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The Case for Symmetry in Antidiscrimination Law

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THE CASE FOR SYMMETRY IN ANTIDISCRIMINATION LAW

Naomi Schoenbaum*

Forthcoming Wisconsin Law Review (2017)

Antidiscrimination law faces a fundamental design question: the choice between symmetry and asymmetry. A symmetrical law prohibits discrimination on the basis of a trait for a universal class of persons, and for both “sides” of the trait. An asymmetrical law prohibits discrimination on the basis of one “side” of the trait, and for a limited class of persons. Current law is inconsistent in its design. For example, employment discrimination law prohibits race discrimination symmetrically (everyone is protected, and on the basis of any race), but prohibits disability discrimination asymmetrically (only the disabled are protected, and only on the basis of disability). This critical design choice has received scant attention outside of the affirmative action context, leaving this key inconsistency in current law unexplained, and the implications unexplored.

Relying on employment discrimination law and the traits of race, sex, disability, and age as core examples, this Article provides the first systematic study of this design choice. It makes the case for symmetry on three grounds: purpose, practice, and politics. As for the purpose of antidiscrimination law, this Article reaches the counterintuitive conclusion that a symmetrical design that protects everyone is effective not only at reducing classifications on the basis of protected traits, but also at improving the labor market circumstances of subordinated groups. When it comes to practice, a symmetrical law avoids challenges arising from protected-class determinations that limit plaintiffs’ ability to pursue their claims. Finally, symmetrical antidiscrimination laws are more likely to produce positive policy feedback, generating greater support for these laws. After discussing how to optimize symmetry, this Article explores further applications, including additional traits, such as appearance and sexual orientation, and additional areas of law, such as housing law, education law, and constitutional law.

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INTRODUCTION

Last year Senator Tom Harkin, a key proponent of the Americans with Disabilities Act (ADA),¹ shared the experience of his deaf brother becoming employed at a factory.² After having the chance to show his worth as a worker, Harkin's brother performed quite well. In fact, as Harkin explained, the employer was so impressed with the special ability that his brother's condition conferred—avoiding the noise and distraction of the factory—that he might prefer deaf workers to hearing workers in the future.³ Although the ADA bars employers from discriminating against the disabled, an employer who favors the disabled to the non-disabled faces no legal barrier in doing so.⁴

Consider a similar case in the context of sex. An employer prefers women rather than men to fill the job of flight attendant because it believes that women are “superior in such non-mechanical aspects of the job as providing reassurance to anxious passengers, giving courteous personalized service and, in general, making flights as pleasurable as possible”⁵ Here, however, such preferences are unlawful, as the prohibition on sex discrimination bans not only discrimination against women in favor of men, but also discrimination against men in favor of women.⁶

These examples highlight a critical design choice for every antidiscrimination law, what this Article terms the choice between *symmetry* and *asymmetry*. Under a symmetrical law like Title VII of the

¹ 42 U.S.C. §§ 12101-113.

² See Tom Harkin, Senator, U.S. Senate, Address at the Employment Discrimination and the Americans with Disabilities Act at Twenty-Five Years Panel of the American Association of Law Schools Annual Meeting (Jan. 3, 2015).

³ See *id.*; Linda Federico-O'Murchu, *How Employers Are Tapping Talents of Disabled Workers*, CNBC (July 24, 2014, 8:24 a.m.), <http://www.cnbc.com/id/101867230> (documenting how employers prefer autistic employees for some positions because “[t]raits like extreme mathematical, scientific and mechanical aptitude are so coveted by certain industries that accompanying conditions, such as social anxiety, have become an accepted part of the equation”).

⁴ See 42 U.S.C. § 12201(g) (“Nothing in [the ADA] shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual’s lack of disability.”); *Ortner v. Paralyzed Veterans of Am.*, No. 91 CA 3146, 16 MENTAL & PHYSICAL DISABILITY L. REP. 612, 612 (1992) (D.C. Super. Ct. Sept. 10, 1992) (dismissing discrimination suit brought by able-bodied employee denied promotion by Paralyzed Veterans of America because he was not disabled).

⁵ *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir. 1971).

⁶ See, e.g., *Scott v. Parkview Mem’l Hosp.*, 175 F.3d 523 (7th Cir. 1999); *Longariello v. Sch. Bd. of Monroe Cnty.*, 161 F.3d 21 (11th Cir. 1998); *Martinez v. El Paso Cnty.*, 710 F.2d 1102, 1104 (5th Cir. 1983). The only exception is when sex is a “bona fide occupational qualification” for the position. 42 U.S.C. § 2000e-2(e).

Civil Rights Act of 1964,⁷ which bans discrimination on the basis of sex, antidiscrimination protection applies to everyone on the basis of the protected trait. Under an asymmetrical law like the ADA, antidiscrimination protection applies only to a limited class—those identified as disadvantaged—and only on the basis of the disadvantaged “side” of the classification. Antidiscrimination law is divided on this crucial question, with, for example, employment discrimination law treating race and sex symmetrically, and disability and age asymmetrically.⁸

No law or scholarship explains, let alone justifies, the current divide in the design of antidiscrimination law, or its consequences.⁹ One might attempt to explain the divide based on varying levels of constitutional scrutiny. The traits that are protected symmetrically are subject to heightened scrutiny,¹⁰ and some degree of symmetry might be demanded there.¹¹ But this does not explain current law,¹² nor, more importantly, does

⁷ Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 5, 28, & 42 U.S.C.).

⁸ Compare *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280, 286-87 (1976) (holding that race discrimination protection is symmetrical under Title VII); *Martinez*, 710 F.2d at 1104 (same for sex), with 42 U.S.C. § 12201(g) (making clear that the ADA is asymmetrical); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 667 (2004) (holding the same for federal age discrimination law).

