

Saint Louis University School of Law
Scholarship Commons

All Faculty Scholarship

Spring 2007

The Rhetoric of Symmetry

Karen Petroski

Saint Louis University School of Law

Follow this and additional works at: <https://scholarship.law.slu.edu/faculty>

 Part of the [Legal Writing and Research Commons](#)

Recommended Citation

Petroski, Karen. The Rhetoric of Symmetry. Valparaiso University Law Review, vol. 41, no. 3, pp.1165-1234, Spring 2007.

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarship Commons. For more information, please contact erika.cohn@slu.edu, ingah.daviscrawford@slu.edu.

THE RHETORIC OF SYMMETRY

Karen Petroski*

I. INTRODUCTION

References to the concept of symmetry have appeared in judicial opinions, advocacy efforts, and scholarly commentary throughout American legal history. But for every legal writer who invokes the concept as a logical or moral ideal, there is another who dismisses it as a formalistic distraction or an arid illusion. What is more, although legal writers virtually always use the term “symmetry” as if its meaning were self-evident, in fact they have used the same term to refer to a variety of distinct concepts, each with its own ambiguities.

These inconsistencies, and the deeper patterns beneath them, should be of interest to all legal professionals, not only to scholars. Normative references to symmetry are more than trivial examples of the rhetorical practices that give our legal discourse its characteristic texture. Like all of these rhetorical practices, references to symmetry both structure and constrain legal reasoning in significant ways.¹ In fact, legal rhetoric and legal reasoning—the themes and structures of persuasion typical of legal writing—are simply two sides of the same coin, interdependent and mutually supporting aspects of any functional, effective legal communication.² Partly as a result of this relationship between legal rhetoric and reasoning, the examination of our rhetorical practices can indicate the limits of our thinking.³ Sustained analysis of even a seemingly insignificant rhetorical device may serve this end, as this Article seeks to demonstrate. The historical analysis presented here suggests that despite the inconsistencies noted above, references to symmetry have played a consistent role in legal writing. But, in part

* J.D., University of California, Berkeley, 2004; Ph.D., Columbia University, 1999.

¹ See NEIL MACCORMICK, *RHETORIC AND THE RULE OF LAW* 31, 54, 254 (2005); J.M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 211-24 (Peter Brooks & Paul Gewirtz eds., 1996). *But see* discussion *infra* note 215.

² See, e.g., JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS IN THE RHETORIC AND POETICS OF THE LAW* 17 (1985) (noting that in classical rhetoric, persuasion involved stating grounds for a conclusion); see also ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 165-93 (2000); MACCORMICK, *supra* note 1; Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2008 (2002); Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 216, 219 (1990); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 (1995); Gerald Wetlauffer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545 *passim* (1990).

³ See *Berkey v. Third Ave. R.R. Co.*, 155 N.E. 58, 61 (N.Y. 1926) (Cardozo, J.) (“Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”).

1166 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

because the nature of this role has never been expressly acknowledged, references to symmetry in legal writing may also function to reinforce broader patterns in legal rhetoric and thinking about law. These remain powerful as long as they remain unexamined. Closer attention to the role the concept has played can help us see ways to counteract the threats these patterns might pose to the effectiveness of our communication in and about legal institutions.

Recent criticism of a parallel theme in contemporary political and military-strategic rhetoric illustrates the potential ramifications of uncritical allusions to “symmetry.” Since the late 1990s,⁴ United States military strategists have increasingly applied the label “asymmetric” to a growing range of nonconventional military challenges.⁵ Many such references to “asymmetric threats” or “asymmetric warfare” have little in common other than application of the adjective to scenarios involving antagonists of the United States.⁶ Commentators critical of this rhetoric have pointed out that asymmetry is always a matter of perspective, that it is nothing new in warfare, and that the United States itself poses a kind of “asymmetric threat” to other global actors.⁷ These critics contend that labeling new scenarios “asymmetric” is a way of avoiding analysis by identifying a relationship as self-evidently unfair.⁸ More importantly, these uses of the label distance United States military strategy from responsibility for security shortfalls by attributing those shortfalls to the inherent unfairness of opponents’ tactics, rather than to any failure by

⁴ Kenneth E. McKenzie, Jr., *What Is Asymmetric Warfare?*, in THE REVENGE OF THE MELIANS: ASYMMETRIC THREATS AND THE NEXT QDR 1 (2000), available at <http://www.hdu.edu/inss/McNair/mcnair62/m62cvr.html> (dating the first appearance of the term to a 1997 Quadrennial Defense Review report); see also Robert David Steele, *The Asymmetric Threat: Listening to the Debate*, JOINT FORCES Q., Aut.-Wint. 1998-99, at 78-84, available at http://www.dtic.mil/doctrine/jel/jfg_pubs/1520.pdf.

⁵ See, e.g., STEPHEN J. BLANK, RETHINKING ASYMMETRIC THREATS 7 (Sept. 2003), available at www.au.af.mil/au/awc/awcgate/ssi/asymetry2.pdf; STEVEN LAMBAKIS ET AL., UNDERSTANDING “ASYMMETRIC” THREATS TO THE UNITED STATES 59-62 (Sept. 2002), available at <http://www.nipp.org/Adobe/Asymmetry%20%20final%2002.pdf>; Timothy J. Thomas, *Deciphering Asymmetry’s Word Game*, MIL. REV. 32, July-Aug. 2001, at 1-2, available at <http://www.leavenworth.army.mil/milrev/English/JulAug01/thomas.htm>. By the mid-2000s the term had entered popular discourse. See, e.g., David Carr, *I’m in Love. Why Shouldn’t I Be Paid?*, N.Y. TIMES, June 20, 2005, at C1 (describing race for celebrity photos among paparazzi and tabloid newspapers as “asymmetric warfare”).

⁶ See BLANK, *supra* note 5, at 3-6; Thomas, *supra* note 5, at 1-2.

⁷ See, e.g., BLANK, *supra* note 5, *passim*; McKenzie, *supra* note 4, at 4-13; Thomas, *supra* note 5, at 2, 6.

⁸ See generally BLANK, *supra* note 5, *passim*; Thomas, *supra* note 5, at 3-4; see also, BLANK, *supra* note 5, at 16 (“[A]symmetric threats or techniques are a version of not ‘fighting fair[.]’ . . .” (quoting INST. FOR NAT’L SEC. STUD., NAT’L DEF. UNIV., STRATEGIC ASSESSMENT 1998, at 169)).

the United States to investigate the strategic goals of various nonstate actors.⁹ In effect, the critics describe references to “asymmetric threats” as themselves subtle threats to national security.

These critics have anticipated many of the observations that emerge from this Article. They note the extent to which perceptions and assertions of symmetry depend on the speaker’s or writer’s frame of reference, the ways this dependency can result in the assignment of opposed normative values to the concept, the apparent readiness with which writers and speakers use it to avoid confronting or analyzing complex scenarios, and our tendency to overlook all of these implications. This Article shows how these dynamics are also present in legal use of the concept and the term, and how careless references to “symmetry” in that context may also pose a threat of sorts. However, this Article also draws from the story of legal reliance on the concept—positive lessons for more careful approaches to the problems that we have used the term and concept of “symmetry” to avoid rather than to resolve.

Part II of this Article introduces the term and the concept. It first discusses current usage of the term “symmetry” outside the legal context and the three senses in which the term has been used in legal discourse—to refer to holistic aesthetic harmony, to relationships of precise correspondence, and to relationships of bilateral reflection. Part II then explores the power and implications of these senses of the term by discussing the relations between these abstract conceptions and our perceptions and everyday life experiences. By emphasizing the links between concrete experience and the abstractions to which the term refers, this discussion shows how the significance of the concept of symmetry is neither self-evident nor trivially simple. Part III then presents a brief survey of the ways legal scholars to date have nevertheless tended to assume that the meaning of the concept is self-evident. Their possibly increasing reliance on the concept further clarifies the need for a better understanding of its function in legal rhetoric.

Part IV surveys the ways in which the concept has been used in legal rhetoric, primarily judicial opinions, throughout United States legal history. It identifies five areas of judicial functioning to which this rhetoric has linked the concept of symmetry: rendering justice or

⁹ See BLANK, *supra* note 5, at 32 (“[W]hat makes this ‘asymmetric strategy’ a compelling threat is that it surpasses our capabilities of cognition . . .”); see also *id. passim*.

1168 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

achieving fairness, remaining faithful to the purposes of other lawmakers, making coherent law, correcting for market imperfections, and providing reasoned support for conclusions. In each area, legal writers have consistently appealed to symmetry as a norm, but they have also questioned the validity of that norm. Regardless of whether symmetry is viewed positively or critically, however, most references to the concept serve a similar rhetorical function: underscoring the relative powerlessness or passivity of the writing court. Writers of judicial opinions consistently use the term to describe the work courts do and to deny the labor and contingency that go into that work, or to assign this labor and risk to other institutions.

Part V begins by reviewing the patterns described in Part IV in historical perspective to clarify the larger patterns in the use of the term. Specifically, Part V explains how the story told in Part IV is one of increasing conceptual pluralism and of increasing reliance on each of the conceptions of symmetry to articulate a posture of judicial passivity. Part V then briefly reviews the problems inherent in current uses of the term, summarizes the lessons that emerge from this review, and offers some preliminary suggestions for more self-aware use of the concept of symmetry in legal thought and writing.

II. SENSES OF SYMMETRY

A. *Current Usage*

According to standard modern dictionaries, English speakers currently use the term “symmetry” in four related ways. The relationships among these senses of the term are, at least superficially, relatively straightforward: (1) “symmetry” refers to the quality of having “balanced proportions,” or “beauty of form deriving from balanced proportions”; (2) it also refers to “the property of being symmetrical; [especially] correspondence in size, shape, and relative position of parts on both sides of a dividing line”; (3) in a more technical geometric sense, it refers to the property of “a rigid motion of a geometric figure that determines a one-to-one mapping onto itself”; and (4) finally, in a sense used primarily in physics, it refers to “the property of remaining invariant under certain changes (as of orientation in space . . . or of the direction of time flow).”¹⁰ The following discussion outlines the history of and some of the relationships among these senses of the term.

¹⁰ MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 1266 (11th ed. 2004) [hereinafter MERRIAM WEBSTER’S].

1. Holistic Symmetry

The first dictionary sense of “symmetry” – “beauty of form deriving from balanced proportions” – is close to the original Hellenistic Greek meaning of the term.¹¹ For many centuries afterward this was its primary meaning. It is also the earliest sense in which the term appears in legal usage in the United States.¹² At least after its initial appearance, this sense has largely lacked the connotations of correspondence tied to the other three senses in current use.¹³ That is, instead of naming a relationship among different entities, this sense of the term names a unified relationship between parts and whole or a human response arising from perception of such a relationship. Still, this sense of symmetry overlaps with the other senses discussed below. Most obviously, instances of geometric symmetry, discussed next, appear to most people to involve pleasingly “balanced proportions,”¹⁴ as discussed in Part II.B.2 below.

2. Symmetry as Correspondence and Reflection

The second and third senses of the term noted above are particularly closely related, as the second is a special case of the third. Because the third sense – referring to “the rigid motion of a geometric figure” – is the broader sense, understanding it helps to clarify the second sense, that of

¹¹ See HERMANN WEYL, SYMMETRY 5-25 (1952); Salomon Bochner, *Symmetry and Asymmetry*, in 4 DICTIONARY OF THE HISTORY OF IDEAS 346 (1973-74), available at <http://etext.lib.virginia.edu/DicHist/dict.html>. The OXFORD ENGLISH DICTIONARY 456 (J.A. Simpson & E.S.C. Weiner, eds., 2d ed. 1989), lists usages corresponding to the first sense from the sixteenth century, but usages corresponding to the second, third, and fourth senses only from the nineteenth century on. *Id.*

¹² See, e.g., *Commonwealth v. Coxe*, 4 U.S. (4 Dall.) 170, 203 (1800) (Yeates, J.). “The construction I have adopted, appears to me to restore perfect symmetry to the whole act, and to preserve its due proportions.” *Id.*

¹³ See Katherine Brading & Elena Castellani, *Symmetry and Symmetry Breaking*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2004), available at <http://plato.stanford.edu/archives/win2004/entries/symmetry-breaking>. Brading and Castellani note that the term’s roots imply a correspondence of parts: “The term ‘symmetry’ derives from the Greek words *sun* (meaning ‘with’ or ‘together’) and *metron* (‘measure’), yielding *summetria*, and originally indicated a relation of commensurability It quickly acquired a further . . . meaning . . . of a proportion . . . harmonizing the *different* elements into a *unitary whole*.” *Id.*

¹⁴ See DOROTHY K. WASHBURN & DONALD W. CROWE, SYMMETRIES OF CULTURE: THEORY AND PRACTICE OF PLANE PATTERN ANALYSIS *passim* (1988). On the other hand, balanced proportions do not always involve precise correspondence of parts. See, e.g., GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 602-06 (1969) (discussing shifts in understanding of the balance involved in models of mixed government from the balancing of complementary components to the balancing of multiple identical components).

1170 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

correspondence on both sides of a dividing line, which may now be the most widespread sense in general usage.¹⁵

Geometers identify four types of “rigid motion” giving rise to symmetrical relationships between figures on a two-dimensional plane.¹⁶ Moving a figure in accordance with one of the motions to a new location on a plane produces another figure, which has a relationship of symmetry, or perfect structural correspondence, with the first. The four symmetry-producing rigid motions are: (1) reflection across an axis, resulting in reflective or bilateral symmetry, the second dictionary sense of the term (found, roughly, in the human face); (2) translation along a line, or translational symmetry (present in the holes on a belt); (3) rotation about a point, resulting in rotational symmetry (seen in the arms of a starfish); and (4) translation accompanied by reflection across a line parallel to the line of translation, or glide reflectional symmetry (exemplified by a set of footprints).¹⁷

English speakers’ use of the term “symmetry” to refer to spatial correspondence of this variety seems to have solidified during the nineteenth century.¹⁸ A more general use of the term to refer to relationships—physically concrete or not—of precise correspondence also probably first emerged in the nineteenth century, both in and outside of legal writing.¹⁹ Legal rhetoric still uses the term in this way, but it has been joined and, in a number of contexts, eclipsed by the second sense—that of reflective symmetry.

This more specific second sense of the term became widely popular later than the use of the term to refer to relationships of precise correspondence.²⁰ Adoption of this sense in legal writing was even more belated. Although references to bilateral symmetry appear sporadically in early twentieth-century legal discourse,²¹ this did not become a common way of articulating abstract relationships in legal writing until

¹⁵ See WASHBURN & CROWE, *supra* note 14, *passim* (noting the ascendancy of this sense).

¹⁶ *Id.* at 44; Bochner, *supra* note 11, at 351.

¹⁷ WASHBURN & CROWE, *supra* note 14, at 44-50.

¹⁸ BOCHNER, *supra* note 11, at 347, 351.

¹⁹ See OXFORD ENGLISH DICTIONARY, *supra* note 11, at 456. The *Oxford English Dictionary* dates at 1823 the first usage of the term to mean “[e]xact correspondence in position of the several points or parts of a figure or body.” *Id.*

²⁰ See WASHBURN & CROWE, *supra* note 14, *passim*.

²¹ See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 328 (1937).

the late twentieth century.²² Now, however, it seems to be becoming the most prevalent sense in which the term is used in legal rhetoric.²³

Because of this prevalence, a further word on the relation between the bilateral sense of symmetry and the other types of geometric symmetry is in order. In at least one significant way, reflective symmetry is unique among the geometric symmetries: it is the only inherently binary form of symmetry. Other types of symmetry may exist among indeterminate or even infinite numbers of repeated figures, but in two dimensions, a relationship of reflective symmetry by definition exists between two figures. Metaphoric references to this conception of symmetry to explain issues thus limit, from the beginning, the amount of information that will be addressed in each instance.²⁴

3. Symmetry as Invariance

The relationship between the geometrical senses of “symmetry” and the fourth dictionary definition—the “property of remaining invariant under certain changes”²⁵ attributed to physical phenomena—should now be clear. This notion of invariance in one respect, despite transformation in others, is simply an abstract extension of the concept of rigid motion, a metaphorical elaboration of the geometric meaning of “symmetry.”²⁶

²² See *infra* Part V.A.

²³ See *infra* Parts II, III.A.3-III.A.5, III.D, IV.A; see also *infra* notes 45-53.

²⁴ See *Legal Servs. Corp. v. Velazquez* 531 U.S. 533, 549 (2001) (Scalia, J., dissenting). In his dissenting opinion, Justice Scalia used the bilateral conception of symmetry to support his argument that the restriction on legal services funding at issue was not viewpoint discriminatory. *Id.* Justice Scalia pointed out that the funding ban “is symmetrical: Litigants challenging the covered statutes . . . do not receive . . . funding, and neither do litigants defending those laws against challenge.” *Id.* at 551. Justice Scalia’s designation of all affected parties as “litigants” interchangeable but for their litigation positions permitted his point but also limited the accuracy of his description. *Id.*

In other ways, reflective symmetry is clearly analogous to other geometrical symmetries. In all cases, the parts of geometrically symmetrical figures correspond precisely to the parts of the figures with which they are symmetrical. Thus, although bilateral symmetry is in one sense categorically different from the other forms of geometrical symmetry, it is also just like these other forms in that it involves a relationship of precise structural correspondence. *But see* DONALD D. HOFFMAN, *VISUAL INTELLIGENCE: HOW WE CREATE WHAT WE SEE* 96 (1998) (“Repetition, after all, is just translation, whereas [reflective] symmetry is translation *and* reflection.”).

²⁵ MERRIAM WEBSTER’S, *supra* note 10, at 1266.

²⁶ See BAS C. VAN FRAASSEN, *LAWS AND SYMMETRY* 243 (1990). Philosopher of science Bas Van Fraassen explains this sense in this way: “Symmetries are transformations . . . that leave all relevant structure intact—the result is always exactly like the original, in all *relevant* respects.” *Id.*

1172 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

This sense, too, appears to have first gained wide usage in the nineteenth century.²⁷ Legal rhetoric rarely uses the term in this sense. Still, the metaphorical extension that gave rise to this meaning of the term hints at the incredible conceptual adaptability of the geometric sense of the term, a phenomenon illustrated at length in Parts II.B.2 and II.B.3 below.

B. *Giving Content to Symmetry*

1. Is Symmetry an Empty Concept?

In a well-known critique of the concept of equality, Peter Westen characterizes the concept as an “empty idea.”²⁸ Symmetry is, like equality, a relational concept with precise mathematical meanings and protean legal meanings.²⁹ Does Westen’s critique apply to the concept of symmetry as well?³⁰

Westen’s main point is that the concept of equality is so purely abstract and relational that it cannot, in itself, possibly have any concrete content—thus, it is “empty.” Although Westen never couches his point in precisely these terms, his work describes legal reliance on the concept of equality as a conceptual and rhetorical shortcut whose use both permits and masks avoidance of the analysis of relevant normative issues.³¹ This analysis is similar to that of the critics of the “asymmetric

²⁷ See OXFORD ENGLISH DICTIONARY, *supra* note 11, at 457. The *Oxford English Dictionary* lists 1819 as the date of the first usage of the word “symmetrical” “[a]ppplied to an expression, function, or equation whose value is never altered by interchanging the values of any two variables or unknown quantities.” *Id.*; see also Bochner, *supra* note 11, at 352-53.

²⁸ See PETER WESTEN, SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF “EQUALITY” IN MORAL AND POLITICAL DISCOURSE (1990) [hereinafter WESTEN, SPEAKING OF EQUALITY]; Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) [hereinafter Westen, *Empty Idea*].

²⁹ See WESTEN, SPEAKING OF EQUALITY, *supra* note 28, at 262-80. Isaiah Berlin, cited by Westen in this connection, even equated the concepts in discussing the meaning of “equality.” See Isaiah Berlin, *Equality as an Ideal*, in JUSTICE AND SOCIAL POLICY 128, 131 (F. Olafson ed., 1961). “The assumption is that equality needs no reasons, only inequality does so; that uniformity, regularity, similarity, symmetry . . . need not be specially accounted for, whereas differences, unsystematic behaviour, change in conduct, need explanation . . .” *Id.*

³⁰ See, e.g., WHITE, *supra* note 2, at 121 (noting that a danger of analysis in terms of binaries or contraries is an excessive focus on the relation between the contraries, at the expense of attention to the substance of the contrary elements).

³¹ See Westen, *Empty Idea*, *supra* note 28, at 547. In Westen’s view, the concept of equality always borrows its substance from the rules whose application is at issue. *Id.* In his book, Westen addresses how the term allows its users to avoid performing or articulating certain communicative and cognitive tasks, primarily the precise disambiguation of allied ideas. *Id.*; see also WESTEN, SPEAKING OF EQUALITY, *supra* note 28, at 262-80.

threat” concept. But Westen’s insistence on addressing his subject in exclusively abstract terms, although it is consistent with a certain philosophical tradition, seems to foreordain his conclusion regarding the nature of the concept of equality.³² Ultimately, his critique approaches tautology.

In an attempt to avoid this pitfall, this Article next looks at one approach to understanding how our experience gives content to abstract concepts, including the conceptions of symmetry presented above.

2. From Perception to Concept

Over the past few decades, legal scholars have fruitfully drawn on research in cognitive science for insight into such central legal concerns as the nature of intentional action and decision-making. Much of the most influential work in this vein has focused on the intentions and unconscious biases of those subject to the law³³ or making the law.³⁴ With a few exceptions, however, this type of scholarship has not applied the insights of cognitive and behavioral science to explore the implications of the conscious and unconscious decision-making involved specifically in persuasive communication, or rhetoric,³⁵ even though some recent interdisciplinary work in cognitive science has focused heavily on the relationships linking perception, experience, language use, and reasoning.³⁶ This work suggests that understanding our

³² See WESTEN, SPEAKING OF EQUALITY, *supra* note 28, at 285. This limitation is reproduced by most of Westen’s critics. *Id.* Westen himself acknowledges it, albeit not as a problem. *Id.*

³³ See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

³⁴ See, e.g., Ronald Chen & Jon Hansen, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103 (2004); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1988); Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153 (2002).

³⁵ But see STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* (2001).

³⁶ George Lakoff and Mark Johnson are prominent popularizers of this particular approach. See GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1987); GEORGE LAKOFF & MARK JOHNSON, *PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT* (1999) [hereinafter LAKOFF & JOHNSON, *PHILOSOPHY IN THE FLESH*]. For other introductions to a similar approach to interdisciplinary cognitive science, see MARK TURNER, *COGNITIVE DIMENSIONS OF SOCIAL SCIENCE passim* (2001); FRANCISCO J. VARELA ET AL., *THE EMBODIED MIND: COGNITIVE SCIENCE AND HUMAN EXPERIENCE* 7-9 (1993); ROBERT A. WILSON, *BOUNDARIES OF THE MIND: THE INDIVIDUAL IN THE FRAGILE SCIENCES: COGNITION* 144-213 (2004); and Mark Anderson, *How to Study the Mind: An Introduction to Embodied Cognition*, in *EMBODIED COGNITION AND PERCEPTUAL*

1174 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

perceptions and experiences of symmetry may be crucial to understanding the full implications of more metaphorical and abstract uses of the term. The following discussion explains this approach briefly, then reviews what some researchers have learned about human perception of symmetry in the various senses described above, before turning to the question of how these perceptions might shape and inform legal uses of the term.

