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Constitutional Law:
Symmetric Constitutionalism

Zachary S. Price¹

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. This Chapter makes the case for the latter approach, focusing on examples from the Supreme Court's last term with former "swing" justice Anthony Kennedy.

More specifically, I argue 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 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.

To offer some examples at the outset, the First Amendment rule requiring content-neutrality in speech regulation is paradigmatically symmetric: it protects all speakers, no matter what they are saying. 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.² In the Court's 2017 Term case *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

1. Summarized and excerpted from Zachary S. Price, *Symmetric Constitutionalism: An Essay on Masterpiece Cakeshop and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. 1273 (2019).

2. 554 U.S. 570 (2008).

religious-liberty case.³ 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.

Symmetric constitutionalism, so understood, is not a full-blown interpretive theory, nor even a primary interpretive consideration. It is instead an ethos, a disposition. It is a thumb on the scale that judges subscribing to different primary interpretive approaches may equally incorporate. In that sense, it is akin to judicial restraint or a preference for narrow “minimalist” rulings. Just as judges subscribing to different primary interpretive theories may be more or less restrained 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,⁴ 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

3. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

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

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.

The remainder of this Chapter will sketch the current political context of constitutional law, address some arguments for and against symmetric constitutionalism, discuss some key examples from Justice Kennedy's last term on the Supreme Court, and identify symmetric constitutionalism's implications for several key areas of doctrine.

Constitutional Law's Challenges in a Polarized Era

Constitutional law today operates 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.

Polling and social-science findings support this picture. The Pew Research Center, for example, found in 2017 that roughly half of each partisan side (and higher proportions among those most engaged) reports being "afraid" of the other side.⁵ 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.'"⁶ Some evidence further suggests that partisan affiliations are increasingly hardening into social identities aligned with other key features of individuals' self-understanding.⁷

These divisions extend not only to policy prescriptions and political behavior, but also to constitutional understandings and public perceptions of judicial rulings. Almost every high-profile case holds a partisan valence that tends to dominate public discussion of the case's outcome. More

5. PEW RESEARCH CTR., *PARTISANSHIP & POLITICAL ANIMOSITY IN 2016*, at 54 (2016).

6. Nathan P. Kalmoe & Lilliana Mason, *Lethal Mass Partisanship: Prevalence, Correlates, & Electoral Contingencies* 22 (draft paper).

7. LILLIANA MASON, *UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY* (2018).

generally, progressives today typically embrace a constitutional vision centered on advancing social justice, protecting sexual and reproductive autonomy, and enabling expert administrative governance. Conservatives, by 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 clashing constitutional visions—tribal partisanship threatens to undermine neutral constitutional decisionmaking and to complicate courts' capacity to resolve legal and constitutional questions for the polity.

Why Symmetric Constitutionalism?

Symmetric constitutionalism—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 present era of partisan polarization and distrust. 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. On a normative level, 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 imagining a parallel case with opposite political valence.

An explicit ethos of symmetric constitutionalism can also draw support from at least two major legitimating considerations in constitutional law, each, appropriately enough, with opposite political valence. First, the political process school of thought associated with New Deal constitutionalism and John Hart Ely's classic *Democracy and Distrust* should encourage judges in the current political environment to favor symmetric rulings. The central preoccupation of process theorists in their heyday was the "countermajoritarian difficulty"—the question why judicial invalidation of legislation is legitimate. The central danger to American constitutionalism today is the risk that partisan animus will shred the very freedoms and institutions that enable pluralistic self-governance in the first place. By aiming to counteract this partisan

impulse, symmetric constitutionalism affords an appropriate means of reinforcing democratic self-governance through constitutional law today.

Second, symmetric constitutionalism can draw support from history and the basic structure of our Constitution. Those who drafted and ratified the Constitution feared factional division and understood the risks it could pose to the constitutional order they established. Federalist No. 10, for example, warned about risks to republican government from “the violence of faction.” 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” could cause “the ruins of public liberty.” The structure of the Constitution as a framework of relatively spare and unspecific text that leaves significant space for judicial elaboration allows judges to use principled constitutional interpretation—and symmetric constitutionalism—to guard against these perils of factionalism.