⁹ Scholars have only addressed the question piecemeal, focusing on one protected trait, see, e.g., Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 398 (2000) (disability); Cary Franklin, *The Antistereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 101, 104-06 (2010) (sex); Michael A. Stein, et al., *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 721-26 (2014) (disability), or on one cause of action, see, e.g., Angela Onwuachi-Willig, *When Different Means the Same: Applying a Different Standard of Proof to White Plaintiffs Under the McDonnell Douglas Prima Facie Case Test*, 50 CASE W. RES. L. REV. 53 (1999) (Title VII’s proof standard for disparate treatment); Charles Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1550-55 (2004) (disparate impact under Title VII).

¹⁰ Compare *City of Richmond v. J.A. Croson*, 488 U.S. 469, 494 (1989) (O’Connor, J., plurality opinion) (race classifications subject to heightened scrutiny); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); (sex classifications subject to heightened scrutiny), with *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (disability classifications subject to rational basis review); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (age classifications subject to rational basis review).

¹¹ Because heightened scrutiny applies equally to malign and benign classifications, see *Croson*, 488 U.S. at 494, a law that treated advantaged and disadvantaged groups differently, even to help the latter, might not pass constitutional muster, especially for race classifications, which are subject to stricter scrutiny than sex classifications. Compare Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 585-86 (2003) (suggesting that such a law could survive even under strict scrutiny after *Grutter v. Bollinger*, 539 U.S. 306 (2003), upheld a facially classificatory regime), with Sullivan, *supra* note 9, at 1550-55 (suggesting that such a law might fail). See *infra* note 34 and accompanying text for further discussion. Because this Article

it justify it, as constitutional treatment is not dispositive of the normative question of what the design of antidiscrimination law, including constitutional law, *should* be.

While longstanding debates about affirmative action touch on the symmetry-asymmetry divide, they set up the choice as one between the dueling purposes of antidiscrimination law. On the one side are the anticlassificationists, who oppose all uses of protected classifications, and favor a symmetrical ban on any use of a protected trait, whether the use of the protected trait harms a member of a disadvantaged *or* advantaged group.¹³ On the other side are the antisubordinationists, who oppose only those uses of a protected trait that harm the disadvantaged group, and thus favor an asymmetrical ban that would allow only members of the disadvantaged group to utilize the law.¹⁴ The narrow focus of this debate has wrongly rendered symmetry synonymous with the anticlassification view, and misses the full range of consequences of the choice between symmetry and asymmetry.

This Article untethers the choice between symmetry and asymmetry from the stunted affirmative action debate. It makes the case for symmetry on novel grounds, including antisubordination goals. Before going further, a word about methodology is in order. To make the analysis tractable, this Article focuses on one area of antidiscrimination law—federal employment discrimination law—which is by far the most common federal antidiscrimination claim.¹⁵ The volume of cases in this area provides

proposes more rather than less symmetry, it poses fewer constitutional concerns than current law.

¹² The Supreme Court and other courts read these traits to be protected symmetrically *before* it held that heightened scrutiny applied to all classifications on the basis of these traits, and relied not at all on constitutional arguments in doing so. *Compare, e.g.,* McDonald, 427 U.S. at 286-87 (holding that race discrimination protection is symmetrical on the basis of statutory text, legislative history, and administrative practice), *with* Croson, 488 U.S. at 494 (applying heightened scrutiny to all race classifications). And the Constitution does nothing to explain traits that are treated asymmetrically, as they are subject only to rational basis review, permitting either symmetrical or asymmetrical treatment. *See* Cleburne, 473 U.S. at 442 (disability); Murgia, 427 U.S. at 313 (age). *See infra* notes 34-37, 41 and accompanying text for further discussion.

¹³ *See, e.g.,* William Bradford Reynolds, *Individualism v. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995 (1984) (arguing that antidiscrimination requires elimination of classifications and thus favoring symmetrical standard that applies to all classifications).

¹⁴ *See, e.g.,* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976) (arguing that antidiscrimination requires a sensitivity to whether a classification disadvantages a subordinated group and arguing for more asymmetry on this basis).

¹⁵ *See* Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation*, 12 J. EMP. L. STUDS. 4, 5 & n.13 (2015) (documenting that litigation under “the employment [discrimination] statutes has constituted the largest fraction of the nonprisoner federal civil

substantial data for studying the impact of legal design. Within employment discrimination law, I focus on four protected traits—race/national origin,¹⁶ sex, age, and disability—which constitute the vast majority of claims,¹⁷ and divide evenly between symmetrical (race/national origin and sex) and asymmetrical (age and disability) treatment.¹⁸

This Article’s case for symmetry is made on three grounds: purpose, practice, and politics. As for purpose, the Article shows how, in contrast to the debates surrounding affirmative action, symmetry can serve antisubordination ends. First, by providing universal protection, a symmetrical law can avoid one well-recognized problem of asymmetrical laws: that they make members of the protected group—the disadvantaged group—more expensive to employ, thereby counterproductively harming their employment prospects.¹⁹ Second, a symmetrical law more effectively combats subordinating stereotypes by allowing them to be challenged when they are exercised in mirror-image form against privileged groups.²⁰ Finally, even members of advantaged groups can face pockets of systematic disadvantage, for example, younger workers denied promotions,²¹ or men excluded from caring professions.²² Only a symmetrical law allows

docket”). I address other areas of law, and whether the conclusions drawn from employment are generalizable, in *infra* Part III.C.2.

¹⁶ I treat these traits together as it can be difficult to disentangle whether discrimination is on the basis of race, national origin, or both. See EEOC, COMPLIANCE MANUAL § 13 (2002), available at <http://www.eeoc.gov/policy/docs/national-origin.html#IIC> (“[D]iscrimination based on physical traits or ancestry may be both national origin and racial discrimination.”).