The reasons for the appearance of abstract concepts, like that of symmetry, in the cognitive systems of developing children are not well understood, but the capacity appears to be a human universal.³⁷ Based on this fact and on experimental results, some researchers and theorists in cognitive science have suggested that the capacity for abstraction, including the use of language referring to abstractions, does not depend on different brain functions from those we use in exercising our capacities for perception and physical action. In this approach, the building blocks of purposive action, abstract thought, and language alike are “stable recurring patterns of sensorimotor experience,”³⁸ or consistent patterns of neural activity known as schemas,³⁹ which provide the raw material and concrete basis for our conceptual systems, including our use of language and our reasoning.⁴⁰ For example, our

LEARNING IN ADAPTIVE DEVELOPMENT (F. Santoianni & C. Sabatano eds., 2005), available at <http://cogprints.org/3945/>.

³⁷ See MORTON HUNT, *THE STORY OF PSYCHOLOGY* 528-29 (1993).

³⁸ Mark Johnson & Tim Rohrer, *We Are Live Creatures: Embodiment, American Pragmatism, and the Cognitive Organism*, in 1 *BODY, LANGUAGE AND MIND* 11, 12 (Jordan Zlatov et al. eds., 2005).

³⁹ See MARK JOHNSON, *THE BODY IN THE MIND: THE BODILY BASIS OF IMAGINATION, REASON, AND MEANING* (1987).

⁴⁰ When a person experiences a visual sensation, the stimulus activates a networked system of connections within the person's brain. See, e.g., HOFFMAN, *supra* note 24, at 67-71, 177-82; JOHN HOLLAND, *EMERGENCE: FROM CHAOS TO ORDER* 101-14 (1998); VARELA ET AL., *supra* note 36, at 93-98. Some connections take the form of “topological neural maps,” patterned in ways corresponding to (but not reproducing or representing) the structure of the perceived object. Johnson & Rohrer, *supra* note 38, at 12. Such maps are also activated by motor activity, as well as by reading, imagining, and reasoning—and the neural maps activated by mental activities that we typically understand to be distinct from physical experience in fact overlap significantly with those activated by physical perception or manipulation. *Id.* at 8-13; Tim Rohrer, *Image Schemata in the Brain*, in *FROM PERCEPTION TO MEANING: IMAGE SCHEMAS IN COGNITIVE LINGUISTICS* 7-23 (Beate Hempe & Joe Grady eds., 2005). Thus, experiments have shown that “abstract reasoning about economics can be done by the same structured neural network that has the capacity to control high-level motor schemas.” LAKOFF & JOHNSON, *PHILOSOPHY IN THE FLESH*, *supra* note 36, at 583 (citing S. Narayanan, *Embodiment in Language Understanding: Sensory-Motor Representations for Metaphoric Reasoning About Event Descriptions* (1997) (unpublished Ph.D. diss., Univ. of Cal., Berkeley)). In other words, perception, action, and abstract conceptualization may not involve fundamentally different types of brain processes. *Id.*

physical experience with containers and their contents generates a stable schema that we use to interact with and draw inferences about not just actual containers of all kinds, but also our selves, our minds, and our creations.⁴¹ On this view, when we identify particular abstract relationships as “symmetrical,” and then draw inferences based on those references, we are using schemas drawn from our perceptions of and experience with concrete relationships or phenomena that we would also identify as symmetrical, such as the human body and many architectural structures.

What has research shown about how we actually experience those concrete relationships and phenomena? One theorist of perception, Michael Leyton, has gone so far as to hypothesize that the mental reconstruction of symmetry, a condition he equates with “indistinguishability,” is the basis of all perception.⁴² His view is fairly radical and not particularly widespread,⁴³ although some of Leyton’s conclusions are shared more widely. For instance, many vision theorists hold that people tend to “interpret image motions as projections of rigid motions in three dimensions” – that is, they experience perceived motion as if it were occurring through the generation of geometric symmetries.⁴⁴ This is one explanation of the process that allows us to feel that we see continuous motion when presented with a sequence of static images, as in a flipbook or a film, and it is fully consistent with Leyton’s theory. On the other hand, in a conclusion that appears to contradict Leyton’s theory, the physiological psychologist Bela Julesz proposed that “the visual system encodes reflection symmetry but not direct repetition[.]”

Further, one approach to the nature of reasoning holds that we draw inferences based on the “entailments” of our cognitive schemas – features, properties, and functional aspects of the underlying concrete schemas. *Id.* Among the entailments of the container schema, for instance, are the facts that we can put things into and take things out of containers and that it may be easier to perceive a container than it is to perceive its contents. *Id.* We use these features to reach conclusions not only about containers but also about things, including other abstract concepts, that we liken to them. *Id.*; see also LAKOFF & JOHNSON, *METAPHORS WE LIVE BY*, *supra* note 36, at 9, 17-19; LAKOFF & JOHNSON, *PHILOSOPHY IN THE FLESH*, *supra* note 36, *passim*; Jacqueline P. Leighton, *Defining and Describing Reason*, in *THE NATURE OF REASONING* 13 (Jacqueline P. Leighton & Robert J. Sternberg eds., 2004).

⁴¹ See LAKOFF & JOHNSON, *METAPHORS WE LIVE BY*, *supra* note 36, at 29-32; LAKOFF & JOHNSON, *PHILOSOPHY IN THE FLESH*, *supra* note 36, at 341, 379-90.

⁴² See MICHAEL LEYTON, *SYMMETRY, CAUSALITY, MIND* (1992).

⁴³ Leyton approaches vision and cognition as modular, simplifying processes. *Compare id.*, with WILSON, *supra* note 36, 172-80, 232-41 (discussing theorists who take a different approach to the conceptualization of vision).

⁴⁴ HOFFMAN, *supra* note 24, at 159.

1176 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

or translation symmetry.⁴⁵ Julesz based this conclusion on experiments in which he showed subjects two types of images. Both types involved the repetition of small arrays of randomly spaced dots. In one set of images, the arrays were repeated through translation, as in a wallpaper pattern. In the other set, the arrays were repeated through reflection. Subjects recognized the reflected arrays as instances of repetition more readily and consistently than they recognized the translated arrays as instances of repetition. Julesz's experiments seemed to show that people might be in some sense hard-wired to perceive reflective symmetry, and also that they prefer reflective symmetry to simple correspondence.

In line with this preference, most other experimental studies investigating the perception of symmetry have focused on reflective symmetry alone, and not in comparison with translational symmetry.⁴⁶ It is possible that researchers are predisposed to identify bilateral symmetry as an interesting topic for research by their own tendency to perceive it more readily.⁴⁷ Much of the experimental data may therefore beg the question of the reason for the predisposition. But even with these limitations, recent studies have provided interesting information regarding our perception of—and strong preference for—bilateral symmetry. People prefer bilaterally symmetrical figures to asymmetrical ones.⁴⁸ Generally, people are also able to reproduce bilaterally symmetrical figures more accurately than asymmetrical ones.⁴⁹ The preference for bilateral symmetry is so strong, in fact, that people will unconsciously distort asymmetrical figures to see them as symmetrical.⁵⁰

⁴⁵ WASHBURN & CROWE, *supra* note 14, at 19. This conclusion was based on experiments in which Julesz demonstrated that “the eye distinguishes between sections of dot arrays which are repeated from array sections which are reflected across a mirror plane.” *Id.*; see also CHRIS MCMANUS, RIGHT HAND, LEFT HAND: THE ORIGINS OF ASYMMETRY IN BRAINS, BODIES, ATOMS AND CULTURES 350-52 (2002).

⁴⁶ See WASHBURN & CROWE, *supra* note 14, at 14, 19. For a discussion of Ernst Mach, who likely conducted the first experimental studies of human perception of symmetry in the late nineteenth century, see HOFFMAN, *supra* note 24, at 95-97 (describing some of Mach's experiments); MCMANUS, *supra* note 45, at 352 (same); and WASHBURN & CROWE, *supra* note 14, at 19-24 (providing synopsis of research on perception of symmetry).

⁴⁷ See HOFFMAN, *supra* note 24, at 95-97 (discussing the flaws of Mach's experiments).

⁴⁸ WASHBURN & CROWE, *supra* note 14, at 21. This preference may not constrain conceptions of human attractiveness as much as was popularized in recent decades. Compare Geoffrey Cowley & Karen Springer, *The Biology of Beauty*, NEWSWEEK, June 3, 1996, at 60 (setting forth popular notion that facial symmetry is directly correlated with perceived attractiveness), with Dahlia Zaidel & Jennifer Cohen, *The Face, Beauty, and Symmetry: Perceiving Asymmetry in Beautiful Faces*, 115 INT'L J. NEUROSCIENCE 1165 (2005), available at <http://cogprints.org/4601/> (finding that subjects detected asymmetry in beauty, and suggesting that faces considered beautiful can be functionally asymmetrical).

⁴⁹ WASHBURN & CROWE, *supra* note 14, at 21, 23.

⁵⁰ *Id.* at 21.

And vertical bilateral symmetry—symmetry on both sides of a vertical axis—is the most perceptually salient form of symmetry.⁵¹ This salience may be a human universal,⁵² although developmental and cultural variations exist in the ease with which people perceive reflective symmetry around axes that are other than vertical.⁵³

This research indicates that the term “symmetry,” at least in the geometric and bilateral senses, refers to a type of perception that we respond to differently from other perceptions. Perception research has also not included research into our perceptions of symmetry in the holistic sense, as such, but researchers have explored our aesthetic perceptions and preferences and our reactions to simplicity and complexity. Much research has found strong preferences for cognitive efficiency,⁵⁴ or simplicity and familiarity, and closure.⁵⁵ But we are not driven only by a need to reduce cognitive complexity and resolve conflict. Experiments on animals and humans have also shown a universal “cognitive need . . . for mental stimulation” in the form of a moderate level of variety and complexity.⁵⁶ Subjects given a choice between a featureless environment and a stimulating one invariably choose the latter.⁵⁷

How do these experimental findings help us to understand the various notions of symmetry described above and, beyond that, the uses of the term in legal communication? First, our drives toward cognitive efficiency and closure, combined with our preference for limited variety, suggest an explanation for the longevity of the holistic conception of symmetry. Ultimately, when we use the term in this sense we seem to be

⁵¹ MCMANUS, *supra* note 45, at 350-52; WASHBURN & CROWE, *supra* note 14, at 21-22.

⁵² WASHBURN & CROWE, *supra* note 14, at 24.

⁵³ *Id.* at 21-22; MICHAEL C. CORBALLIS, *THE LOPSIDED APE: EVOLUTION OF THE GENERATIVE MIND* 129 (1991).

⁵⁴ See HOFFMAN, *supra* note 24, at 27-46; Chen & Hanson, *supra* note 34, at 1128, 1140-68; Maxwell J. Roberts, *Heuristics and Reasoning I: Making Deduction Simple*, in *THE NATURE OF REASONING* 234 (Jacqueline P. Leighton & Robert J. Sternberg eds., 2004).

⁵⁵ Dan Simon has devoted several articles to explaining his experimental demonstration of coherence, a form of logical closure, as a cognitive constraint and applying these findings to legal decision-making. See, e.g., Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 *RUTGERS L.J.* 1 (1998) [hereinafter *Simon, A Psychological Model of Judicial Decision Making*]; Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision-making*, 71 *U. CHI. L. REV.* 511 (2004); Dan Simon, *Freedom and Constraint in Adjudication: A Look Through the Lens of Cognitive Psychology*, 67 *BROOKLYN L. REV.* 1097 (2002); see also Johnson & Rohrer, *supra* note 38, at 13.

⁵⁶ HUNT, *supra* note 37, at 493-94.

⁵⁷ *Id.* at 494 (citing ROBERT A. BARON ET AL., *PSYCHOLOGY: UNDERSTANDING BEHAVIOR* 320 (1980)); ROSS BUCK, *HUMAN MOTIVATION AND EMOTION* 356 (1988).

1178 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

referring to our satisfaction at attaining a coherent perception or conceptualization.⁵⁸ Because it refers to the result of a process, this conception does not imply any need for further action or analysis; it presupposes the prior satisfactory completion of a process without implying anything in particular about the nature of that process. The “balanced proportions”⁵⁹ involved may, in some cases, be akin to bilateral reflection, but could just as easily be other relationships we are disposed to perceive as pleasing, possibly because of the frequency with which we encounter them.⁶⁰ When we achieve or need to assert that we have achieved comprehension of the solution to a problem, it is therefore natural to think of and describe the achievement in terms of a diffuse, pleasing holism.⁶¹ This holism is not a property of the problem itself, or a property of its parts or the process of its solution, but a feature we attribute to its solution.

The observations described above also suggest ways to be more specific about the significance of the concept of bilateral symmetry. As noted above, this type of symmetry is an especially salient visual pattern and conceptual schema.⁶² Its perceptual salience is paralleled by its prevalence in linguistic usage and experimental inquiry, as well as the growing predominance of reflective symmetry over translational symmetry in legal conceptualization.⁶³ Schemas of reflective symmetry are particularly powerful because their binary simplicity efficiently satisfies both our drive toward moderate complexity and our drive toward closure—they embody both variety and completeness.⁶⁴ In several regards, this schema also bears directly on our self-conceptualization as active individuals and social beings. For instance, it has been suggested that we associate vertical reflective symmetry not only with humanity, as the human body outwardly appears bilaterally symmetrical,⁶⁵ but also with the capacity for effective directed action, as a creature lacking bilaterally symmetrical appendages cannot move in a

⁵⁸ See Chen & Hanson, *supra* note 34; *supra* note 55.

⁵⁹ MERRIAM WEBSTER'S, *supra* note 10, at 1266.

⁶⁰ See *infra* Part V.B.2.

⁶¹ See *supra* note 55; *infra* note 302.

⁶² See *supra* notes 48-53 and accompanying text; see also TURNER, *supra* note 36, at 41-42 (identifying symmetry as among the strong regularities in the construction of meaning).

⁶³ See *infra* Parts III, IV.D.

⁶⁴ See, e.g., WHITE, *supra* note 2, at 115. “[T]he most significant truth is a simultaneous statement of opposing truths.” *Id.*

⁶⁵ See WEYL, *supra* note 11, at 3. But see MCMANUS, *supra* note 45, at 95 (noting that the human body is actually characterized by “external symmetry coupled with a gross internal asymmetry of the viscera”).

straight line.⁶⁶ A bilaterally reflective symmetrical schema can also structure our conceptualization of the most rudimentary form of social existence: interaction between two individuals, at least when observed passively by a third party.⁶⁷ But at the same time, reflective symmetry is linked to schemas of stasis; we perceive something like reflective symmetry when we perceive substances in absolute equilibrium, like items on a balancing scale.⁶⁸ Bilateral symmetry schemas thus paradoxically and powerfully embody both action and its nullification.⁶⁹ These properties appeal simultaneously to our drives toward cognitive efficiency and closure⁷⁰ and to our drive toward manageable complexity.⁷¹

3. Symmetry in the Constructed World

Cognitive scientists and those drawing on their work have studied not only the experiences of individuals, but also human interactions and other environmental factors as cognitive context.⁷² The notion of distributed or extended cognition⁷³ refers to the ways in which “successful cognition often requires many functionally interacting agents and instruments, no one of whom conducts the thinking entirely or even mostly.”⁷⁴ This approach notes the human tendency to “offload” cognition on to artifacts, such as written records and computers, and institutions, such as language and social organization, and it takes those factors to be integral parts of our cognitive apparatus.⁷⁵ This approach also stresses the extent to which cognition is an interactive, not passive,

⁶⁶ See generally CORBALLIS, *supra* note 53, at 81, 101, 206; MCMANUS, *supra* note 45, at 91-94; WEYL, *supra* note 11, at 27.

⁶⁷ See PAUL SEABRIGHT, *THE COMPANY OF STRANGERS: A NATURAL HISTORY OF ECONOMIC LIFE* 48-66 (2004).

⁶⁸ WEYL, *supra* note 11, at 25.

⁶⁹ Cf. Bochner, *supra* note 11, at 349-51 (discussing limitations of notion of bilateral symmetry).

⁷⁰ See *supra* notes 54-55 and accompanying text.

⁷¹ See HUNT, *supra* note 37, at 493-94.

⁷² See generally EDWIN HUTCHINS, *COGNITION IN THE WILD* (1995); LAKOFF & JOHNSON, *PHILOSOPHY IN THE FLESH*, *supra* note 36, at 107.

⁷³ See HUTCHINS, *supra* note 72; WILSON, *supra* note 36; cf. MARY DOUGLAS, *HOW INSTITUTIONS THINK* (1987).

⁷⁴ TURNER, *supra* note 36, at 46. “[H]uman beings arrange their environments to serve, extend, and alter their thinking, or, metaphorically, rely on their environments to do some of their thinking for them.” *Id.* Robert Wilson terms this “exploitative representation” and presents the example of using a pen and paper to perform simple mathematical computations. WILSON, *supra* note 36, at 162-80, 291.

⁷⁵ See, e.g., CORBALLIS, *supra* note 53, at 63-75; TERRENCE W. DEACON, *THE SYMBOLIC SPECIES: THE CO-EVOLUTION OF LANGUAGE AND THE BRAIN* 402-05 (1997); WILSON, *supra* note 36, at 183-307.

1180 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

process.⁷⁶ The approach is relevant to understanding the various senses of symmetry in legal rhetoric in at least two ways.

First, the fact that the experience of those involved in creating legal rhetoric involves a large number of human-made artifacts may shed some light on their, and our, metaphoric use of schemas of translational symmetry. The discussion above noted that people may be less disposed to perceive translational symmetry than they are to perceive reflective symmetry. Yet humans are also clearly drawn to translational symmetry; people across cultures have had a striking tendency to create artifacts including not only reflectional, but also translational and glide-reflective symmetries as components of their design and, more recently, to create and value artifacts that are translationally symmetrical in the sense that they are, for all practical purposes, identical to one another.⁷⁷ Mass-produced artifacts exhibiting symmetries of both types now pervade the perceptible lived environments of many people more extensively than do any natural symmetries.⁷⁸ This development affects perception and, as a consequence, thinking.

For instance, a person who grows up in a city surrounded by structures with many geometrically symmetrical features will actually develop a slightly different perceptual apparatus from a person who does not develop while surrounded by similar stimuli.⁷⁹ This different perceptual apparatus will make different cognitive schemas available to that person. Increasingly, these symmetries seem to be a given. Yet it is always evident that they are created, rather than natural. They bespeak controlled, predictable, and thus comforting repetition, on the one hand, and endless proliferation, on the other. They threaten to overwhelm us,

⁷⁶ See, e.g., WILSON, *supra* note 36, at 221.

⁷⁷ Aesthetic and functional creations in many cultures recreate symmetries compulsively. See WASHBURN & CROWE, *supra* note 14, at 7. Conceptual creations also exhibit this tendency. See LEYTON, *supra* note 42; see also J.M. Balkin, *The Crystalline Structure of Legal Thought*, 39 *RUTGERS L. REV.* 1 (1986).

⁷⁸ See WASHBURN & CROWE, *supra* note 14, at 13; cf., e.g., CORBALLIS, *supra* note 53, at 308; LEYTON, *supra* note 42, at 586-98.

⁷⁹ See HUNT, *supra* note 37, at 454-55. "Line detector" cells in the visual cortex become specialized through use and development to respond to vertical and horizontal lines. *Id.* Kittens raised in an environment lacking vertical lines will develop a visual apparatus unable to perceive such lines. "Similarly, people reared in cities have more exposure to vertical and horizontal lines during early childhood than to lines oriented otherwise, and develop a greater sensitivity to the former." *Id.* (citing R.B. Annis & B. Frost, *Human Visual Ecology and Orientation Anisotropies in Acuity*, 182 *SCIENCE* 729-31 (1973)); see also LEYTON, *supra* note 42, at 596 ("Mass production . . . creates an environment that is a hierarchy purely of symmetries, and this ensures that behavior is a hierarchy purely of symmetries.").

yet imply a history of human control.⁸⁰ As the discussion below shows, the ambivalence inherent in this conceptual schema, which is slightly different from the ambivalence inherent in references to bilateral symmetry, has also found its way into legal rhetoric.

The second insight provided by the notion of distributed cognition is the perspective it suggests on the legal system itself, a perspective complemented by the role that the concept of symmetry has played in legal rhetoric, as discussed more fully below. To date, legal scholarship that has drawn on cognitive science research focused mostly on the cognition of individuals, not on interpersonal or institutional cognition.⁸¹ But this focus is not inherent in the nature of either subject. Both courts and legal discourse are tools with which people solve complex problems that they cannot solve on their own, either because they individually lack sufficient cognitive resources⁸² or because diverse perceptions and interests make it impossible for each individual personally involved in the problems to accommodate all relevant perspectives on a state of affairs.⁸³ In this way, legal systems can be understood as cognitive systems, even though they are transpersonal systems.⁸⁴ Procedural devices, such as rules of evidence, juries, discovery rules, and other mechanisms for the generation of consensual facts, are paradigmatic examples of distributed cognition. So is the form of the reasoned judicial

⁸⁰ See, e.g., CORBALLIS, *supra* note 53, at 308 (“The proliferation of objects means that we need different and more economical ways to represent them in our minds.”); see also JEAN BAUDRILLARD, *SIMULACRA AND SIMULATION* (Sheila Farina Glaser, trans., 1994); WALTER BENJAMIN, *THE WORK OF ART IN THE AGE OF MECHANICAL REPRODUCTION* (1937); CORBALLIS, *supra* note 53, at 182-86, 195-97.

⁸¹ See, e.g., WINTER, *supra* note 35; sources cited *supra* note 36. This may be in part because of the difficulties in working out clear models of extended cognition. See generally DOUGLAS, *supra* note 73; WILSON, *supra* note 36, at 265-307.

⁸² See DOUGLAS, *supra* note 73, at 111-28.

⁸³ Many anthropologists of law take a similar view. See, e.g., Sally Engle Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057, 2063 (1987); see also KARL LLEWELLYN, *THE BRAMBLE BUSH* 12 (1930) (describing law as “[w]hat . . . officials do about disputes”) (emphasis omitted). Certain areas of law, such as the law of agency, contracts, and corporations, do acknowledge and institutionalize the necessarily social, extended nature of cognition.

⁸⁴ See DOUGLAS, *supra* note 73.

1182 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

opinion.⁸⁵ The cognitive work performed by judicial opinions is, indeed, a crucial part of the social and political work they perform.⁸⁶

Another aspect of the American legal system performing an important distributed cognitive function more commonly recognized as such is the legal academy. But this function extends beyond the education of students.⁸⁷ The work produced by legal scholars also performs self-evidently, and often self-consciously, collective problem-solving functions.⁸⁸ Yet, as Part III demonstrates, this function of legal scholarship does not always inform scholars' methods. Legal scholars' use of the concept of symmetry provides an instructive case study of this phenomenon.

III. SYMMETRY IN RECENT LEGAL SCHOLARSHIP

In the past two or three decades, legal scholars have increasingly relied on conceptual schemas of symmetry to organize their analyses and recommendations.⁸⁹ But the concept has been subjected to surprisingly

⁸⁵ For traditional justifications, see, e.g., Alexander M. Bickel, *The Supreme Court 1960 Term – Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 64-65, 76-77 (1961) [hereinafter Bickel, *The Passive Virtues*]; Frederick Schauer, *Giving Reasons*, 47 STAN L. REV. 633, 653-59 (1995); and David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737-38 (1987).

⁸⁶ Opinions publicize the conceptual bases for the resolution of conflicts in a way allowing affected individuals to integrate that resolution into their own lives, see JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* (1990); DOUGLAS, *supra* note 73, and facilitating the resolution of other problems by other participants in the legal system, including other courts and legislatures. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 156, 162-63, 240 (2d ed. 1986) [hereinafter BICKEL, *THE LEAST DANGEROUS BRANCH*]; Bickel, *The Passive Virtues*, *supra* note 85, at 50-51, 56, 60-64.