Some have argued instead that judges today should be minimalist, favoring narrow rulings on the narrowest possible grounds. But minimalism is precisely the wrong medicine for our current disease. Almost every case has some partisan valence in its immediate context, yet judges can telegraph their commitment to cross-partisan legal principle by grounding their decisions explicitly in general doctrinal principles that cut across different possible cases. Others will object in principle to pursuing bipartisan symmetry, for fear of unilaterally disarming when total victory may be just over the next hill. It is possible that current knife-edge divides in American politics will soon give way to a more stable political order, but there is reason for skepticism, and in any event we need some path through the current thicket that preserves our institutions and traditions of civil liberty for the future. Symmetric constitutionalism aims to provide that path.

Examples from Justice Kennedy's Last Term

As a practical matter, what would following an ethos of symmetric constitutionalism mean? The Constitution is obviously not agnostic between all possible 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. Within the range of reasonable disagreement, however, symmetric constitutionalism might be a reason 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. Any number of theories, apart perhaps from a purely cynical legal realism, could yield a symmetric body of case outcomes if applied in principled fashion.

More concretely, at the level of particular cases, symmetry is an ethos that judges with differing theoretical approaches can equally incorporate. Justice Kennedy's last term on the Supreme Court afforded several useful examples.

First, *Masterpiece Cakeshop*, as already noted, 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. Although the Colorado Civil Rights Commission determined that the baker's denial of service violated state law, the baker argued that the law both compelled expression in violation of constitutional free-speech protections and an impermissibly burdened his free exercise of religion. The Court chose to resolve the case on free-exercise grounds, and on exceedingly narrow grounds at that. It held that the Commission acted with impermissible animus towards religion, and thus violated a constitutional requirement of "religious neutrality," because some members of the Commission expressed generalized hostility to religion in the course of the deliberations.

Masterpiece Cakeshop's minimalist reasoning was in effect highly asymmetric, and thus potentially more polarizing than necessary. 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. The Court could have resolved the case instead on free-expression grounds, which would have carried broader implications and therefore would have been more symmetric. Had the Court held 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 the message expressed.

Symmetry arguments featured explicitly in another case from the 2017 term: *National Institute of Family & Life Advocates v. Becerra (NIFLA)*.⁸ This case asked whether California could require certain clinics serving pregnant women to notify clients that the state would pay for certain

8. 138 S. Ct. 2361 (2018).

services, including abortions, and certain other clinics to provide notice that they were unlicensed (though no license for their operation was required). The law's evident purpose, and primary effect, was to require pro-life "crisis pregnancy centers" that provide pregnancy-related care while discouraging abortion to alert clientele to the availability of more abortion-friendly alternatives. The Court held that the law unconstitutionally compelled speech.

Standing alone, *NIFLA*'s holding was not necessarily asymmetric. Abortion, needless to say, is a fraught political issue, on which partisan coalitions 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. 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*.⁹ 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. Against that backdrop, Breyer accused the majority of defying "the law's demand for evenhandedness"—effectively, constitutional symmetry.

This debate between the opinions illustrates how broader, rather than narrower, reasoning may sometimes be preferable in a politically polarized period. The majority might have reduced the decision's asymmetry, and thus softened its partisan sting, by signaling openness to entertaining challenges to at least some other laws imposing disclosure requirements on abortion providers. 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 allegiance¹⁰ and drivers from carrying objectionable messages on their license plates,¹¹ among other things.

A third case, *Janus v. American Federation of State, City and Municipal Employees, Council 31*, presented similar concerns.¹² The

9. 505 U.S. 833 (1992).

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

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

12. 138 S. Ct. 2448 (2018).