¹⁷ See EEOC, *Charge Statistics*, EEOC (last visited Aug. 4, 2015), <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>. This excludes the bases of religion, color, and genetic information, which are also protected by federal employment discrimination law, see 42 U.S.C. § 2000e-2(a) (religion and color); *id.* § 2000ff-1(a) (genetic information), but make up only a small fraction of claims, see EEOC, *supra* (showing that religion claims make up approximately 3% of claims; color claims make up approximately 2% of claims; and genetic claims make up approximately .3% of claims).

¹⁸ See sources cited *supra* note 8.

¹⁹ See Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 227 (2000); *infra* Part II.A.2.a.

²⁰ See *Knussman v. Maryland*, 272 F.3d 625, 628 (4th Cir. 2001) (male plaintiff claiming discrimination based on supervisor denying child-care leave because “there is no way [he] could be [the] primary care [giver]” unless his wife was “in a coma or dead,” thereby challenging stereotype of *both* male breadwinner and female caregiver); *infra* Part II.A.2.b.

²¹ See, e.g., *Bergen Commercial Bank v. Sisler*, 723 A.2d 944 (N.J. 1999) (twenty-five-year-old demoted from vice president position after employer learned of his age).

²² See, e.g., *Evans v. Principi*, No. Civ. A 02-2258(GK), 2005 WL 485743, at *1 (D.D.C. Feb. 17, 2005) (male nurse claiming sex discrimination after supervisor telling him that he “d[id]n’t belong here”).

disadvantage to be challenged in all of its manifestations.²³ As for practice, a symmetrical law avoids the need for the plaintiff to establish membership in the protected class at the outset of each case, a hurdle that has unduly restricted understandings of discrimination and plaintiffs' ability to prove their claims.²⁴ Moreover, the protected-class hurdle, which requires a judicial determination of a plaintiff's identity, is increasingly out of place in an era where the likes of Caitlyn Jenner and Rachel Dolezal complicate static notions of protected class membership and necessitate a more fluid understanding of identity.²⁵ As for politics, a symmetrical law that provides universal benefits is more likely to generate positive policy feedback that increases support for the law.²⁶

After setting forth the case for symmetry, this Article considers a move towards more symmetry in antidiscrimination law. Weighing the benefits of symmetry with its potential costs, I conclude that, while the benefits vary by trait, a symmetrical approach is recommended for each trait. None of the concerns critics might raise—undermining the expressive function of the law, increasing costs imposed by the law, or interfering with affirmative action or disparate impact—should trouble us. In light of the significant benefits of symmetry, this Article proposes not only that currently asymmetrical law—the protections against disability and age discrimination—should be made symmetrical—but that even currently symmetrical law—the protections against race, national origin, and sex discrimination—should be made *more* symmetrical, and proposes how to do so. Finally, the Article expands its focus, offering thoughts on how the analysis would apply to additional traits that are the subject of pending legislation—appearance and sexual orientation—and additional areas of law—education law, housing law, and constitutional law.

This Article proceeds in three parts. In Part I, this Article defines its key terms—symmetry and asymmetry—and explains how they map on to current law. Part II catalogues the benefits of symmetry for the purpose, practice, and politics of antidiscrimination law. After evaluating the benefits and costs of symmetry, Part III addresses the optimal level of symmetry, and says a few words about how the analysis of Part II would apply to additional protected traits and areas of law.

I. SYMMETRY AND ASYMMETRY

This Part introduces the symmetry-asymmetry design choice by

²³ See *infra* Part II.A.2.c.

²⁴ See *infra* Part II.B.

²⁵ See *id.*

²⁶ See *infra* Part II.C.

defining the constituent features of symmetry and asymmetry. It sets forth a typology of protected traits—binary, discrete, and continuous—and explains how symmetry and asymmetry applies to each. This Part then explains how these definitions map on to current law, which, among the four primary bases for claims—race/national origin, sex, age, and disability—splits evenly between symmetrical and asymmetrical protections.

A. Definitions and Typology

An antidiscrimination law may adopt either a symmetrical or asymmetrical design. Two features distinguish a symmetrical from an asymmetrical law: the direction of discrimination prohibited, and the scope of the protected class. I illustrate these concepts using the example of sex discrimination. As for direction, the law could ban discrimination on the basis of any sex, or on the basis of *either* female *or* male sex. As for protected class, the law could protect everyone from discrimination on the basis of sex (a universal protected class), or it could limit protection to just women or just men (a limited protected class). This Article uses the term *symmetrical* to describe an antidiscrimination law that does not limit the scope of persons who are protected on the basis of a given trait, nor does it limit the direction of discrimination prohibited. This Article uses the term *asymmetrical* to describe an antidiscrimination law that limits the scope of persons who are protected on the basis of the trait, as well as the direction of discrimination prohibited.

This Article applies this same terminology not only to binary classifications, like sex, but to classifications with multiple discrete permutations, and to classifications that fall along a continuous spectrum (see Table 1). Binary protected traits are those in which the trait can be divided into two groups. Traditionally at least, the sex classification divides persons into male and female.²⁷ Discrete protected traits are those that

²⁷ This Article hews to the accepted usage of sex to describe a biological phenomenon and gender to describe a sociological expression. Even on the biological level, it may be more accurate to view sex as a “lumpy” spectrum, with most persons clearly male or female, but with a small number who fall between these two categories, either phenotypically, as a result of ambiguous genitalia, or genetically, as a result of multiple or missing sex chromosomes. See Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 16 n.36 (1995); cf. Lee Ann Fennell, *Lumpy Property*, 160 U. PA. L. REV. 1955, 1956 (2012). At the sociological level, one conception of gender identity would view it as existing along a continuous spectrum from masculine to feminine, regardless of biological sex. See Case, *supra*, at 18-28. Another conception of gender identity would view it as discrete, with groupings of cis men, cis women, agender, bigender, gender-fluid,

contain multiple discrete groups within the classification. Although each discrete group might exist along a spectrum, there are dividing lines that can be drawn between the multiple groupings that exist within the classification. Examples of discrete protected traits include race, national origin, and disability. Race includes groupings of Asian, black, Native American, and white. While there is a spectrum within each grouping of those who might identify as more or less black, or more or less Asian (e.g., someone who is multiracial), we can at least draw rough lines around the various races. So too with national origin and disability. Continuous protected traits are those in which the trait exists along a spectrum with no clear breaking points dividing the different permutations of the trait. Age is a continuous protected trait.

