Symmetric Constitutionalism: An Essay on *Masterpiece Cakeshop* and the Post-Kennedy Supreme Court

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Following Justice Kennedy's retirement and the bitter fight over Justice Kavanaugh's confirmation, increasingly polarized views about constitutional law in general, and specific constitutional cases in particular, threaten to undermine courts' legitimacy, degrade their institutional capacity, and weaken public support for important civil liberties.

To help mitigate these risks, this Essay proposes that judges subscribe to an ethos of "symmetric constitutionalism." Within the limits of controlling considerations of text, structure, history, precedent, and practice, courts in our polarized era should lean towards outcomes, doctrines, and rationales that confer valuable protections across both sides of the nation's major political divides, and away from those that frame constitutional law as a matter of zero-sum competition between competing partisan visions. In other words, courts should aspire to craft a constitutional law with cross-partisan appeal, avoiding when possible interpretations that favor one ideological position without possible benefit to others.

Reflecting on several cases from Justice Kennedy's last term, including Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, *this Essay explores what subscribing to such an ethos might mean in practice. It also considers what critical purchase a preference for symmetry might offer in several controversial areas, including freedom of expression, structural constitutional law, equal protection, gun rights, and substantive due process.*

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INTRODUCTION

We live in a polarized era, in which mutual suspicions and animosities increasingly define our politics. In such a period, constitutional law can take two forms: a continuation of political conflict by other means, in which Supreme Court decisions mop up the defeated remnants of a losing coalition, or a search for neutral principles of civil liberty that may be mutually reinforcing across the nation's political divides. Using as examples the Supreme Court's recent *Masterpiece Cakeshop* decision and other cases from the pivotal 2017–2018 term—which turned out to be the last for erstwhile "swing" Justice Anthony Kennedy—this Essay makes the case for the latter approach.

More concretely, the Essay argues that courts should practice "symmetric constitutionalism." Insofar as the governing legal materials of text, structure, precedent, and history leave room for judicial discretion, courts in a polarized

period should lean towards outcomes, doctrines, and rationales that confer valuable protections across both sides of the Nation's major political divides, and away from those that frame constitutional law as a matter of zero-sum competition between competing partisan visions. In other words, courts should aspire to craft a constitutional law with cross-partisan appeal, avoiding when possible interpretations that favor one ideological position without possible benefit to others.

From this point of view, the First Amendment rule requiring content-neutrality in speech regulation is paradigmatically symmetric: it protects all speakers, no matter what they are saying. Trans-substantive procedural due process is likewise inherently symmetric: it grants equivalent protections to all claimants and defendants. By contrast, the holding in *District of Columbia v. Heller* that the Second Amendment protects an individual right to bear arms is paradigmatically asymmetric: whether it is ultimately right or wrong, the decision attempted to resolve a contested political issue in one side's favor.[1] So too are some substantive due process holdings, though (for reasons I'll come back to) often only when viewed in isolation. In *Masterpiece Cakeshop*, which involved a baker's refusal on religious grounds to create a custom cake for a same-sex marriage, the Court could have framed the dispute as an expressive freedom case or a religious liberty case.[2] In choosing the latter approach, the Court favored an asymmetric doctrine—one that at present principally benefits members of the conservative coalition. By contrast, a free-expression rationale would have been more symmetric: it could have applied even-handedly over a broader set of disputes. Precisely what positions are asymmetric in the sense I discuss here is contingent upon existing partisan configurations and so may change over time. At all times, however, when confronting questions implicating sharp ideological divides, symmetric constitutionalism should encourage judges to mitigate doctrinal asymmetry to the extent possible.

To be clear at the outset, symmetric constitutionalism, so understood, is not a primary consideration of interpretive theory, but instead an ethos or disposition. It is a thumb on the scale that judges subscribing to different primary interpretive approaches may equally incorporate. In American constitutional law, arguments based on text, structure, precedent, and history properly control the analysis, though fierce battles rage over how best to conduct the inquiry when these considerations conflict or prove indeterminate. Apart from such primary considerations of interpretive theory, however, scholars have long advocated organizing judicial review around certain secondary dispositions. A century ago, James Bradley Thayer advocated an ethos of judicial restraint: courts, he argued, should defer to outcomes of the democratic process unless the

1. 554 U.S. 570, 575 (2008).
2. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018).

Constitution clearly required a different result.[3] Similarly, Cass Sunstein, among others, has advocated an ethos of "judicial minimalism" under which courts proceed with caution, deciding no more than necessary in each case and employing the narrowest possible rationale.[4]

Symmetric constitutionalism is another organizing mindset of this sort, and indeed one that judges going back at least to John Marshall have sometimes exhibited. Just as an opinion, decision, or doctrine can be more or less Thayerian or more or less minimalist, it can also be more or less symmetric. By the same token, though, just as judges subscribing to different primary interpretive theories may be more or less Thayerian or minimalist in practice, so too may judges with varying primary interpretive commitments lean more or less sharply in favor of symmetry. As compared to these competing dispositions, however, symmetric constitutionalism is the appropriate ethos for our time. In particular, although some have advocated minimalism as a response to polarization,[5] the truth is that broader doctrines, holdings, and rationales may often be preferable today, precisely because greater breadth may enable greater symmetry.

Amid intense partisanship and deep political divisions over particular case outcomes, an orientation towards bipartisan symmetry may give force to notions of mutual toleration and broadly shared equal citizenship that ultimately underlie our system of constitutional self-governance. What is more, by seeking cross-partisan distribution of constitutional law's benefits, symmetric constitutionalism may respond to the central political-process risk facing our constitutional order: the danger that tribal factionalism will degrade and destroy institutional structures and shared fundamental commitments. By creating beneficiaries across political divides, symmetric conceptions of civil liberty at least stand a chance of becoming mutually reinforcing: they may encourage each side to view the other's freedoms as a reflection of its own. By the same token, activating such political dynamics might help relieve political pressure on courts, limiting the risk that one-sided attacks on the judiciary become a focus of political action.

As I will explain in due course, a preference for symmetry can operate at several relevant levels of generality.[6] Achieving symmetry at any level will not always be possible; the Constitution is not neutral between all possible ideological outcomes. Yet just as courts often must expend political capital and invite political challenges to strike down democratically enacted laws, so, too, in a polarized era, will courts often consume accumulated legitimacy by reaching

3. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). For a more recent argument to similar effect, see ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006).

4. CASS R. SUNSTEIN, CONSTITUTIONAL PERSONAE 67 (2015); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) [hereinafter SUNSTEIN, ONE CASE AT A TIME].

5. *See, e.g.*, Mark A. Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOW. L.J. 661, 666 (2013).

6. *See infra* Part II.

asymmetric results. Courts should accordingly strive to avoid such results by favoring symmetric theories, doctrines, and rationales when possible.

As evidence of symmetry's importance in our moment, the Court's most recent term included several cases, particularly the widely followed *Masterpiece Cakeshop* litigation, that raised problems of constitutional symmetry. In several opinions, in fact, the Justices stumbled towards recognizing symmetry's value. In *Masterpiece Cakeshop* itself, which involved a conflict between the generally progressive cause of same-sex marriage and the generally conservative cause of religious liberty, Justice Kennedy's majority opinion highlighted the importance of both gay rights and religious freedom (before coming down in favor of the latter).[7] In another case, dissenters associated ideological "evenhandedness" with the rule of law, implicitly accusing the majority of factional bias.[8] And in a third example, the dissent accused the majority of "weaponizing" the First Amendment by employing it to reach a result with strong partisan valence.[9]

These stray arguments, however, were undeveloped. In fact, at present, courts and commentators lack any adequate vocabulary or theoretical perspective for addressing problems of partisan asymmetry in constitutional law. But if we lack such tools, we had better acquire them fast. By virtue of Justice Kennedy's politically idiosyncratic legal views—favoring rights to abortion and same-sex marriage on the one hand and rights to gun ownership and corporate political speech on the other—a Supreme Court with Kennedy as the median Justice was functionally symmetric at the level of overall case outcomes. With his retirement and replacement by Justice Brett Kavanaugh, the Court threatens to lurch right—yet many progressives, embittered not only by the Court's rightward trajectory but also by the Senate's confirmation of Kavanaugh following allegations of sexual assault, are threatening to respond at the next opportunity with court-packing or other bare-knuckle measures. As a point of orientation and a new vocabulary of critique, symmetric constitutionalism might help judges and justices weather these stormy seas with less damage to either their own institutional authority or the country's shared commitments to civil liberty.

My argument for this view proceeds as follows. I begin in Part I by elaborating the concept of symmetric constitutionalism, sketching the political context in which constitutional law today operates, and attempting to link symmetric constitutionalism to multiple legitimating considerations in constitutional law. Part I also responds to some possible objections and competing points of view. Part II explores the symmetry principle's implications at different levels of generality in constitutional analysis. It starts with some

7. *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

8. Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2385 (2018) (Breyer, J., dissenting).

9. Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501–02 (2018) (Kagan, J., dissenting).

reflections on general interpretive theory and then turns to several specific cases from the last Supreme Court term in which debates over bipartisan symmetry bubbled to the surface. Part II closes by widening the aperture to consider what perspective symmetric constitutionalism might offer on five major areas of current constitutional controversy: free expression; equal protection; structural questions; gun rights; and substantive due process. The Essay concludes by briefly recapitulating my key points and encouraging judges to resist the increasing pull of partisan factionalism.

I. SYMMETRY EXPLAINED

Symmetric constitutionalism, again, is a judicial ethos in which courts, when possible, favor outcomes, doctrines, and rationales that distribute benefits across the country's major ideological divides. It seeks to orient constitutional decision-making towards achieving bipartisan appeal (or at least acceptance) and away from zero-sum competition between partisan understandings. Being only an ethos akin to Thayerian restraint and judicial minimalism, symmetric constitutionalism is not a primary interpretive theory; it need not be decisive in any given case. But neither is symmetry simply a matter of pleasing the median voter: free speech doctrine, for example, is counter-majoritarian in every specific application (and might well be unpopular if put to a vote), but is symmetric insofar as it protects competing ideological viewpoints across the political spectrum.

I will turn in Part II to concrete examples. Here, I lay groundwork for that analysis by sketching, in Subpart I.A, the political context in which federal constitutional law today operates and then, in Subpart I.B, linking symmetric constitutionalism to two major legitimating considerations, political process theory and historical tradition. Subpart I.C responds to several competing perspectives on the appropriate judicial response to political polarization.

A. CONSTITUTIONAL LAW'S CHALLENGES IN A POLARIZED ERA

Constitutional law today must operate in an environment of acute political polarization, particularly among legal and political elites. Americans are increasingly divided along partisan lines (even when they report no specific party affiliation), and these partisan identities are increasingly tribal and negative, meaning they are often defined as much by visceral opposition to the other side as by any affirmative policy platform. At the same time, geographic sorting, along with social media technology, increasingly enables citizens to inhabit communities of the like-minded, with limited exposure to competing viewpoints.

This rather bleak picture is abundantly documented by polling data and political science. The Pew Research Center reports, for example, that Americans in 2017 were more sharply divided than at any point since the poll began in

1994[10] and that roughly half of each side's partisans (and higher proportions among those most engaged) report that the other side makes them "afraid."[11] Still more alarmingly, another recent survey found that some "15 percent of Republicans and 20 percent of Democrats agreed that the country would be better off if large numbers of opposing partisans in the public today 'just died.'"[12] Reflecting these trends in the electorate, partisan voting patterns in both the U.S. House of Representatives and Senate are more polarized today than at any point since the late nineteenth century.[13]

Some evidence suggests, furthermore, that partisan affiliations are increasingly hardening into social identities aligned with other key features of individuals' self-understanding.[14] According to political scientist Lilliana Mason, partisanship is becoming a "mega-identity" combining features of religion, race, gender, class, geography, and culture along with party affiliation, often resulting in "bias and even prejudice" toward partisan opponents.[15] Legal scholar Jamal Greene likewise observes that our politics are increasingly "Schmittian" (in the sense associated with Weimar theorist and eventual Nazi Carl Schmitt): to a greater and greater degree, "the project of each side is not to negotiate towards a policy outcome everyone can live with; it is to dominate, marginalize, and kneecap the other side."[16]

The key point here is that these divisions extend not only to policy prescriptions and political behavior, but also to constitutional understandings and public perceptions of judicial rulings. For one thing, almost all salient constitutional cases carry some political valence in their immediate context, even if the principles at stake have broader application, and which partisan team wins or loses in that immediate context appears to increasingly shape

10. PEW RESEARCH CTR., THE PARTISAN DIVIDE ON POLITICAL VALUES GROWS EVEN WIDER 3–4 (2017), http://assets.pewresearch.org/wp-content/uploads/sites/5/2017/10/05162647/10-05-2017-Political-landscape-release.pdf.