Janus majority held, contrary to the Court's forty-year-old decision in *Abood v. Detroit Board of Education*,¹³ that public employers may not compel union-represented public employees to pay dues to support the union's representational functions. 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. 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. 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. The Court thus overturned the laws of some twenty-two states that required payment of union dues in accordance with *Abood*.

Janus may well present a difficult question on the merits regarding the compelled-speech doctrine. Yet the decision's “political valence,” as the majority opinion frankly acknowledged, is unmistakable. Public-sector unions generally support the Democratic Party through contributions, mobilization, and other forms of campaign support, and although *Abood* forbids 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). The Court's holding in *Janus* was in fact—and was widely perceived as—a one-sided blow to the liberal coalition.

Symmetric constitutionalism sharpens this critique. *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 a relatively symmetric result to achieve a relatively asymmetric one.

A last case from the 2017 Term did not involve express debate over symmetry but nonetheless usefully illustrates symmetry's value. In *Murphy v. National Collegiate Athletic Association*, the Court reviewed the Professional and Amateur Sports Protection Act, a rather odd federal statute forbidding states from “authorizing” certain forms of sports betting

13. 431 U.S. 209 (1977), overruled by *Janus*, 138 S. Ct. 2448.

and further providing a civil cause of action to enjoin operation of any such state-authorized sports-betting businesses.¹⁴ 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. So construed, the Court held, the statute impermissibly “commandeered” the state legislative process by dictating how states could regulate rather than by regulating private parties directly. It then further held that none of the statute’s provisions, including its cause of action to enjoin private state-authorized gambling, was severable from the defective provisions.

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. In that context, 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?

Back when federalism was more generally perceived as a conservative cause, the most liberal justices dissented from key anti-commandeering decisions. From a symmetry standpoint, 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.

Symmetry at the Level of Doctrine

Symmetric constitutionalism may have its greatest utility at the level of general doctrinal principles and frameworks. Here, 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.

14. 138 S. Ct. 1461 (2018).

As one example, already noted above, the First Amendment principle of content-neutrality is paradigmatically symmetric: it protects all speakers, across the political spectrum, no matter what viewpoints they express. It also enjoys, for the moment, cross-partisan support on the Supreme Court, as reflected in recent unanimous decisions. Outside the Court, however, the increasing vitriol of our politics and a troubling rise in bigoted speech has led to calls for increased regulation, particularly among progressives. Even on the Court, moreover, cases like *Janus* and *NIFLA* suggest a risk of drifting into highly partisan applications of speech doctrine through inattention to its proper scope of application. The Court should counteract these trends through renewed attention to maintaining symmetry in any further elaborations of First Amendment doctrine.

Separation of powers and federalism are a second area that should be a paradigm case of symmetric constitutionalism, though here the partisan gale threatens to blow judges off course. Particularly in a period like ours in which voters are closely divided over substantive policies, 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. They should embrace maintaining such symmetry as a self-conscious ethos.

Key features of a third area of doctrine, equal protection, also reflect constitutional symmetry, and the symmetric perspective may again highlight some underappreciated 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. For another, in the especially fraught area of affirmative action, the Court's moderate conservatives have staked out an intermediate position over time that allows limited consideration of race and other suspect factors, at least

with respect to higher education admissions, so long as it is part of a holistic, individualized assessment. In light of current partisan configurations' increasingly divergent views on this question and other racial issues, the moderate justices' middle-ground understanding might well be more symmetric, and thus more politically stable, in the particular context of affirmative action than competing proposals in either direction.

Finally, symmetry could help judges and justices navigate the fraught area of substantive due process. Substantive due process decisions regarding contraception, abortion, parental rights, and same-sex marriage, among other things, have been recurrent political flashpoints. From the perspective of symmetric constitutionalism, however, the trouble with substantive due process is not the doctrine itself but the absence of any clear theory to explain the pattern of case results and to enable principled identification of additional unenumerated rights. Whatever path the Court charts in the years ahead in this fraught area, it should take care to formulate an approach that even-handedly permits (or does not permit) recognition of unenumerated rights with differing political valence. 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.

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, and 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.