Binary: Sex			
Male		Female	
Discrete: Race, National Origin, Disability			
White	Asian	Native American	Black
British	Italian	Latino	Arab
No Disability	Crohn's Disease	Deaf	Cerebral Palsy
Continuous: Age			
Young		Old	

TABLE 1

A law that banned discrimination against all persons on the basis of any race, whether Asian, black, Native American, or white, would be symmetrical. A law that banned discrimination against only a subset of persons and only on the basis of black, Asian, and/or Native American race would be asymmetrical. A law that banned discrimination against all persons on the basis of any age, whether young or old, would be symmetrical. A law that banned discrimination only against a subset of

transgender, and so on. *See* Debby Herbenick & Aleta Baldwin, *What Each of Facebook's 51 New Gender Options Means*, THE DAILY BEAST (Feb. 15, 2014, 5:45 AM), <http://www.thedailybeast.com/articles/2014/02/15/the-complete-glossary-of-facebook-s-51-gender-options.html>. Finally, the prevalence and increasing acceptance of transgenderism also complicates the male-female sex binary, with persons increasingly blurring the line. I return to this point in discussing the practical consequences of the choice between symmetry and asymmetry, and specifically the difficulty of assessing whether a plaintiff is a member of the protected class, in *infra* Part II.B.

persons on the basis of old age would be asymmetrical.

While symmetrical antidiscrimination laws take the protected trait as the relevant unit of analysis for determining unlawful discrimination, asymmetrical laws focus on a subset of the protected trait. This subset with which an asymmetrical law is concerned is measured by societal disadvantage.²⁸ When antidiscrimination laws are designed asymmetrically, they ban discrimination on the basis of the societally disadvantaged trait, and limit this protection to the subset of persons who are most likely to experience this societal disadvantage. Racial and ethnic minorities, women, the elderly, and the disabled are the groups that have been viewed to have been burdened in the distribution of societal costs and benefits and thus worthy of protection under an asymmetrical law.

The direction of protection and the scope of the protected class are linked both in theory and in practice. Symmetrical laws adopt a universal protected class to effectuate their universal ban on discrimination on the basis of the protected trait. If a law symmetrically bans discrimination on the basis of black race *and* on the basis of white race, to effectuate this ban, both black and white individuals need to be subject to its protections. By contrast, asymmetrical laws adopt a limited protected class to effectuate their limited protections. So a law that is meant to protect against discrimination only on the basis of black race would limit the protected class to black persons. Indeed, at first blush, it would not make sense to permit a universal protected class here, as only black persons can be discriminated against on the basis of black race. This means that asymmetrical laws must reach a definition of a protected class.

I say at first blush because a white individual who was *perceived* as black could be a candidate for protection even under an asymmetrical law. It would be plausible then to disaggregate the scope of the protected class from the direction of discrimination protected. While an antidiscrimination law that bans discrimination in only one direction but adopts a universal protected class is possible in theory, we do not see this in practice.²⁹ Because these features of symmetrical and asymmetrical laws are linked in practice, I treat them as such. I return to a more detailed discussion of the possible disaggregation of these features when addressing the practical consequences of symmetry and asymmetry.³⁰

²⁸ While in theory, an asymmetrical law could divide groups in any number of ways, in practice, they are divided in this way. This is best understood in terms of an antisubordination reading of such laws, which is discussed at *infra* notes 57-58, 66-68 and accompanying text.

²⁹ Both the ADEA and ADA adopt limited protected classes. *See infra* notes 41-52 and accompanying text.

³⁰ *See infra* Part II.B.

B. Current Law

Federal law provides symmetrical protection against employment discrimination on the basis of race,³¹ national origin,³² and sex.³³ The Supreme Court held that Title VII was symmetrical in the context of race in a surprisingly brief analysis that turned not at all on constitutional scrutiny,³⁴ but on statutory text,³⁵ legislative history,³⁶ and administrative

³¹ See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280, 285-87 (1976) (holding that white persons can sue for race discrimination under Title VII and 42 U.S.C. § 1981, despite the latter's statutory text: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .") (internal quotation marks omitted).

³² See, e.g., *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88-89 (1973) (indicating that national origin should be interpreted broadly to mean any country from which the person's ancestors came).

³³ See, e.g., *Martinez v. El Paso Cnty.*, 710 F.2d 1102 (5th Cir. 1983) (allowing male plaintiff to raise sex discrimination claim). Under Title VII, pregnancy discrimination is defined as a subset of sex discrimination. See 42 U.S.C. § 2000e(k). The basic protection against pregnancy discrimination is symmetrical: both pregnant and non-pregnant workers are included within the protected class of individuals who may file suit and claim discrimination on the basis of pregnancy status. See *Cal. Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (allowing non-pregnant workers to raise claim that they were disadvantaged on the basis of non-pregnancy). Nonetheless, the Supreme Court has allowed some amount of preferential treatment of pregnant as compared with non-pregnant workers. *Id.* at 285 (holding that Title VII does not preempt a state law that mandates benefits for pregnant workers and not for non-pregnant workers because "Congress intended the [Pregnancy Discrimination Act] to be a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise").