11. PEW RESEARCH CTR., PARTISANSHIP AND POLITICAL ANIMOSITY IN 2016, at 54 (2016), http://assets.pewresearch.org/wp-content/uploads/sites/5/2016/06/06-22-16-Partisanship-and-animosity-release.pdf.

12. Nathan P. Kalmoe & Lilliana Mason, Lethal Mass Partisanship: Prevalence, Correlates, & Electoral Contingencies 22 (draft paper prepared for the American Political Science Association's 2019 Annual Meeting) (on file with the *Hastings Law Journal*).

13. NOLAN MCCARTY ET AL., POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 25–35 (2d ed. 2016).

14. *See, e.g.*, ALAN I. ABRAMOWITZ, THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP 8–9 (2018).

15. LILLIANA MASON, UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY 14, 23 (2018); *see also* Geoffrey C. Layman et al., *Activists and Conflict Extension in American Party Politics*, 104 AM. POL. SCI. REV. 324, 325 (2010) (offering an empirical and theoretical account of partisan polarization through "extension" of issue conflicts).

16. Jamal Greene, *Trump as a Constitutional Failure*, 93 IND. L.J. 93, 99–100, 103 (2018). Morris Fiorina has argued that this partisan dynamic is more a function of partisan "sorting" than polarization of opinion in the electorate at large, but Fiorina nonetheless acknowledges that "party sorting has raised the stakes of politics," leading to greater partisan animosity and "emotional involvement." MORRIS P. FIORINA, UNSTABLE MAJORITIES: POLARIZATION, PARTY SORTING & POLITICAL STALEMATE 44, 58, 77–78 (2017).

perceptions of whether the decision was legally correct.[17] In addition, the two major partisan camps seem increasingly committed to conflicting visions of constitutional civil liberty. Progressives today typically embrace a constitutional vision centered on advancing social justice, protecting sexual and reproductive autonomy, and enabling expert administrative governance. Conservatives, in contrast, typically focus on protecting historic understandings of individual rights (including gun rights and religious freedom), leaving moral questions to the political process, and restoring a traditional view of separation of powers. Through both these vectors of conflict—result-oriented perceptions of cases and broader conflict between competing constitutional visions—tribal politics threaten to infect constitutional decision-making and complicate courts' capacity to resolve legal and constitutional questions for the polity.[18]

B. NORMATIVE FOUNDATIONS FOR SYMMETRIC CONSTITUTIONALISM

My central claim here is that symmetric constitutionalism—defined, again, as a conscious tilt towards outcomes, doctrines, and rationales that distribute constitutional law's benefits across major ideological divisions—is an appropriate and even necessary judicial ethos in the era of partisan polarization and distrust I just described. The reasons are partly practical. Decisions and doctrines seem more likely to prove durable in our polarized era if they can claim bipartisan rather than one-sided support.[19] On a normative level, furthermore, a spirit of bipartisan generosity—a willingness to apply the law without regard to persons or parties—is an inherent and obvious feature of the judge's role-morality within our system. Judges are not (or at least should not be) result-driven partisans; their function is to apply legal principles without fear or favor. Principled judges therefore routinely check their intuitions in hard cases by

17. *See, e.g.*, PEW RESEARCH CTR., THE PUBLIC, THE POLITICAL SYSTEM AND AMERICAN DEMOCRACY 21, 84 (2018), http://assets.pewresearch.org/wp-content/uploads/sites/5/2018/04/26140617/4-26-2018-Democracy-release.pdf (discussing polling evidence that "[m]ost Republicans viewed the Supreme Court unfavorably after its decisions on the Affordable Care Act and same-sex marriage in summer 2015" and that Republicans and Democrats hold differing views as to whether "the U.S. Supreme Court should make its rulings based on what the Constitution 'means in current times,'" or based on "what the Constitution 'meant as originally written'"); Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1751 (2016) ("Nowadays, the President can often count on support—or at least silence—from like-minded attorneys, legal academics, and other expert commentators. . . . Law, I fear, is increasingly seen as simply another move in a partisan game—a raw extension of politics with less persuasive force of its own.").

18. For an account of how the Court developed two "clear ideological blocs" aligned with partisan divides, see Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 301.

19. Thomas Keck has similarly suggested that the public may broadly support a robust judicial role "[s]o long as the set of constitutional principles being enforced is not overly derivative of a particular partisan platform." Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 LAW & SOC. INQUIRY 511, 540 (2007); *cf.* Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 DUKE L.J. 959, 963 (2008) (arguing that maintaining the rule of law requires a form of "judicial statesmanship" in which judges seek to "sustain[] social solidarity amidst reasonable, irreconcilable disagreement" while also "expressing social values as social circumstances change").

imagining a parallel case with opposite political valence. This simple and intuitive exercise, performed daily by judges in oral arguments and professors in law school classes, carries at least the germ of symmetric constitutionalism.[20]

Yet a more explicit ethos of symmetric constitutionalism can also draw support from at least two major legitimating considerations in constitutional law (each, appropriately enough, with a different political valence): political process theory and historical tradition.

1. Updating Political Process Theory

One key legitimating theory for constitutional judicial review in the post-New Deal period is the so-called political process school of thought. As synthesized most famously by John Hart Ely in *Democracy and Distrust*, this theory posits that judicial review is legitimate in a democracy insofar as it either unblocks equal access to the political process or corrects for systematic disadvantages confronted by minority groups within that process.[21] The theory thus aims to answer the "counter-majoritarian difficulty"—the question why allowing life-tenured judges to override majoritarian preferences is legitimate in a democracy[22]—by understanding constitutional judicial review as aiding, rather than obstructing, democracy.

Though subject to various objections and qualifications that I will not address here,[23] this theory's basic premises have had a profound structuring effect on overall patterns of modern doctrinal development.[24] As classically formulated, however, the theory fails to account for the central process distortion

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20. For this reason, my proposal is not an example of what Eric Posner and Adrian Vermeule have called the "inside/outside fallacy," that is, an incoherent pairing of pessimistic assumptions about self-interested judicial behavior with an optimistic normative prescription that judges behave disinterestedly. Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013). Even if political scientists have shown that party affiliation is highly predictive of judicial behavior, no judge worthy of the name wants to be perceived as simply carrying into effect the political commitments of their partisan coalition.

21. JOHN HART ELY, DEMOCRACY & DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). The canonical judicial statement of political process theory is *Carolene Products* footnote four. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

22. The classic statement of this dilemma is ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–22 (1962).

23. For a recent survey of critiques, see Aaron Tang, *Reverse Political Process Theory*, 70 VAND. L. REV. 1427, 1441–48 (2017).

24. In particular, political process theory helps explain current constitutional doctrine's emphasis on protecting free expression (because elected officials can hardly be trusted to view public criticism neutrally), regulating criminal procedure (because accused criminals, not to mention the economically disadvantaged groups most likely to engage in crime, are quintessential disfavored minorities), and policing discrimination against racial, ethnic, religious, and sexual minorities (because such groups are likely to face systematic disadvantage in the political process). *See* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 748 (1991) (defending these features of constitutional law based on political process theory). Modern doctrine's general structure of tiered scrutiny, which calibrates the intensity of judicial review to the degree of suspicion surrounding the legislative judgment at issue, likewise reflects political process theory's focus on making the democratic process work, rather than overriding the outputs of its proper functioning.

we confront in our time: the risk, not that political in-groups will suppress political out-groups, but rather that the political process will cannibalize itself, degrading its own structures over time as each side's pursuit of immediate tactical advantage yields tit-for-tat erosion of procedural norms. In other words, if the central preoccupation of constitutional theorists of Ely's generation was the counter-majoritarian difficulty—the question why judicial invalidation of duly enacted laws was legitimate—the central danger to American constitutionalism in our time is that partisan animus will shred the very freedoms and institutions that enable pluralistic self-governance in the first place.

While it is possible the partisan fever will soon break, yielding some more stable political order (and making this Essay poorly timed), the risk of institutional degradation due to negative partisanship hardly seems hypothetical at the moment. On the heels of the bitter fight over Justice Kavanaugh's appointment, some conservatives are relishing the opportunity to cement a conservative Supreme Court majority for decades to come. At the same time, some progressives are sharpening their knives for eventual retribution, perhaps through aggressive measures such as defying Court decisions or expanding the Court's future membership.[25] Among those who take a broader view, political polarization has prompted worries that our political and legal order may be more fragile than was previously appreciated.[26] The increasingly bare-knuckle character of American politics, as evidenced by (among other things) repeated government shutdowns and near shutdowns, routine Senate filibusters, and Senate Republicans' year-long refusal to consider President Obama's Supreme Court nominee, at least make it plausible that key norms enabling our constitutional government to function will continue a dangerous downward spiral.[27]

To the extent these dangers are the central political-process distortion in our time, political process theory should support a judicial approach that accounts for them and attempts to mitigate their destructive effects. Favoring symmetric doctrines, holdings, and rationales over one-sided ones may be one important means of achieving that end. By contrast, other competing theories—if left unadorned by a preference for symmetric constitutionalism—could threaten to undermine the political process by yielding understandings that are

25. *See, e.g.*, Michael Klarman, *Why Democrats Should Pack the Supreme Court*, TAKE CARE BLOG (Oct. 15, 2018), https://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court.

26. Tara Leigh Grove, for instance, has recently highlighted that key pillars of judicial independence—the permanence of judicial offices, state compliance with federal court orders, and aversion to court-packing—are in fact conventions of relatively recent vintage. Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 469–70 (2018). Meanwhile, political scientists reflecting on international examples have noted how negative partisanship may degrade norms of forbearance vis-à-vis political adversaries that are ultimately necessary for democracy to function. *See, e.g.*, STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 8–9 (2018).

27. For worries that the United States is at risk of such "retrogression," see Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 85 (2018).

too often one-sided or politically fraught. Originalism and formalism, for example, might yield results and rationales indifferent to political workability, while theories of a "living constitution" may be more oriented towards entrenching current moral views than towards facilitating ongoing political contestation.

2. Recovering a Historical Tendency

Apart from political process theory, a preference for symmetric constitutionalism can draw support from history and the basic structure of our Constitution. To begin with, as compared to many more recent constitutions (including those of some states), the U.S. Constitution is concise and speaks in broad generalities; it establishes a general framework for government while rarely addressing current policy questions with precision. Such a "framework" constitution, as some political scientists have called it,[28] may well require at least a degree of symmetric interpretation to sustain itself. Because its text often (though not always)[29] requires doctrinal elaboration to resolve concrete questions in a sufficiently determinate fashion, such a constitution can function in a divided polity only if both sides accept the basic legitimacy of procedures (such as judicial review) for elaborating its meaning and resolving concrete disputes.[30] Symmetric constitutionalism may thus arise as a necessary impulse to sustain procedural legitimacy when public opinion on substantive questions is polarized.

At any rate, the Framers who drafted our Constitution feared factional division and understood the risks it could pose to the constitutional order they established. *Federalist No. 10*, for example, warned that "instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished."[31] Publius (here James Madison) thus argued that "[t]he friend of popular governments . . . . will not fail . . . to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for" what he called "the violence of faction."[32] President George Washington likewise worried in his Farewell Address that "[t]he alternate domination of one faction over another, sharpened by the spirit of revenge natural to party dissension,"

28. *See, e.g.*, ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 103–04, 164 (2009).

29. Some features of the Constitution are either so uncontroversial or so clear that they do not permit serious disagreement. *See infra* Subpart II.A.

30. *Cf.* ELKINS ET AL., *supra* note 28, at 164 (suggesting that "[t]he very vagueness of the [U.S. Constitution] has forced the Supreme Court to articulate the boundaries of the Constitution").

31. THE FEDERALIST NO. 10 (James Madison), *reprinted in* THE FEDERALIST PAPERS 47, 47 (Ian Shapiro ed., 2009).

32. *Id.*

could eventually lead to despotism and "the ruins of public liberty."[33] (Expressing similar sentiment, former President Obama recently urged citizens of democracies to resist tribal animosity.[34] "[D]emocracy demands," he argued, "that we're able also to get inside the reality of people who are different than us so we can understand their point of view."[35])

Contrary to the Framers' hopes, to be sure, partisan competition quickly emerged as an organizing feature of American politics.[36] Within the two-party structure of government, however, symmetric constitutionalism may give judicial effect today to the founders' anxiety to avoid destructive factionalism. Indeed, when acute negative partisanship did first emerge in the early republic, the most important judicial constitutionalist of them all, Chief Justice John Marshall, responded by favoring constitutional symmetry in important cases. Echoing the anti-factional sentiment of his generation, Marshall observed in a letter that "nothing is more to be deprecated than the transfer of party politics to the seat of Justice."[37] Accordingly, although his decisions sometimes gave effect to legal theories of his own Federalist party, Marshall also sought repeatedly to distribute his rulings' benefits across partisan divides.

