdf [<https://perma.cc/AP4R-EHYF>].

⁵³⁵ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

⁵³⁶ *Id.*

⁵³⁷ *Roe v. Wade*, 410 U.S. 113, 163-64 (1973).

⁵³⁸ *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1492 (2019).

intent in *Hyatt* eventually to overturn the constitutional right wholesale) is that the removal of this particular constitutional right returns the question of legalizing abortion to the political process to resolve. It thus undoes the original unilateral judicial act which placed abortion rights beyond contestation. This justification is not an after the fact rationalization—rather, it goes to the heart of the objection of the original members of the Federalist Society to *Roe*.⁵³⁹ It also goes to the unease announced by Justice Alito in a dissenting opinion joined by Chief Justice Roberts in *Whole Woman's Health*: the *Whole Woman's Health* majority, according to the Chief Justice, displaced any ordinary application of constitutional principle to legislative action simply because it concerned abortion.⁵⁴⁰ This special treatment, according to the dissent, undermines contestation and republican decision-making processes.⁵⁴¹

This first defense is a gesture at the ideal of contestation. But it is arguably not enough of a gesture, at least when it comes to the wholesale removal of protections for abortion rights. The flaw with its reasoning is that such a move reduces women's rights significantly—and does so in a manner that affects their ability to participate in civic discourse. Unlike *Austin* and *Citizens United*, however, the decision does nothing to increase the rights of affected persons to participate in civic discourse. *Citizens United* increased contestation by removing barriers to political speech.⁵⁴² Overturning *Roe* has no such analogous effect—at least as its logic is articulated so far.

This leaves the question—how would a contestation-based court have to go about it if it actually meant to overturn *Roe*? The question is central to a truly contestatory ideal. Short of answering it, contestation would again collapse into a form of substantive public reason rather than an ideal of neutrality that can continue plausibly to support diametrically opposing outcomes.

It turns out that a theoretical path very much remains open. Following the logic of why *Roe* is appropriate, one must identify the

⁵³⁹ Kruse, *supra* note 472.

⁵⁴⁰ *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2330 (2016) (Alito, J., dissenting).

⁵⁴¹ *See id.* at 2343-45.

⁵⁴² *Citizens United v. FEC*, 558 U.S. 310, 319 (2010).

person most negatively affected by current law and particularly identify an infringement of their ability to speak and be heard.

Such a conception can only look to a protection of the unborn as those affected by current law.⁵⁴³ But to defend the interests of the unborn, one needs to make a reasonably large leap from current constitutional jurisprudence. The unborn are not currently participants in civil discourse or traditionally protected by the Fourteenth Amendment.⁵⁴⁴ In fact, political coalition building does not give even minors an active role to play, let alone an equal one. So long as this is the case, the argument will find its path obstructed.

To free that path would require a fuller conception of intergenerational equity. Religious teachings opposed to abortion readily make such a broader conception available. These teachings would have us provide a greater place for the intergenerational rights and contributions of children.⁵⁴⁵

One can thus draw on an understanding of the dignity of the life to be as a guidepost for judicial decision-making without limiting the space for civic contestation. But such an understanding would have to not only take the unborn seriously as full and equal right holder. It would have to take seriously the rights to future dignity of children and adolescents in general (children and adolescents who, after all, are already born). Such a conception therefore would require a far more rigorous engagement with issues that disproportionately affect the next (and potentially future) generations compared to the current generation.⁵⁴⁶

As this discussion has shown, if this is what *Hyatt* intended to do, it went about it the wrong way. *Hyatt* did not increase the space for contestation for anybody. To the contrary, it closed avenues for contestation by limiting access to justice against states.⁵⁴⁷ This thus is a decision that does not sit well with the unilateralist framework.

⁵⁴³ See *Roe v. Wade*, 410 U.S. 113, 163-64 (1973).

⁵⁴⁴ *Id.* at 158.

⁵⁴⁵ *Encyclical Letter Laudatio Si' of the Holy Father Francis on Care for Our Common Home*, VATICAN (May 24, 2015), http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html [https://perma.cc/K4KX-L7EK].

⁵⁴⁶ See generally STEPHEN M. GARDINER, A PERFECT MORAL STORM: THE ETHICAL TRAGEDY OF CLIMATE CHANGE (2011).

⁵⁴⁷ *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1492 (2019).

It appears a unilateral arrogation of power by the courts that is on its way to Vermeule and not on the way to protecting the integrity of republican ideals.⁵⁴⁸

That is not to say that other litigation had not been available to make a principled point along the lines outlined above. The *Juliana* litigation asserting equal protection rights of minors in the face of political inaction against climate change might well have provided such an avenue.⁵⁴⁹ It did not.⁵⁵⁰

The Roberts Court thus in many instances is able to balance the forces of unilateralism. Yet, like most institutions, it, too, makes missteps. *Hyatt* is one such potential misstep. It heralds a far looser understanding of judicial minimalism and precedent than is needed to maintain the space for civic contestation. It thus suggests signs of danger on the horizon.

These signs of danger should not, however, be taken out of proportion. As this Article has shown, the Roberts Court more often than not is in fact acting as a constitutional balance in the face of vibrant unilateralism. It has secured means to continue contestation, to build coalitions, and to further republican government even in today's hyper-partisan times. It thus lives up to the ideal of republican neutrality. Or, differently put, the view of the Roberts Court as just another constitutional actor playing at power politics can be dispelled as vastly exaggerated. The hope expressed by Chief Justice Roberts, on the other hand, to act as an honest umpire in the political engagement of other constitutional actors has aged remarkably well.

CONCLUSION

Unilateralism is alive and well. And it is desirable. It provides us with means to act on deeply held moral convictions. It allows us to engage each other not just with words, but also with actions. It thus provides us with a controlled laboratory for constitutional experimentation. It does not have to spill into illiberalism. As this Article has shown, unilateralism in a republican system is intensely

⁵⁴⁸ *Vermeule BO*, *supra* note 13.

⁵⁴⁹ *Juliana v. United States*, 217 F. Supp. 3d 1224, 1242-48 (D. Or. 2016), *rev'd*, 947 F.3d 1159 (9th Cir. 2020).

⁵⁵⁰ *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020).

curious. It continues to build broad and intense coalitions. It provides opportunities for engagement. And it provides possibilities for compromise. Far from being illiberal, unilateralism is thus a very liberal ideal. What this Article has also shown is that such a unilateralist engagement asks much of the courts. It requires finesse in allowing contestation and coalition building to continue all the while shutting down unconstitutional overreaches. This Article has shown that the Roberts Court has been uniquely adept at providing such a backstop.