³⁴ Equal protection doctrine subjects race and national origin classifications to strict scrutiny, see *City of Richmond v. J.A. Croson*, 488 U.S. 469, 494 (1989) (O'Connor, J., plurality opinion), and sex classifications to intermediate scrutiny, see *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). A classification subject to strict scrutiny can survive only if it is "narrowly tailored" to serve a "compelling government interest." *Croson*, 488 U.S. at 497, 507. A classification subject to intermediate scrutiny can survive only if furthers "important governmental objectives" by means that are "substantially related to the achievement of those objectives." *Hogan*, 458 U.S. at 724 (internal quotation marks omitted). It is perhaps unsurprising that the Court reached the conclusion that Title VII was symmetrical without resort to the Constitution given that a dozen years would have to pass before the Court held that race classifications for benign purposes, such as an asymmetrical antidiscrimination law meant to benefit the subordinated race, are subject to the same strict scrutiny as classifications for malign purposes. Thus, the symmetrical reading of Title VII can only be explained as a matter of constitutional law in retrospect, and does not justify the design as a normative matter.

³⁵ *McDonald*, 427 U.S. at 278 (noting that Title VII's "terms are not limited to discrimination against members of a particular race").

³⁶ *Id.* at 280 (recounting "uncontradicted legislative history to the effect that Title VII was intended to 'cover white men and white women and all Americans,' and create an

practice.³⁷

It is worth spelling out what this symmetry means in practice. For disparate treatment claims, any employee can bring a claim of intentional discrimination on the basis of any of the traits protected by Title VII.³⁸ This means that whites can sue for race discrimination, men can sue for sex discrimination, and so on. When it comes to disparate impact, there is an open question as to whether “reverse” claims are cognizable.³⁹ Even if disparate impact is asymmetrical, this makes only a small dent in the overarching symmetry of Title VII, as there are few disparate impact cases, and even fewer in which plaintiffs prevail.⁴⁰

By contrast, employment discrimination law protects the traits of age and disability asymmetrically by protecting discrimination only in one direction, and only against a limited protected class.⁴¹ So even employer programs or policies that intentionally favor older employees or disabled employees are not subject to challenge under the ADEA or ADA.⁴²

The Age Discrimination in Employment Act (ADEA) protects only employees who are at least forty years of age, and only discrimination against older workers who are disfavored as compared with younger workers.⁴³ The protected class was limited by statute,⁴⁴ and the direction of

‘obligation not to discriminate against whites’”) (internal citations omitted).

³⁷ *Id.* at 279-80 (noting that the EEOC “has consistently interpreted Title VII to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against non-whites”) (internal citations omitted).

³⁸ *Id.* While anyone can raise a claim under Title VII, note that not all courts apply the same standard of proof to “reverse” disparate treatment claims as they do to standard disparate treatment claims. For further discussion of this point, see *infra* notes 323-31 and accompanying text.

³⁹ See Sullivan, *supra* note 9, at 1506-08 (arguing that the purposes of the doctrine suggest that they should not be, but that an asymmetrical approach would raise constitutional concerns). For further discussion of this point, see *infra* notes 332-36 and accompanying text.

⁴⁰ See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 735, 738-40 (2006) (finding that in the span of six years, there were only 171 reported disparate impact cases decided by district courts, and documenting low success rates of these claims).

⁴¹ The Constitution plays little to no role in this design choice. Both of these traits are subject only to rational basis review. See sources cited *supra* note 10. This means that a law that classifies on the basis of either of these traits is permissible so long as it is “rationally related to a legitimate government interest.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Therefore, a symmetrical or asymmetrical law for either of these traits would pass constitutional muster so long as there was some minimum justification for the design choice.

⁴² See Christopher J. Kuczynski, Assistant Legal Counsel, *ADA & ADEA: Hiring Practices*, EEOC (2012), http://www.eeoc.gov/eeoc/foia/letters/2012/ada_adea_hiring_practices.html.

⁴³ 29 U.S.C. §§ 621-34.

protection was limited later by the Supreme Court.⁴⁵ After concluding that the ADEA's text was ambiguous,⁴⁶ the Court relied on the legislative history, the purpose of the law, and the context in which it was passed to decide that the ADEA prohibits discrimination only on the basis of old age.⁴⁷

The ADA also protects against discrimination on the basis of disability asymmetrically, meaning that it protects against discrimination only on the basis of the presence of a disability, rather than the absence of one.⁴⁸ The ADA limits its protected class to one of three groups: those who have an actual disability, those who are "regarded as" disabled, and those who have a "record of" disability.⁴⁹ This definition has been notoriously difficult to satisfy.⁵⁰ The ADA also defines discrimination to include an employer's

⁴⁴ 29 U.S.C. § 631(a)(1) (limiting the protections of the ADEA "to individuals who are at least 40 years of age").

⁴⁵ *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 591 (2004) (employees aged forty to forty-nine claiming that they were disadvantaged as compared with *older* employees by reduction in health benefits that applied only to those with later retirement dates).

⁴⁶ *Id.* at 586 (determining that "'discrimination . . . because of [an] individual's age,'" could be interpreted to ban discrimination on the basis either of *old* age, or on the basis of any age) (quoting 29 U.S.C. § 623(a)(1)).

⁴⁷ *See id.* at 587 (noting that the Department of Labor report that underlies the ADEA "was devoid of any indication that the Secretary had noticed unfair advantages accruing to older workers at the expense of their juniors"); *id.* at 589 ("[F]rom the voluminous records of the hearings, we have found . . . nothing suggesting that any workers were registering complaints about discrimination in favor of their seniors"); *id.* ("The findings stress the impediments suffered by older workers. . . ."); *id.* at 591 ("[C]ommon experience" confirms that discrimination against younger workers is not "a social problem requir[ing] a federal statute to place a younger worker in parity with an older one."). *But see id.* at 602 (Thomas, J., dissenting, joined by Kennedy, J.) (reasoning that the plain language of the ADEA dictates a symmetrical reading of the law).

⁴⁸ 42 U.S.C. § 12201(g) ("Nothing in this chapter shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability.").

⁴⁹ *Id.* § 12102(1) ("The term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.").