For example, in his very first decision for the Court, the politically fraught case of *Talbot v. Seeman*,[38] Marshall pleased anti-French Federalists by upholding a French ship's capture during the Quasi-War, but then qualified the victory by reducing the American commander's salvage award.[39] Marshall's decision establishing the principle of judicial review in *Marbury v. Madison*[40] reflects the same impulse. As was "typical[]" of Marshall, one biographer observes, his "decision [in *Marbury*] paid heed to the claims raised on both sides of the case. The High Federalists were awarded the nominal prize of hearing that Marbury was entitled to his commission, and the Republicans gained a victory

33. President George Washington, Farewell Address (1796), http://avalon.law.yale.edu/18th_century/washing.asp.

34. President Barack Obama, Speech at the 2018 Nelson Mandel Annual Lecture (July 17, 2018), https://www.npr.org/2018/07/17/629862434/transcript-obamas-speech-at-the-2018-nelson-mandela-annual-lecture.

35. *Id.*

36. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2319–25 (2006).

37. Letter from John Marshall to Timothy Pickering (Feb. 28, 1811), *in* 7 THE PAPERS OF JOHN MARSHALL 270, 270 (Charles F. Hobson et al. eds., 1993); *see also* GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 459 (2009) (discussing this letter and Marshall's outlook).

38. Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801).

39. JOEL RICHARD PAUL, WITHOUT PRECEDENT: CHIEF JUSTICE JOHN MARSHALL AND HIS TIMES 240–42 (2018); JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 295 (1996).

40. 5 U.S. (1 Cranch) 137 (1803).

with the dismissal of the rule to show cause."[41] One Republican newspaper even praised Marshall for "calm[ing] the tumult of faction."[42]

On some other politically fraught issues—questions, for example, regarding federal courts' authority to recognize common law crimes[43] or allow prosecutions for "constructive treason"[44]—Marshall deployed Republican constitutional theories against Republican presidents, thereby imposing a form of mutual disarmament on the political system. Whatever else justified them, such decisions can be understood as efforts to impose symmetric constraints on both partisan factions in Marshall's day, thereby inviting a virtuous cycle of mutual toleration rather than a downward spiral of retributive political prosecution.[45] As one recent biographer observes, "Chief Justice Marshall lived in a revolutionary age in which the country was deeply polarized by competing ideologies."[46] Yet he "creatively navigated his way through a thicket of domestic and international controversies, choosing his battles prudently and forging consensus where none seemed possible."[47]

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41. SMITH, *supra* note 39, at 323; *see also* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY: 1789–1835, at 245–55 (rev. ed. 1937) (discussing *Marbury*'s reception in the Federalist and Republican press).

42. SMITH, *supra* note 39, at 325, 626 n.72 (internal quotation marks omitted) (quoting *Aurora*, April 26, 1803). In general, although some Republican publications complained about the decision's assertion of authority over the Executive and about its consideration of the merits despite finding no jurisdiction, *see* WARREN, *supra* note 41, at 249–53; 2 G. EDWARD WHITE, LAW IN AMERICAN HISTORY: FROM RECONSTRUCTION THROUGH THE 1920S, at 217 (2016), others highlighted the decision's conciliatory character, *see* WARREN, *supra*, at 248 ("While the Federalist commendation of Marshall's opinion was profuse, it is surprising to note that the most bitterly partisan Republican papers . . . made no criticism of the decision . . . .").

43. Riding circuit, Marshall repeatedly cast doubt on federal courts' authority to recognize common law crimes, 2 WHITE, *supra* note 42, at 231; Livingston v. Jefferson, 15 F. Cas. 660, 665 (C.C.D. Va. 1811), an authority Federalist judges had earlier employed to prosecute Jeffersonian Republicans for sedition. SMITH, *supra* note 39, at 284. On the Supreme Court, Marshall held for the Court that federal courts' jurisdiction is not "regulated by their common law" but instead "by written law." *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93 (1807).

44. In presiding over the treason trial of former Vice President Aaron Burr, Marshall rejected arguments that the Constitution allowed conviction, as under English common law, for "constructive treason" based on mere criticism of the government without any concrete action against it. SMITH, *supra* note 39, at 366–67 & n.*, 371–72. Although the ruling's immediate practical effect was to disempower a Democratic-Republican prosecution (prompting a Baltimore mob to burn Marshall in effigy, PAUL, *supra* note 39, at 294–95), Marshall's decision effectively rejected a theory Federalists had earlier employed to repress Jeffersonians. WOOD, *supra* note 37, at 415–18.

45. Marshall himself alluded to this feature of the decisions, observing in *Ex parte Bollman* that

> the framers of our constitution, . . . must have conceived it more safe that punishment in such cases [of treason] should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation.

Bollman, 8 U.S. at 127.

46. PAUL, *supra* note 39, at 440.

47. *Id.*; *see also* 1 WHITE, *supra* note 42, at 244 (2012) ("[The Court's] stature [after Marshall] would be associated not only with its intervention in major contested issues but with its skill at striking the right balance between competing visions of American society.").

If Chief Justice Marshall thus offers some early examples of symmetric constitutionalism, the most notorious Supreme Court decision of all time, *Dred Scott v. Sanford*,[48] offers a paradigm case of disastrous asymmetry. Apparently assuming it could impose a one-sided pro-slavery result on an increasingly divided country, the Supreme Court ruled both that African Americans were not U.S. citizens and that slavery could not constitutionally be barred in federal territories.[49] Far from removing the issue from politics, however, the decision put the Court itself in the emerging anti-slavery coalition's cross-hairs,[50] helping bring about the Civil War and quite possibly weakening the Court's capacity to address other important questions during and after the War.[51]

No doubt other examples of symmetric and asymmetric constitutionalism could be identified across American history, but I will not attempt a systematic historical account in this brief Essay. It suffices here to observe that an ethos favoring partisan symmetry can draw strength not only from political process theory, but also from our Constitution's basic design, the anti-factional anxiety of its framers, and the measured approach Chief Justice Marshall applied to constitutional law during the country's first period of acute factional partisanship. The negative example of *Dred Scott*, by contrast, stands as a stark warning about courts' capacity to impose one-sided outcomes on a sharply divided polity.

C. SOME COMPETING VIEWS

Other scholars, of course, have noticed political polarization's potentially hazardous effects on constitutional law and governmental stability. Yet symmetric constitutionalism holds advantages over competing responses that have been put forward to date.

Reflecting on the same political trends addressed here, Mark Graber worries that constitutional law in the years ahead may form a "yo-yo" pattern, swinging back and forth between extreme positions without any deep connection to consensus views in the polity.[52] As the appropriate response, Graber

48. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

49. *Id.* at 422–23, 452.

50. For discussion of why *Dred Scott* failed in its immediate political context to settle the questions it addressed, see KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 68–71 (2007).

51. *See* 1 MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 394, 470 (2d ed. 2002) (discussing *Dred Scott*'s role in precipitating the Civil War and suggesting that during Reconstruction the Justices "recognized that the tangled emotional and constitutional issues of the time required discretion on their part" in part because "the consequences of Roger Taney's rushing in to settle the slavery question in *Dred Scott* remained fresh in their memory"); 1 WHITE, *supra* note 42, at 367 (2012) ("The effort of a majority of the Court [in *Dred Scott*] to constitutionalize proslavery ideology, and the opposition that effort precipitated, revealed that the great symbols of American cultural unity and national uniqueness, a Union of states created and defined by the Constitution of the United states, could no longer endure with the taint of slavery.").

52. Graber, *supra* note 5, at 665–66, 704, 709–12.

advocates judicial minimalism[53]—an ethos, again, that favors narrow holdings and rationales.[54] As I will illustrate in my discussion below, however, minimalism in the present climate may in fact be more polarizing than broader rulings that gesture towards symmetry. Almost every constitutional case carries some partisan valence in its immediate context, yet such cases often also involve applying frameworks and principles with other applications whose valence may be different. Symmetric constitutionalism encourages judges to highlight and develop those implications of their decisions. The resulting decisions may be less minimal, but their very breadth may help defuse partisan fury over particular outcomes by reinforcing underlying shared (or at least mutually beneficial) commitments.

In another astute reflection on current legal politics, Jamal Greene worries about how well our broad-brush, "framework" constitution can contain the destructive tendencies of Schmittian political competition.[55] Among other proposals, Greene advocates reorienting constitutional rights adjudication away from the current largely categorical approach and towards a focus on balancing and proportionality (the predominant approach among constitutional courts around the world).[56] But while Greene hopes a proportionality focus will lower the stakes of constitutional litigation and encourage greater democratic deliberation,[57] I fear the indeterminacy of balancing standards might only open the door to more partisan judging.[58] At the very least, it could exacerbate public perceptions of judicial bias. Keeping an eye on partisan symmetry (and faulting judges for failing to do so) strikes me as a more concrete means of promoting the more "prosocial" constitutional culture Greene advocates (and rightly worries we are losing).[59]

A third strand of scholarship reflecting on current trends has argued that courts either will or should adhere especially closely to precedent in light of political divisions that reduce the legal system's overall political responsiveness.[60] Yet even if current political dynamics yield a form of super-strong stare decisis,[61] the startling frequency of blockbuster constitutional cases in recent years—itself likely the result of fraying non-constitutional restraints on government action—suggests a strong likelihood that politically salient cases

53. *Id.* at 717–18.

54. SUNSTEIN, ONE CASE AT A TIME, *supra* note 4.

55. Greene, *supra* note 16, at 96–97.

56. *Id.* at 107; *see also* Jamal Greene, Foreword, *Rights as Trumps?*, 132 HARV. L. REV. 28, 34–35 (2018) (generally advocating a proportionality approach to rights adjudication).

57. Greene, *supra* note 16, at 108.

58. For further discussion of this point, see *infra* note 133 and accompanying text.

59. Greene, *supra* note 16, at 94.

60. *See generally* RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT (2017); Thomas W. Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547 (2018).

61. I do not attempt any developed theory of stare decisis here. For some thoughts on Kozel's "institutional" theory of precedent and its appeal in our moment, see Zachary S. Price, *Precedent in a Polarized Era*, 94 NOTRE DAME L. REV. 433 (2018) (reviewing KOZEL, *supra* note 60).

will continue to arise in areas where precedent is non-existent or inconclusive. An ethos of symmetric constitutionalism may help courts navigate such controversies in ways that adherence to precedent alone may not.

Finally, some will object in principle to pursuing bipartisan symmetry. Why pursue multilateral disarmament when total victory could be just over the next hill? And why seek symmetry if the other side is evil, illegitimate, or un-American, as partisans on both sides appear increasingly to think? Without minimizing the depth of feeling surrounding current constitutional issues, or the dread our current president has prompted in some quarters, this foreseeable objection only demonstrates the partisan dynamics that risk eroding judicial capacity and degrading our constitutional culture. Again, it is possible that current knife-edge divides in American politics will soon give way to a more stable political order, but I doubt it, and in any event we are where we are, for the moment at least. To the extent deep polarization remains a central feature of American politics (or gets worse), preserving constitutional stability will require finding some constructive path forward that does not involve one side's total domination of the other.[62]

As for Donald Trump, the current President may well threaten our constitutional order and fundamental commitments.[63] But those appalled by Trump should care about finding solutions to polarization. Trump is likely not only a cause but also a consequence of polarization; while the visceral feelings he evokes have exacerbated partisan animosities, the election of such an ill-prepared and anti-constitutional personality likely would have been impossible in a more cohesive political culture. Furthermore, to the extent Trump himself does pose serious risks to the constitutional order, containing the damage will require not only checking specific unlawful or ill-advised actions, but also preserving the institutional structures and shared commitments that enable such checks to function. Symmetric constitutionalism could provide a means of doing so, for so long as the current polarized environment lasts.

II. APPLYING SYMMETRY

Having made a normative case for symmetric constitutionalism, I will now attempt to elaborate the concept by exploring what critical purchase it might provide at different levels of constitutional analysis: first, at the level of overall interpretive theory and output; second, at the level of particular case outcomes and reasoning, using the Court's recent term as a source of examples; and third, at the level of doctrinal design with respect to several areas of current

62. *Cf.* ABRAMOWITZ, *supra* note 14, at 120 ("The forces producing polarization in the American electorate are far from spent. . . . [P]olitical scientists and others concerned about the future of American democracy should focus on finding ways to help the political system function in a polarized era.").