⁸⁷ For example, the type of learning encouraged through Socratic dialogue is, contrary to received wisdom, not unique to legal education, but institutionalized throughout legal practice. See Michael C. Dorf, *The Supreme Court 1997 Term – Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 33-34 (1998); see also BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 86, at 156.

⁸⁸ See, e.g., Shapiro, *supra* note 85, at 731.

⁸⁹ Work in the 1950s and early 1960s introduced the concepts of information and other asymmetries into economic and political analysis. See, e.g., DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* 58 (1958); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961). Otherwise, the earliest example of legal scholarship relying on the concept of symmetry for organizational or normative purposes revealed in the research for this project dates from 1965. Charles D. Tarlton, *Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation*, 27 J. POL. 861 (1965). For other early examples, see David Gray Adler, *The Framers and Treaty Termination: A Matter of Symmetry*, 1981 ARIZ. ST. L.J. 891; William C. Gifford, Jr., *United States Tax Effects of Foreign Losses: A Symmetry Analysis*, 83 YALE L.J. 312 (1973); and Luther M. Swygert, *The Proposed National Court of Appeals: A Threat to Judicial*

little analysis. One scholar, Robert Laurence, has critically analyzed the sense of the term “symmetry” used in physics in connection with his examination of patterns in federal Indian law doctrine.⁹⁰ Two others, Barbara Flagg and Katherine Goldwasser, have advanced a brief assessment of the function of symmetry as a norm in legal discourse.⁹¹ But these approaches, discussed below, are not exhaustive analyses of the concept. They are also anomalous; most commonly, legal scholars note the extent to which concepts of balance (reflective symmetry)⁹² and equality (translational symmetry)⁹³ underpin legal thought, then stop analysis at the point of this identification, reducing the schemas to a priori principles.⁹⁴

A comprehensive study of the use of the schemas in legal scholarship would require a great deal of space. This survey presents just a few illustrations of how the schemas work in legal scholarship in order to clarify why the present study is needed.

A. *Uses of Symmetry in Legal Scholarship*

1. Symmetry as an Organizing Device

In recent decades, legal scholars have increasingly used the concept of symmetry, mainly in the bilateral sense, to organize presentation of their insights. Matter organized in this way ranges from the domain of legal doctrine at its most abstract level, conceived as an ordered system built on conceptual opposition,⁹⁵ through the relationships and tensions

Symmetry, 51 IND. L.J. 327 (1976). As other examples cited in this section suggest, the number of articles giving a prominent place to the concept has increased greatly since the 1990s, as has the volume of legal scholarship generally.

⁹⁰ Robert Laurence, *Symmetry and Asymmetry in Federal Indian Law*, 42 ARIZ. L. REV. 861 (2000).

⁹¹ Barbara Flagg & Katherine Goldwasser, *Fighting for Truth, Justice, and the Asymmetrical Way*, 76 WASH. U. L.Q. 105 (1998).

⁹² See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 159 (2d ed. 1994) (“[J]ustice is traditionally thought of as maintaining or restoring a *balance* or *proportion*.”); WINTER, *supra* note 35, at 16, 115 (“It is hard to imagine a system of moral reasoning that is not motivated by the BALANCE schema.”); see also JOHN RAWLS, *A THEORY OF JUSTICE* 36, 48-53 (1971) (describing device of “reflective equilibrium”).

⁹³ See, e.g., HART, *supra* note 92, at 159; RAWLS, *supra* note 92, at 54-60; John E. Coons, *Consistency*, 75 CAL. L. REV. 59, 99-103 (1987).

⁹⁴ See, e.g., Coons, *supra* note 93.

⁹⁵ See, e.g., Leo Katz, *What We Do When We Do What We Do and Why We Do It*, 37 SAN DIEGO L. REV. 753, 754 (2000) (citing Weyl, *supra* note 11, for the proposition that “the best way to explore any subject you are interested in . . . is to explore its symmetries and asymmetries”); cf. Balkin, *supra* note 77.

1184 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

among various constitutional principles,⁹⁶ to highly specific doctrinal questions.⁹⁷

In this work scholars usually adopt the reflective sense of symmetry, apparently for its familiarity, its simplicity, and its analytic implications.⁹⁸ The normative implications of the conception in this type of scholarship consist mainly of the ways in which bilaterally symmetrical organization implies that analytic possibilities are exhausted once contraries are considered. This vein of scholarship assumes that the utility of the concept is self-evident and makes no explicit claims about the normative value of any sense of symmetry.

2. Symmetry as a Norm

Scholars have also used the concept of symmetry in more self-consciously normative ways.⁹⁹ Normative use of the bilateral sense of symmetry is especially common in contexts conventionally conceptualized in oppositional terms, such as questions of procedure in the adversary system¹⁰⁰ and questions surrounding private economic transactions.¹⁰¹ In both contexts, scholars sometimes use the concept of symmetry to argue for the establishment of a regime that is asymmetrical in some way. This type of argument presumes that a state of symmetry is the default norm and justifies departures from that norm.¹⁰² More

⁹⁶ See, e.g., Martin S. Flaherty, *Constitutional Asymmetry*, 69 FORDHAM L. REV. 2073 (2001); Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699 (2005); Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641 (2001).

⁹⁷ See, e.g., Kenneth D. Heath, *The Symmetries of Citizenship: Welfare, Expatriate Taxation, and Stakeholding*, 13 GEO. IMMIGR. L.J. 533 (1999) (addressing rules governing acquisition and relinquishment of citizenship along with federal statutory creation of financial burdens and benefits in the United States).

⁹⁸ See Katz, *supra* note 95; see also *supra* notes 24, 62-71 and accompanying text.

⁹⁹ Unlike contemporary courts, scholars virtually never use the term normatively in the holistic sense.

¹⁰⁰ This is true particularly in the context of criminal trials and sentencing. See, e.g., Vikramaditya S. Khanna, *Double Jeopardy's Asymmetric Appeal Rights: What Purpose Do They Serve?*, 82 B.U. L. REV. 341 (2002); Evan J. Mandery, *Notions of Symmetry and Self in Death Penalty Jurisprudence (with Implications for the Admissibility of Victim Impact Evidence)*, 15 STAN. L. & POL'Y REV. 471 (2004); Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41 (2000).

¹⁰¹ See, e.g., Paul J. Heald, *Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game*, 88 MINN. L. REV. 249 (2003); Edward M. Iacobucci & Ralph A. Winter, *Asset Securitization and Asymmetric Information*, 34 J. LEGAL STUD. 161 (2005).

¹⁰² For instance, Evan J. Mandery argues that evidentiary rules in capital sentencing hearings should be based on clearer awareness of the asymmetry of error risks in that context. Mandery, *supra* note 100.

often, however, commentators present reflective symmetry as a norm toward which the existing asymmetrical regime should be reformed.¹⁰³

In a brief analysis of the function of the norm of bilateral symmetry in legal scholarship, Barbara Flagg and Katherine Goldwasser note commentators' tendencies to presume symmetry as the default measure of "fairness."¹⁰⁴ They urge resistance to this tendency, contending that adherence to a norm of bilateral symmetry in legal reasoning and doctrine reinforces existing inegalitarian distributions of resources and power.¹⁰⁵ Like the many similar critiques discussed in Part IV, however, this one ultimately depends on an appeal to the same norm. Flagg and Goldwasser advocate doctrinal asymmetry in areas such as antidiscrimination and criminal law to counteract existing social and economic asymmetries—in other words, they presume that bilateral asymmetry, once perceived or conceived of, requires correction.¹⁰⁶ Flagg and Goldwasser do not acknowledge this inconsistency or provide clear guidelines for distinguishing acceptable from unacceptable symmetries.

Still, Flagg and Goldwasser's general point is borne out by other scholars' reliances on the concept to show the legitimacy of portions of the existing legal regime.¹⁰⁷ This use of the concept of symmetry is similar to its use to organize a discussion; both rely on the concept to make an area of doctrine coherent. But arguments justifying the status quo by reference to bilateral symmetry obviously add normative implications not present in purely organizational uses of the concept. Approaches in this vein propose that parts of the world should be perceived as or made symmetrical by courts and other legal actors. In this, such normative arguments are similar to some of the uses of the concept in legal rhetoric discussed in Part IV.

B. Robert Laurence's Work on Indian Law

One scholar, Robert Laurence, has critically examined the concept of symmetry before using it to organize his account of historical patterns in

¹⁰³ Thus, Stephen T. Parr argues that existing Cruel and Unusual Punishment Clause doctrine should be reformed so that disproportionately lenient penalties are also considered unconstitutional. Parr, *supra* note 100; see also John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003).

¹⁰⁴ Flagg & Goldwasser, *supra* note 91, at 108-09.

¹⁰⁵ *Id.* at 109-12.

¹⁰⁶ *Id.* at 108-09.

¹⁰⁷ See, e.g., Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211 (2003); Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333 (1991).

1186 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

federal Indian law.¹⁰⁸ Laurence's analysis focuses on the sense of the term used in physics. He makes this focus seem natural by noting how this sense of symmetry characterizes the *laws* of physics. Laurence acknowledges only in passing, however, an important difference between the domains of physical and human "law," noting that humans "*construct*[] the law; [they do] not just describe it," as physicists claim to do.¹⁰⁹ This Article considers this difference—the constructedness of law—to be more central than Laurence does to an understanding of how the concept of symmetry has functioned in legal thought and rhetoric. But Laurence's analysis also yields important insights built on in the discussion below.

For one thing, Laurence stresses the importance of perspective and frames of reference in the perception and attribution of symmetry.¹¹⁰ Symmetry may be visible within one frame of reference but invisible within another:

[I]magine a formal dinner in the State Dining Room at the White House, and begin with the china: The plate in front of you is probably bilaterally symmetric, or perhaps symmetric about a point . . . Pull back, and the place setting is bilaterally asymmetric: forks on the left, knives and spoons on the right, napkin and crystal in a lopsided arrangement. Pull back. The table itself is likely bilaterally symmetric, with the same number of chairs on both sides. (Or symmetric about the center if the table is round). . . Pull back and the State Dining Room itself is revealed to be bilaterally asymmetric, with fireplaces on one side, but not the other. Pull back, and the White House itself is largely a symmetric building . . . Pull back farther, and one sees the largely symmetric layout of Washington, D.C. Finally, North America is . . . asymmetric when viewed from afar.¹¹¹

Laurence's observations recall the critiques of the "asymmetric threat" concept discussed in Part I.¹¹² His illustration reemphasizes the extent to which perceptions of symmetry result from processes of

¹⁰⁸ See Laurence, *supra* note 90, at 865-934.

¹⁰⁹ *Id.* at 878.

¹¹⁰ Many laws of physics, Laurence notes, "are not symmetric as to scale." *Id.* at 869.

¹¹¹ *Id.* at 870-72.

¹¹² See *supra* notes 4-9 and accompanying text.

selection and decision-making or selective inattention, even when they are experienced as passive reactions to the environment.

Second, like Flagg and Goldwasser, Laurence questions the habit of unreflecting reliance on symmetry as a norm and advocates asymmetry in certain areas of legal doctrine.¹¹³ Also like Flagg and Goldwasser, he relies on the norm at the same time, noting that “asymmetry in the broad sense of departures from universal uniformity is at times essential for balance[,]” by which Laurence means the equilibrium of opposing forces or interests.¹¹⁴ Like Flagg and Goldwasser, Laurence does not explain when such equilibrium is desirable and when it is to be resisted. Ultimately, he too seems to consider the normative value of the concept to be self-evident.¹¹⁵

Although Laurence’s analysis is more sustained than any other legal commentator’s, his perspective remains external. No legal scholar has examined how the concept actually functions within legal rhetoric and, by implication, within legal thought. This failure is unfortunate. As the next sections attempt to show, these functions are fascinatingly pervasive and suggestive. For a long time, they have been shaping legal reasoning and rhetoric in ways that we have never fully recognized.

IV. CONCEPTIONS OF SYMMETRY IN LEGAL RHETORIC AND REASONING

From its origins, legal writing in the United States has consistently linked the three conceptions of symmetry described above to different aspects of the functions those writers tacitly declare the legal system, and particularly courts, to be performing. These functions fall into five categories, which structure the discussion below: doing justice, remaining faithful to the purposes of other lawmakers, making coherent law, correcting for market imperfections, and justifying conclusions.

In each area, judicial opinion writers have used conceptions of symmetry to describe what they are doing, but they have also paradoxically used the concept to articulate the passivity of courts. Often, these writers use the concept of symmetry to locate the decision or norm that disposes of the issue at hand somewhere other than in the adjudicative process. Even when the writers acknowledge their own responsibility for attributing symmetrical or asymmetrical relationships

¹¹³ See, e.g., Laurence, *supra* note 90, at 874-87.

¹¹⁴ *Id.* at 880.

¹¹⁵ Cf. WEYL, *supra* note 11, at 13 (“Even in asymmetric designs one feels symmetry as the norm from which one deviates under the influence of forces of non-formal character.”).

1188 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

to phenomena, their use of the concepts rarely, if ever, acknowledges the contingency of these perceptions—the fact that symmetry is not inherent in the phenomena examined, but results from active selection of or selective inattention to features of those phenomena. Like legal scholars, but for much longer, writers responsible for making law have largely treated conceptions of symmetry as self-evident principles driving reasoning and guiding decision-making. The conceptions drive legal decision-making and articulation, but because their meanings and uses vary so widely, the meaning and significance of the concept is far from self-evident.

A. *Doing Justice*

1. Symmetry as Justice or Fairness

Sometimes, opinion writers simply equate conceptions of symmetry with fairness or justice in the most abstract, general sense. A writer implicitly asserts that a result is just because it is symmetrical, and vice versa, but does not otherwise explain the meaning of the concepts or the connection between them. Early uses in this vein imply that the concepts entail one another, or that an asymmetrical result could not possibly be fair.¹¹⁶ Over time, opinion writers have come more often to present symmetry and justice as correlated properties of the correct result without asserting a logical relation between them.¹¹⁷ The concepts of symmetry and basic fairness remain strong rhetorical partners to this day.¹¹⁸

These references to symmetry are usually so glancing that it is difficult to identify their relation to any particular cognitive schema or more specific conception of symmetry. In recent opinions, such as Justice Scalia's 2001 dissent in *Legal Services Corp. v. Velazquez*, the

¹¹⁶ See, e.g., *Mo. Pac. Ry. Co. v. Holley*, 30 Kan. 465, 473 (1883) ("Thus a symmetry and order will be preserved which will tend to secure truth and justice."); *Hertzog v. Ellis*, 3 Binn. 209, 1810 WL 1362, at *2 (Pa. Dec. 22, 1810) (argument for defendant) (referring to "defac[ing] and destroy[ing] the symmetry of judicial proceedings, which is as essential to their justice as it is to their beauty").

¹¹⁷ See, e.g., *Sarlund v. Anderson*, 205 F.3d 973, 974 (7th Cir. 2000) (Posner, J.) ("[The case being distinguished] shifts the emphasis from considerations of dignity, deterrence, respect, propriety, and symmetry found in a number of earlier cases . . ."); *Donatelli v. Nat'l Hockey League*, 893 F.2d 459, 471 (1st Cir. 1990) ("[T]he inquiry illustrates the essential symmetry and fairness of the result which we reach . . ."); *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 553-54 (Tex. 1985) ("The time has come to revise the . . . rule to make injured parties whole and restore equity and symmetry to this area of the law.").

¹¹⁸ See discussion *supra* note 24.

reference often appears to be to reflective symmetry.¹¹⁹ But even when this is the case, such references carry holistic implications. Equating symmetry with fairness allows a writer to justify a legal conclusion by characterizing it, impressionistically, as a perceptible whole embracing parts related in some satisfactory but unspecified manner.

Opinion writers have also linked symmetry to fairness in more specific ways. Some prevalent approaches link the concept of symmetry to fairness in various procedural aspects of adjudication. Before describing these approaches, this discussion looks briefly at the types of contrasts opinion writers have drawn between symmetry and fairness.

2. Fair Asymmetry

Since at least the late nineteenth century, judicial writing has also repeatedly contrasted symmetry with fairness or justice. This tradition defines the task of rendering justice in opposition to that of achieving or perceiving symmetry, which is usually in turn linked to other negatively valued concepts. The approach hints at a self-aware use of the concept. But in various ways, writing using this approach usually stops short of full analysis and, like writing that links symmetry with fairness, backs off from assertions of agency. The tendency is, instead, to acknowledge and then reject the self-evident attractiveness of symmetry in favor of the self-evident authority of another norm, presented as the basis for the result attained.

This approach seems to have first appeared in late nineteenth-century judicial opinions. Courts at this time sometimes aligned their common-law functions with doing justice and opposed these tasks to legal “science”¹²⁰ or “theory,”¹²¹ which they characterized as symmetrical in a sense combining implications of holism and correspondence or comprehensiveness and precision.

¹¹⁹ 531 U.S. 533, 551 (2001) (Scalia, J., dissenting).

¹²⁰ See *Benton v. Burbank*, 54 N.H. 583 (1874) (“If the question . . . were merely technical and abstract, or one having relation to the symmetry and consistency of the law as a science rather than to its practical application and administration, a decision in favor of the ruling would give occasion for less uneasiness.”).

¹²¹ See *Ash v. Cummings*, 50 N.H. 591 (1872) (“[I]t is easy enough to give neat definitions and profound symmetrical theories; but the difficulty is, to make the definitions and theories square themselves with principles known to be sound”); see also *George’s Radio v. Capital Transit Co.*, 126 F.2d 219, 223 (D.C. Cir. 1942) (Edgerton, J., dissenting) (citing Fleming James, Jr., *Contribution Among Joint Tortfeasors, A Pragmatic Criticism*, 54 HARV. L. REV. 1156, 1159 (1941)) (“The common law rule . . . should . . . be retained, even though it mars a theoretical symmetry in the law”).

1190 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

A more specific type of distinction between doing practical justice in the individual case and conforming to theoretical symmetries entered opinion writing around the turn of the twentieth century.¹²² An important example of this approach is Justice Holmes's frequently quoted statement in his 1914 opinion for the Supreme Court in *Patsone v. Pennsylvania*: "A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience."¹²³ This assertion seems at least to hint at a court's active role in determining "practical" answers to questions on the basis of specific judicial and social "experience."¹²⁴ But similar, later references do not follow up on the hint. Instead, in later opinions employing oppositions between particular facts and abstract symmetry,¹²⁵ writers refer key decisions—expressly turning in part on perspective-dependent perceptions of symmetry—to other bodies: school districts, lower courts, and administrative agencies.¹²⁶

The contrast between practical reality and theoretical symmetry continues to function effectively in legal rhetoric¹²⁷ and does not in every

¹²² See, e.g., *Jordahl v. Berry*, 75 N.W. 10, 11 (Minn. 1898) ("[I]t is more important to work practical justice than to preserve the logical symmetry of a rule . . .").

¹²³ 232 U.S. 138, 144 (1914). But compare Holmes's famous dictum several decades earlier in *THE COMMON LAW* 1 (1881). In *Patsone*, the Court held that a state statute forbidding possession of a firearm by a noncitizen did not violate either treaty obligations or the Fourteenth Amendment. The above language from *Patsone* is still quoted. See, e.g., *Walker v. Commonwealth*, 127 S.W.3d 596, 603 (Ky. 2004).

¹²⁴ *Patsone*, 232 U.S. at 144.

¹²⁵ See *Kemp v. Beasley*, 389 F.2d 178, 190 (8th Cir. 1968) ("It is misleading to think that 'balance' means exact symmetry or equilibrium of the races. Numerical quotas or percentages, although appealing for their simplicity, lack that equitable flexibility . . ."); *Brooks v. Beto*, 366 F.2d 1, 24 (5th Cir. 1966) ("Although there is an apparent appeal to the ostensibly logical symmetry of a declaration forbidding race consideration in both exclusion and inclusion, it is both theoretically and actually unrealistic."); *Mary Carter Paint Co. v. FTC*, 333 F.2d 654, 660 (5th Cir. 1964) (Brown, J., concurring specially) ("The variety of problems dealt with [by administrative agencies] make . . . perfect symmetry[] impossible. And the law reflects its good sense by not exacting it.")

¹²⁶ In *Kemp v. Beasley*, the Eighth Circuit concluded that race-based assignment of faculty to schools to correspond with the racial makeup of the student bodies violated equal protection principles. 389 F.2d 178, 190 (1968). In *Brooks v. Beto*, the Fifth Circuit affirmed a trial court's refusal to grant a new trial on the ground of claimed jury bias due to disproportionate racial representation. 366 F.2d 1, 24 (1968). In *Mary Carter Paint Co.*, Judge Brown opposed symmetry to practicality in agency decision-making to establish a general presumption of legitimacy for such decision-making. 333 F.2d 654, 660 (1964).

¹²⁷ See, e.g., *Standefer v. United States*, 447 U.S. 10, 25 (1980) (Burger, J.) ("While symmetry of results may be intellectually satisfying, it is not required."); *Lumen Constr., Inc. v. Brant Constr. Co., Inc.*, 780 F.2d 691, 695 (7th Cir. 1985) ("In analyzing whether [abstention is indicated], we look not for formal symmetry between the two actions, but for a substantial likelihood that the state litigation will dispose of all claims . . ."); see also

case involve a denial of judicial agency.¹²⁸ Yet it most often seems to involve such a denial. Opinion and other writers frequently refer to the intuited and unelaborated dictates of “practical experience” as self-evident alternative rules of decision. Moreover, even when they reject the concept of symmetry as a norm, these writers link the concept to passivity. References to the priority of experience over abstraction tend, when they explain the rejection of symmetry at all, to explain that rejection on the basis of the inflexibility of the concept of symmetry rather than on that of its contingent nature, which might lend it to arbitrary application and unpredictable results.¹²⁹ In this connection, symmetry is rejected because it does not permit active decision-making, or requires an unnecessary and deliberate deviation from the intuitively correct result.

To be fair, the approaches discussed so far appear in general statements that the opinion writers themselves likely would not deny are conclusory. But similar patterns appear when those writers use the concept to describe more specific aspects of courts’ roles in ensuring procedural fairness. The next sections address four forms of this approach.

3. Symmetry in Civil Procedure

Despite large shifts in the practical details of civil procedure, United States opinion writers have consistently tied the concept of symmetry to judicial responsibilities in this area. Nineteenth-century opinions frequently referred to the “symmetry” of special pleading, drawing on the holistic sense of symmetry to defend and justify legal fictions and pleading requirements.¹³⁰ As special pleading systems eroded, these

Dretke v. Haley, 541 U.S. 386, 396 (2004) (Justice Stevens’s dissent is discussed in Part IV.E.2).

¹²⁸ See, e.g., *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 325 (1971) (White, J.) (“[T]he application of *res judicata* in this case makes the law asymmetrical. But the achievement of substantial justice rather than symmetry is the measure of the fairness of the rules of *res judicata*.”).

¹²⁹ A less common opposition presents symmetry as contrary to fairness. See, e.g., *Dretke v. Haley*, 541 U.S. 386, 396 (2004) (Stevens, J., dissenting). This opposition is closely tied to the presentation of symmetry as a cognitive distraction, discussed in Part IV.E.2.