⁵⁰ As for actual disability, many scholars agree that "courts have inappropriately applied a restrictive definition of 'disability' to squelch ADA cases at the summary judgment stage." Bagenstos, *supra* note 9, at 398; *see also* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99–100 (1999); Robert L. Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL L. REV. 409, 536 (1997). Although recent amendments to the ADA were meant to ease this burden, scholars have found that many courts continue to construe actual disability claims quite narrowly. *See, e.g.,* Stein, et al., *supra* note 9, at 721-26;

failure to provide a reasonable accommodation,⁵¹ but only to those who are actually disabled or who have a record of disability (and not to those “regarded as” disabled).⁵²

II. THE BENEFITS OF SYMMETRY

This Part sets forth the underappreciated benefits of symmetry along three dimensions: purpose, practice and politics. It begins with a reconfiguration of the choice between symmetry and asymmetry, showing how a symmetrical law can further not only anticlassification purposes, but also antisubordination purposes. It next turns to the practical implications of a symmetrical or asymmetrical design, and explains how symmetry avoids problems that arise from a limited protected class, which complicates the discrimination inquiry and narrows the available theories of discrimination and which plaintiffs may proceed. Finally, this Part addresses the politics of legal design, and argues that a symmetrical law will generate greater support for antidiscrimination law.

Two points are worth noting before proceeding further. First, I intentionally sidestep the question of which traits should be protected by law, and instead simply presume that there are some traits that should qualify.⁵³ Whenever we find a trait worthy of special protection, we are

Stephen F. Befort, *An Empirical Examination of Case Outcomes under the ADA Amendments Act*, 70 WASH & LEE L. REV. 2027, 2065–66 (2013).

As for “regarded as” disabled, the ADA does not permit anyone to bring this claim, but narrows it to those who have an actual or perceived substantially limiting impairment that is not minor and transitory. 42 U.S.C. § 12102(3)(A) (defining “regarded as” disabled as having “an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity”); 42 U.S.C. § 12102(3)(B) (excepting impairments that are “transitory and minor,” and defining a “transitory impairment” as one “with an actual or expected duration of 6 months or less”). Courts’ unduly restrictive approach to interpreting the definition of disability extends to the “regarded-as” prong. See Arlene B. Mayerson, *Restoring Regard for the “Regarded As” Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587 (1997). Again, despite statutory amendments, many courts continue to construe regarded-as disability claims narrowly. See, e.g., Stein, et al., *supra* note 9, at 726-27; Befort, *supra*, at 2063; Deborah Widiss, *Still Kickin’ After All These Years: Sutton and Toyota As Shadow Precedents*, 63 DRAKE L. REV. 919, 942-46 (2015) (documenting how courts continue to apply restrictive definition of “regarded as” prong even post-amendment).

⁵¹ 42 U.S.C. § 12112(b)(5)(A) (including within the definition of discrimination “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability” unless “the accommodation would impose an undue hardship”).

⁵² *Id.* § 12201(h).

⁵³ A variety of considerations are thought to be relevant to whether a treat warrants special protection in law. See, e.g., *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164, 165

faced with whether to protect the trait symmetrically or asymmetrically. Second, each of the benefits discussed below does not apply equally across protected traits. In this Part, I rely on examples across protected traits to make clear the benefit at hand. In the next Part, I address these benefits on a trait-by-trait basis to evaluate how each trait fares under this analysis.

A. Purpose

Two primary theories underlie antidiscrimination law: the anticlassification theory and the antisubordination theory.⁵⁴ Under an anticlassification view, the wrong of discrimination is in “classify[ing] people either overtly or surreptitiously on the basis of a forbidden category: for example, their race.”⁵⁵ The most familiar instantiation of this view is one of so-called “trait-blindness,” which is skeptical of classifications made on the basis of a protected trait, even when classifications are made for benign purposes.⁵⁶ The antisubordination view, by contrast, maintains that the wrong of discrimination is in “practices that enforce the secondary social status of historically oppressed groups.”⁵⁷ An antisubordinationist regime would accept and even encourage classifications that expand opportunities for members of traditionally subordinated groups.⁵⁸

I do not seek to choose between the anticlassification and antisubordination rationales for antidiscrimination law. While symmetry has been aligned with the anticlassification perspective, my aim to show how antisubordination purposes can *also* be furthered by a symmetrical design. First, by offering universal protection, a symmetrical law avoids a

(1972) (holding that immutable characteristics, or “accidents of birth,” should be protected because they are unrelated to individual responsibility); *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that protection should apply when “prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities”); *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) (holding that protection should apply to traits that are “so integral an aspect of one’s identity, it is not appropriate to require a person to repudiate or change [them] in order to avoid discriminatory treatment”). In *infra* Part III.C.1, I address additional traits that have been protected in some jurisdictions.

⁵⁴ See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003).

⁵⁵ See *id.* at 10.

⁵⁶ See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (in the context of a school assignment program that considered race to promote integration, stating that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race”); Reynolds, *supra* note 13, at 998 (advocating for “colorblindness”).

⁵⁷ Balkin & Siegel, *supra* note 54, at 9.

⁵⁸ See Fiss, *supra* note 14, at 159.

key shortcoming of asymmetrical laws: that they increase the cost of employing members of the disadvantaged group, thereby damaging their employment prospects, precisely contrary to the goal of such laws. Second, stereotypes that hold subordinated groups back are exercised not only against subordinated workers themselves, but also, in mirror-image form, against privileged groups. Failing to permit privileged groups to challenge these stereotypes limits the law's ability to dismantle them. Finally, the advantaged and disadvantaged groups cannot always be neatly divided, and only a symmetrical law permits the flexibility to combat subordination in its heterogeneous manifestations. I first briefly explain how symmetry furthers anticlassification objectives, and then set forth the novel case for how symmetry can also further antisubordination objectives.