63. For an argument that Trumpism reflects a return to the Gilded Age constitutional vision associated with the *Lochner* era, see Mila Sohoni, *The Trump Administration and the Law of the Lochner Era*, 107 GEO. L.J. __ (forthcoming 2019).

constitutional controversy. In cases of conflict, choosing the level of generality at which to apply symmetry may present hard questions. I will not attempt here to resolve all such conflicts, but will instead focus on illustrating what critical purchase symmetry-based critiques may provide at each level. I will also suggest that symmetry likely has the greatest value in the mid-range—at the level of general doctrinal design.

A. SYMMETRY AT THE LEVEL OF THEORY AND OUTPUT

The Constitution is obviously not agnostic between all possible political viewpoints. The Fourteenth Amendment is not neutral between racial equality and white supremacy; nor is the Constitution as a whole neutral between authoritarianism and representative democracy. Much of the Constitution, furthermore, is either uncontroversial or sufficiently clear to prevent reasonable disagreement. No one much disputes the value of regular elections; nor does anyone doubt (whether they like it or not) that each state gets two popularly elected Senators. On some level, the whole point of a Constitution is to take certain questions off the table. Symmetric constitutionalism accordingly has built-in limits.

In addition, even within the range of reasonable interpretive disagreement, I have argued that constitutional symmetry is not so much a primary interpretive commitment as an ethos that judges with differing interpretive persuasions may equally apply. It thus, once again, may have limited capacity to override understandings dictated by a given judge's primary interpretive understanding, whether that understanding is a form of originalism, interpretivism, common-law constitutionalism, popular constitutionalism, or what have you.

Even so, symmetric constitutionalism does have some critical purchase at high levels of interpretive generality. For one thing, at the level of raw output, a Supreme Court operating in a polarized environment that consistently rules in favor of one political faction's constitutional vision may well invite the sort of legitimacy challenges that symmetric constitutionalism seeks to avoid. In recent years, we may have avoided such a pattern of results principally because Justice Kennedy's cross-cutting legal views have shaped the Supreme Court's output in close cases.[64] To the extent that is true, and considering how Justice Kavanaugh's confirmation has exacerbated partisan divides over constitutional law, more explicit attention to symmetry may have great value going forward.

By the same token, a tilt towards symmetry might be a reason at the margins to prefer some general interpretive theories over others—or at least to encourage a gut check as to whether one *has* a theory, as opposed to a set of political commitments imported into constitutional law. In fact, any number of

64. For a rather apocalyptic argument to this effect, see Michael Brendan Dougherty, *Anthony Kennedy Can't Be Allowed to Die*, NAT'L REV. (Jan. 23, 2018, 6:15 PM), https://www.nationalreview.com/2018/01/anthony-kennedy-swing-vote-supreme-court-we-need-him-alive/ (speculating that Kennedy may have been "the one man preventing the United States from political breakdown").

theories, if applied in principled fashion, could yield a symmetric body of case outcomes. Some fear, for example, that the currently ascendant interpretive philosophy of originalism is simply a smokescreen for reaching politically conservative outcomes. To the extent it is true (and it need not be), this worry would be a strike against the theory. By the same token, symmetric constitutionalism is a reason to disfavor strong forms of legal realism that deny any distinction between law and politics. In contrast, almost by definition, any interpretive method that aspires to a principled consistency independent of particular case results should yield at least a degree of cross-partisan symmetry.

To lay my cards on the table, although this is not the place for a general interpretive theory, my own view is that constitutional interpretation should (and generally does) involve an exercise of holistic judgment centered on conventional forms of interpretive argument—text, structure, history, precedent, and policy—with a strong preference in most cases for maintaining fidelity to existing judicial precedents and governmental practices.[65] Insofar as the pattern of results generated over time by this "mainstream" interpretive approach[66] is unlikely to sharply favor one contemporary partisan coalition over the other, its symmetry may be an additional point in its favor.[67]

In any event, symmetric constitutionalism's main utility in charting a path forward is likely to come at lower levels of generality: through the reasoning in particular cases and the elaboration of doctrinal frameworks.

B. CASE-SPECIFIC EXAMPLES FROM JUSTICE KENNEDY'S LAST TERM

To turn next to a much lower level of generality, the Supreme Court's just-completed blockbuster term—which turned out to be Justice Kennedy's last—provides abundant evidence of constitutional symmetry's relevance to particular case outcomes in our moment. The term, for one thing, included an extraordinary volume of politically fraught, high-profile cases, many implicating key fears for the future of constitutional law and civil liberty in the Trump era.[68] Even more important here, however, it also included several cases in which the Justices stumbled towards a vocabulary of constitutional symmetry. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, Justice Kennedy's majority opinion highlighted the potential conflict between gay rights and

65. For a useful account of this approach, see H. JEFFERSON POWELL, TARGETING AMERICANS: THE CONSTITUTIONALITY OF THE U.S. DRONE WAR 191–93 (2016). For the canonical account of the basic interpretive modalities of constitutional law and their relevance, see PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).

66. POWELL, *supra* note 65, at 191.

67. Admittedly, this result may reflect in part the past influence of relatively moderate median justices on the Court's jurisprudence.

68. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (challenge to "travel ban" barring certain immigrants from specified countries); Gill v. Whitford, 138 S. Ct. 1916 (2018) (challenge to political gerrymandering).

religious freedom.[69] In *National Institute for Family & Life Advocates v. Becerra (NIFLA)*, Justice Breyer's dissent faulted the majority for failing to be "evenhanded" in ruling on compelled-speech issues relating to abortion.[70] And in *Janus v. American Federation of State, County & Municipal Employees, Council 31*, Justice Kagan's dissent accused the majority of "weaponizing the First Amendment" and "turning [it] into a sword" to attack disfavored "economic and regulatory" policies.[71]

At the level of particular decisions, my discussion will illustrate, symmetric constitutionalism may sometimes support broader statements of governing principles than minimalists would deem advisable, and sometimes it may support greater interference with democratic choices than Thayerians would wish. Often it will require forms of rhetoric and rationalization that courts have not typically employed. Yet by the same token symmetric constitutionalism may give force to moderating impulses in ways that preserve counter-majoritarian civil liberties and avoid simply splitting the difference in hard cases. For that reason, it is the appropriate attitude with which judges should approach divisive cases in our polarized era.

1. Masterpiece Cakeshop

My first and central example, *Masterpiece Cakeshop*, reflects precisely the sort of clash between conflicting civil liberties with opposite partisan valence—traditional religion on the one hand and marriage equality on the other—that current political fault lines seem likely to generate. The case also implicated just the sort of choice among doctrinal pathways—free exercise on the one hand and free expression on the other—that an ethos of symmetric constitutionalism can help navigate. Yet if the case was thus a test of symmetric constitutionalism's value, the Court failed almost totally to appreciate it.

Masterpiece Cakeshop presented the question whether a baker could decline on religious grounds to create a cake celebrating a same-sex marriage despite a state law prohibiting discrimination on the basis of sexual orientation.[72] Although the Colorado Civil Rights Commission determined that the baker's denial of service violated state law, the baker argued that this result amounted to both compelled expression in violation of constitutional free speech protections and an impermissible burden on his free exercise of religion.[73] The Court chose to resolve the case on free exercise grounds, and on exceedingly narrow grounds at that.[74]

69. 138 S. Ct. 1719, 1723 (2018).
70. 138 S. Ct. 2361, 2385 (2018) (Breyer, J., dissenting).
71. 138 S. Ct. 2448, 2501–02 (2018) (Kagan, J., dissenting).
72. *Masterpiece Cakeshop*, 138 S. Ct. at 1720.
73. *Id.*
74. *Id.*

In the course of its deliberations, some members of the state Commission expressed hostility towards religion because of its historic use to legitimize injustices. "Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust," one commissioner declared.[75] "[T]o me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others."[76] The Commission, furthermore, had found no impermissible discrimination on grounds of religion when bakers declined to produce cakes with religious messages opposing same-sex marriage.[77] In the Court's view, the Commissioners' manifest animus towards religion, combined with their inconsistency in addressing comparable cases, showed that the Commission lacked the "religious neutrality" required by prior free exercises cases.[78]

In tone and spirit, Justice Kennedy's opinion aspired to bipartisan symmetry. Kennedy began by framing the dispute (correctly) as a conflict between "the rights and dignity of gay persons" and "the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment."[79] He faulted the Commission for its own lack of neutrality and emphasized that although "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth," nevertheless "religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression."[80] By adhering closely to past precedent and breaking little new ground, furthermore, the Court embraced a minimalist spirit that at least avoided aligning itself dramatically with one political camp or the other.

On a deeper level, however, the Court's reasoning betrayed its own rhetorical posture. In fact, both the overall choice of rationale and the Court's narrow focus on bad intent seem likely to undermine the very spirit of symmetric toleration that the opinion's rhetoric aims to advance.

To begin with, relying on free exercise rather than free expression grants doctrinal weaponry to adherents of traditional religion that secular progressives will lack—and within current political configurations traditional religious views (or even any religious adherence at all) are principally concentrated on one side of our partisan divides.[81] A free expression holding, by contrast, would have held near-perfect symmetry across partisan divides. Had the Court held (as a

75. *Id.* at 1729 (internal quotation marks omitted).

76. *Id.*

77. *Id.* at 1730.

78. *Id.* at 1731–32.

79. *Id.* at 1723.

80. *Id.* at 1727. I had the great privilege and honor to serve as a law clerk to Justice Kennedy and admire him in many ways, but my current role requires offering critical perspective, as I will attempt to do here.

81. For some general data on the increasing alignment of churchgoers with the Republican Party, see MASON, *supra* note 15, at 35. This alignment is not total, of course.

separate opinion by Justice Thomas urged[82]) that producing custom-designed cakes is expressive conduct implicating constitutional protections against compelled speech, this protection would have applied equally to all cakes and comparably expressive commercial services, no matter what message the cake or service were expressing.

To be sure, insofar as a free expression holding would have swept beyond religious objections, that theory might have risked carving a larger hole in progressive anti-discrimination laws.[83] But examples cutting the other way are not fanciful: in recent years dressmakers have refused to create inaugural gowns for First Lady Melania Trump, restaurants have refused service to Trump Administration officials, and lawyers have chosen not to represent certain causes.[84] As *Masterpiece Cakeshop* illustrates, furthermore, such actions could conceivably violate prohibitions on religious or political discrimination (among other laws) in particular jurisdictions. Even a holding that cakes were not sufficiently expressive to implicate free-speech principles would have provided better guidance across the universe of disputes over commercial services with an expressive dimension. By contrast, the Court's free-exercise holding will empower religious groups to seek exemption from general anti-discrimination laws, yet gives proponents of LGBT rights and other progressive goals no exemption from any legal restraints on anti-religious or political bias.

It is also true that in this particular instance the Colorado commission's own lack of symmetry supported the Court's free exercise ruling. But again the decision's logic does not work in reverse. If state authorities in a future case uphold religious denials of same-sex wedding cakes but not secular denials of anti-LGBT cakes, the secular bakers will have no recourse under *Masterpiece Cakeshop*'s free-exercise reasoning. At best, *Masterpiece Cakeshop* might support recognizing a parallel prohibition on governmental animus towards progressives in closely parallel circumstances, but even reaching that result would require extending the decision's logic beyond religion, as the Court resisted doing in its opinion. In any case without the sort of specific biased statements at issue in *Masterpiece Cakeshop*, furthermore, progressive bakers or artisans would need to fall back on a broader theory that state law was effectively compelling expression of a viewpoint they do not hold. The latter claim would just bring courts back to the free expression argument that the Court avoided, and to some degree disparaged, in *Masterpiece Cakeshop*. Accordingly, even if

82. *Masterpiece Cakeshop*, 138 S. Ct. at 1740 (Thomas, J., concurring).

83. For an argument that the case should have been resolved narrowly based on the cakemaker's "hybrid" speech and religion rights, see Barry P. McDonald, *Same-Sex Wedding Cakes: Why Hybrid Rights Paradigm Is Best Way out of Thicket*, NAT'L L.J. (Jan. 22, 2018, 9:55 AM), https://www.law.com/nationallawjournal/sites/nationallawjournal/2018/01/22/same-sex-wedding-cakes-why-a-hybrid-rights-paradigm-is-the-best-way-out-of-the-thicket/.

84. Michael W. McConnell, *Dressmakers, Bakers, and the Equality of Rights*, *in* RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 378, 378–84 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2018) (discussing dressmakers and several other examples).

the Court's bottom-line result in *Masterpiece Cakeshop* is correct, a preference for partisan symmetry should have inclined the Court more sharply towards a free-expression rationale as opposed to the free-exercise holding it chose.

One might argue that, from a broader point of view, *Masterpiece Cakeshop* was symmetric because it offset the Court's earlier decision in *Obergefell v. Hodges* recognizing a constitutional right to same-sex marriage.[85] The *Obergefell* decision, indeed, could itself have been more symmetric had the Court framed its holding as a protection against government compelling any one moral view of marriage, rather than as a right to same-sex marriage per se.[86] But even if that is true, in *Masterpiece Cakeshop* a broader free-speech rationale could have provided a more symmetric, less divisive basis for the Court's result than the narrow free-exercise rationale the Court chose.