¹³⁰ See, e.g., *Slater v. Emerson*, 60 U.S. 224, 230 (1856) (argument of plaintiff) (“[T]he . . . symmetry of pleading . . . requires . . . an allegation of complete performance . . .”); *Biggam v. Merritt*, 1 Miss. 430 (1831) (referring to “fictions of law . . . necessary to preserve the harmony and symmetry of its proceedings”); *Shaw v. Redmond*, 1824 WL 2313, 11 Serg. & Rawle 27, at *7 (Pa. 1824) (referring to “an excrescence . . . disfiguring the admirable symmetry of the law, and the just and beautiful proportions of special pleading”).

1192 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

writers persisted in linking symmetry to the judiciary's role in ensuring procedural fairness. In the mid- and late nineteenth century, opinion writers used the concept to present legislative reforms as incursions on the beauty of holistically symmetrical, judicially developed procedural requirements¹³¹ or, under a statutory pleading system, to justify judicial action in reforming pleadings.¹³²

These approaches seem to have disappeared in the early twentieth century. Eventually they were replaced by a different notion of judicial management. Beginning around the early 1980s, opinion writers have increasingly aligned the concept of symmetry with their role in preserving the proper balance of risks, opportunities, and power between the parties in a bilaterally symmetrical adversarial system.¹³³ This reliance on the bilateral sense of symmetry in the civil procedure context seems to have appeared around the same time as widespread use of the bilateral schema to identify courts' roles in several other areas, as discussed below.¹³⁴

Opinion writers have thus long appealed to symmetry as a positively valued concept in connection with civil procedure, although this history falls into two distinct phases. With increasing frequency, however, writers are also resisting this linkage, aligning courts' procedural

¹³¹ See, e.g., *Butler v. Wentworth*, 9 How. Pr. 282, 17 Barb. 649 (N.Y. Sup. 1854) (Clerke, J., dissenting) (referring to "the original system of pleading, before its symmetry was disfigured by ill-considered legislation and judicial expedients"); *O'Neal v. O'Neal*, 1842 WL 4800, 4 Watts & Serg. 130 (Pa. 1842) ("[T]he symmetry of legal proceedings has yielded in England to legislative measures of convenience; and, in our own state, much more so . . .").

¹³² See, e.g., *The Sapphire*, 78 U.S. 164, 168 (1870) (Bradley, J.) ("If a substitution of names is necessary or proper it . . . can be made by the court under its general power to preserve due symmetry in its forms of proceeding."); *Brickman v. S.C. R.R. Co.*, 8 S.C. 173 (1876) ("[A]mendment after judgment is of the utmost importance . . . to give symmetry to the system of pleading adopted by the Code.").

¹³³ See, e.g., *Burnham v. Superior Court*, 495 U.S. 604, 638 (1990) (Brennan, J., concurring) ("Without transient jurisdiction, an asymmetry would arise: A transient would have the full benefit of the power of the forum State's courts as a plaintiff while retaining immunity from their authority as a defendant."); *Santosky v. Kramer*, 455 U.S. 745, 764 (1982) (Blackmun, J.) ("The disparity between the adversaries' litigation resources is matched by a striking asymmetry in their litigation options."); *Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995) (noting that where "the plaintiffs would have a choice of venues but [the defendant] would not, . . . there is no reason for such an asymmetry of procedural choices"); *Deakle v. John E. Graham & Sons*, 756 F.2d 821, 833 (11th Cir. 1985) ("Symmetrical treatment should be given to the estimated lost earnings both before and after trial so that neither party can benefit . . ."); *Copeland v. Marshall*, 641 F.2d 880, 912 (D.C. Cir. 1980) ("[D]efending and plaintiffs' counsel . . . should have compensation of . . . the same amplitude. There is a logical symmetry in this principle.").

¹³⁴ See *infra* Parts IV.A.4-IV.A.5, IV.D.

responsibilities with adjustments in the interests of asymmetrical fairness.¹³⁵ This countercurrent is especially visible in the context of civil rights fee awards.¹³⁶ The continued sway of the concept of symmetry in this area is revealed by the form taken by statements of the need for procedural asymmetry, which justify the apparent imbalance as a mechanism for rectification of preexisting asymmetries in resources or incentives. Like the approach taken by Flagg and Goldwasser, and like other judicial approaches to fair asymmetry, these statements seem to presuppose that symmetry is a measure of fairness, even if a certain superficial symmetry is not fair in the case at hand.

Opinion writers have thus regularly used the concept of symmetry to acknowledge the role of the judicial system in controlling the course of civil litigation, but the nature of this acknowledgment has shifted. Nineteenth-century writers were willing to describe themselves as the calibrators of a judicially constructed system. Today, writers are more likely to describe procedural decisions as technical adjustments in response to a self-evident, easily reinstated binary balance. In this way, opinion writers' acknowledgment of their active involvement in making procedural decisions has diminished.

4. Symmetry in Criminal Procedure

Until well into the twentieth century, judicial opinions did not commonly refer to symmetry or asymmetry in the criminal context.¹³⁷ But the dialectic implicit in earlier references to justified asymmetry has also recently emerged in this area, as opinion writers have come consistently to refer to courts' duty to safeguard mechanisms of

¹³⁵ See, e.g., *Tyson v. Trigg*, 50 F.3d 436, 441 (7th Cir. 1995) (urging "a balance between the total advantages enjoyed by each side rather than an insistence on symmetry at every stage in the process").

¹³⁶ See, e.g., *Sanglap v. LaSalle Bank*, 345 F.3d 515, 520 (7th Cir. 2003) ("Fee shifting under the ADA, like other civil rights statutes, is asymmetric . . ."); *Monroe v. Children's Home Ass'n of Ill.*, 128 F.3d 591, 594 (7th Cir. 1997) (Easterbrook, J.) ("Fee-shifting provisions in the civil rights laws are asymmetric.").

¹³⁷ The earliest examples located in research for this project are *State v. Morrison*, 64 Ind. 141 (1878) ("This makes the criminal system . . . the more symmetrical."); and *State v. Baldwin*, 36 Kan. 1 (1886) ("The charge given was clear and symmetrical, and embraced the law of all proper requests made by the defendant . . ."). See also *Edwards v. United States*, 312 U.S. 473, 482 (1941) ("The refusal to permit the accused to prove his defense may prove trivial . . . Procedural errors often are. But procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body."); *Johnson v. State*, 198 Ark. 871 (1939) ("[I]t is more important that the law's symmetry be preserved than it is that a criminal be punished in a particular case."). Similar usages do not become numerically significant until after 1969.

1194 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

procedural asymmetry, usually to correct preexisting asymmetries of power between prosecutors and criminal defendants. Often, opinions trace this duty to the Constitution, rather than to the courts' own decision-making powers. In 1997, for instance, the Ninth Circuit noted that the "asymmetr[ical]," defendant-focused guarantees of the Bill of Rights "help[] explain why application of the rule of evidence is . . . asymmetrical between defense and prosecution."¹³⁸

Opinions addressing the adjudication of criminal issues also sometimes present a fair result in an individual case in opposition to symmetry, in the sense of precise correspondence or regularity—a value these writers nevertheless stop short of categorically rejecting.¹³⁹ But this approach, too, seems to have appeared later in the criminal context than in other areas of law.

Given the long availability elsewhere of the concepts involved in both approaches, it is not easy to explain the delay in their appearance in the criminal context. If references to symmetry function both to describe the judicial role and to signal judicial passivity, however, such references could well seem out of place in the criminal context, where the coercive, and hence active, face of the legal system is highly apparent. It may be telling that the only sense of symmetry that appears in the criminal context is the bilateral sense, which implies both action and its absence.

5. Symmetry in Remedies

Courts are also highly active when they order and review remedies in civil actions. In this area, more clearly than in the criminal context, opinion writers have tended to use references to symmetry to articulate courts' passivity.

Early approaches presented particular remedies as necessary to preserve or reinstate the holistic symmetry of equity or of legal

¹³⁸ *United States v. Paguio*, 114 F.3d 928, 934 (9th Cir. 1997); *see also* *United States v. Wilson*, 420 U.S. 332, 352 (1975) (Marshall, J.) ("[P]ermitting review of all claimed legal errors would have symmetry to recommend it But . . . the Double Jeopardy Clause militate[s] against permitting the Government to appeal"); *United States v. Harbin*, 250 F.3d 532, 540 (7th Cir. 2001) ("Due process does not require absolute symmetry between rights granted to the prosecution and those afforded the defense."); *United States v. Turkish*, 623 F.2d 769, 774 (2d Cir. 1980) ("A criminal prosecution . . . is in no sense a symmetrical proceeding.").

¹³⁹ *See, e.g.*, *United States v. Shead*, 568 F.2d 678, 684 (10th Cir. 1978) ("The Due Process and Equal Protection Clauses do not command symmetry within the probation and parole systems."); *cf. Dretke v. Haley*, 541 U.S. 386, 396 (2004) (Stevens, J., dissenting).

doctrine.¹⁴⁰ In the mid-nineteenth century, advocates and opinion writers began to stress not just the comprehensive holism of the law, but also consistency among remedies and correspondence between rights and remedies.¹⁴¹ The focus in this slightly more active approach is on matching remedial choices with their naturally corresponding rights or with the remedies afforded others in corresponding situations.

This approach persists,¹⁴² but in the past two and a half decades writers of judicial opinions have increasingly articulated conclusions about appropriate remedies using references to bilateral reflective symmetry. This trend is not confined to civil litigation,¹⁴³ but it is particularly common in civil cases, especially in those turning on the fairness of remedies contracted for by the parties.¹⁴⁴ In this context, writers for courts are more likely to cast the courts as relatively passive enforcers of remedies determined outside the legal system.

¹⁴⁰ See *Lee v. Lee*, 9 Pa. 169 (1848) (stating that the appropriate “remedy [is] a new trial . . . The symmetry of our system is thereby preserved”); *Richards v. McDaniel*, 9 S.C.L. 18, 1818 WL 731 (S.C. Const. App. 1818) (noting that under proposed construction, “the mischief and the remedy may be more distinctly seen and applied, [establishing] a system perfect in its symmetry”).

¹⁴¹ See, e.g., *Clark v. Douglas*, 62 Pa. 408 (1869) (“Nothing can be more just, consistent and symmetrical than the system of administering the law here indicated; for . . . it gives a remedy for every wrong . . .”); *Juvenal v. Patterson*, 10 Pa. 282, 1849 WL 5609, at *2 (Pa. 1849) (Rogers, J.) (“[I]t is not easy to perceive why . . . [the plaintiff] is not entitled to a remedy commensurate with her rights. This preserves the symmetry of the case . . .”).

¹⁴² For examples of the correspondence and consistency approach, see, e.g., *Linder v. Berge*, 567 F. Supp. 913, 917 (D.R.I. 1983) (Selya, J.) (describing the need to prevent “engraft[ing] onto the law” “an inexplicable asymmetry between railroad workers and other union members in the fashioning of remedies”); and *Collier v. Insignia Fin. Group*, 981 P.2d 321, 326 (Okla. 1999) (referring to need to avoid “the pitfall of according asymmetrical remedies to members of a single class of . . . victims”). For examples of the fair-asymmetry approach, see *United States v. Telluride Co.*, 146 F.3d 1241, 1247 (10th Cir. 1998) (noting that “the lack of precise symmetry between actual damages . . . and the costs of mitigation or the costs of the sanction, does not change the nature of the remedy”); and *Kalman Floor Co., Inc. v. Jos. L. Muscarelle, Inc.*, 481 A.2d 553, 560 (N.J. Super. 1984) (noting “no reason why justice should require perfect symmetry of remedy”).

¹⁴³ See, e.g., *United States v. Booker*, 125 S. Ct. 738, 763 (2005) (Breyer, J.); *United States v. Castillo*, 406 F.3d 806, 826-27 (7th Cir. 2005) (Easterbrook, J., dissenting from denial of en banc rehearing) (describing “the reason the remedial opinion in *Booker* made the Guidelines advisory across the board” as a desire to avoid the “asymmetric” “alternative”).

¹⁴⁴ See, e.g., *McKinley Assocs., Inc. v. McKesson HBOC, Inc.*, 110 F. Supp. 2d 169, 187 n.9 (W.D.N.Y. 2000) (“[T]he Agreement [between the parties] . . . although not creating perfect symmetry regarding remedies, does not leave McKinley defenseless.”); *Goodwin v. Ford Motor Credit Co.*, 970 F. Supp. 1007, 1012 (M.D. Ala. 1997) (noting authority indicating that “both sides may have to have symmetrical remedies in an adhesion contract, or it may be found unconscionable”).

1196 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

An unusually nuanced analysis of bilaterally symmetrical remedial relationships appears in the 2000 opinion of the California Supreme Court in *Armendariz v. Foundation Health Psychcare Services*.¹⁴⁵ Writing for the court, Justice Mosk noted that parties are generally “free to contract for asymmetrical remedies and arbitration clauses of varying scope”¹⁴⁶ before holding that adhesion contracts containing unilateral arbitration clauses are per se unconscionable. The *Armendariz* opinion devotes much analysis to justification of the latter holding, which depended in part on a judicial determination of the asymmetry in bargaining power between the parties to the agreement in question.¹⁴⁷ The space the opinion devotes to this explanation makes sense in light of the fact that the court’s holding was a significant departure from the background presumption against which it was operating, expressed in the quotation above: private individuals are generally responsible for engineering their own bilateral relationships and determining the forums in which to resolve their disputes. This presumption suggests that, in many cases, adjudicators should not even take a first step toward analysis of the fairness of agreements, as such fairness is ordinarily a matter of how the bargain looks from the parties’ perspectives. An agreement that seems bilaterally asymmetrical to outside parties may not seem unfair to the parties to the agreement.

Armendariz is an exception proving the rule regarding the rhetoric of judicial passivity. By presenting the court’s imposition of symmetry on the contractual relationship as a deviation from the default rule, this opinion shows how, even when opinion writers are at their most self-aware in acknowledging the contingency of perceptions of symmetry, those writers describe the courts’ role as primarily passive.

6. Symmetrical Treatment of Like Cases Alike

Perhaps the most prevalent link between symmetry and norms of procedural fairness occurs across almost all types of litigation. This approach, unlike many of those discussed above, draws primarily on the sense of symmetry as precise correspondence, not holistic integration or bilateral reflection, and aligns it with the like treatment of like cases.¹⁴⁸ Although United States advocates and opinion writers have drawn this

¹⁴⁵ 24 Cal. 4th 83 (2000).

¹⁴⁶ *Id.* at 118.

¹⁴⁷ *Id.* at 115-21.

¹⁴⁸ See WESTEN, SPEAKING OF EQUALITY, *supra* note 28, at 185-229; RAWLS, *supra* note 92, at 83-90.

connection for more than two centuries, their manner of doing so has changed.

Throughout the nineteenth century, judicial opinions made summary references to symmetry as correlated with unelaborated concepts of uniformity and consistency.¹⁴⁹ This correlation implies some sense of the like treatment of like cases, but, around the 1860s, advocates and opinions increasingly began to make this implication—that symmetrical treatment is the treatment of like cases alike and vice versa—more explicit.¹⁵⁰

Subsequent discussions have added new details to this approach. Twentieth-century opinion writers, for instance, have linked symmetry to a need for interjurisdictional doctrinal correspondence. An important example is Justice Douglas's opinion in *Mapp v. Ohio*, which characterized *Mapp* as "an appropriate case in which to put an end to the asymmetry which *Wolf*¹⁵¹ imported into the law."¹⁵² (In *Wolf*, the Court

¹⁴⁹ See, e.g., *Barstow v. Adams*, 2 Day 70 (Conn. 1805) ("[T]he construction put upon the act . . . is . . . necessary to preserve the symmetry and uniformity of the system."); *Burnham v. De Bevoise*, 8 How. Pr. 159 (N.Y. 1853) (indicating that result would be compelled "as long as legal proceedings retain any . . . consistency and symmetry"); *Clark v. Douglass*, 62 Pa. 408 (1869) ("Nothing can be more just, consistent and symmetrical than the system of administering the law here indicated . . ."); *Irish v. Clayes*, 10 Vt. 81 (1838) (referring to "every rule of consistency and symmetry" as dictating holding in case); see also JAMES KENT, COMMENTARIES ON AMERICAN LAW 444-45 (14th ed. 1896) ("Twenty-six independent state courts of final jurisdiction over the same questions, arising upon the same general code of common and of equity law, must necessarily impair the symmetry of that code.").

¹⁵⁰ See, e.g., *Wood v. Truckee Turnpike Co.*, 24 Cal. 474 (1864) ("[S]ymmetry of decision requires that the like rule should be applied in the case of turnpike corporations . . ."); *Appeal of Roberts*, 39 Pa. 417 (1861) ("[T]his general and just principle would be violated, and the symmetry of our system would be marred, if parental succession, like all other successions, were not made to conform to it . . ."). The development of a sense of symmetry as precise correspondence of applicable principles from case to case coincided with the systematization and solidification of legal doctrine in the mid-nineteenth century. See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 253-66 (1977).

¹⁵¹ *Wolf v. Colorado*, 338 U.S. 25 (1949) (holding Fourth Amendment applicable to the states, but declining to hold the exclusionary rule applicable against state officials in state courts, even though the rule had applied in federal courts since the decision in *Weeks v. United States*, 232 U.S. 383 (1914)).

¹⁵² 367 U.S. 643, 670 (1960) (Douglas, J., concurring); see, e.g., *Conetta v. Nat'l Hair Care Ctrs., Inc.*, 236 F.3d 67, 78 (1st Cir. 2001) ("[T]he applicable federal and state claims appear to be wholly symmetrical . . ."); *In re Johnson*, 691 F.2d 249, 256 (6th Cir. 1982) (describing case law as "reflect[ing] a concern that there be some symmetry between the bankruptcy laws and state laws governing the definition of 'property'"); *Saffron v. Dep't of the Navy*, 561 F.2d 938, 946 (D.C. Cir. 1977) (noting the "symmetry between . . . courts which Congress has endeavored to promote"). But see *Atherton v. FDIC*, 519 U.S. 213, 224 (1996) (Breyer, J.).

1198 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

had held that the Fourth Amendment applied to the states through the Fourteenth Amendment, but declined to make the exclusionary rule, already available in federal court, applicable in state courts against state actors.) Since the 1980s, opinion writers have also identified symmetry-as-correspondence with stare decisis and precedential reasoning.¹⁵³

Although it would seem difficult for an opinion writer to deny that the responsibility for ensuring case-to-case consistency rests with the courts themselves, all of the above approaches to the like treatment of like cases also often obscure the courts' active role in decision-making. The identification of formal equality with the sense of symmetry as precise correspondence purports to specify each concept, but it often functions only to extend a halo of self-evident normative value around both. The sense of symmetry as precise correspondence connotes the type of lawlike regularity found in scientific disciplines and a form of reproduction one step removed from human activity, although ultimately traceable to human initiative.¹⁵⁴ These conceptions convey predictability, but the predictability depends in part on freedom from immediate human interference. Identifying formal justice with this sense of symmetry may represent another aspect of unwillingness to acknowledge the work done by courts and opinion writers—in this context, the choices they must make to draw parallels between cases.

B. Remaining Faithful to the Purposes of Lawmakers

The previous section focused on how legal rhetoric sometimes spotlights the action of courts as the renderers of justice, and it suggested that opinion writers have increasingly tended to obscure their own decision-making agency in this connection. Denials of this type are not always covert. This section discusses two long traditions of open denials of judicial agency.

¹⁵³ See, e.g., *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 219 (2000) ("There is symmetry then in the holding here and in *Rosenberger*."); *In re Balfour MacLaine Int'l Ltd.*, 85 F.3d 68, 78 (2d Cir. 1996) ("The situation is symmetrical to one where the all risk insurer must prove there is no coverage of a loss . . ."); *Autotrol Corp. v. Cont'l. Water Sys. Corp.*, 918 F.2d 689, 694 (7th Cir. 1990) ("The proper analysis of that case is symmetrical with the proper analysis of our case."); *Zinser v. Cont'l Grain Co.*, 660 F.2d 754, 760 (10th Cir. 1981) (referring to Supreme Court's reasoning in an earlier case as "[e]xtending the rule of *Hanover Shoe* in what it believed to be a symmetrical fashion").

¹⁵⁴ See *supra* notes 77-80 and accompanying text.

1. Faithfulness to Legislatures

Congress itself has very rarely used the term “symmetry” in its enactments.¹⁵⁵ This fact may underscore the centrality of the concept of symmetry to legal and judicial rhetoric and, particularly, to the acts of self-justification not typically required of legislatures. Advocates and opinion writers, in contrast, have long posited the achievement of abstract symmetry as among a legislature’s chief purposes. Nineteenth-century writers drew consistent parallels between symmetry and “the obvious intent of the legislator.”¹⁵⁶ These early references, like many of those discussed in previous sections, are to the holistic sense of the term.

Twentieth-century opinion writers have continued to describe legislative purposes by reference to a norm of symmetry, although the sense implied has shifted toward that of precise correspondence and away from that of holism.¹⁵⁷ But in the twentieth century, opinion writers asserting deference to legislatures have also often declared that symmetry is not among a legislature’s usual or achievable goals, and

¹⁵⁵ The only metaphorical references to symmetry or asymmetry in extant acts of Congress are very recent invocations of “asymmetric threats.” In statutes setting forth the reporting duties of the Chairman of the Joint Chiefs and the Defense Secretary, Congress provided that these reports are to include a “description of the international threats posed by terrorism . . . and asymmetric challenges to United States national security[.]” 10 U.S.C. § 153(d)(2)(D) (2000 & Supp. 2004) (Chairman of the Joint Chiefs), and “the most significant . . . capabilities . . . necessary for the armed forces to prevail against the most dangerous threats, including asymmetrical threats, . . . to the national security interests of the United States,” 10 U.S.C. § 486(c)(1) (Defense Secretary). The term also appears in recent defense spending bills. See, e.g., Pub. L. No. 108-375, div. A, tit. I, § 141, 118 Stat. 1829 (2004).

¹⁵⁶ *Carpenter v. Hoyt*, 17 Ill. 529 (1856); see also *King v. Fraser*, 23 S.C. 543 (1885) (report of special master) (referring to legislature’s efforts at “systematizing our . . . law” and court’s duty “to sustain and promote this effort at symmetry”); *Gibbons v. Brittenum*, 56 Miss. 232 (1878) (noting that provisions, “though adopted on different days . . . were intended to form parts of a symmetrical and harmonious whole”); *Glamorgan Iron Co. v. Snyder*, 84 Pa. 397 (1877) (noting that two “statutes are . . . to be construed as parts of a system designed to be general and symmetrical”).

¹⁵⁷ See, e.g., *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1134 (9th Cir. 2003) (Thomas, J., concurring) (noting that a court is to “presume[] congressional intent to create a ‘symmetrical and coherent regulatory scheme’” (citing *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 133 (2000)) (“A court must therefore interpret the statute ‘as a symmetrical and coherent regulatory scheme . . .’” (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995))); *In re Newbury Café, Inc.*, 841 F.2d 20, 22 (1st Cir. 1988) (“It is only reasonable to assume that the drafters of the Code . . . would not, without good cause, break up its symmetry.”); *Sykes v. Tex. Air Corp.*, 834 F.2d 488, 491 (5th Cir. 1987) (“We cannot imagine that Congress actually intended such a perverse asymmetry”); *United Gas Pipe Line Co. v. FPC*, 350 F.2d 689, 695 (5th Cir. 1965) (“It is not forbidden judicial legislation to give Congress credit for desiring symmetry.”).