1. Anticlassification

The primary concern underlying the anticlassification view is with treating an individual as an individual rather than on the basis of a protected trait. The anticlassification view has long been associated with a symmetrical regime, because the only way to challenge all classifications on the basis of a protected trait is to allow claims for discrimination by both "sides" of the protected trait.⁵⁹ Earlier justifications for the anticlassification view focused on the unfairness of limiting important opportunities on the basis of a protected trait, whether it is to the disadvantaged *or* advantaged side.⁶⁰ It is obvious that symmetry is necessary to avoid this harm of unfairness. If the nature of the trait is such that relying on it in any way to distribute important benefits is unfair, then avoiding this unfairness requires a law that bans classifications on the basis of the trait symmetrically, allowing members of both disadvantaged and

⁵⁹ Note that although anticlassificationists would, at a minimum, support a symmetrical antidiscrimination regime, the anticlassification approach and the symmetry approach are not identical. While anticlassification absolutists would ban all classifications on the basis of a protected trait, symmetry would simply require that whatever doctrines apply to one group should apply equally across all groups. So whereas anticlassification absolutists would ban affirmative action and disparate impact, symmetry absolutists would argue that affirmative action and disparate impact should be available to all on equal terms. I return to this distinction in *infra* Part III.B.1.

⁶⁰ See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (Powell, J., plurality opinion) (critiquing affirmative action plan because of unfairness based on harms to "innocent people"); *Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 n.34 (1978) (Powell, J., plurality opinion) ("One should not lightly dismiss the inherent unfairness of . . . a system of allocating benefits and privileges on the basis of skin color and ethnic origin."); Reva B. Siegel, *The Racial Rhetorics of Colorblind Constitutionalism: The Case of Hopwood v. Texas*, in *RACE & REPRESENTATION: AFFIRMATIVE ACTION* 29, 37 (Michael Rogin & Robert Post eds., 1998).

advantaged groups to challenge discriminatory classifications.

Later iterations of the anticlassification purpose focus more on the stereotyping harms that classifications impose on disadvantaged groups.⁶¹ Classifying on the basis of a protected trait reinforces the salience of group membership rather than the qualities of the individual in her own right.⁶² Here, too, a symmetrical design that allows employees from either “side” of the trait to challenge classifications is necessary to avoid these harms. For an employer to disfavor white employees, the employer must distinguish employees on the basis of race, thereby making race salient to the employer. And the justification for the race-based distinction must rely on some feature believed to be common to all members of a particular race, which reinforces stereotypical thinking rather than individualized assessments.⁶³ Under asymmetrical laws, these decisions would never be challenged.

While these concerns have been raised primarily in the context of affirmative action programs, we can see broader application in the choice between symmetry and asymmetry. For example, in the context of disability, technology firms have begun to prefer individuals with autism for positions that require high levels of concentration and attention to detail, like software testing and data conversion.⁶⁴ Targeting workers based on their disability rather than their skills relies on stereotypes. While these stereotypes—such as mathematical or other technical skills—may seem benign, they reinforce stereotypical thinking about the abilities and characteristics of someone with that disability. So these workers may be assumed to be skilled at certain tasks, but they may also be assumed to have the negative traits that go along with their condition, such as problems

⁶¹ See Siegel, *supra* note 60, at 38 (explaining that later equal protection jurisprudence described the harm of racial classifications to be how they “can injure racial minorities”).

⁶² See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (explaining that racial classifications “reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin”); *Croson*, 488 U.S. 469, 495 (1989) (O’Connor, J., plurality opinion) (failing to apply strict scrutiny to all racial classifications “effectively assures that race will always be relevant in American life”); Burgdorf, *supra* note 50, at 525 (“The classification . . . of people with disabilities as a distinctive status group in society is not merely a cause of discrimination, it is the ‘wellspring’ and the ‘essence’ of discrimination on the basis of disability.”).

⁶³ In the context of affirmative action, there has been a particular concern that such programs stigmatize their intended beneficiaries. See *Croson*, 488 U.S. at 493 (explaining that “classifications based on race carry a danger of stigmatic harm”); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, (1990) (O’Connor, J., dissenting) (concluding that race-based affirmative action program justified by the view that a minority is “likely to provide [a] distinct perspective, impermissibly value[d] individuals” based on a presumption that “persons think in a manner associated with their race”) (internal quotations marks omitted).

⁶⁴ See Federico-O’Murchu, *supra* note 3.

socializing and associating with their supervisors and coworkers.⁶⁵ The anticlassification perspective judges these classifications as harmful, despite their benign purpose, precisely because they reinforce this type of group-based thinking. Only a symmetrical law allows these classifications to be challenged.

2. Antisubordination

The antisubordination rationale views the purpose of antidiscrimination law to be the eradication of policies that contribute to the subordination of disadvantaged groups.⁶⁶ Note that the focus is on individuals as members of groups rather than as individuals.⁶⁷ Unlike advocates of the anticlassification view, the antisubordination camp has advocated for a more asymmetrical approach to antidiscrimination law.⁶⁸ In this Section, I argue instead that symmetry better furthers the goal of antisubordination by reducing the negative distributive consequences of employment mandates that protect only the disadvantaged group; by allowing interlocking stereotypes of advantaged and disadvantaged groups to be challenged from both sides; and by recognizing systematic pockets of disadvantage that even privileged groups face.

a. Costs of Mandates

Many in the antisubordination camp assume that a law protecting the subordinated group will have positive distributive effects on these workers, in terms of raising employment levels and wages. However, mandating protection for an identifiable group of workers can backfire, harming the disadvantaged group that the law is meant to help. This is because an asymmetrical mandate makes the protected group of workers more expensive to employ, which can lead to reduced employment levels and wages for these workers.⁶⁹ A symmetrical law can reduce or eliminate

⁶⁵ *See id.*

⁶⁶ For additional examples of antisubordination theories, see KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989); DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32-45 (1987).