Even given the choice to focus on free exercise, furthermore, the Court's doctrinal emphasis on apparent discriminatory motives made the decision's asymmetry worse than it needed to be. Under present political circumstances, centering the inquiry on intent in cases like *Masterpiece Cakeshop* seems likely to exacerbate the very dynamics from which the opinion's rhetoric recoils. For defenders of religious liberty, the hunt is now on for impure motivations lurking behind every adverse decision. Modern technology will make the search easier, as today every ill-considered text or email is potentially available to discovery, and even oral comments can be surreptitiously recorded. Nor will it be surprising, given many current progressives' views on religion, to find expressions of animus akin to those deemed so nefarious in *Masterpiece Cakeshop*.

Post-*Masterpiece Cakeshop*, when indications of bias are uncovered, courts will face imponderable disputes over what degree of taint so infects a decision as to condemn it under the Free Exercise Clause. In some cases, they will face further dilemmas over when, if ever, future unbiased proceedings can purge the taint from past deliberations. (Even in *Masterpiece Cakeshop* itself, the Court was vague about whether Colorado authorities could reach the same legal result in untainted future proceedings.[87]) Outside of the clearest cases, the inevitable arbitrariness of such determinations will open the door to judicial bias and thus to a sense of asymmetric grievance among losing litigants.

A free expression holding, to be sure, would have bred litigation and line-drawing too. Courts would have had to sort out which goods and services are sufficiently expressive in character to implicate constitutional protections against compelled expression, and the Court seems to have recoiled from

85. 135 S. Ct. 2584 (2015).

86. The Court's decision included some language suggesting this view, albeit obliquely. For instance, the Court observed that "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." *Id.* at 2607.

87. *Masterpiece Cakeshop*, 138 S. Ct. at 1732 ("In this case the adjudication concerned a context that may well be different going forward in the respects noted above.").

launching a quizzical jurisprudence of bakers, florists, hair-dressers, and painters.[88] But however unsatisfactory such case law would have been, it could at least have been applied symmetrically. Courts could have drawn lines knowing full well that a freedom recognized in one case could be deployed to convey opposite messages in the future—and having reached such conclusions they could readily enforce the chosen lines apolitically. Accordingly, just as *Masterpiece Cakeshop* illustrates how symmetric constitutionalism may inform courts' choice of rationale in a polarized period, so too does it illustrate why broader rulings may sometimes be preferable to narrower ones. In this case, at least, a broad free expression ruling would have had obvious bipartisan symmetry, and might for that reason have been less divisive than the religious freedom holding the Court chose.

However hard the Court tried to deny this reality in its opinion, the fact is that conflict between competing world-views—one centered on traditional understandings and the other on personal liberation—is an animating feature of our current politics. The Court's decision in *Masterpiece Cakeshop* will not purge this battle from the polity; it will instead force courts to referee endless disputes on a field tilted towards one team's goal posts. The Court could better have protected civil liberty in our time by resolving the case on free expression grounds. Because that rationale would have conferred symmetric benefits across ideological divides, it would have kept the playing field level, thus enabling lower courts to resolve recurrent questions more neutrally and perhaps even encouraging citizens to view others' freedoms as a reflection of their own. The decision is thus a case study in the costs of neglecting symmetric constitutionalism.

2. Other Compelled Speech Cases

Two other cases last term in which symmetry featured explicitly, *NIFLA*[89] and *Janus*,[90] offer further negative examples. These cases also highlight deficiencies in current vocabulary for addressing undue partisanship in judicial rulings.

i. NIFLA

NIFLA presented the question whether California could require certain clinics serving pregnant women to notify clients that the state would pay for certain services, including abortions, and certain other clinics to provide notice that they were unlicensed (though no license for their operation was required).[91] The law's evident purpose, and primary effect, was to require pro-life "crisis

88. *Id.* at 1728 (observing that "there are no doubt innumerable goods and services that no one could argue implicate the First Amendment").

89. Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361 (2018).

90. Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

91. *NIFLA*, 138 S. Ct. at 2368–70.

pregnancy centers" that provide pregnancy-related care while discouraging abortion to alert clientele to the availability of more abortion-friendly alternatives. The Court held, however, that the law amounted to unconstitutional compelled speech.[92] With respect to licensed clinics covered by the law, the majority deemed the notice requirement an impermissible "content-based regulation of speech."[93] The Court reasoned: "By requiring [the clinics] to inform women how they can obtain state-subsidized abortions—at the same time [the clinics] try to dissuade women from choosing that option—the licensed notice plainly 'alters the content' of [the clinics'] speech."[94] With respect to unlicensed clinics, similarly, the Court held that the law "targets speakers, not speech, and imposes an unduly burdensome disclosure requirement that will chill [the clinics'] protected speech."[95] The Court thus concluded that both aspects of the law violated the First Amendment under applicable standards of review.

Standing alone, *NIFLA*'s holding was not necessarily asymmetric. Abortion, needless to say, is a fraught political issue, one on which the two partisan coalitions (or at least key elements of their bases) hold sharply divergent views. For that very reason, however, the Court could readily craft a symmetric compelled-speech doctrine, one protecting (or not) both abortion providers and pro-life clinics from obligations to relay messages with which they disagree. Yet Justice Breyer charged in dissent that the Court failed to do so.[96] Although it had previously held that abortion providers could refuse to give certain notices, the Court overruled those precedents in 1992 in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[97] The controlling opinion in that case, Justice Breyer pointed out, upheld a law requiring abortion providers to relay information to patients not only about health risks of the procedure, but also about fetal development, available adoption services, and even available financial assistance for women carrying pregnancies to term.[98] Against that backdrop, Breyer accused the majority of defying "the law's demand for evenhandedness"[99]—effectively what I here call constitutional symmetry. "If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services," Breyer asked, "why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services?"[100]

92. *Id.* at 2365.
93. *Id.* at 2371.
94. *Id.*
95. *Id.* at 2378.
96. *Id.* at 2385 (Breyer, J., dissenting).
97. 505 U.S. 833, 882–83 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.).
98. *NIFLA*, 138 S. Ct. at 2385 (Breyer, J., dissenting).
99. *Id.*
100. *Id.*

The majority, to be sure, had an answer to this objection. It explained that the required notices in *Casey* were a means of assuring informed consent on the part of patients undergoing a medical procedure, not a form of ideological communication required for its own sake.[101] Yet this answer, however coherent on its own terms, is nonetheless unsatisfactory from the perspective of symmetric constitutionalism. From a pro-choice point of view, depriving patients of information of alternative, more comprehensive service options is effectively depriving them of informed consent not to pursue those options. And while abortion opponents might object that a fetal life is at stake in one case but not the other, that distinction would only restate the ideological disagreement that free speech doctrine must negotiate.

Much like *Masterpiece Cakeshop*, *NIFLA* illustrates how broader, rather than narrower, reasoning may sometimes be preferable in a politically polarized period. Even granting the majority's informed-consent rationale for distinguishing *Casey*, other laws affecting abortion providers may not be justifiable on that basis.[102] The majority might have reduced the decision's asymmetry, and thus softened its partisan sting, by signaling openness to entertaining such challenges. Likewise, the Court might have gestured explicitly beyond abortion altogether, pointing out that compelled speech doctrine as a whole has obvious symmetric importance across the universe of possible cases. The same principle, indeed, excuses public school children from reciting the pledge of allegiance[103] and drivers from carrying objectionable messages on their license plates,[104] among other things.

Under prevailing current norms of judicial rhetoric, many might consider referencing such broader implications unnecessary and perhaps even improper; they come perilously close to opining on matters not before the Court. But just as Chief Justice Marshall, in another polarized period, made the pro-Jeffersonian outcome in *Marbury v. Madison* effectively symmetric by including extended dicta on judicial review and the rule of law, so too might express reference to situations not before the Court today help render politically fraught decisions more palatable.

ii. Janus

Janus, yet another compelled speech case, presents similar concerns. The *Janus* majority held, contrary to the Court's forty-year old decision in *Abood v. Detroit Board of Education*,[105] that public employers may not compel union-

101. *Id.* at 2373–74.

102. *See generally* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939 (questioning validity of certain speech requirements for physicians providing abortions).

103. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

104. Wooley v. Maynard, 430 U.S. 705, 717 (1977).

105. 431 U.S. 209 (1977), *overruled by* Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

represented public employees to pay dues to support the union's representational functions.[106] In *Abood*, the Court had recognized that compelled subsidization of union political activities, such as campaigning and electioneering, violated First Amendment protections against compelled speech.[107] The *Abood* Court nonetheless concluded that compelled support for union representational activities—its work negotiating contracts and representing employees in grievance proceedings, among other things—was a valid form of labor regulation aimed at ensuring "labor peace" in public workplaces.[108] Rejecting this distinction, the *Janus* majority held instead that all public-sector union activities are so laden with policy import that compelling any subsidization amounts to impermissible compelled speech.[109] The Court thus overturned the laws of some twenty-two states that required payment of union dues in accordance with *Abood*.

No less than *NIFLA*, *Janus* may well present a difficult question on the merits regarding proper elaboration of compelled-speech doctrine. Yet the decision's "political valence," as the majority opinion frankly acknowledged, is unmistakable.[110] Public-sector unions generally support the Democratic Party through contributions, mobilization, and other forms of campaign support, and although *Abood* forbid requiring direct support for such activities, unions' power to collect dues for their other activities may well have been important to their overall vitality (or at least union supporters so fear).[111]

The Court's holding in *Janus* was thus a one-sided blow to the liberal coalition, and was widely perceived as such, but symmetric constitutionalism permits sharpening of this critique. To begin with, *Abood* itself had not been the one-sided victory that *Janus* suggests. On the contrary, *Abood* was something of a symmetric compromise: unions lost the option of compelling membership and support for political activities, while in exchange conservative union-objectors lost the freedom to decline support for representational activities. *Janus* thus undid an arguably symmetric result to achieve a more asymmetric one.

Even if *Janus*'s bottom-line was correct, furthermore, the opinion dripped with gratuitous rhetoric of a sort symmetric constitutionalism should discourage. Justice Alito's majority opinion observed, for example, that the "ascendance of public-sector unions [since *Abood*] has been marked by a parallel increase in public spending," as if such spending were self-evidently undesirable (a

106. *Janus*, 138 S. Ct. at 2460.

107. *Abood*, 431 U.S. at 232.

108. *Id.*

109. *Janus*, 138 S. Ct. at 2475–77.

110. *Id.* at 2483.

111. *See, e.g.*, Douglas Schoen, Opinion, *Unions and Dems Lost Big in* Janus, HILL (June 29, 2018, 5:30 PM), https://thehill.com/opinion/judiciary/394907-unions-and-dems-lost-big-in-janus ("The decision has major ramifications for the national political landscape because unions, specifically public-sector unions, have long been staunch supporters of Democratic candidates.").

conclusion many progressives would dispute).[112] Likewise, Alito laid the problems of underfunded public pension liabilities and municipal bankruptcies at public unions' feet, without seeming to consider that conservative hostility to taxation could bear part of the blame as well.[113] As in *NIFLA*, it would have been far more constructive, and done more to support the decision's legitimacy in a polarized nation, had the majority instead emphasized how the compelled speech doctrine it employed has obvious symmetric applications in other contexts with opposite partisan valence.

Still more relevant here was Justice Kagan's complaint in dissent that the *Janus* majority "weaponiz[ed] the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."[114] On its face, this language was exaggerated and imprecise. While *Janus* might have implications beyond the union context, its compelled speech rationale need not cast doubt on "workaday economic and regulatory policy," as Justice Kagan claimed.[115] Nor is it clear that the First Amendment is any more of a "weapon[]" and "sword" in this context than when used to reach liberal results that interfere with democratic choices. Proponents of laws requiring recital of the pledge,[116] restricting pornography that dehumanizes women,[117] or limiting sale of violent video games to minors[118] surely felt the First Amendment was weaponized against them too.

Nevertheless, Justice Kagan was right to sound an alarm. Appreciating why requires taking broader stock of First Amendment doctrine, as I will do below in Subpart II.C. As I understand her, Justice Kagan was attempting to raise an asymmetry objection: she was rejecting, and attempting to preempt, a threatened extension of First Amendment principles beyond symmetric concerns about enabling open debate and "protect[ing] democratic governance" into highly partisan interference with economic and workplace regulation.[119] Her dissent thus implied—correctly—that even a formally symmetric doctrine like the First Amendment rule against content-discrimination may become substantively asymmetric in effect unless courts take care to maintain symmetry in determining the doctrine's scope of application. Her misfired articulation of this point only illustrates how deficient our current constitutional vocabulary is for expressing such concerns.