1200 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

thus should not guide statutory interpretation.¹⁵⁸ This approach is clearly a variation on the opposition between practical reality and abstract symmetry described above. In the statutory context, however, opinion writers locate the need to deal with complex reality in the legislature, rather than in the courts. Thus, this usage is not a means of asserting judicial activity, but a statement of reasons for the denial of such activity. It characterizes legislation as the unexaminable product of a purely political process of accommodating interests and facts. In so doing, it also implies the impossibility of meaningful judicial analysis of legislation.

The consistency of rhetorical postures of passivity in the area of statutory interpretation is hardly surprising. For related reasons, opinion writers have assumed a similar posture in describing courts' roles in conducting judicial review of the constitutionality of legislation.¹⁵⁹

2. Faithfulness to the Purposes of the Makers of the Constitution

This discussion has already noted a few ways in which constitutional adjudication has found asymmetry in the Constitution, particularly in its guarantees of the rights of criminal defendants.¹⁶⁰ This section focuses on the ways constitutional adjudication has linked symmetry with the conceptualization of separations of powers.

Even before judges began to interpret and apply the Constitution, James Madison described the constitutional scheme of divided powers as asymmetrical in two of the *Federalist* Papers. Madison's approach to the concept is unusually nuanced. In both essays, he recognizes that an arrangement lacking apparent symmetry, in the holistic sense, may seem intuitively wrong, but that the attribution of any such harmony to the arrangement is ultimately a matter of perspective.¹⁶¹ Most judicial

¹⁵⁸ See, e.g., *Jankowski-Burczyk v. INS*, 291 F.3d 172, 176 (2d Cir. 2002) ("Congress may enact a regulatory measure . . . without a rationale for the resulting lack of symmetry."); *United States v. McDowell*, 117 F.3d 974, 977 (7th Cir. 1997) ("[S]ymmetry is not always Congress's paramount objective."); *Ind. Ins. Agents of Am., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 890 F.2d 1275, 1282 (2d Cir. 1989) ("[T]his would not be the first time that Congress has adjusted the competing positions of strong forces with a compromise of imperfect symmetry."); *United States v. Shirah*, 253 F.2d 798, 800 (4th Cir. 1958) ("[C]ourts are not free to rewrite legislative enactments to give effect to the judges' ideas of . . . the desirability of symmetry in statutes.").

¹⁵⁹ See, e.g., BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 86, at 2.

¹⁶⁰ See *supra* notes 123-24, 138-39 and accompanying text.

¹⁶¹ In *Federalist No. 37*, discussing "The Difficulties of the Convention in Devising a Proper Form of Government," Madison asked,

references to the symmetry or asymmetry of the Constitution have been more cursory than Madison's.¹⁶² For instance, to support his argument for federal Supreme Court review of state court judgments in *Cohens v. Virginia*, Justice Marshall quoted the following appeal to the holistic sense of symmetry from the Virginia legislature's session records: "The duties [that the Justices of the United States Supreme Court] have to perform will lead them necessarily to the most enlarged and accurate acquaintance with the jurisdiction of the federal, and several State Courts, together with the admirable symmetry of our Government."¹⁶³

Opinion writers have continued to appeal to the symmetry of the institutional structures created by the Constitution to support conclusions regarding government power. In 1985, for instance, Chief Judge Clark, writing for the Court of Appeals for the Fifth Circuit, referred to the "constitutional symmetry among the branches" of the federal government in adjudicating the constitutionality of congressional extension of bankruptcy judges' terms in office.¹⁶⁴ However, it is difficult to find many recent examples of appeals to the symmetry or asymmetry of the constitutional scheme that, like Justice Marshall's, foreground judicial power.¹⁶⁵ In describing their relationship to the structure of or established by the Constitution, opinion writers increasingly obscure rather than foreground the activity of courts. In the

Would it be wonderful [i.e., surprising] if, under the pressure of all these difficulties [inherent in constitutional engineering and the negotiation of conflicting interests], the convention should have been forced into some deviations from that artificial structure and regular symmetry which an abstract view of the subject might lead an ingenious theorist to bestow on a Constitution planned in his closet or in his imagination?

FEDERALIST NO. 37 (James Madison); *see also* FEDERALIST NO. 47 (James Madison); *cf.* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 163, 1905 (1833).

¹⁶² *See, e.g.,* Hunter v. Martin, 4 Munf. 1, 18 Va. 1 (1815) (supporting argument for preclusion of federal Supreme Court review of state court judgments with statement that proposed approach "will keep up and perfect the symmetry between this and every other part of the constitution").

¹⁶³ *Cohens v. Virginia*, 19 U.S. 264, 358 n.23 (1821) (citing Extract from the Journal of the Senate of the Commonwealth of Virginia, Richmond, Dec. 4, 1809).

¹⁶⁴ *Matter of Koerner*, 800 F.2d 1358, 1367 (5th Cir. 1986); *see also* *Stockton & Visalia R. Co. v. Common Council of Stockton*, 41 Cal. 147 (1871) (reasoning against conclusion that would "permanently mar the symmetry of the structure of the Government itself"); *Taggart v. Commonwealth*, 102 Pa. 354 (1883) ("The construction [suggested] . . . would seem to indicate a fundamental fault . . . destructive of the symmetrical system devised by the Constitution . . ."); *Att'y Gen. v. Chicago & N.W. Ry. Co.*, 35 Wis. 425 (1874) (noting "the symmetrical distribution of judicial powers in the constitution").

¹⁶⁵ *But see* *State v. Hayne*, 4 S.C. 403 (1873) ("If the Constitution should lose symmetry in consequence of our judicial exposition of its terms, the responsibility would not rest on the framers of that instrument.").

1202 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

area of constitutional adjudication, perhaps more than in other areas, the pressures driving this tendency have been well-examined. Commentators often note the absence of a clear warrant for judicial review¹⁶⁶ and the frequent desirability of judicial passivity,¹⁶⁷ or at least minimalism,¹⁶⁸ in constitutional adjudication. The next section addresses two areas in which the virtues of passivity are less apparent and have less frequently been defended by commentators.

C. *Making Coherent Law*

Opinion writers have long articulated the courts' role as the institutional guardian of the common law using references to symmetry to characterize the doctrine to which judicial opinions contribute and are ostensibly bound. An almost equally long tradition involves references to symmetry in connection with recognition of the courts' role as a statutory interpreter, rather than a diviner of legislative intent. In both areas, opinion writers consistently represent the courts' role of ensuring coherence in the relevant legal domain.¹⁶⁹ But from the very beginning, writers have also represented this role as one involving the restoration or preservation of a prior legal coherence—that is, they have described the role as largely passive.

1. Statutory Coherence

In a tradition complementing that of legislative deference, advocates and opinion writers have linked symmetry not to the creation of the statutory scheme, but to the nature of the scheme itself.¹⁷⁰ This approach

¹⁶⁶ See, e.g., BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 86, at 2-15.

¹⁶⁷ See generally *id.*; ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); Bickel, *The Passive Virtues*, *supra* note 85.

¹⁶⁸ CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

¹⁶⁹ This presentation is related to a powerful vein of jurisprudential commentary. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 176-224 (1988) (presenting theory of "law as integrity," under which "lawmakers . . . try to make the total set of laws morally coherent" and "see[the law] as coherent in that way"); Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273 (1992); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988). Dan Simon approaches the norm of coherence from another perspective, arguing that our inbuilt drive toward cognitive coherence is a significant constraint on legal decision-making. See works cited *supra* note 55.

¹⁷⁰ This link may involve focus on statutory text, but need not do so. Courts also attribute symmetry to abstract conceptual relationships within a statutory scheme. See, e.g., *Fulman v. United States*, 434 U.S. 528, 538, 540 (1978) (majority op. and op. of Powell, J., dissenting) (noting "the logical symmetry between the gain recognized at the shareholder level and the dividend credit allowed at the corporate level" and preference for "a

is best understood as a variation on the posture of deference to the legislature's will, even though it does not expressly posit such a will.

In one version of this approach, writers present symmetry and coherence as identical, immanent in the statutory scheme, and indicative of other positive norms. The norm most often linked to symmetry and coherence in this way is consistency or logical noncontradiction.¹⁷¹ In the early and mid-nineteenth century, advocates and judges often aligned symmetry and coherence with uniformity, an even more holistic concept.¹⁷² Recently, opinion writers seem to have begun to use "symmetry" to refer to coherence arising from structural parallelism, or correspondence, between individual statutory provisions.¹⁷³

Opinion writers do not always identify the statutory scheme with symmetry. References to the necessary asymmetry of statutes first emerged around the turn of the twentieth century, roughly when the opposition between practical justice and theoretical symmetry also

resolution that advanced the symmetry of the relevant Code provisions"). In another tradition, courts invoke statutory symmetry as an indication of legislative intent. The idea is not that the legislature intended symmetry as such, but that the symmetry of the scheme indicates something about a more specific legislative purpose. *See, e.g.,* *United States v. Chavarria-Herrera*, 15 F.3d 1033, 1035 (11th Cir. 1994) ("The symmetrical structure of § 3742 indicates that Congress intended appellate review of sentences to be available to the government The legislative history confirms this symmetry."); *United States v. Kurka*, 818 F.2d 1427, 1429-30 (9th Cir. 1987) ("An examination of the symmetry of section 33 makes it apparent that the Government's interpretation was not the intended construction of the statute."); *ICC v. Atl. Coast Line R. Co.*, 334 F.2d 46, 50 (5th Cir. 1964) ("Symmetry . . . suggests a congressional purpose to allow [the construction reached] . . ."); *State ex rel. Carson v. Harrison*, 16 N.E. 384, 388 (Ind. 1888) ("[T]he term is not only etymologically correct, but it renders the several provisions of the constitution . . . symmetrical . . . and effectuates the evident intention of its authors.").

¹⁷¹ *See, e.g.,* *Missouri v. Andrews*, 787 F.2d 270, 289 n.4 (8th Cir. 1986) (Bright, J., dissenting) ("This explanation . . . gives the Act internal symmetry and consistency . . ."); *Davis v. U.S. Lines Co.*, 253 F.2d 262, 265 (3d Cir. 1958) (rejecting interpretation of statute that would "rob the statute of symmetry and logic"); *Bishop v. Sanford*, 15 Ga. 1 (1854) (noting need "to harmonize [statutory provisions], if it be possible, to . . . maintain a symmetrical system of legislation, if it can be done"); *Sasportas v. De La Motta*, 31 S.C. Eq. 38 (S.C. App. Eq. 1858) ("All of these Acts being in *pari materia* should be construed . . . so as to form a symmetrical and rational system.").

¹⁷² *See, e.g.,* *Barstow v. Adams*, 2 Day 70 (Conn. 1805) (This "construction . . . is necessary to preserve the symmetry and uniformity of the system."); *Comm'r v. Wyman*, 49 Mass. 247 (1844) ("[The law revision commissioners] were occasionally deficient in giving that symmetrical form to the laws which would have been desirable . . .").

¹⁷³ *See, e.g.,* *United States v. Shi*, 317 F.3d 715, 717 (7th Cir. 2003) ("The prohibition of possessing . . . these phony documents is symmetrical with the prohibition of possessing and selling illegal drugs . . .").

1204 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

emerged in other areas.¹⁷⁴ Such references have become increasingly common since the mid-twentieth century, when opinion writers also began to articulate the notion that legislatures do not necessarily intend a symmetrical statutory scheme.¹⁷⁵ Although they reject symmetry, these approaches usually involve appeals to coherence, or even correspondence in some sense. Thus, a writer may explain statutory asymmetry by reference to the complexity of reality, which makes the perception of coherence, or of the correspondence between law and fact, a matter of perspective and an activity committed to the legislature.¹⁷⁶ More recently, writers have explained statutory asymmetry simply by noting that justifications for legislative action, unlike those for judicial action, need not be declared or self-evident.¹⁷⁷

As these examples indicate, here, as in other areas, opinion writers have shied away from acknowledging either the active decision-making involved in the identification of symmetrical relationships or the active decision-making involved in the judicial tasks in the service of which that perception occurs.¹⁷⁸ Although a few nineteenth-century opinions refer to a court's creation or restoration of symmetrical coherence to the

¹⁷⁴ See, e.g., *In re H.B. Claflin Co.*, 52 F. 121, 124 (2d Cir. 1892) (“[T]he court cannot attempt to adjust into symmetry the various provisions of a statute”); see also *Monroe v. Pape*, 365 U.S. 167, 248 (1961) (“The legislative process of the post-bellum Congresses . . . was one of struggle and compromise . . . This was not an endeavor for achieving legislative patterns of analytically satisfying symmetry.”); *Abtox, Inc. v. Exitron Corp.*, 122 F.3d 1019, 1029 (Fed. Cir. 1997) (“[S]tatutory symmetry is preferable but not required.”); *Sec. Bank S.S.B. & Subsidiaries v. Comm’r*, 116 F.3d 302, 305 (7th Cir. 1997) (“[Congress’s] intent was clearly to recognize the economic realities of the situation for the taxpayer rather than an abstract principle of symmetry.”).

¹⁷⁵ See *supra* note 158 and accompanying text.

¹⁷⁶ See, e.g., *Sec. Bank S.S.B. & Subsidiaries*, 116 F.3d at 305; *Ind. Ins. Agents of Am., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 890 F.2d 1275, 1282 (2d Cir. 1989) (“[T]his would not be the first time that Congress has adjusted the competing positions of strong forces with a compromise of imperfect symmetry.”); *Finzer v. Barry*, 798 F.2d 1450, 1475 (D.C. Cir. 1986) (“Congress was not obliged to regulate such demonstrations for the sake of symmetry. . . .”); *In re Permanent Surface Min. Reg. Litig.*, 653 F.2d 514, 522-23 (D.C. Cir. 1981) (“From such a process of compromise and adjustment, a symmetrical statute . . . is unlikely to emerge.”).

¹⁷⁷ See, e.g., *United States v. Koyomejian*, 970 F.2d 536, 541 (9th Cir. 1992) (“[A]lthough [the] . . . scheme is asymmetrical, Congress is not required to think like a lawyer, and we are not empowered to impose on clear statutory language our own notions of symmetry.”); *Finzer v. Barry*, 798 F.2d 1450, 1475 (D.C. Cir. 1986) (“Congress was not obliged to regulate such demonstrations for the sake of symmetry”); *United States v. Le Boeuf Bros. Towing Co.*, 537 F.2d 149, 152 (5th Cir. 1976) (“[C]ongressional schemes need not seem to courts symmetrical [or] consistent . . . to be valid.”).

¹⁷⁸ *But see Comm’r v. Lester*, 366 U.S. 299, 304 (1961) (discussed *infra* note 181).

statutory scheme,¹⁷⁹ even during that period advocates and judges primarily described coherence as present in the scheme before any judicial activity took place. Thus, a court's role has long been described as that of preserving¹⁸⁰ the symmetry of the scheme.¹⁸¹ One longstanding approach has been to reject a proposed interpretation on the basis that it would mar the already existing symmetry of the scheme.¹⁸² This posture of detachment from the statutory scheme is a variation on the posture of legislative deference, but it is not quite the same. Advocates and opinion writers usually refer to attributes of the statutory scheme itself when

¹⁷⁹ See, e.g., *Pennsylvania v. Coxe*, 4 U.S. 170, 203 (1800) (Yeates, J.) ("The construction I have adopted, appears to me to restore perfect symmetry to the whole act, and to preserve its due proportions."); *Std. Underground Cable Co. v. Att'y Gen.*, 19 A. 733 (N.J. Err. & App. 1890) ("Under the construction which we give to this law, it will fall symmetrically into our system of . . . taxation.").

¹⁸⁰ See, e.g., *The Star*, 16 U.S. 78, 92 (1818) ("In considering the section in question as merely affirmative, . . . the symmetry of a system apparently built up with great care and caution . . . is maintained and enforced."); *United States v. Arishi*, 54 F.3d 596, 597 (9th Cir. 1995) ("[T]he symmetry between Rule 35(b) motions and U.S.S.G. § 5K1.1 motions is maintained."); *Ochoa v. Employers Nat'l Ins. Co.*, 724 F.2d 1171, 1176 (5th Cir. 1984) (citing precedent that "persuades us to maintain the symmetry of the Act"); *Hills v. Comm'r.*, 691 F.2d 997, 1006 (11th Cir. 1982) (under the interpretation adopted, "[s]ymmetry is preserved."); *Field v. City of Boston*, 64 Mass. 65 (1852) ("Thus the symmetry of the law of taxation is preserved."); *Macoy v. Curtis*, 14 S.C. 367 (1880) ("Such is the meaning of the whole provision taken together, and its enforcement is necessary to preserve order and symmetry.").

¹⁸¹ This tradition is especially pronounced in interpretations of the Internal Revenue Code. See, e.g., *United States v. Olympic Radio & Television*, 349 U.S. 232, 236 (1955). "We can only take the Code as we find it and give it as great an internal symmetry and consistency as its words permit." *Id.* Interestingly, and contrary to the trends traced throughout most of this study, the Court later transformed this rule, which originally stressed the court's passivity, into a command to courts to impose symmetry on the code to help it to attain the intended coherence. See *Lester*, 366 U.S. at 304. "[T]he Code *must be given* 'as great an internal symmetry and consistency as its words permit.'" *Id.* (citing *Olympic Radio & Television*, 349 U.S. at 236) (emphasis added).

¹⁸² See, e.g., *Hiller Cranberry Prods., Inc. v. Koplovsky*, 165 F.3d 1, 12 (1st Cir. 1999) (Selya, J., dissenting) ("[T]he majority . . . disrupts the symmetry of the statutory scheme."); *Sharp Microelectronics Tech., Inc. v. United States*, 122 F.3d 1446, 1452 (Fed. Cir. 1997) ("We thus can identify a symmetry in the [statute] . . . We think that symmetry is dislodged and its components discounted too much by [the] argument . . ."); *Richey Manor, Inc. v. Schweiker*, 684 F.2d 130, 135 (D.C. Cir. 1982) (rejecting construction that would "destroy the symmetry of the regulatory scheme"); *Int'l Org. of Masters, Mates & Pilots, Marine Div., Intern Longshore Men's Ass'n, AFL-CIO v. NLRB*, 539 F.2d 554, 560 (5th Cir. 1976) (noting that party's "argument, if allowed to prevail, would destroy the symmetry . . . embodied in [the statute]"); *United States v. Klinger*, 199 F.2d 645, 646 (2d Cir. 1952) (rejecting "alteration in the statutory scheme . . . that destroys its symmetry"); *Carpenter v. Hoyt*, 17 Ill. 529 (1856) ("We should destroy the symmetry, mar the design, and defeat the obvious intent of the legislator, in any other interpretation."); *State v. Sturgess*, 9 Or. 537 (1881) ("[I]t is quite apparent that if the [statute] last enacted should be held [to have the meaning proposed], a conflict . . . would be developed; . . . symmetry . . . lost, inconsistencies and incompatibilities introduced . . .").

1206 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

legislative intention is obscure or off-limits as material for justification. In such a situation, the activity and power of a court are potentially at their height. Yet, as described, most references to symmetry function to veil this activity and power.

It is not immediately clear how this rhetoric of detachment applies to the context of a court's common-law role, as it would seem difficult to describe the common law as created by anything other than courts. The next section explores legal writers' responses to this difficulty.

2. Doctrinal Coherence and the Edifice of the Law

References to symmetry in descriptions of the coherence of legal doctrine have been more complex than references to the concept in connection with statutory coherence. As in the statutory context, legal writers have consistently referred to the body of common law and constitutional legal doctrine as self-evidently symmetrical, and they have also referred to it as justifiably asymmetrical. But in references to legal doctrine as symmetrical, writers have also added another approach: a pervasive figure of speech that first metaphorically transforms the body of doctrine into an architectural structure and then attributes symmetrical properties to it. This device permits legal writers to maintain the descriptive distance from the courts' own efforts and the disavowal of interference that usually seems to accompany references to symmetry in legal writing, while also acknowledging the created nature of the law.

The approach appears as early as the first chapter of Blackstone's *Commentaries*:

The mischiefs that have arisen to the public from inconsiderate alterations of our laws [through legislation], are too obvious to be called in question . . . The common law of England has fared like other venerable edifices of antiquity, which rash and inexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity

exchanged for specious embellishments and fantastic novelties.¹⁸³

Many American judges have taken up Blackstone's image.¹⁸⁴ The preeminent United States example of the metaphor is probably Justice Cardozo's 1937 statement in *Palko v. Connecticut*.¹⁸⁵ To cap his argument that no constitutional guarantees were violated by a state statute permitting the retrial for a capital crime of a defendant already convicted of a noncapital crime based on the same offense, Justice Cardozo stated that the statute did no damage to constitutional doctrine, but rather lent reciprocal, or bilateral, symmetry to the law:

If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge, has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.¹⁸⁶

Justice Cardozo's articulation, unlike Blackstone's, describes constitutional doctrine and statutory law as a seamless whole. It also illustrates the trend toward a more concrete conception of bilateral symmetry and away from references to lawmaking in terms of activity. But Justice Cardozo's approach echoes Blackstone's in identifying the "edifice of justice" as something basically created by a body other than the court deciding the dispute in question.¹⁸⁷

¹⁸³ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765-69), § 1, ¶14 (Introduction) (On the Study of Law). On the significance of Blackstone's *Commentaries* to American law, see LAWRENCE W. FRIEDMAN, A HISTORY OF AMERICAN LAW 59-60, 467-68 (3d ed. 2005); WOOD, *supra* note 14, at 10, 264, 350.

¹⁸⁴ For a recent example, see *NLRB v. Acme Die Casting Corp.*, 728 F.2d 959, 963 (7th Cir. 1984) (Reported cases "do not form an edifice of perfect symmetry."). In addition to the cases cited *infra* notes 192, 193, 195, 199, see *Den v. Vanclève*, 5 N.J.L. 589 (1819) ("[I]f we were to take up the decisions of all the states founded as they are upon local customs, colonial necessities, and legislative innovations, and . . . make them the rule of adjudication here, we should . . . disfigure and break down the ancient temple of justice.").

¹⁸⁵ *Palko v. Connecticut*, 302 U.S. 319, 328 (1937).

¹⁸⁶ *Id.* (internal citations omitted). For a discussion of Cardozo's approaches to use of the concept of symmetry in legal discourse, see Laurence, *supra* note 90, at 876 n.53, and discussion *infra* note 276.

¹⁸⁷ *Palko*, 302 U.S. at 328.

1208 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

The power of the edifice metaphor is surely due partly to its versatility. It links a holistic conception of symmetry to an array of otherwise unrelated norms: comprehensiveness, aesthetic harmony, tradition, stability, and impersonality, as well as social cohesion, implied by the fact that “edifices” can be created only by the organized work of many people. Despite this versatility, around the end of the nineteenth century, opinion writers sometimes declined to invoke it in linking symmetry to doctrinal coherence. Instead, they began to link both doctrinal coherence and symmetry to a norm that is less easy to accommodate within the edifice-of-the-law metaphor—efficiency.¹⁸⁸

Around the same time, and consistently with the development noted repeatedly above, opinion writers also began to use the opposition between practical reality and theoretical symmetry to justify conclusions sustaining or introducing apparent asymmetries, or anomalies, within legal doctrine.¹⁸⁹ This approach became widespread by the second half of the twentieth century. But like the analogous trends discussed in previous sections, it did not involve the rejection of symmetry as a norm, as the approach presumes a need to justify apparently asymmetrical doctrinal structures. And alongside this approach, opinion writers have continued to align the edifice-of-the-law metaphor and other references to symmetry directly with doctrinal coherence.¹⁹⁰ Judges and justices

¹⁸⁸ See *Workman v. City of New York*, 179 U.S. 552, 559 (1900) (noting the “evil springing from” “[t]he disappearance of all symmetry in the maritime law”); *Hardie v. Swafford Bros. Dry Goods Co.*, 165 F. 588, 591 (5th Cir. 1908) (“[W]e are disposed to deny that in . . . bankruptcy law the discharge of the honest debtor . . . could have been omitted without impairing [the law’s] symmetry and efficiency . . .”).