112. *Janus*, 138 S. Ct. at 2483.
113. *Id.*
114. *Id.* at 2501 (Kagan, J., dissenting).
115. *Id.*
116. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
117. Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).
118. Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011).
119. *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).

3. An Aside on Murphy *and the Anti-Commandeering Doctrine*

Before turning away from the recent term and towards broader debates over the First Amendment and other matters, let me close this Subpart with one constructive example, albeit one in which symmetry concerns made no explicit appearance. In *Murphy v. National Collegiate Athletic Association*,[120] the Court reviewed the Professional and Amateur Sports Protection Act, a rather odd federal statute forbidding states from "authorizing" certain forms of sports betting and further providing a civil cause of action to enjoin operation of any such state-authorized sports-betting businesses.[121] The Court understood the law, which exempted states that allowed sports betting at the time of enactment, to prohibit any other states from altering their laws to eliminate prohibitions on sports gambling.[122] So construed, the Court held, the statute impermissibly "commandeered" the state legislative process, dictating how states could regulate rather than regulating private parties directly.[123] Based on past precedent, the Court held that such commandeering violated the independent sovereignty assured to states by the federal Constitution.[124] It then further held that none of the statute's provisions, including its cause of action to enjoin private state-authorized gambling, were severable from the defective provisions.[125]

While the Court's severability holding (and thus its ultimate bottom line) may be debatable, *Murphy*'s strong reaffirmation of the anti-commandeering principle provides a textbook example of bipartisan symmetry in this moment. In a nation divided between predominantly Republican "red" states and predominantly Democratic "blue" states, constitutional federalism principles are increasingly intersecting with matters of intense substantive controversy. Red state legislatures and attorneys general worked to undercut the Affordable Care Act and lenient federal policies toward immigration during the Obama years; blue states today have repeatedly challenged Trump Administration policies, particularly its efforts to strengthen immigration enforcement.

Whether or not it is correct as a matter of first principles, the anti-commandeering doctrine at least carries the benefit of applying symmetrically across all such disputes. Whatever a case's substance, the doctrine makes outcomes turn on a straightforward, value-neutral question: did the federal law in question compel state legislation or executive action, or did it instead only authorize or encourage it? In this particular moment, this understanding of constitutional federalism appears markedly preferable to alternative approaches, such as the Court's earlier (now abandoned) effort to identify "essential state

120. 138 S. Ct. 1461 (2018).
121. 28 U.S.C. §§ 3701–04 (2012), *invalidated by Murphy*, 138 S. Ct. 1461.
122. *Murphy*, 138 S. Ct. at 1474.
123. *Id.* at 1478.
124. *Id.*
125. *Id.* at 1484.

functions" that were appropriately exempt from federal regulation.[126] Whereas any such approach would require courts to apply open-ended and manipulable criteria in hot-button cases, the anti-commandeering principle provides courts with a straightforward, readily administrable rule that can be applied neutrally across the universe of cases.

Back when federalism was more generally perceived as a conservative cause, the most liberal justices dissented from key anti-commandeering decisions.[127] From a symmetry point of view, that view looks short-sighted; the contingency of the doctrine's political valence in any given instance should have been apparent even then. In any event, in the red, blue, and purple America of today, the doctrine is unambiguously symmetric. Symmetric constitutionalism should therefore incline judges of all stripes towards preserving it, theoretical objections notwithstanding.

C. SYMMETRY AT THE LEVEL OF DOCTRINE

A last level of generality to consider falls in the mid-range, at the level of general doctrinal principles and frameworks. Here, indeed, symmetry may be most useful, as it can support leaning towards one general principle or another, or going down one pathway but not some alternative. In hopes of further illustrating the concept and demonstrating what critical purchase it can provide, I will here briefly address five general areas of significant current controversy: freedom of expression; structural constitutional law; equal protection doctrine; the Second Amendment; and substantive due process.

Almost by definition, this enterprise involves addressing several areas of intense disagreement, at a time when passions are running high. I emphasize that I do not intend here to take any ultimate position on how the Constitution should be interpreted in any of these areas. I aim simply to illustrate what positions are and are not symmetric, or are more or less symmetric, and thus which positions should receive a thumb on the scale by virtue of the ethos I advocate. Once again, judges (and commentators) are free to reach asymmetric results when the Constitution as they understand it so requires. Within the bounds of controlling considerations of text, structure, precedent, and history, however, symmetry should be a reason to lean one way rather than another, and it should also be a reason for judges to proceed cautiously, with due attention to mitigating negative effects, when reaching sharply asymmetric conclusions.

126. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 579 (1985) (overruling Nat'l League of Cities v. Usery, 426 U.S. 833 (1976)).

127. Printz v. United States, 521 U.S. 898, 939 (1997) (Stevens, J., dissenting); New York v. United States, 505 U.S. 144, 190 (1992) (White, J., dissenting).

1. Free Speech Absolutism

Let me start with a comparatively easy case: The principle of content-neutrality around which modern American free speech doctrine is organized provides a paradigmatic example of symmetric constitutionalism. Subject to narrowly defined (and viewpoint-neutral) exceptions for threats, incitement, defamation, and fighting words, among other things, modern doctrine subjects any content-based restriction on expression to strict scrutiny.[128] A regulation that applies based on a given statement's viewpoint or subject-matter is thus constitutional only if it is necessary to achieve a compelling government purpose.[129] By the same token, in administering permitting regimes for public protests and other uses of public forums, officials must maintain neutrality between ideas being expressed; they may not base denials and restrictions on the offense (or even anger and violence) that controversial speech may trigger in its audience.[130]

This approach took hold on the Supreme Court in the 1960s and 1970s, against the backdrop of the Civil Rights Movement, when it had the obvious benefit of protecting civil rights protesters and other dissidents from government repression.[131] Since then, it has become a striking point of judicial consensus. Although judges and justices have diverged on its proper implications in a number of areas (most notably campaign finance), judges of varied ideological dispositions have repeatedly endorsed the principle that "[t]he First Amendment recognizes no such thing as a 'false' idea."[132]

The end result is a constitutional law of expressive freedom that confers benefits across the political spectrum: whatever partisan valence speech carries, indeed even if it is far outside mainstream opinion, it is equally protected. The doctrine thus provides strong protection for over-heated rhetoric within each political coalition, as well as strong assurances that judges' own biases will not infect the degree of protection they afford to particular statements. Judges, indeed, routinely test their intuitions in particular cases or about how doctrine should further develop by positing hypothetical utterances with opposite political import. These symmetric benefits might even explain the doctrine's durability amid other vicissitudes in constitutional law. Conservative judges in a liberal culture can appreciate expressive freedom's value just as readily as liberal judges in a conservative polity. We all have our favorite dissidents, even if we no longer agree on which are most worthy. The doctrine's symmetry,

128. *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 805 (2011).

129. *See, e.g.*, *Brown*, 564 U.S. at 805.

130. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 130–31, 133–34 (1992).

131. For my own earlier discussion of this history and its importance today, see Zachary S. Price, *Our Imperiled Absolutist First Amendment*, 20 U. PA. J. CONST. L. 817, 821 (2018).

132. *E.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 51 (1988) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974)).

moreover, could make it self-reinforcing. By adhering so firmly to a readily administrable rule of across-the-board protection, courts encourage citizens to see others' freedom as a reflection of their own, even as divergence in the views actually espoused sharpens.

Nevertheless, this understanding might well be coming under increasing pressure. On the Court itself, several more liberal Justices have advocated a looser approach focused more on a regulation's specific rationales and consequences than application of any categorical rule. Justice Breyer, for instance, has argued that "[t]he First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as 'content discrimination' and 'strict scrutiny,' would permit."[133] Although this approach aims to be more responsive to competing concerns and provide a model of deliberative democracy, the very mushiness of such context-dependent judgments could risk degrading First Amendment doctrine's current symmetry. The content-based rule is symmetric; particular legal rationales often are not. What is more, in a polarized society, judgments about how to weight competing societal concerns are likely to be highly variable. Inviting greater judicial subjectivity in First Amendment doctrine could thus erode public confidence that judges are applying the law neutrally across competing ideological positions.

Outside the Court, meanwhile, a troubling increase in the volume and visibility of bigoted speech has led some to call for official suppression of offensive speech on grounds of equality.[134] Though this view shows no sign so far of gaining traction on the Court,[135] such proposals could also risk eroding First Amendment law's symmetry and thus triggering a more general slackening of expressive freedom. At the least, amid current partisan dynamics, it seems unlikely that any weakening of protections for hateful or offensive expression will redound wholly to one side of our political divides. More likely, through a process Eugene Volokh has called "censorship envy," weakened protection for offensive speech directed at some groups will simply yield calls for greater protection against speech that similarly offends other groups.[136] At any rate, abandoning the doctrine's current ideological symmetry, however appealing in the abstract, could again jeopardize the doctrine's political foundations, making civil liberty appear to be a one-sided value rather than a broadly shared implication of citizenship that all within the polity must respect.

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133. *Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring).

134. I discussed these developments in Price, *supra* note 131.

135. The Court unanimously rejected any such position in Matal v. Tam, 137 S. Ct. 1744, 1749 (2017) (plurality opinion); *see also id.* at 1765 (Kennedy, J., concurring).

136. Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1059–61 (2003) (describing "censorship envy" as likely to arise "when a free speech exception is created for one constituency," with the consequence that "others may resent even more the absence of an exception for their own favored cause").

On the other side of the spectrum, as *Janus* and *NIFLA* reflect, conservatives on the Court (and outside it) also risk drifting into highly partisan applications of speech doctrine through inattention to its proper scope of application.[137] While the Court's general First Amendment absolutism enjoys broad support among the current Justices, the Court's campaign finance jurisprudence is controversial not only among the Justices but also among the broader public. The same is true of decisions like *NIFLA* and *Janus* that extend First Amendment protection into areas of economic and workplace regulation with clear partisan valences. As Justice Kagan observed in her *Janus* dissent:

> Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices. The First Amendment was meant for better things. It was meant not to undermine but to promote democratic governance . . . .[138]

Again, rather than complaining about the First Amendment being "weaponiz[ed]" in general, Justice Kagan here effectively raised a concern about converting the Court's formally symmetric jurisprudence of content-neutrality into a substantively asymmetric doctrine by selectively expanding the doctrine's scope of application. In other words, by employing the First Amendment to disrupt economic and workplace regulations valued principally by progressives, an emerging jurisprudence of "First Amendment *Lochnerism*," as some have described it,[139] risks being perceived as advancing one partisan camp's agenda at the expense of the other's. Such asymmetry could again make expressive freedom as a whole appear partisan, fueling calls for reciprocal restrictions and thus weakening overall support for expressive freedom in the broader constitutional culture.

Broad expressive freedom has been such a strong American value, and such a strong point of consensus on the Court, that fears of it slipping away or becoming more partisan may seem quixotic. But consider two recent data points. First, in a separate opinion in *Janus*, Justice Sotomayor explained that she was joining Justice Kagan's dissent in full despite having earlier joined the majority opinion invalidating an economic regulation in *Sorrell v. IMS Health Inc.*[140] Sotomayor wrote that she did so because of "the troubling development in First Amendment jurisprudence over the years, both in this Court and in lower

137. As Frederick Schauer has observed, the Court's cases have generally failed to articulate any clear framework for differentiating which verbal acts trigger First Amendment analysis. *See, e.g.*, Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1766–67, 1801–02 (2004).

138. *Janus*, 138 S. Ct. at 2502 (Kagan, J., dissenting).

139. *See, e.g.*, Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1917–18 (2016); *see also* Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1399–1400 (2017).

140. 564 U.S. 552 (2011).

courts," in decisions like *NIFLA* and *Janus*.[141] Second, in an interview, Justice Alito explained his dissents in several speech cases by highlighting then-retired Justice Stevens's advocacy of a constitutional amendment to overturn the Court's decision in *Citizens United v. Federal Election Commission*[142] protecting corporate political speech.[143] "[I]f we lose focus on what is at the core of the free-speech protection by concentrating on these peripheral issues [as in the cases where he dissented]," Justice Alito worried, "there's a real danger that our free-speech cases will go off in a bad direction."[144]

Both these statements at least hint at the possible contingency of some Justices' votes on other Justices' commitment to apply doctrinal principles symmetrically. To the extent that is true, more explicit attention to symmetric constitutionalism and the benefits of maintaining current doctrine's overall symmetry could help both the Court and the constitutional culture at large avoid such tit-for-tat degradation of civil liberty.

2. Structural Questions

As the earlier *Murphy* discussion reflects, the structural Constitution—separation of powers and federalism—should be another paradigm case of symmetric constitutionalism, though here once again the partisan gale threatens to blow judges off course. Particularly in a period like ours in which voters are closely divided over substantive policies, it should be obvious that structural rulings advantaging one partisan camp today may be put to quite different policy aims in the future. Nonenforcement authority evoked to benefit immigrants and marijuana entrepreneurs in the Obama years could benefit gun owners or regulated industries in a later administration; a ruling today supporting state sanctuaries against federal immigration enforcement might tomorrow thwart federal firearms or environmental regulation. In these areas and others like them, positions embraced today may well advantage quite different presidents (or Congresses or states) in the future. Judges should thus have ready means of maintaining an ethos of symmetry: they need only check their intuitions in any given case by imagining how identical principles would apply in a case with opposite political valence.

It may be true that in the recent past structural constitutional questions had sharper partisan valences, with liberals favoring robust federal authority and defending the post-New Deal administrative state's constitutionality (and conservatives holding misgivings about both). To some degree, these questions retain the same political dimension. At the least, any decision sharply diminishing federal legislative or administrative capacity would strike most

141. *Janus*, 138 S. Ct. at 2487 (Sotomayor, J., dissenting).

142. 558 U.S. 310 (2010).

143. *Samuel Alito Transcript*, CONVERSATIONS WITH BILL KRISTOL (July 10, 2015), https://conversationswithbillkristol.org/transcript/samuel-alito-transcript/.

144. *Id.*

progressives as a paradigm case of conservative judicial activism. Short of any such extreme ruling, however, the political valence of structural constitutional question may no longer be quite as one-sided. The governing conservative coalition, after all, favors robust federal action in some areas, such as immigration, while pursuing deregulatory action in other areas. As for federalism, the country's relatively even division into blue states and red states has made questions about state and federal power more readily symmetric. At the least, as we saw, principles such as anti-commandeering can be deployed as easily for liberal as conservative ends.

Nevertheless, if the governing structural principles themselves have grown less partisan in character, the pressures on courts to rule one way or the other on the merits have only grown stronger. Indeed, the key danger in our moment is not so much that courts will embrace asymmetric structural principles, but rather that they will apply those principles unevenly due to political exigencies in each particular case—or for that matter that they will stumble into incorrect structural rulings so as to reach congenial substantive outcomes. During the Trump years, lower courts have reached dubious decisions regarding the revocability of administrative guidance, among other things, without seeming to anticipate how Trump-appointed judges might employ these same precedents to reach different substantive ends during a future liberal administration.[145] Similarly, some argued during the Obama years that political polarization and resulting congressional incapacity necessitated an expansion in executive and administrative authority.[146] Progressive enthusiasm for this academic view seems now to have waned, though one suspects it will one day spring back. Meanwhile, repeated nationwide injunctions of major government programs risk fostering a jaded perception that federal judges appointed by one party will always find ways to block major programs by the other party's presidents.[147] Should any such view take hold, or if executive officials are tempted into outright defiance of court decisions, the damage to court authority and the rule of law could be severe.

Explicit attention to constitutional symmetry can help judges resist these blind alleys. A theory of executive power or federalism or any other structural principle that is acceptable only if exercised by one's co-partisans is not a legal

145. *See, e.g.*, Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1048 (N.D. Cal. 2018) (enjoining termination of non-binding immigration relief program). For my contemporaneous critique of this decision, see Zachary Price, *Why Enjoining DACA's Cancellation Is Wrong*, TAKE CARE BLOG (Jan. 12, 2018), https://takecareblog.com/blog/why-enjoining-daca-s-cancellation-is-wrong.

146. *See, e.g.*, Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 2–3 (2014); *cf.* David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2 (2014) (discussing presidential "self help" remedies to congressional norm-violations).

147. For competing views on the legality of such injunctions, see generally Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018) (in favor), Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. __ (forthcoming 2020) (same), and Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017) (opposed).

theory but an act of force. As such, it will command diminished respect by the public and political actors alike. To avoid the institutional damage and loss of credibility that could result from repeated decisions of this sort, courts should redouble their effort to ensure that their structural rulings satisfy this basic criterion of symmetric constitutionalism.

3. Equal Protection Egalitarianism

Key features of a third area of doctrine, equal protection, also reflect constitutional symmetry, and the symmetric perspective may again highlight some under-appreciated benefits of the existing doctrine, whether or not it is ultimately sound as a matter of first principles.

For one thing, equal protection doctrine's overall focus on classification rather than disadvantage is symmetric in the strictly empirical sense that it distributes the doctrine's benefits across different groups (and thus political parties), potentially resulting in a more politically stable conception of civil liberty. Current equal protection doctrine generally views all race-conscious government action as suspect.[148] Such actions are thus constitutional only if they satisfy strict scrutiny, meaning that they must be necessary to accomplishing some compelling government purpose.[149] In other areas, such as sex discrimination, the Court has followed a parallel approach, focusing on the nature of the classification rather than whether the litigant's own group has been subject to historic prejudice.[150]

From some points of view, protecting historically privileged groups against rare instances of prejudice is perverse.[151] As Justice Rehnquist observed in his dissent in *Craig v. Boren*, a key early gender discrimination case involving disadvantaging of young men,

> Most obviously unavailable to support any kind of special scrutiny in this case [] is a history or pattern of past discrimination, ... There is no suggestion in the Court's opinion that males in this age group are in any way peculiarly disadvantaged, subject to systematic discriminatory treatment, or otherwise in need of special solicitude from the courts.[152]

With respect to gender, targeting such laws was a calculated strategy (developed by now-Justice Ruth Bader Ginsburg) to appeal to a male-dominated judiciary.[153] Apart from its immediate tactical utility, however, this approach

148. *See, e.g.*, Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2207–08 (2016); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989).

149. *See, e.g.*, *Fisher*, 136 S. Ct. at 2208.

150. United States v. Virginia, 518 U.S. 515, 525 (1996).

151. For a concise survey of arguments supporting an "anti-subordination" approach to anti-discrimination, see Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 155 (2017).

152. 429 U.S. 190, 219 (1976) (Rehnquist, J., dissenting).

153. *See, e.g.*, David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQ. 33, 53–58 (1984) (discussing Ginsburg's strategy). *But cf.* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 88 (2010) ("Ginsburg pressed the

could have broader political value. As one recent study of anti-discrimination statutes observes, "[a] symmetrically designed law [here meaning a law that applies equally to all races and genders] brings political benefits, as the universality of such laws helps to enhance support for them."[154] To the extent symmetric statutes carry such benefits, a universally applicable constitutional prohibition on race or sex discrimination might likewise invite less political controversy. From that point of view, whatever the anti-classification theory's ultimate merits, understanding the Equal Protection Clause to protect everyone, and not only particular groups, from identity-based disadvantage might at least carry the political benefit of giving everyone a stake in preserving the governing principles—even if those principles serve overwhelmingly in practice to protect the groups and individuals most likely to face invidious prejudice.[155]

The question becomes more fraught, however, with respect to affirmative measures aimed not at specific adverse treatment but instead at improving the condition of historically disadvantaged groups. On this question, progressives have long complained that a formally symmetric color-blindness (or sex-blindness) principle may become functionally asymmetric due to accumulated effects of present-day prejudice and historic disadvantage. Giving partial effect to this view, the Court's moderate conservatives, in a series of opinions on higher-education going back to Justice Powell's controlling one-Justice opinion in *Regents of the University of California v. Bakke*,[156] have relaxed the overall anti-classification approach to allow limited consideration of race and other

claims of male plaintiffs in order to promote a new theory of equal protection founded on an anti-stereotyping principle.").

154. Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 WIS. L. REV. 69, 116 (2017). Schoenbaum discusses "[s]everal theories of political support" that support this conclusion. *Id.* at 116–20. She goes on to argue that "the benefits of symmetry in the context of race are weaker than in the context of age and sex," but nonetheless notes several benefits of racial symmetry, including the likelihood that "universal laws garner more political support, and thus can be more effective than targeted laws at promoting equality." *Id.* at 123. In another recent treatment of symmetry in anti-discrimination statutes, Bradley Areheart observes that "symmetry aligns the interests of majority and minority groups in the following way: If all groups are protected under a relevant ground, then all groups (including the majority group) have a stake in both the passage and implementation of that protection." Bradley A. Areheart, *The Symmetry Principle*, 58 B.C. L. REV. 1085, 1110–11 (2017); *see also id.* at 1113 ("[T]he fact that all groups are protected may facilitate more goodwill, than under an asymmetric measure, through a sense that the law is fair and even-handed."). After discussing a range of costs and benefits to anti-discrimination symmetry, Areheart argues that an anti-subordination understanding of equal protection is preferable with respect to race. *Id.* at 1133–34 (discussing Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986)). My only objective here is to highlight the political benefit of an equal protection jurisprudence that gives something to both sides of major partisan and ideological divides; I take no position on what understanding of equal protection should ultimately prevail.

155. A more jaded version of this argument posits that "the interest of blacks in achieving racial equality is accommodated only when that interest converges with the interests of whites in policy-making positions." Derrick Bell, Brown v. Board of Education*: Reliving and Learning from Our Racial History*, 66 U. PITT. L. REV. 21, 22 (2004); *cf.* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2171–72 (2013).

156. 438 U.S. 265, 315 (1978) (Powell, J.).

suspect factors as part of a holistic, individualized assessment aimed at achieving student-body diversity.[157]

Insofar as current partisan configurations appear (depressingly) to involve increasingly divergent views on this question and other racial issues,[158] the moderate Justices' middle-ground understanding might well be more symmetric in the particular context of affirmative action than competing proposals in either direction. On an ideological level, after all, the *Bakke* approach reflects a certain compromise between a (mostly progressive) focus on group disadvantages and a (mostly conservative) focus on present-day individual merit. At the same time, on a rawer political level, the middle-ground approach may allow public institutions to pursue goals of diversity and inclusion with respect to race and other suspect characteristics so long as the effort is refracted through a broader individualized assessment including other forms of diversity, such as class, religion, family background, and personal adversity, that may have varied political valences.[159] By the same token keeping focus on individualized assessment, as the *Bakke* understanding requires, might help preserve broader political support for efforts to overcome historic discrimination.[160] By contrast, under current political configurations, foreclosing such measures altogether, as some Justices have sought to do,[161] would likely appear highly partisan and divisive.

As with all issues addressed here, symmetric constitutionalism need not be dispositive. Symmetric constitutionalism is an ethos, not an interpretive theory; judges' primary interpretive commitments need not always bow to it. Nevertheless, here, as in other areas, recognizing symmetry as a value can yield fresh perspective on the likely political effects of different doctrinal formulations in a polarized period. Whatever one makes of it as a matter of first principles, current equal protection doctrine's qualified anti-classification approach distributes constitutional benefits across the population, straddling identity-based partisan divides and encouraging citizens to view others' freedom as a

157. Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2214 (2016); Grutter v. Bollinger, 539 U.S. 306, 337 (2003).

158. *See, e.g.*, MASON, *supra* note 15, at 38–40; Eugene Scott, *The Share of Republicans Who Think There's a Lot of Discrimination Is Plummeting*, WASH. POST (Aug. 6, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/08/06/the-number-of-republicans-who-think-theres-a-lot-of-discrimination-is-plummeting/?utm_term=.6cc52952a465.

159. *See, e.g.*, *Grutter*, 539 U.S. at 338 ("The Law School does not . . . limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity."); *Bakke*, 438 U.S. at 315 ("The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."). Reva Siegel has characterized the equal protection theory underlying these cases as "anti-balkanization," meaning "an emergent independent view more concerned with social cohesion than with colorblindness." Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1281 (2011).

160. As Reva Siegel has suggested, the Court might also improve its decisions' overall symmetry by extending *Bakke*'s "anti-balkanization" understanding beyond affirmative action to certain police practices that aggrieve minority communities. Siegel, *supra* note 159, at 1360–65.

161. *Fisher*, 136 S. Ct. at 2217 (Alito, J., dissenting).

reflection of their own. It might thus stand a chance of defusing partisan conflicts instead of exacerbating them, thereby averting a destructive downward spiral in which counter-majoritarian protections against discrimination become more controversial than they should be. At the least, symmetric constitutionalism should compel judges to consider these potential benefits before changing course.

4. Second Amendment Rights

If symmetric constitutionalism largely favors the status quo in the examples addressed so far, it provides critical purchase on a fourth area of doctrine: the newly invigorated Second Amendment right to bear arms.