¹⁸⁹ See, e.g., *Tyler v. Tomkinson*, 414 F.2d 844, 847 (5th Cir. 1969) (“[T]his field of the law continues to defy symmetry.”); *Jordahl v. Berry*, 75 N.W. 10 (Minn. 1898) (“[I]t is more important to work practical justice than to preserve the logical symmetry of a rule . . .”). Similar usages did preexist the late nineteenth century. See *United States v. Forness*, 125 F.2d 928, 937 n.28 (2d Cir. 1942) (noting Henry Maine’s criticism, in *Ancient Law* (1861), of the notion that “somewhere . . . there existed a complete, coherent, symmetrical body of English law . . . furnish[ing] principles [applicable] to any . . . combination of circumstances”); *Richardson v. Daggett*, 4 Vt. 336 (1832) (“[T]here is not in the law on this subject, that perfect symmetry . . . which might be desired. The difficulty is probably inherent in the subject.”).

¹⁹⁰ See, e.g., *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 344 F.3d 1359, 1374 (Fed. Cir. 2003) (Rader, J., concurring) (“Like the proverbial balloon, a pinch on this backside of the law disrupts symmetry on the front side.”); *Wigginton v. Centracchio*, 205 F.3d 504, 511 n.9 (1st Cir. 2000) (noting that court’s earlier “broadening of [a principle drawn from an earlier case] was required . . . to maintain doctrinal symmetry”); *Waddle v. Sparks*, 414 S.E.2d 22, 27 (N.C. 1992) (“[A]pplying the same standard . . . promotes a symmetry desirable in this area of the law.”).

sometimes even cite doctrinal symmetry as the sole justification for a result, without linking it to any other value.¹⁹¹

In a related tradition that also first emerged in the second half of the nineteenth century, advocates and opinion writers began to refer to symmetry in descriptions not of doctrine, but of the judicial system considered institutionally.¹⁹² This usage sometimes borrowed the edifice metaphor and also sometimes, as in *Palko*, seemed to identify doctrine and institution as parts of the same edifice.¹⁹³ This focus on the holistic integrity of the judicial system has now largely given way to linkages of institutional symmetry with transjurisdictional correspondence and parallelism.¹⁹⁴

As in all of the areas discussed above, when discussing doctrinal coherence, opinion writers commonly cast themselves and courts, in a passive role. To be sure, these writers have sometimes acknowledged the fact that doctrine is the product of judicial action¹⁹⁵ and, less often,

¹⁹¹ *Burnham v. Superior Court*, 495 U.S. 604, 638 (1990) (Brennan, J., concurring) (“Without transient jurisdiction, an asymmetry would arise: A transient would have the full benefit of the power of the State’s courts as a plaintiff while retaining immunity from their authority as a defendant.”).

¹⁹² See *Coombs v. State*, 47 S.W. 163, 167 (Tex. Crim. App. 1898) (“[U]nique in outline, perfect in symmetry, . . . this magnificent temple of justice, builded by the framers of our constitution, is well fitted to . . . grapple with all the demands of litigation.”); see also *New England Mut. Marine Ins. Co. v. Dunham*, 78 U.S. 1, 23 (1870) (“The admiralty courts . . . deriv[ed] . . . much of [their] completeness and symmetry . . . from the civil law.”); *In re Wyllie*, 2 Hughes 449, 30 F.Cas. 733 (W.D. Va. 1872) (declining invitation to “mar the symmetry . . . of that wisely constructed system of courts for administering the law of both governments”); *Persons v. Hight*, 4 Ga. 474 (1848) (Nisbet, J., concurring) (“Nothing is more painful to me, than this marring of the beauty of the law—this destruction of its symmetry and order . . .”).

¹⁹³ *Palko v. Connecticut*, 302 U.S. 319, 328 (1937). For other examples in which it is difficult to distinguish doctrine from institution, see *Commonwealth v. Chapman*, 54 Mass. 68 (1847); *Den v. Vancleve*, 5 N.J.L. 589 (N.J. 1819), cited *supra* note 184.

¹⁹⁴ See, e.g., *Wilson v. Garcia*, 471 U.S. 261, 285 (1985) (O’Connor, J., dissenting) (“In achieving statewide symmetry among civil rights claims the Court creates fresh problems of asymmetry that are of far greater moment . . .”); *Tipton-Whittingham v. City of Los Angeles*, 316 F.3d 1058, 1063 (9th Cir. 2003) (noting “symmetry” between California and federal antidiscrimination statutes); *Shepherd v. Comm’r.*, 147 F.3d 633, 636 (7th Cir. 1998) (Posner, J.) (referring to “the symmetry that we have stressed throughout this opinion between the Tax Court in deficiency cases and the district courts in refund cases”); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1480 (9th Cir. 1997) (“[I]here is some symmetry between RICO’s private right of action and Nevada’s administrative scheme.”); *Saffron v. Dep’t of the Navy*, 561 F.2d 938, 946 (D.C. Cir. 1977) (referring to “the symmetry between the [Court of Claims and the district courts] which Congress has endeavored to promote”).

¹⁹⁵ See, e.g., *Ex parte Andrews*, 40 Ala. 639 (1867) (Byrd, J.) (“The integrity, learning, patriotism, and legal and judicial opinions of [Story, Hamilton, Kent, and Marshall] are the solid, massive, polished, and enduring pillars, upon which reposes the vast superstructure

1210 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

their own role in its construction.¹⁹⁶ But usually they use devices such as the edifice metaphor to obscure their agency. The metaphor most often identifies the symmetrical edifice of doctrine as something perfected before the adjudicator comes on the scene. By distinguishing doctrine from their own actions in this way, opinion writers easily represent their relationship to doctrine as a matter of relatively passive preservation¹⁹⁷ or restoration¹⁹⁸ of the symmetry of the edifice. Thus, opinion writers have commonly used the metaphor to justify a refusal to act, on the basis that any action would deface the edifice.¹⁹⁹

of American . . . jurisprudence; and whatever beauty of expression, symmetry of proportion, unity of construction, and solidity of texture, are to be found in the splendid fabric, may be traced to [their] labors"); *Dehon v. Foster*, 86 Mass. 545, 555 (1862) (referring to "perfect[ion]" of "'English equity into a symmetrical science'"); *cf.* *Hughes v. Anderson*, 68 Ala. 280 (1880) ("The rough outline of natural right, or natural liberty, must submit to the chisel of the mason, that it may enter symmetrically into the social structure."); *Schall v. Williams Valley R. Co.*, 35 Pa. 191 (1860) (quoting district court opinion referring approvingly to "a symmetrical system of principles and rules, built up by the labours of the learned through a series of ages").

¹⁹⁶ *See, e.g., Ward v. Studebaker Sales Corp. of Am.*, 113 F.2d 567, 569 (3d Cir. 1940) (referring to "the difficult effort to preserve juristic symmetry and at the same time not disturb stare decisis").

¹⁹⁷ *See, e.g., Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 535 (3d Cir. 1998) ("[T]he need to preserve symmetry between the treatment of general and special verdicts would . . . be denigrated, by a finding of waiver"); *Butler v. Local Union 823, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers*, 514 F.2d 442, 450 (5th Cir. 1975) ("[T]he rule [proposed] preserves the symmetry . . . necessary to the furtherance of federal labor policy"); *Ward v. Studebaker Sales Corp. of Am.*, 113 F.2d 567, 569 (3d Cir. 1940); *Howland v. Doyle*, 5 R.I. 33 (1857) ("Except to preserve the symmetry of the common-law system, it is . . . of little practical importance whether a warranty . . . be implied"); *Joslyn v. Smith*, 13 Vt. 353 (1841) (argument of plaintiff) ("This doctrine is necessary to preserve the symmetry of the law, (which ought not to be departed from but from necessity or by statute).").

¹⁹⁸ *See, e.g., United States v. Burgos*, 94 F.3d 849, 862 (4th Cir. 1996) ("[W]e restore symmetry and consistency to our law."); *Travelers Ins. Co. v. Calbeck*, 293 F.2d 52, 56 (5th Cir. 1961) ("[The position taken in previous cases] has more than restored symmetry within . . . this Circuit."); *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 553-54 (Tex. App.), *rev'd in part*, 696 S.W.2d 549 (Tex. 1985) ("The time has come to . . . restore equity and symmetry to this area of the law"); *cf. Mapp v. Ohio*, 367 U.S. 643, 670 (1961) (Douglas, J., concurring) ("[T]his is an appropriate case in which to put an end to the asymmetry which Wolf imported into the law.").

¹⁹⁹ *See, e.g., Reeves v. Petty & Goodner*, 44 Tex. 249 (1875) ("When we reflect that those who sat in judgment in these cases were men who . . . drew up, gave shape to, and aided in the passage of many of our laws, we may not wonder that those of us who follow . . . dislike to see the symmetry of the temple defaced or marred."); *see also Peterson v. Kennedy*, 771 F.2d 1244, 1259 (9th Cir. 1985) (rejecting conclusion that would "destroy the rationality and symmetry the Supreme Court has finally brought to the law"); *United States v. Fleming*, 115 F.2d 314, 316 (5th Cir. 1940) (noting that proposed result "encroaches on and to that extent impairs, the symmetry of the rule of comparative negligence broadly applied"); *Haynes v. Nowlin*, 29 N.E. 389, 390 (Ind. 1891) ("The decisions which

Both the description of doctrinal symmetry as a matter of efficiency and references to justified asymmetry commonly accompany a rhetoric of judicial passivity. The focus on efficiency achieves this by stressing not court-generated doctrine, but its real-world consequences, and implying a norm of minimal activity. The justified-asymmetry approach achieves a similar end by stressing the correspondence of the preferred result with the complexity of reality or with intuited, rather than theoretical or logically derived, justice.

Thus, opinion writers' references to symmetry in articulating the roles of courts in shaping doctrine and interpreting statutes do resemble the approaches discussed in previous sections. Regardless of whether these writers posit symmetry or asymmetry as components of lawmakers' intent or as features of the law itself, the writers usually locate the origin of that symmetry or asymmetry elsewhere than in the courts. Increasingly, in as many ways as possible, opinion writers avoid direct acknowledgment of their own role in the attribution of symmetry or asymmetry to the problem before them or to the law they create and apply. In the past three decades, opinion writers have developed a new rhetorical device for achieving a similar end, addressed in the next section.

D. Correcting for Market Imperfections

The increasingly popular approaches discussed in this section are much more uniform than those discussed in previous sections. In describing the judicial system's role of correcting for imperfections in various markets, opinion writers invariably mobilize a very pure form of the bilateral conception of symmetry.

Although the notion of bilateral reciprocity has clear applicability to common-law contract doctrine,²⁰⁰ and although the sense of symmetry to mean a specifically bilateral abstract relationship was certainly in wide use by the mid-nineteenth century,²⁰¹ explicit linkages of concepts of symmetry and asymmetry with bilateral bargaining and competitive

denied . . . a right of action broke the line of consistency and marred the symmetry of the law.”).

²⁰⁰ See, e.g., *Pine R. State Bank v. Mettelle*, 333 N.W.2d 622, 629 (Minn. 1983) (“The demand for mutuality of obligation, although appealing in its symmetry, is simply a species of the forbidden inquiry into the adequacy of consideration . . .”); Jeffrey L. Harrison, *A Case for Loss Sharing*, 56 S. CAL. L. REV. 573, 573 (1983) (“Contract law is characterized by a comforting symmetry.”).

²⁰¹ See *supra* note 19 and accompanying text.

1212 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

relationships are rare before the 1980s.²⁰² (This timing could be taken as a sign of the influence on legal reasoning and rhetoric of economic analysis, which seem to have begun to draw heavily on the bilateral conception of symmetry in the 1950s and '60s,²⁰³ and the subsequent development of law and economics scholarship.²⁰⁴) The explicit judicial references to the concept that began to appear in the 1980s link the corrective role played by courts to, among other things, asymmetries in risk,²⁰⁵ bargaining power,²⁰⁶ opportunity,²⁰⁷ and information.²⁰⁸

²⁰² Courts have long referred to the "symmetry" of contracts but earlier used the term in its holistic sense. Many early twentieth-century opinions address the severability of contract clauses as a question of whether excision of a clause would affect the symmetry of the contract as a whole. The rule using this language may have originated in *Newport Rolling Hill Co. v. Hall*, 144 S.W. 760 (Ky. App. 1912): "The general rule is that where obnoxious feature of a contract can be avoided without impairing its symmetry as a whole, the courts will be most likely to adopt this view . . ." *Id.* at 762-63. An unusual early opinion connecting symmetry to bilaterality in the contract context is *Harris v. Indep. Gas Co.*, 92 P. 1123 (Kan. 1907): "[A] system which attempts . . . to insure to [a contracting party] the actual fruits of his bargain, ought, for the sake of completeness and symmetry, to enable him to insist upon the performance even of a purely executory contract." *Id.* at 1124. One early reference to symmetry to describe the relative power of parties to a bargain is really an instance of the precise-correspondence sense of symmetry. See S.D. Warren Co. v. NLRB, 353 F.2d 494, 500 (1st Cir. 1965) (referring to need to a void result that might "mar the symmetry of plant-wide [collective] bargaining"). In a similar early example, the Fourth Circuit noted, "While symmetry of application and predictability . . . are [important], . . . [w]hat is symmetrical is a complex question. . . . [T]he search for symmetry here is rendered even less manageable by the complex exchange relationship created by these contracts." *Bear Brands Hosiery Co. v. Tights, Inc.*, 605 F.2d 723, 726-27 (4th Cir. 1979).

²⁰³ See *supra* note 89.

²⁰⁴ Cf. Eric M. Fink, *Post-Realism, or the Jurisprudential Logic of Late Capitalism: A Socio-Legal Analysis of the Rise and Diffusion of Law and Economics*, 55 HASTINGS L.J. 931, 951-63 (2004) (concluding that diffusion of the law and economics approach into judicial decision-making has been mild, based on analysis of frequency of citation to law and economics scholarship in judicial opinions); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003) (discussing "deep capture" of legal and political discourse by economic modes of thought).

²⁰⁵ See, e.g., *Abbott v. Bragdon*, 107 F.3d 934, 948 (1st Cir. 1997) (noting "asymmetry of control of risk-reduction measures between health-care workers and patients"); *Jason's Foods, Inc. v. Peter Eckrich & Sons, Inc.*, 774 F.2d 214, 218 (7th Cir. 1985) (Posner, J.) (noting "argument for regarding the parties' positions as symmetrical from the standpoint of ability either to prevent or to shift losses").

²⁰⁶ See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 118 (Cal. 2000) (discussed *supra* notes 145-47 and accompanying text); *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1070 (D.C. Cir. 1995) (Wald, J., dissenting) ("Under our rule, the symmetry and mutuality of the bargaining process are preserved.").

²⁰⁷ See, e.g., *Degen v. United States*, 517 U.S. 820, 827 (1996) ("[P]ermit[ting an] absent party to pursue [certain remedies] . . . prevent[s] him from exploiting the asymmetries he creates by participating in one suit but not the other."); *Santosky v. Kramer*, 455 U.S. 745,

These references share many features. Virtually all imply that an asymmetry of any of these types is inherently undesirable and self-evidently calls for correction. The opposition between practical reality and theoretical symmetry, noted in most of the areas discussed above, is thus rare in this context.²⁰⁹ Identifications of market asymmetry also present the correction of such asymmetries as the obviously proper task of the legal system. But almost as often as they assign this task to the courts, as in *Armendariz*,²¹⁰ opinion writers assign the corrective role to other institutions—legislatures²¹¹ or administrative agencies and executive officers.²¹² Even when a writer acknowledges the courts' active role in resolving a dispute, the writer can also present the opinion's effects as merely the modest restoration of a natural balance by making the correction of market asymmetries the justification for a conclusion.²¹³

764 (1981) ("The disparity between the adversaries' litigation resources is matched by a striking asymmetry in their litigation options.").

²⁰⁸ Examples of this usage are especially numerous. Recent instances include, e.g., *AT&T Commc'ns. of Cal., Inc. v. Pac. Bell Tel. Co.*, 375 F.3d 894, 908 (9th Cir. 2004) (justifying conclusion in part by reference to local telephone providers' "asymmetric access to cost data"); and *Nat'l Commc'ns Ass'n Inc. v. AT & T Corp.*, 238 F.3d 124, 130-31 (2d Cir. 2001) ("[I]n applying a similar burden shift to other sections of the Act, the FCC has considered information asymmetry.").

²⁰⁹ *But see* *Pabst Brewing Co., Inc. v. Corrao*, 161 F.3d 434, 443 (7th Cir. 1998) (Ripple, J., dissenting) ("Labor contracts . . . rarely reflect the pristine symmetry of the textbook contract.").

²¹⁰ *See supra* Section IV.A.5; *see, e.g.*, *Degen v. United States*, 517 U.S. 820, 827 (1996) (discussing how "permit[ting an] absent party to pursue [certain remedies] . . . prevent[s] him from exploiting the asymmetries he creates by participating in one suit but not the other"); *Gracyalny v. Westinghouse Elec. Corp.*, 723 F.2d 1311, 1319 n.14 (7th Cir. 1983) ("As a result of this asymmetry of information, some courts have imposed upon manufacturers a continuing duty to warn of defects . . ."); *Armendariz v. Foundation Health Psychcare Servs.*, 24 Cal. 4th 83, 118 (Cal. 2000) (linking asymmetry in contractual clauses and bargaining power to contract law doctrine of unconscionability).

²¹¹ *See, e.g.*, *Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 330 n.4 (6th Cir. 2001) (rejecting interpretation of Truth in Lending Act that would result in "credit customers [being] asymmetrically advantaged in bargaining over price"); *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1071 (D.C. Cir. 1995) (Wald, J., dissenting) (referring to "the symmetry, mutuality, and balance of the collective bargaining process as crafted by Congress over the past 60 years"); *Ruefenacht v. O'Halloran*, 737 F.2d 320, 336 (3d Cir. 1984) (discussing "state law that did not . . . admit of asymmetries between buyer and seller").

²¹² *See, e.g.*, cases cited *supra* note 208; *see also* *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1050 (3d Cir. 1995) (same); *McDonnell v. United States*, 4 F.3d 1227, 1241 (3d Cir. 1993) (same); *Alliance for Cmty. Media v. FCC*, 10 F.3d 812, 817 (D.C. Cir. 1993) (stating that regulation "presented some symmetry between PEG access, leased access, and commercial channels"); *King v. U.S. Dep't of Justice*, 830 F.2d 210, 218 (D.C. Cir. 1987) ("Affidavits submitted by a governmental agency . . . must . . . strive to correct . . . the asymmetrical distribution of knowledge that characterizes FOIA litigation.").

²¹³ *Cf. E.E.O.C. v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1543 n.1 (2d Cir. 1996) (Jacobs, J., dissenting) (noting that "the delicate contractual balances created by sophisticated financial

1214 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

Contributing to this effect is the exclusive reliance of this approach on the bilateral conception of symmetry. As noted above, this schema implies a modicum of analysis and is also virtually always presented as involving comprehensive assessment of all possibilities.²¹⁴ Because of the salience of this schema and our apparent tendency to perceive it as natural, references to it almost never involve acknowledgment of the contingency of perceptions of symmetry, making it the ideal vehicle for a rhetoric of passivity.

In this area, too, references to symmetry function to obscure judicial activity. The same is largely true of the approaches discussed in the next section.

E. Justifying Conclusions

This survey concludes by examining the ambivalent uses legal writers have made of the concept of symmetry in relation to the reasoned justification of legal conclusions. It is in this area that judicial opinion writers most self-consciously address the work they perform.²¹⁵ But in this context, as in those discussed above, these writers have tended to use the concept of symmetry as a kind of shorthand. Even when they come closest to discussing the activity they are performing, they generally avoid addressing it directly or describing it as activity.

1. Symmetry and Logic

United States opinion writers have consistently drawn both positive and negative connections between symmetry and logic. Most of the positive approaches fall into two overlapping categories. In the first, writers simply link logic and symmetry grammatically. In the second, these opinion writers, like some of the commentators discussed in Part III, use the concept of symmetry as an organizational and reasoning tool, an indicator of the route to a sound conclusion.

professionals [can] become distorted by . . . asymmetries, and unsettled expectations"); *Cajun Elec. Power Co-op., Inc. v. FERC*, 28 F.3d 173, 178 (D.C. Cir. 1994) (reversing decision on ground that result "creates an odd asymmetry" in market power).

²¹⁴ See discussion *supra* notes 21, 62-70 and accompanying text.

²¹⁵ Although legal rhetoric is the public manifestation of legal reasoning, the cognitive process by which judges arrive at their conclusions should be distinguished from the process of reasoned presentation of conclusions. See Simon, *A Psychological Model of Judicial Decision Making*, *supra* note 55; Wetlaufer, *supra* note 2. But see Wald, *supra* note 2, at 1375 ("It is not so unusual [for a judge writing an opinion] to modulate, transfer, or even switch an originally intended rationale or result in midstream because 'it just won't write.'").

One form of the first approach, particularly prevalent in, but not restricted to, the nineteenth century involves the assertion of identity between “logic” or “reason” and symmetry.²¹⁶ Another variant makes the concepts into attributes of one another by appealing to “logical symmetry.”²¹⁷ This approach presents symmetry as a feature of logic and vice versa. Judge Cardozo’s discussion of “the method of analogy” in the first of his lectures in *The Nature of the Judicial Process* blends these approaches; he uses the terms “logic” and “symmetry,” as well as “analogy,” as synonyms for consistency and noncontradiction.²¹⁸ Earlier approaches had implied an aesthetic approach to logic, appealing to a sense of symmetry somewhere between that of holistic coherence and that of regular correspondence. Cardozo’s equation of symmetry and analogy draws more directly on the conception of symmetry as precise correspondence.²¹⁹

The organizational use of the concept of symmetry in connection with logic takes a number of forms. In one longstanding variant still used today, symmetry in any one of its senses may be presented as one

²¹⁶ See, e.g., *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 378 (1960) (“[T]here is symmetry and logic in the design of § 24.”); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 313 (1945) (“Statutes of limitations always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law.”); *Bressler v. Fortune Magazine*, 971 F.2d 1226, 1240 (6th Cir. 1992) (“[D]efendants’ argument has more than merely a logical or symmetrical appeal.”); *Black v. Black*, 34 Pa. 354 (1859) (“[A] proper plea, presenting that issue, would have been more consistent with legal symmetry and logic.”); *Hill v. Sanders*, 38 S.C.L. 521 (S.C. App. 1851) (rejecting position as “calculated to deform instead of maintaining the symmetry and beauty of the law as a system of reason and logic”).

²¹⁷ *Copeland v. Marshall*, 641 F.2d 880, 912 (D.C. Cir. 1980) (Wilkey, J., dissenting) (“There is a logical symmetry in this principle.”); *NLRB v. Annapolis Emer. Hosp. Ass’n, Inc.*, 561 F.2d 524, 533 (4th Cir. 1977) (“[T]he Board has no authority, even in the service of logical symmetry, to deny a place on the ballot to a petitioner . . .”); *Am. Metal Cap Co. v. Anchor Cap & Closure Corp.*, 20 F.2d 725, 727 (2d Cir. 1927) (characterizing position as “important, at least theoretically, for its logical symmetry”); *Adams v. Way*, 32 Conn. 160 (1864) (“Any other course would mar the logical symmetry of common law pleadings.”).

²¹⁸ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

²¹⁹ Cardozo states, for instance: “[T]he judge must . . . extract from the precedents the underlying principle[,] . . . then determine the path . . . along which [it] is to move and develop. . . . The social interest served by symmetry or certainty must . . . be balanced against the social interest served by equity and fairness or other elements of social welfare.” *Id.* at 112-13. This quotation hints at Cardozo’s ambivalent attitude toward the normative value of symmetry when linked with logic. See *Jacob & Youngs v. Kent*, 230 N.Y. 239, 242-43 (1921) (“Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a [rule such as that announced]. . . .”); see also *infra* note 276.

1216 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

justification among others for a conclusion.²²⁰ Although this approach usually does not treat symmetry as a stand-alone justification, opinion writers have on occasion referred to the symmetry of a conclusion as “compelling”²²¹ or “requiring”²²² that conclusion. Some such references attribute holistic symmetry to self-evident generalizations embracing particular conclusions.²²³ Others attribute precise correspondence to the inductive extrapolation of conclusions from regular and recurring scenarios.²²⁴

Still another approach refers to the concept of symmetry to generate objections to be refuted. This approach involves an assertion that while symmetry, in the sense of either reflection or correspondence, suggests a certain conclusion, that conclusion is incorrect.²²⁵ A final approach uses the concept of symmetry to generate the starting point or next step in a process of reasoning or systematic description.²²⁶ This approach seems

²²⁰ See, e.g., *McCarthy v. Azure*, 22 F.3d 351, 361 (1st Cir. 1994) (“Perhaps most important . . . adopting appellant’s proposal would introduce a troubling asymmetry into the law . . .”); *De Letelier v. Republic of Chile*, 748 F.2d 790, 795 (2d Cir. 1984) (“Our disagreement with the finding . . . rests on more than the resulting lack of symmetry in application of the [statute].”); *In re Continental Inv. Corp.*, 637 F.2d 1, 7 n.11 (1st Cir. 1980) (“[T]his asymmetry further supports the proposition advanced above . . .”); *GAF Corp. v. Milstein*, 453 F.2d 709, 719 (2d Cir. 1971) (“There are compelling reasons in addition to preserving symmetry which mandate that GAF has standing.”).

²²¹ *Richmond Black Police Officers Ass’n v. City of Richmond, Va.*, 548 F.2d 123, 129 (4th Cir. 1977) (“[S]ymmetry in legal logic compels our holding . . .”).

²²² See *Chapron v. Cassaday*, 22 Tenn. 661 (1842) (“[T]he symmetry of the law requires that we . . . hold the doctrine laid down by [precedent].”); *Irish v. Clayes*, 10 Vt. 81 (1838) (“By perfect parity of reasoning, by analogy of principle, by every rule of consistency and symmetry, it must be held that . . . the law . . . restored the other party to his . . . rights.”).

²²³ See LAKOFF & JOHNSON, *PHILOSOPHY IN THE FLESH*, *supra* note 36, at 380-82, 398-400 (describing deduction as container-based reasoning); Winter, *supra* note 36, at 223-58 (addressing analogical reasoning as category extension).

²²⁴ Cf. Keith Stenning & Padraic Monaghan, *Strategies and Knowledge Representation, in THE NATURE OF REASONING*, *supra* note 40, at 129 (addressing social function of enthymemes in establishing consensus).

²²⁵ See, e.g., *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 412 n.5 (7th Cir. 2000) (“While the lack of symmetry between the treatment of cases filed in state court and federal court may appear to be incongruous, it is justified . . .”); *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 331-32 (D.C. Cir. 1989) (“We recognize that the . . . rule produces asymmetrical results . . . That asymmetry derives, however, from the . . . test [on] which the question [depends].”); *United States v. Milby*, 400 F.2d 702, 708 (6th Cir. 1968) (“[A]lthough the argument has the virtue of a certain symmetry . . . Congress chose to write the statute otherwise.”); *Simons v. Bryce*, 10 S.C. 354 (1878) (“It may be insisted . . . that as in the one case a mortgage must still be regarded as an alienation, that it ought also to be so considered in the other . . . [to] preserv[e] the symmetry of the law . . . [W]e are unable to see by what authority a Court can abrogate a statute . . . even for . . . so desirable an end.”).

²²⁶ See *Bear Brand Hosiery Co. v. Tights, Inc.*, 605 F.2d 723, 726 (4th Cir. 1979) (“While symmetry of application and the predictability of attempts to strike fair . . . bargains are

first to have appeared around the end of the nineteenth century; Oliver Wendell Holmes, Jr., used something similar to structure his analysis of doctrine concerning the succession of rights in land in *The Common Law*.²²⁷ This variation sometimes draws on the holistic conception of symmetry, in which case the direction of reasoning is governed by the court's asserted grasp of the overall structure of the issue.²²⁸ Sometimes, however, this variation draws on the bilateral conception, in which case the next step in reasoning is generated by considering the contrary of a proposition that has already been addressed.²²⁹

All of these uses recognize a place for symmetry in legal justification, but the reasons for this role are never stated. Instead, legal writers cite symmetry as a self-evidently valuable component of an orderly reasoning process. Of course opinion writers are not obliged to explain every aspect of the reasons they provide for particular conclusions. And with a few exceptions, symmetry is rarely the linchpin of a justification. But it remains remarkable how little analytic attention this clearly functional concept has received. This neglect becomes more perplexing in light of the uses discussed next.

2. Symmetry as a Threat to Reason

The notion of symmetry as a threat to sound decision-making is closely related to the notion of justified asymmetry, but the approaches discussed here use stronger language than do most references to justified asymmetry, and they move further toward categorical rejection of symmetry as a useful concept. References to symmetry as a threat oppose the concept to the practical reality with which the law is properly

lights along the way in the search for contractual intent, our purpose is far more circumscribed here."); *see also* *Am. Rivers v. FERC*, 187 F.3d 1007, 1026 (9th Cir. 1999) ("We thus turn to the merits . . . We begin with the critical asymmetry in sections 18 and 10(j)."); *Abbs v. Sullivan*, 963 F.2d 918, 927 (7th Cir. 1992) ("[H]e will be no worse off than he would have been had he never brought the present suit, assuming (for symmetry) that this suit terminated adversely to him on the merits."); *ICC v. B&T Transp. Co.*, 613 F.2d 1182, 1186 n.6 (1st Cir. 1980) ("[S]ymmetry suggests allowing a court, in the exercise of full equitable powers under *DeMario*, the same scope . . ."); *ICC v. Atl. Coast Line R. Co.*, 334 F.2d 46, 50 (5th Cir. 1964) ("Symmetry also suggests a congressional purpose to allow review of an award-order . . .").

²²⁷ *See* HOLMES, *supra* note 123, at 381. "[A]lthough it would be more symmetrical if this analysis exhausted the subject, there is another class of cases in which the transfer of rights takes place upon a wholly different plan."

²²⁸ *See, e.g., Bear Brand Hosiery Co.*, 605 F.2d at 726; *ICC*, 613 F.2d at 1186 n.6; HOLMES, *supra* note 123, at 381.

²²⁹ *See, e.g., Abbs v. Sullivan*, 963 F.2d 918, 927 (7th Cir. 1992); *ICC*, 334 F.2d at 50.

1218 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

concerned, link the concept to other negative norms, and seem to deny that symmetry may ever be a guide to a correct or justified conclusion.

Such uses extend well back into United States legal history, predating most references to justified asymmetry. In some cases, however, the two approaches overlap. In the *Federalist No. 37*, for instance, Madison suggested that only “a Constitution [planned] in [a] closet or in . . . imagination” would possess “artificial structure and regular symmetry.”²³⁰ Even stronger dismissal of the concept was common in the nineteenth century: advocates and opinion writers during this period identified symmetry, used as a guide for justification or a reason in support of a conclusion, as “unsubstantial,”²³¹ “imagined,”²³² a “fancied”²³³ temptation to be resisted,²³⁴ the object of an irrational “blind love,”²³⁵ the source of only temporary gratification,²³⁶ a source of distortion,²³⁷ “hazardous,”²³⁸ and confusing.²³⁹ Rejections of arguments based on “mere” symmetry²⁴⁰ span both nineteenth- and

²³⁰ THE FEDERALIST NO. 37 (James Madison) (Jacob E. Cooke ed., 1961).

²³¹ *Seymour’s Adm’r v. Beach*, 4 Vt. 493 (1831) (“To restore symmetry in the law . . . would be [a] benefit[] too . . . unsubstantial to justify . . . disturbing the settled law. . .”).

²³² *Moore v. Paul*, 28 S.C. Eq. 358, 1855 WL 3164 (S.C. App. Eq. Jan. 1855) (per curiam).

²³³ *McCree v. Houston*, 7 N.C. 429 (1819) (argument for defendant) (“[M]en should make laws to meet actual . . . mischiefs, and not to accommodate their acts to the fancied symmetry of the theorist.”).

²³⁴ *Hamilton v. People*, 29 Mich. 173 (1874) (“[P]rofessional persons are under a constant temptation to make the law symmetrical by disregarding small things.”).

²³⁵ *Tompkins v. Hollister*, 27 N.W. 651, 656 (Mich. 1886) (citing STORY, *supra* note 161); *Sparks v. Pittman*, 51 Miss. 511 (1875) (same).

²³⁶ *Golson v. Dunlap*, 73 Cal. 157, 16,214 P. 576, 578 (1887). “A fixed standard might gratify a love of symmetry and be easy of application, but would not further the ends of justice.” *Id.*

²³⁷ In his *Commentaries on the Constitution*, Joseph Story noted:

Men of ingenious and subtle minds, who seek for symmetry and harmony in language, having found in the constitution a word used in some sense, which falls in with their favorite theory of interpreting it, have made that the standard, by which to measure its use in every other part of the instrument. They have thus stretched it, as it were, on the bed of Procrustes, lopping off its meaning, when it seemed too large for their purposes, and extending it, when it seemed too short.

STORY, *supra* note 161, § 454; see also *State v. Shaw*, 9 S.C. 94 (1878) (quoting this passage).

²³⁸ *Painter v. Pasadena Land & Water Co.*, 91 Cal. 74, 84-85 (1891).

²³⁹ *Hall v. City of Ionia*, 38 Mich. 493 (1878) (“Some confusion has . . . been caused by an attempt among writers to create symmetry in the law by putting all rights connected with land . . . into classes . . .”).

²⁴⁰ See, e.g., *Elkins v. United States*, 364 U.S. 206, 216 (1960) (“Mere logical symmetry and abstract reasoning are . . . not enough . . . to support [the proposed] doctrine . . .”); *State v. McDonnell*, 32 Vt. 491 (1860) (“[A]n exceptional rule . . . likely to be characterized as an

twentieth-century legal writing. Opinion writers have been emphatically dismissive: judicial opinions have called symmetry superficial,²⁴¹ a matter of nit-picking “niceties,”²⁴² an “academic desire,”²⁴³ “a sort of legal scholasticism,”²⁴⁴ an “unrealistic” goal seriously entertained by “no one in his right mind,”²⁴⁵ “misleading,”²⁴⁶ “illusory,”²⁴⁷ a “deceptive”²⁴⁸ and “seductive”²⁴⁹ “lure,”²⁵⁰ attractive only to the naïve,²⁵¹ a quixotic goal,²⁵² “purposeless,”²⁵³ “sterile,”²⁵⁴ “inappropriate,”²⁵⁵ irrelevant,²⁵⁶ and spurious.²⁵⁷

absurdity by the mere advocates of logical symmetry in the law, will nevertheless be sure, in the long run, to constantly gain ground . . .”).

²⁴¹ *Sullivan v. CIA*, 992 F.2d 1249, 1253 (1st Cir. 1993) (“[E]quating the two might produce a certain superficial symmetry, [but] doing so flies in the teeth of history.”); *Claudio v. Scully*, 982 F.2d 798, 811-12 (2d Cir. 1992) (Newman, J., dissenting) (“The superficial symmetry of this argument ignores the nature of the appellate function.”); *Potomac Elec. Power Co. v. Dir., Office of Workers’ Comp.*, 606 F.2d 1324, 1328 n.28 (D.C. Cir. 1979) (“The apparent symmetry achieved by this argument is only superficially pleasing . . .”); *Gen. Motors Corp. v. City of New York*, 501 F.2d 639, 657 (2d Cir. 1974) (Mansfield, J., concurring) (“[S]uch a . . . doctrine . . . may have surface appeal to those dedicated to sheer symmetry . . .”).

²⁴² *United States v. F.&M. Schaefer Brewing Co.*, 356 U.S. 227, 249 (1958) (Frankfurter, J., dissenting) (“[T]he problem before us concerns not the niceties of abstract logic or legal symmetry, but the practicalities of litigation and judicial administration in the federal courts . . .”).

²⁴³ *CIR v. Duberstein*, 363 U.S. 278, 290 (1960) (referring to “academic desire for . . . symmetry”).

²⁴⁴ *Dellums v. Powell*, 566 F.2d 167, 214 (D.C. Cir. 1977) (Tamm, J., dissenting) (disparaging majority opinion as “self-justifying . . . adroit intellectual symmetry—a sort of legal scholasticism”).

²⁴⁵ *United Servs. Life Ins. Co. v. Delaney*, 328 F.2d 483, 487 (5th Cir. 1964) (Tuttle, J., dissenting) (“[N]o one in his right mind is unrealistic enough to suppose that the law is always a perfect symmetry, never involves contradictions, always avoids conflicts.”).

²⁴⁶ *Kemp v. Beasley*, 389 F.2d 178, 190 (8th Cir. 1968).

²⁴⁷ *United States v. Wexler*, 31 F.3d 117, 120 (3d Cir. 1994) (“[T]he apparent symmetry is illusory . . .”).

²⁴⁸ *Inland Trucking Co. v. NLRB*, 440 F.2d 562, 564 (7th Cir. 1971).

²⁴⁹ *United States v. Chaidez*, 919 F.2d 1193, 1203 (7th Cir. 1990) (Ripple, J., dissenting).

²⁵⁰ *Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310, 324 (1955); *cf. Scripps-Howard Radio v. FCC*, 316 U.S. 4, 19 (1942) (Douglas, J., dissenting) (“[T]o seize on that lack of symmetry here is to miss the forest for the trees.”).

²⁵¹ *Exacto Spring Corp. v. CIR*, 196 F.3d 833, 835 (7th Cir. 1999) (Posner, J.) (“One would have to be awfully naïve to believe that the seven-factor test generated this pleasing symmetry.”).

²⁵² *Laing v. United States*, 423 U.S. 161, 188-89 (1976) (Blackmun, J., dissenting) (denouncing approach that gives “every evidence of pursuing a quest for what it seems to regard as a desirable or necessary symmetry and, in my view, and most unfortunately, indulg[ing] in a faulty analysis of the Code’s structure”).

²⁵³ *Mitchell v. Scheepvaart Maatschappij Trans-Ocean*, 579 F.2d 1274, 1282 (5th Cir. 1978).

²⁵⁴ *Pittsburgh-Des Moines Steel Co. v. United Steelworkers of Am., AFL-CIO*, 633 F.2d 302, 307 (3d Cir. 1980).

1220 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

Justice Stevens's 2004 dissent in *Dretke v. Haley* is a good recent example of this approach and illustrates both its strength and its pitfalls.²⁵⁸ The majority in *Haley* refused to articulate a new actual-innocence exception to the rule of procedural default in habeas corpus doctrine, even though this seemed to result in great injustice to the petitioner.²⁵⁹ Justice Stevens opened his dissent with the following criticism of the majority's conclusion: "The unending search for symmetry in the law can cause judges to forget about justice. This should be a simple case."²⁶⁰ He thus expressly characterized the majority's conclusion as stemming from a drive toward symmetry and as a deliberate departure from the achievement of justice in the case. Moreover, Justice Stevens implied that the majority must have actively chosen not to resolve Haley's petition as justice clearly indicated it should be resolved: "This should be a simple case."²⁶¹ This statement aligns the majority's pursuit of holistic doctrinal symmetry with a conscious choice to act incorrectly or at least benightedly. Of course, in making this statement, Justice Stevens attributed an active role to that wing of the Court from which he was distinguishing his own position. The outcome Justice Stevens advocated is, in contrast, implicitly so obviously correct as to require virtually no conscious decision-making to discern. In this way, Justice Stevens's critique, like the long tradition of similar critiques cited in this section, ultimately functions just like the positive appeals to symmetry that it ostensibly rejects.²⁶²

Such negative references to symmetry are also problematic in another way. Previous sections have shown how the perception of symmetry in the problems faced by courts has been as much a constant in opinion writers' understandings of their own roles as denial of the writers' agency. The very pervasiveness of the concept suggests that it serves a useful purpose, but rhetoric like Justice Stevens's denies that

²⁵⁵ *Pinkney v. Keane*, 920 F.2d 1090, 1094 (2d Cir. 1990).

²⁵⁶ See *Rosmer v. Pfizer Inc.*, 263 F.3d 110, 119 (4th Cir. 2001) ("Notwithstanding the symmetrical satisfaction of leaving federal law to federal courts and state law to state courts, we cannot read § 1367 [as urged] . . ."); *United States v. Branch*, 91 F.3d 699, 714 (5th Cir. 1996) ("Our issue is error, not symmetry.").

²⁵⁷ *EEOC v. Pipefitters Ass'n Local Union 597*, 334 F.3d 656, 659 (7th Cir. 2003).

²⁵⁸ 541 U.S. 386, 396 (2004) (Stevens, J., dissenting).

²⁵⁹ All parties conceded that the petitioner was actually innocent of the convicted crime. *Id.* at 397. The majority's conclusion was that actual innocence should not be recognized as an exception. *Id.*

²⁶⁰ *Id.* at 396.

²⁶¹ *Id.*

²⁶² In this, Justice Stevens's opinion also conforms to the standard rhetoric of judicial dissents, which often cast the accompanying majority opinion as activist. See Chemerinsky, *supra* note 2, at 2010, 2019-21.

conclusion. The next section explores some of the purposes the concept may have served in the past and can serve now.

V. IMPLICATIONS

A topical survey was the clearest way to present the full scope of the patterns in courts' references to symmetry and to show how closely these references are linked to courts' self-description of their own functions. But this survey also noted numerous historical shifts in these references. For further clarification, this Part first chronologically recapitulates highlights of the survey above. The review draws out both the consistencies and the developments in legal writers' reliances on the concept.

This discussion next identifies two cautionary aspects of the patterns described. First, as noted repeatedly above, legal writers have consistently used the concepts of symmetry and asymmetry to describe the judicial function as predominantly passive. This consistency is a symptom of a more widespread conceptual and rhetorical pattern that identifies courts as basically passive institutions. This pattern is in turn one aspect of an ongoing vulnerability in the legal system's self-description of its function. Second, the unreflective reliance on conceptions of symmetry to structure or drive legal thought and writing contributes incrementally to entrenchment of this pattern, helping to make perception of the weakness more difficult. At the same time, a closer look at the function of the conceptions of symmetry in legal rhetoric suggests ways of using those conceptions to structure and articulate legal analysis in more self-consciously constructive ways.

A. *Historical Trends in Conceptions of Symmetry*

The earliest use of the concept of symmetry in legal rhetoric discussed above is Blackstone's use of the edifice metaphor to describe the English common law in the 1760s.²⁶³ Blackstone's reference to holistic symmetry distances the edifice and the law from present-day judicial action. American adoption of this metaphor by advocates, and especially by judges, served a function similar to American reliance on Blackstone more generally. By characterizing their undertakings as a matter of appreciation rather than construction, American judges and lawyers could also present their activity as part of a coherent national legal tradition, even where no such thing clearly existed yet.²⁶⁴ During

²⁶³ See *supra* note 183 and accompanying text.

²⁶⁴ See FRIEDMAN, *supra* note 183, at 59-60, 467-68.

1222 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

this period, lawyers and judges worked in an institutional context characterized by dispersion and disconnection and in an intellectual culture stressing synthesis and universalism.²⁶⁵ These factors combined to make the edifice metaphor and the holistic sense of symmetry—apparently the primary sense in general use at the time—attractive conceptual models of the judicial function.²⁶⁶

In the mid-nineteenth century, legal writers also began to use the concept of symmetry in the sense of precise correspondence. One way of understanding the increased use of this conception in the legal context is in relation to the trend toward legal formalism and a new culture-wide emphasis on expert inquiry in the second half of the century.²⁶⁷ As experts in other institutions—including legislatures, government agencies, corporations, universities, and other organizations²⁶⁸—began to take on the functions of coordinating activity and resolving conflicts, legal writers increasingly focused on assertions of their own expertise and institutional autonomy.²⁶⁹ Given its mathematical and scientific origins and its connotations of regularity and predictability, the sense of symmetry as correspondence would have been clearly useful in this regard.²⁷⁰ And as translational symmetries proliferated in the everyday lives of Americans, this schema would have come more and more readily to mind.²⁷¹

²⁶⁵ See, e.g., *id.*, at 226-49; WOOD, *supra* note 14, at 29, 58-59, 261 (discussing holism and organicism of eighteenth-century political science and legal theory).

²⁶⁶ Thus, throughout this period, when courts do not refer to the law as an edifice, they tend to refer to it as a seamless web. See, e.g., *Commonwealth v. Chapman*, 54 Mass. 68 (1847) (“[W]ithout the common law, our legislation and jurisprudence would be impotent, and wholly deficient in completeness and symmetry, as a system of municipal law.”); *Lyle v. Richards*, 1823 WL 2183, 9 Serg. & Rawle 322 (Pa. 1823) (noting that rule against contingent remainders “filled up the vacuum, and preserved the symmetry, by converting the tenant for life into a trustee to support the remainders”).

²⁶⁷ See FRIEDMAN, *supra* note 183, *passim*; GRANT GILMORE, *THE AGES OF AMERICAN LAW* 41-67 (1977); HORWITZ, *supra* note 150, *passim*.

²⁶⁸ See DOUGLAS, *supra* note 73, at 47-48, 111-12 (discussing ANDREW SCHOTTER, *THE ECONOMIC THEORY OF SOCIAL INSTITUTIONS* (1981)); FRIEDMAN, *supra* note 183, *passim*.

²⁶⁹ See FRIEDMAN, *supra* note 183, at 340-46, 463-500; THOMAS J. SCHLERETH, *VICTORIAN AMERICA: TRANSFORMATIONS IN EVERYDAY LIFE, 1876-1915*, at 249-53 (1991).

²⁷⁰ See *supra* notes 150-53, 216-217 and accompanying text. In addition to using the concept of symmetry to assert their institutional distinctiveness, courts used the concept to characterize the functions performed by their new lawmaking competitors, legislatures. See FRIEDMAN, *supra* note 183, at 260-72; HORWITZ, *supra* note 150, at 259. Thus, in the early nineteenth century, courts begin to attribute to legislatures holistic symmetric purposes. See *supra* note 156 and accompanying text. Later, they begin to describe statutes as logically consistent and therefore symmetrical. See *supra* notes 171, 173 and accompanying text.

²⁷¹ See *supra* notes 77-80 and accompanying text.