The Supreme Court's decision in *District of Columbia v. Heller*[162] interpreting the Second Amendment to protect a judicially enforceable individual right to bear arms offers a paradigm of constitutional asymmetry. The Court reached its result based on the Second Amendment's putative original meaning, even though this history is contested and the Amendment's cryptic text associates "the right to keep and bear arms" with service in a "well-regulated militia."[163] The decision thus required throwing Thayerian restraint out the window. It disrupted seemingly settled constitutional understandings and cast doubt on a huge variety of democratically enacted laws based on manifestly contestable constitutional grounds.[164]

More to the point here, however, the decision's partisan and ideological valence was unmistakable. Gun control is one of the country's most divisive issues. Although most progressives (and indeed most voters) support stricter gun control, the National Rifle Association and the gun rights constituency it represents align strongly with the Republican Party and exercise their political power to block gun restrictions wherever possible.[165] By taking sides in this controversy, the Supreme Court aligned itself with one side of the debate, legitimating its constitutional view and empowering it to challenge all new gun restrictions in litigation.

In doing so, moreover, the Court elevated an already-fraught policy debate to the level of constitutional principle, thus complicating any effort at legislative compromise. *Heller*, indeed, has drawn gun control advocates' ire onto the Court itself, damaging the Court's own reputation for neutrality and thus its bipartisan legitimacy. To be sure, ruling the other way and rejecting the rights claim in *Heller* would have meant taking sides too. Yet doing so in this instance would

162. 554 U.S. 570 (2008).

163. *Id.* at 636 (Stevens, J., dissenting).

164. Judge J. Harvie Wilkinson, a rare across-the-board Thayerian, complained: "Each of the points on which the two sides take issue [in *Heller*] ends inconclusively. It is hard to look at all this evidence and come away thinking that one side is clearly right on the law." J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 271 (2009).

165. *See, e.g.*, Reid J. Epstein, *For Democrats, Guns Are New Litmus Test*, WALL ST. J., Aug. 10, 2018, at A1.

have simply left the law as it stood and thus left the scope of gun rights to political debate, an arena in which gun rights advocates already held considerable power to defend their interests. If nothing else, then, *Heller* illustrates the perils of asymmetric constitutional rulings in a divided polity.

In fairness, of course, just as some liberals (or others) might object that allowing broader affirmative action is asymmetric but constitutionally correct, so too might some conservatives complain that *Heller* was entirely justified, its political asymmetry notwithstanding. As always, symmetric constitutionalism need not require a particular result when strong enough primary interpretive commitments dictate otherwise. But even if *Heller*'s outcome was adequately justified, symmetric constitutionalism offers useful critical perspective on the decision's rhetoric and reasoning.

Justice Scalia's majority opinion, for example, might have mitigated the decision's one-sidedness by highlighting more progressive results supported in other areas by the same forms of reasoning (including some of his own decisions expanding rights of criminal defendants). By way of illustration, Ninth Circuit dissenters in a predecessor case more expressly advocated judicial protection of Second Amendment rights based on existing doctrine's robust protection of other constitutional guarantees.[166] Reflecting on the majority's argument that the Second Amendment established only a collective right because it was a "right of the people," Judge Kleinfeld observed:

> I cannot imagine the judges on the panel similarly repealing the Fourth Amendment's protection of the right of "the people" to be secure against unreasonable searches and seizures, or the right of "the people" to freedom of assembly, but times and personnel change, so that this right and all the other rights of "the people" are jeopardized by planting this weed in our Constitutional garden.[167]

This type of rhetoric—justifying an asymmetric result by highlighting its affinity to others with differing ideological valence—is not presently conventional, but such forms of argument might help soften a divisive decision's sting by calling attention back to shared cross-partisan commitments.[168]

Symmetric constitutionalism might also usefully discipline the *Heller* right's further doctrinal elaboration. For one thing, disfavoring asymmetry might discourage giving the *Heller* right broad scope. *Heller* itself recognized a number of limitations and exceptions, and lower courts to date have generally

166. Silveira v. Lockyer, 328 F.3d 567, 572 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc).

167. *Id.* (footnotes omitted).

168. Justice Scalia's *Heller* opinion did gesture in this direction in a passage comparing the Second Amendment to the First, but he could have made the point more generally and forcefully. *See Heller*, 554 U.S. at 635 ("The First Amendment contains the freedom-of-speech guarantee that the people ratified . . . . The Second Amendment is no different.").

given the decision little concrete effect.[169] At the same time, to the extent the Court does elaborate upon *Heller*, the Justices might take care to seek ways of doing so that resonate with progressive causes, such as concerns about racial bias in law enforcement and criminal justice.[170] At the least, having defied symmetric constitutionalism to recognize an individual right to bear arms in the first place, the Court should now ensure that the right itself at least applies even-handedly without regard to individuals' demographic and ideological affiliations within our fractured society.

5. Substantive Due Process

A last example to consider is substantive due process, the recognition of unspecified constitutional rights through judicial interpretation of the Fifth and Fourteenth Amendment Due Process Clauses. Because of its textually ungrounded character, this legal theory—which today supports constitutional rights to contraception, abortion, and same-sex marriage, as well as rights to religious education and parental autonomy, among other things—is highly susceptible to asymmetry. At the least, substantive due process decisions have been recurrent political flashpoints.

From the perspective of symmetric constitutionalism, however, the trouble with substantive due process is not so much the doctrine itself, as the absence of any clear theory to explain the pattern of case results and enable principled identification of additional unenumerated rights. What is more, the doctrine's perceived asymmetry appears partly to reflect a failure of judicial communication rather than a problem of substance. Although it certainly tilts toward liberal political goals in its most high-profile applications (such as abortion and same-sex marriage), current substantive due process doctrine overall is more symmetric than the public appears to appreciate.

Although the modern cases center on identifying a "right to privacy" that protects certain intimate and personal life-choices, the Court's method for giving content to this right has meandered from case to case. After claiming to find "penumbras" and "emanations" from enumerated rights in its *Griswold v. Connecticut* decision on contraception,[171] the Court appeared to focus more on medical expertise and interest-balancing in recognizing a right to abortion in *Roe*

169. *See, e.g.*, Silvester v. Becerra, 138 S. Ct. 945, 951 (2018) (Thomas, J., dissenting from denial of certiorari) (complaining about Court's inattention to Second Amendment).

170. The only Supreme Court decision to date addressing the scope of the right post-*Heller* is arguably an example. In *Caetano v. Massachusetts*, the Supreme Court summarily reversed a Massachusetts Supreme Court decision rejecting a domestic violence victim's argument that the Second Amendment gave her the right, notwithstanding state law, to possess a taser (a non-lethal electric stun gun) to defend herself against her prior abuser. 136 S. Ct. 1027 (2016) (per curiam). Even *Heller*-rejecting progressives might find this right of self-protection for abuse victims appealing. The Court may further address the scope of Second Amendment rights in a case accepted for the October 2019 term. *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. City of N.Y., 883 F.3d 45 (2d Cir. 2018), *cert. granted sub nom.*, 139 S. Ct. 939 (2019).

171. 381 U.S. 479, 484 (1965).

v. Wade.[172] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a fractured Court reaffirmed *Roe*'s "core holding" while significantly adjusting its scope.[173] In *Washington v. Glucksberg*, the Court rejected a right to assisted suicide.[174] In doing so, the majority embraced an approach focused on identifying fundamental societal traditions at a low level of generality,[175] but one Justice in the majority wrote a concurrence casting doubt on this very method.[176] In its subsequent decisions on same-sex intimacy and marriage, *Lawrence v. Texas*[177] and *Obergefell v. Hodges*[178] respectively, the majority abandoned *Glucksberg*'s precise method in favor of an approach that combined appeals to positive law and tradition with more open-ended judicial intuition.[179] In *Obergefell*, moreover, and to a lesser degree *Lawrence*, the Court blended substantive due process with equal protection concerns.

To varying degrees, all these outcomes have been politically controversial, and some question whether recognizing unspecified constitutional rights at all is justified. Holding aside this ultimate question, however, it seems at least possible that the Court's methodological inconsistency has contributed to a sense of aggrieved asymmetry among those dissatisfied with particular case results. By holding open a path to recognizing other rights with differing political valence (or perhaps even adjustment of previously recognized rights by means other than court appointments), some clearer method of rights identification might have helped distribute substantive due process doctrine's benefits and thus defused some of the controversy surrounding it. In principle, such a method could yield a jurisprudence amounting to a relatively symmetric package deal of rights protections, as opposed to a menu of asymmetric results, from which judges can pick and choose as they like.

As a matter of fact, furthermore, the overall pattern of decisions is not nearly as asymmetric as the public's predominant focus on abortion and same-sex marriage suggests. In an earlier era when it also recognized unenumerated rights to freedom of contract, the Supreme Court recognized a fundamental constitutional right to pursue private religious or foreign-language education for

172. 410 U.S. 113, 164–65 (1973).

173. 505 U.S. 833, 878–79 (1992).

174. 521 U.S. 702, 735–36 (1997).

175. *Id*. For an argument that the Fourteenth Amendment is best understood to support recognition of unenumerated rights based on convergence among most states' laws, see CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE (2015).

176. *Glucksberg*, 521 U.S. at 736 (O'Connor, J., concurring).

177. 539 U.S. 558 (2003).

178. 135 S. Ct. 2584 (2015).

179. *See Obergefell*, 135 S. Ct. at 2598 ("The identification and protection of fundamental rights . . . . requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. . . . History and tradition guide and discipline this inquiry but do not set its outer boundaries." (citations omitted)).

one's children.[180] Never overruled despite the Court's later repudiation of freedom of contract, these decisions have remained key precedents for the entire line of modern privacy cases.[181] What is more, if rights recognized in *Casey*, *Lawrence*, and *Obergefell* hold stronger support among liberals, the right of parental control recognized in these cases (and their more recent progeny) is one that many *Roe*-skeptical conservatives have reason to value. Its key effect, after all, is to limit governmental interference with private religious education and other basic child-rearing choices. From this point of view, the political controversy surrounding privacy rights might be another indication that broader rather than narrower rationales, and explicit reminders of potential symmetric benefits to asymmetric individual cases, might help stabilize civil liberties in a polarized era.

Substantive due process will likely be newly fraught in the post-Kennedy era, given Justice Kennedy's pivotal vote in key substantive due process cases. Many either fear or hope that the Court will now embark on a quite different course. Whether or not it does so, the Court should attend to the value of symmetric constitutionalism in this area, as in others. Without speculating in any way about what the Court may do, a redesigned substantive due process doctrine that abandoned *Casey* while proceeding to preserve or expand one-sided conservative rights would push hard on the country's political divides, raising precisely the legitimacy challenges that symmetric constitutionalism seeks to mitigate.

CONCLUSION

Americans are sharply polarized over questions of substantive policy, and these divisions have increasingly manifested themselves in public-law litigation and competing visions of constitutional law. We risk entering a period of no-holds-barred competition between rival constitutional visions—one centered on ever-more expansive conceptions of equality and personal autonomy, the other on ever-more expansive notions of religious freedom and economic liberty. Yet there is another path. A rival ethos, with deep roots in our constitutional tradition, competes for attention. Instead of seeking advantage for one side or the other in our intense political divides, judges could strive, when possible, to tilt towards conceptions of civil liberty that confer benefits across major social and political divides, thus avoiding zero-sum tradeoffs between rights and encouraging each side to view the other's freedoms as a reflection of its own.

This ethos could provide a distinctive form of judicial restraint for our polarized era—a model in which judges play a robust role in policing constitutional boundaries on government action, but do so in a manner that

180. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923); *see also* Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion).

181. *Lawrence*, 539 U.S. at 564 (citing *Pierce* and *Meyer*).

activates mutually-reinforcing constitutional commitments instead of downward spirals of tit-for-tat erosion. On this model, instead of drawing ire from one side or the other by seeking resolution of political disputes by constitutional means, judges might diffuse controversies over courts' constitutional role by encouraging both sides to see political benefit in sustaining key legal understandings.

As I have noted repeatedly, symmetric constitutionalism cannot be the overriding feature of constitutional interpretation. The Constitution is not neutral across all conceivable ideological divides, and judges need not fully subordinate their primary interpretive commitments to advancing symmetry. Nevertheless, this ethos does provide valuable fresh perspective not only on the Supreme Court's recently concluded term, but also on some of the most heated controversies in contemporary constitutional law, including free speech, structural interpretation, equal protection, the Second Amendment, and substantive due process.

As in past periods of intense polarization, judges face a choice. They can mortgage their credibility to advance their partisan faction's legal goals, or they can craft constitutional doctrines with sufficiently broad benefits to stand a chance of becoming self-sustaining. The latter course, I have argued, better accords with the logic of judicial review and the judicial role, it reflects a long tradition of civic republicanism and constitutional liberty under law, and it holds at least some potential to diffuse key current controversies instead of exacerbating them. For all these reasons, and for the sake of both civil liberty and political stability, judges (though not only them) should be willing to disappoint their partisan faction and attend to the better angels of their nature, as a great American in another polarized era once urged.

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