In the late nineteenth century, the emphasis on expertise became stronger and more compromised.²⁷² A focus on expertise usually will focus on parts more than on wholes, and this emphasis makes full acknowledgment of context difficult. The intellectual life of this period is marked by discomfort with the growing difficulty of fitting highly specialized human creations—technological, intellectual, institutional—into a cohesive lived experience. Descriptions of this difficulty and efforts to overcome it are characteristic of the period both within and outside the law.²⁷³ Continued references to symmetry in the holistic sense, and to holism generally, were one response. Legal and opinion writers also responded in other ways: by preferring particularized, context-dependent, “practical” justice to symmetrical theory and by asserting that theoretical asymmetry might be unavoidable.²⁷⁴

Into the twentieth century, this discomfort has continued to generate conceptual pluralism and critical reflection, as well as a sustained impetus toward denial of the created aspects of the law. Legal and opinion writers have continued to invoke holistic symmetry and to refer positively to symmetry in the sense of precise correspondence. But the early twentieth century also saw the first notable references to bilateral symmetry in connection with the functions of courts.²⁷⁵ From that period, legal writers, and especially opinion writers, have drawn on not two, but three, different conceptions of symmetry in articulating the function of courts.²⁷⁶

²⁷² See HORWITZ, *supra* note 150, *passim*.

²⁷³ See, e.g., *id.* at 194-95; Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989).

²⁷⁴ See *supra* notes 120-24, 174-75 and accompanying text. In line with the increasing stress on the concrete, this period also sees a shift toward references to the judicial system itself, and not simply justice or doctrine, as the edifice of the law. See *supra* notes 192-94 and accompanying text.

²⁷⁵ See *Palko v. Connecticut*, 302 U.S. 319, 328 (1937); *Patsone v. Pennsylvania*, 232 U.S. 138, 144 (1914). Morton Horwitz has contended that the practice of interest balancing as a mode of legal analysis also first appeared in the first few decades of the twentieth century, although he presents this emergence as a reaction to formalism, not in terms of the emergence of bilateral symmetry as a conceptual model. See HORWITZ, *supra* note 150, at 18, 131; cf. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 948-49 (1987) (contending that the practice first emerged in constitutional adjudication in the 1930s and 1940s).

²⁷⁶ Judge (and then) Justice Cardozo’s varying attitudes toward all three conceptions of symmetry illustrate the confusion implicit in this proliferation. Robert Laurence notes that many of Cardozo’s early opinions were critical of the concept. See Laurence, *supra* note 90, at 876 n.53. But in *The Nature of the Judicial Process*, published during his time on the New York bench, Judge Cardozo equated the legitimate decision-making principle of analogy with reason and symmetry. See *supra* note 218. To be sure, he qualified his endorsement of

1224 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

Despite this pluralism, recent legal rhetoric is pervaded above all by references to bilateral symmetry. This sense of symmetry is both potent and problematic because of its flexibility and apparent naturalness. Bilateral symmetry embodies aspects of both of the other conceptions of symmetry used in legal rhetoric. Bilateral analysis proposes a relationship of precise correspondence between the relevant aspects of its paired components and holistically implies that no analysis is needed beyond the identification of a relationship of inverted correspondence. Because the schema embodies both action and its nullification, it is the perfect metaphor of self-functioning for actors who wish to deny that they act on the world.²⁷⁷ It also necessarily limits the amount of information under analysis.²⁷⁸ For these reasons, the bilateral conception of symmetry may be an even more problematic rhetorical and conceptual tool than the other senses of symmetry. Indeed, as the discussions above indicate, most critiques of the normative use of this conception nevertheless rely on it. This conception thus easily ends up driving and constraining analysis, leading it into circularity or indicating that a problem has been fully considered when its analysis has in fact only just begun.²⁷⁹

To summarize, legal writers' use of the concept of symmetry has moved from an almost exclusive focus on the holistic sense to a reliance on all three senses of the term. The bilateral sense, perhaps embracing the other two, seems increasingly to predominate. These developments have occurred alongside increasing conceptual fragmentation: a movement to a state in which the term "symmetry" names several different ideas and is treated with continued ambivalence. These changes have occurred against a backdrop of increasing difficulty in articulating the function of the legal system, a difficulty in itself partly a product of the proliferation of roles played by the system and the pressure on actors within the system to deny its activity and the contingency of their decision-making.

this principle, and in *Jacobs & Young v. Kent*, decided the same year, he criticized the holistic sense of symmetry. 230 N.Y. 239, 242-43 (1921), quoted *supra* note 219. But just three years later, in *The Growth of the Law*, he described justice as "consistent with symmetry and order." BENJAMIN CARDOZO, *THE GROWTH OF THE LAW* 89 (1924). And in *Palko v. Connecticut*, he took as his reference point symmetry not only in the holistic sense but also in the relatively new sense of bilateral reflection. 302 U.S. at 328.

²⁷⁷ See *supra* notes 24, 62-71 and accompanying text.

²⁷⁸ See *supra* notes 24, 64-69 and accompanying text.

²⁷⁹ See *supra* note 24.

B. *Symmetry as a Symptom*

1. The Problem with Judicial Passivity

The discussion above has sought to show that references to symmetry have consistently functioned as both a way to refer to what courts do and should be doing, and a way to indicate that they are actually doing nothing at all. When judicial opinions use the concept of symmetry metaphorically, they most often use it as a placeholder for descriptions of judicial function.²⁸⁰ It refers to the work courts do: resolving conflict and imposing coherence through the perception or declaration of holistic symmetry; safeguarding regularity and impartiality through the identification of translational symmetries; and ensuring the full consideration of competing interests through the structuring of analysis on the model of bilateral reflection. The compressed and familiar nature of all three of the symmetry schemas suits them well for use in summary references to the function of the judicial system. They are generally used, however, not to explicate this function, but to demonstrate that it is so simple as to be almost nonexistent. In this regard, the schemas simply reinforce the dominant articulation of the function of the law in our culture, which characterizes that function negatively rather than affirmatively. This section briefly explores the reasons for this dominant articulation, touched on in the previous section in the context of references to symmetry, within a description of its wider scope and problematic implications.

Descriptions of the judicial system as passive are ubiquitous in analyses of the nature of that system.²⁸¹ We commonly note, for instance, that in an adversarial system, litigants define the contours of the controversies that the system resolves. In such a system, judges and courts are understood as fundamentally passive.²⁸² The Constitution ratifies this characterization, for the federal courts, through the

²⁸⁰ Even when courts use the concept to refer to judicial functions less directly—as in invocations of justified asymmetry or of the legislature’s intention to create a symmetrical statutory scheme—the perception of symmetry and the judgment regarding its normative value remain implicitly judicial tasks.

²⁸¹ The roots of this tradition extend beyond the founding of the United States, see Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301 (1988-89), but its ultimate origins lie outside the scope of the present study.

²⁸² See, e.g., MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 137 (1986); Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1789-90 (2004); Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1481 (2000); Sward, *supra* note 281, at 312-13, 335-36 (1988-89).

1226 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

jurisdictional restrictions of Article III.²⁸³ Characterizations of courts as lacking agency are also central to Alexander Hamilton's characterization of the judicial system in the *Federalist* as the branch that "can take no active resolution whatever."²⁸⁴

Scholars have also long recognized the conventions through which judicial rhetoric itself dramatizes judicial action as passive and constrained, whether by conventions of precedential reasoning,²⁸⁵ the constitutional assignment of more active roles to the political branches,²⁸⁶ or the need to enact social consensus.²⁸⁷ These conventional judicial stances are reinforced by a generally high scholarly view of judicial passivity. Many current commentators describe both the negative definition of the judicial function²⁸⁸ and the extreme constraint, or even determination, of judicial action by social, economic, institutional, and political factors as not only inherent in the system, but also, perhaps, its defining feature.²⁸⁹ An important example of this tendency appears in the debate surrounding the notions of judicial activism and specifically in the evident difficulty of generating a solid response to that charge, even though many acknowledge the term "judicial activism" to be unsatisfactory and possibly even meaningless.²⁹⁰

²⁸³ U.S. Const. Art. III, § 2, cl. 1; see Molot, *supra* note 282, at 1762-63.

²⁸⁴ THE FEDERALIST NO. 78 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Structural characteristics are not the only constraints on the action of courts. Jonathan T. Molot has noted the range of financial, social, reputational, and historical factors that constrain judicial action. See Molot, *supra* note 282, at 1757-58, 1782-96; see also Dorf, *supra* note 87, at 69-83.

²⁸⁵ See also Molot, *supra* note 282, at 1758-59, 1801-03; Peters, *supra* note 282, at 1499-1513. See generally SUNSTEIN, *supra* note 168. Much of this commentary, deriving from Bickel's work, focuses on the United States Supreme Court. But the tradition of precedentialist constraint is applicable to other courts as well, including state courts. Cf. Dorf, *supra* note 87, at 32-33.

²⁸⁶ See, e.g., BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 86, at 69, 183-98; Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1751-60, 1762-66 (1976); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1413, 1430-32 (1997); Peters, *supra* note 282, at 1455-76.

²⁸⁷ Ferguson, *supra* note 2, at 208; see also BICKEL, THE LEAST DANGEROUS BRANCH, *supra*, at 86, 188, 204-07.

²⁸⁸ See, e.g., Kennedy, *supra* note 286, at 1736-37, 1742-43, 1751-62.

²⁸⁹ See, e.g., BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 86, at 69-71, 111-98, 200; VERMEULE, *supra* note 167, at 86-181; Lessig, *supra* note 286, *passim*; Sward, *supra* note 281, at 312-13, 335-36.

²⁹⁰ On problems with the term "judicial activism," see, e.g., Chemerinsky, *supra* note 2, at 2019-20; Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441, 1442-44 (2004); and Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1141 (2002).

Although the tendency to follow judicial self-presentation by describing courts as desirably passive is widespread, it is not universal.²⁹¹ Critiques of judicial passivity start from the same point as celebrations of that passivity: the need to articulate the distinctiveness of the system in order to legitimate its actions. These critiques note that it is difficult to legitimate an institution defined in primarily negative terms.²⁹² Many such critiques focus on the vices of passivity in judicial rhetoric: its inconsistency with the actual practice of courts in resolving real problems;²⁹³ the tendency it may have to promote a sense that judges, because their role is passive, are also unconstrained;²⁹⁴ and the obstacles it creates for clear communication with the political branches and other institutional actors.²⁹⁵ A few critiques have offered alternative, affirmative characterizations of the judicial role, but most limit these characterizations to particular features of the system—arguing that courts should, for instance, focus only on the protection of individual rights—instead of reconceptualizing the plural functions that the system actually serves.²⁹⁶ This is not an entirely satisfactory solution to the problem.

The difficulty with articulating the distinctiveness of the judicial system, while doing full justice to its plural functions, directly underpins the controversies over judicial activism.²⁹⁷ Most often, that term describes either the assertion of decision-making autonomy by particular individual judges or the assertion of decision-making authority on behalf of the judicial system so as to override acts of other branches of government, which are understood as making the same types of policy decisions through other mechanisms.²⁹⁸ It is impossible to respond to

²⁹¹ Alexander Bickel, despite his championing of the passive virtues, also criticized the rhetoric of passivity, identifying it with “mechanical jurisprudence.” See BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 86, at 71, 77-80, 91-93.

²⁹² See, e.g., Molot, *supra* note 282, at 1838-47; cf. Hugh Baxter, *Autopoiesis and the “Relative Autonomy” of Law*, 19 CARDOZO L. REV. 1987, 1989-92 (1998) (discussing difficulties of articulating “relative autonomy” of the legal system affirmatively).

²⁹³ See Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, SUP. CT. REV., 2002, at 343, 378-98, 407.

²⁹⁴ See BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 86, at 92-93; Molot, *supra* note 282, at 1835.

²⁹⁵ See, e.g., BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 86, at 156, 179; Dorf, *supra* note 87, at 13-14, 60-69, 70-83.

²⁹⁶ Commentators such as Ronald Dworkin, Michael Dorf, and Lawrence Lessig, for example, have argued that courts should be less hesitant about avowing their unique capacity for protecting individual rights. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130, 184-205 (1978); Dorf, *supra* note 87, at 69-83; Lessig, *supra* note 286, at 1414-32.

²⁹⁷ See Young, *supra* note 290, *passim*.

²⁹⁸ Cf. BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 86, at 48, 70-71.

1228 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

the confused equation of such different types of activity through reassertions of the inherent passivity of the judicial role. A more effective response would discard the assumption that the function of the legal system must be understood as fundamentally passive and discard the rhetoric that reinforces this assumption. To date, however, the function of the concept of symmetry in legal rhetoric and reasoning has been to strengthen this assumption, not to work against it.

2. The Mere-Exposure Effect

Every time a judicial opinion or scholarly analysis draws on the rhetoric of judicial passivity or, perhaps more potently, invokes a schema of symmetry to organize description or explanation or to justify a conclusion, the traditions and habits described in the previous section are reinforced. With each unreflective use of the concept of symmetry, its power over us increases.

Increased exposure to a symbol will increase our preference for that symbol, even if we attach no meaning to the symbol. In the 1970s, Robert Zajonc conducted a series of experiments on what he termed the "mere-exposure effect."²⁹⁹ In the experiments, Zajonc showed cards bearing Japanese ideographs to subjects who did not know Japanese. The subjects were shown some cards only a few times, others many more times. Later the subjects were asked to indicate their preference for the cards, shown one at a time. The subjects showed strong preferences for the ideographs they had seen many times, even though the characters held no meaning for the subjects.

To be sure, the concept of symmetry is not devoid of meaning to the legal writers and commentators who rely on it. But one purpose of this Article has been to show that when we assume that the significance of the concept is self-evident, expressing a simple and irreducible truth, we do divest the concept of much of its meaning and of many of its implications. This impoverished understanding of the concept explains both its consistent use in the context of articulations of judicial passivity and the otherwise peculiar normative oscillations—from honorific to epithet and back again—evident in its usage for the past century or more.

The mere-exposure effect suggests that over time this dynamic is likely to have become increasingly entrenched. It may also have become

²⁹⁹ HUNT, *supra* note 37, at 505 (discussing Robert Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 AM. PSYCHOLOGIST 151-75 (1980)).

increasingly invisible. The dramatically increased reliance of scholarly commentary on the concept of symmetry provides some support for these propositions.³⁰⁰ Adding detail to our understanding of the concept, however, gives us the tools to remain aware of its implications as we use it, allowing us to begin to counteract these effects.³⁰¹ This Article closes by sketching some preliminary suggestions for future use of each of the three conceptions of symmetry that have played such a prominent role in legal rhetoric.

C. *A Self-Conscious Rhetoric of Symmetry*

The three conceptions of symmetry described in this Article have tremendous heuristic value, but much of this value is squandered if the meanings of those conceptions are taken to be simple and self-evident.

The holistic conception of symmetry, which powerfully expresses our drive toward coherence, has fit so well for so long into descriptions of the function of the legal system in part because one of the primary functions of that system has always been the resolution of conflict—between individuals, between interests, and between tradition and change. The problem with this conception, and the reason it is the conception most often criticized in legal discourse, is that it elides analysis. It presents coherence as an achieved fact and does not acknowledge the effort and contingency inherent in its attainment. While this conception of symmetry may in some respects accurately reflect the way we reach conclusions,³⁰² a conception of the judicial function that presents coherence as instantaneously achieved in every case is of little use to other individual and institutional participants in the legal system.³⁰³

When tempted to refer to symmetry in the holistic sense, then, we should ask ourselves whether we have sufficiently examined and presented the grounds for our perception of a set of relationships as

³⁰⁰ See discussion *supra* Part III, especially *supra* note 89.

³⁰¹ On the effectiveness of debiasing, see Chen & Hanson, *supra* note 34, at 1228-38.

³⁰² For instance, much of our “backstage” mental operation is more holistic than we conventionally admit. We tend to believe we know how things work without being able to articulate our knowledge in detail, relying heavily on holistic “illusions of explanatory depth” in making our decisions. See WILSON, *supra* note 36, at 202-06 (describing how experimental subjects report confidence in their understanding of how particular processes work but are unable to articulate explanations when prompted). We also eliminate competing alternatives to our conclusions from consideration in the very process of reaching those conclusions. See generally Simon, *A Psychological Model of Judicial Decision Making*, *supra* note 55.

³⁰³ See *supra* notes 81-86 and accompanying text.

1230 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

harmonious. Holistic symmetry should never be the sole reason provided in support of a conclusion. Use of this sense of the term as a pejorative, as in Justice Stevens's *Haley* dissent,³⁰⁴ is less pernicious, insofar as this use tends simply to express the insight that the perception of a conclusion as coherent, consistent, or balanced is always contingent on one's frame of reference, and that such perceived coherence should therefore rarely be the sole justification for a result.

The conception of symmetry as precise correspondence has been tenacious within legal discourse for analogous reasons: it seems to describe both a central aspect of the way we reach conclusions and a central function of the legal system. When we reason analytically, and especially when we must persuade others to accept the results of our reasoning processes, we most often do so using either categorical logic or analogy.³⁰⁵ Both processes depend on the exploitation of correspondences perceived as identity in some relevant regard.³⁰⁶ And we conceive of our legal system as engineered, at least in part, for a similar purpose: the identical treatment of situations and individuals identical in relevant respects.³⁰⁷ Using the term "symmetry" in this sense, moreover, allows us to describe the actions of courts as both technically exact and minimally intrusive. As uncertainty comes to play a larger role in our lives and our institutions, the certainty offered by regularity and expertise may be increasingly attractive. Moreover, as material models of precise correspondence proliferate in our environment, we come to see these processes as more and more inevitable, without ever losing sight of their artifactual character.³⁰⁸

Most of the references to justified asymmetry described in Part IV stem from the valid insight that, outside of the realm of artifacts and abstractions, truly precise correspondences of this type do not exist. Unfortunately, this insight too easily slides into the conclusion—reminiscent of Westen's critique of equality³⁰⁹—that the abstractions are not useful and should be discarded. Actively self-aware use of the sense of symmetry as precise correspondence would, in contrast, remain conscious of the utility of the conception as an analytic device and of its status as a central aspiration of our legal system. This awareness necessitates a conception of that legal system as a deliberate creation, a

³⁰⁴ *Dretke v. Haley*, 541 U.S. 386, 396 (2004) (Stevens, J., dissenting).

³⁰⁵ See *supra* notes 223-224 and accompanying text.

³⁰⁶ See *supra* notes 223-224 and accompanying text.

³⁰⁷ See VAN FRAASSEN, *supra* note 26, at 243.

³⁰⁸ See *supra* notes 77-80, 300 and accompanying text.

³⁰⁹ See *supra* Part II.B.1.

set of institutions that exist to generate solutions to problems people cannot solve on their own. This understanding of the system in turn entails an acknowledgment of its participants as actively engaged in pursuit of a necessarily aspirational goal.

Unthinking reliance on the bilateral reflective conception of symmetry may pose the greatest threat to effective reasoning and analysis. This schema efficiently satisfies both our drive toward closure and our drive toward variety.³¹⁰ It thus combines the strongest feature of the holistic conception of symmetry—its utility as a device for expressing coherence—and the strongest feature of the sense of symmetry as precise correspondence—its usefulness in structuring analysis and giving order to facts. The frequency of this type of configuration in natural forms, in addition to our apparent predisposition to perceive this form of symmetry, ensures that reflective symmetry will almost always seem natural, even comforting, unlike the correspondence conception of symmetry. Usage of conception in legal rhetoric confirms this supposition: it is never the presence of bilateral symmetry, but only departure from it, that self-evidently requires explanation. As the critics of the “asymmetric threat” term have pointed out, however, overreliance on the apparent givenness of this conception can be perilous.³¹¹ After all, our perception of a relationship of bilateral symmetry depends entirely on our frame of reference; what seems bilaterally symmetrical at one level of analysis will not seem symmetrical at another.³¹² Assuming that a perceived relationship of abstract bilateral symmetry or asymmetry tells the whole story with respect to a problem under analysis, and that we have completed analysis once we have identified the complementary components that, together, form the relationship we perceive, may therefore lead us to stop the analysis right where it should start.

The bilateral symmetry schema is indeed a good starting point for analysis because it permits manageable analysis. But because this schema inherently limits the amount of information under consideration, analysis should never end with identification of a relationship of bilateral symmetry or asymmetry. When we are tempted to address a problem in this way, we should always ask ourselves several additional questions. What shift in our conceptual frame of reference would cause the bilateral structure to disappear? What are the reasons not to make that shift? What simplifications might we be performing unconsciously

³¹⁰ See *supra* notes 62-71, 277 and accompanying text.

³¹¹ See *supra* notes 4-9 and accompanying text.

³¹² See text accompanying note 111.

1232 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

in order to make the problem fit this schema? And what difference does it make to our analysis if the symmetry is conceptualized not in terms of vertical reflection, implying equivalence, but in terms of reflection around an axis other than the vertical, perhaps implying hierarchy?

The 2000 opinion of the California Supreme Court in *Armendariz*³¹³ provides a useful model of this type of analysis. The court in *Armendariz* noted, but rejected, the assumption that apparent bilateral asymmetry in contractual terms demands rectification in every case.³¹⁴ It further noted that asymmetry depends on one's frame of reference: an agreement that seems asymmetrical to outside parties may not seem that way to the parties to the agreement.³¹⁵ The court in *Armendariz* concluded, however, that where the asymmetry in question is really a matter of hierarchy rather than a simple lack of correspondence, as in the case of adhesion contracts, active decision-making and interference by courts should not be avoided or denied.³¹⁶

Unfortunately, the type of analysis conducted in *Armendariz* may be the exception rather than the rule; indeed, the opinion presents itself as such. Much more common are approaches resembling that of Justice Scalia in his *Velazquez* dissent.³¹⁷ In that opinion, Justice Scalia based his judgment of the constitutionality of a restriction on legal-services funding largely on his description of the restriction as adversarially symmetrical, and thus self-evidently acceptable.³¹⁸ His description of the parties affected by the funding restriction as complementary but equivalent litigants permitted this characterization and simplified the scenario considerably. Analysis in these terms makes no room for the possibility that from within another frame of reference, such as that of resource access, the respective positions of the parties involved in challenges to welfare laws might not be at all comparable. From this perspective, the dividing line permitting description of the restriction as bilaterally symmetrical in its effects really marks a hierarchical social division,³¹⁹ and active judicial rejection of legal structures that reproduce that social hierarchy in a way conflicting with the redistributive purposes of welfare laws—instead of advancing those purposes—seems far less inappropriate. Summary references to symmetry as equivalent to

³¹³ *Armendariz v. Found. Health Psychcare Servs.*, 24 Cal. 4th 83 (Cal. 2000).

³¹⁴ *Id.* at 118.

³¹⁵ *Id.*

³¹⁶ *Id.* at 114-21.

³¹⁷ *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001) (Scalia, J., dissenting).

³¹⁸ *Id.* at 551.

³¹⁹ See *supra* note 10 and accompanying text.

2007]

The Rhetoric of Symmetry

1233

self-evident fairness, such as Justice Scalia's, preclude more thoroughly contextualized and precise analysis. Such references not only entrench harmful conceptualizations of the judicial system as primarily passive, but also limit the problem-solving flexibility of the system.

Because the concept of symmetry has for so long been used to describe such disparate functions of the legal system, this type of unreflective legal reliance on the concept may pose a threat. Not only is the reliance close to invisible because of its ubiquity, but it subtly exacerbates the problems inherent in the rhetoric of passivity that pervades discussion within and about the judicial system. This effect is unlikely to correct itself as it becomes more and more familiar to us. This Article attempts to offer some of the information needed for more careful use of the various conceptions of symmetry. Refusing to take the significance of these conceptions as self-evident may not only strengthen legal reasoning and description, but also contribute to clearer recognition of the legitimate decision-making activities that legal rhetoric performs and records.