⁶⁷ Indeed, Fiss calls the antisubordination view the “group disadvantaging principle.” Fiss, *supra* note 14, at 157.

⁶⁸ *See id.* at 159.

⁶⁹ *See* Jolls, *supra* note 19, at 227. While Jolls makes the point in the context of accommodation mandates, antidiscrimination mandates impose many of the same costs on employers, including the critical cost of litigation. *See* Daron Acemoglu & Joshua Angrist,

these negative distributive consequences, better fulfilling the antisubordination purpose.

In a classic article, Professor Lawrence Summers formalized a framework for understanding the effects of employer mandates directed to workers as a whole, which I refer to as universal mandates.⁷⁰ Under a supply-and-demand framework of the labor market, Summers showed that there is little hope that these mandates redistribute resources from employers to employees. Assume that employers are required to bear the entire cost of the mandated benefit. This will have effects on both the demand and supply of labor. As for demand, employers will demand less labor because the mandate makes labor more costly (reflected in a shift of the labor demand curve D_0 to D_1 in Figure 1). As for supply, employees will supply more labor because the mandated benefit is a form of additional (typically nonmonetary) compensation. The labor supply curve will shift by the amount that employees value the benefit (reflected in a shift from S_0 to either of the S_1 curves). This leads to an equilibrium of reduced wages, but employment levels that may increase or decrease, depending on how employees value the benefit. The shift to $S_{1'}$ reflects a low employee valuation; the shift to $S_{1''}$ reflects a high employee valuation. Either way, systematic redistribution from employer to employees is unlikely, because “the more a mandated benefit is worth to workers, the more wages will decline when it is provided.”⁷¹

Consequences of Employment Protection? The Case of the Americans with Disabilities Act, 109 J. POL. ECON. 915, 919-20 (2001); Joanna N. Lahey, *International Comparison of Age Discrimination Laws*, 32 RES. ON AGING 679, 680 (2010); Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 55 (2005). Indeed, Jolls herself suggests in the context of the ADA that it may be the litigation costs associated with the law’s antidiscrimination mandate, rather than the cost of accommodations, that lead to the consequences she describes. See Jolls, *supra* note 19, at 277. Therefore, we can expect similar effects with any employment discrimination law, regardless of whether it requires accommodations. See *infra* notes 112-13 (discussing the negative distributive consequences of the ADEA, even though it has no accommodation mandate).

⁷⁰ See Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. 177, 180-81 (1989). While this framework remains widely accepted, some economists have questioned it based on empirical evidence that mandates do not always have this effect. See John Donohue, *Understanding the Reasons for and Impact of Legislatively Mandated Benefits for Selected Workers*, 53 STAN. L. REV. 1, 15-16 (2001) (collecting citations).

⁷¹ Dwight R. Lee, *Why Workers Should Want Mandated Benefits to Lower Their Wages*, 34 ECON. INQUIRY 401, 402 (1996); see also Jolls, *supra* note 19, at 237 (“As the value of the mandated benefit rises, the amount of the cost that is shifted to workers in the form of reduced wages rises as well, limiting the possibility for distributive gains.”).

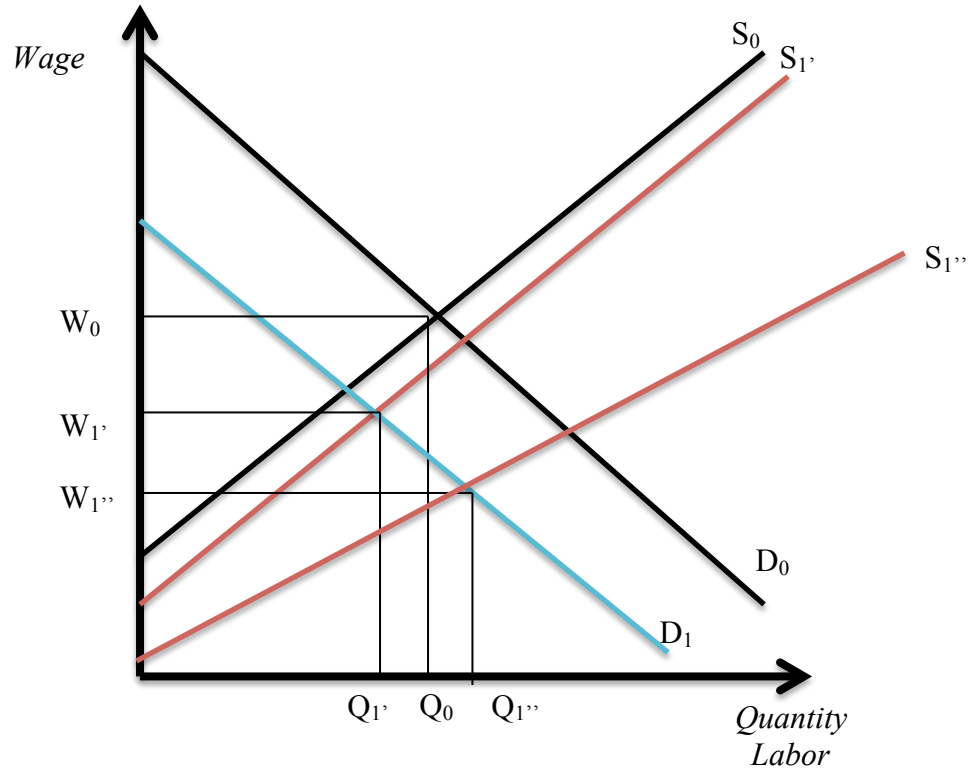


FIGURE 1

As Professor Christine Jolls has explained, this analysis changes when a mandate affects only a subset of workers rather than all workers.⁷² Mandates that protect a limited class typically also bar employers from discriminating against the protected class in hiring and wages. In theory, then, Summers's predictions should not hold, because it would be unlawful for employers to respond to the mandate by failing to hire employees from the protected group or pay them less.⁷³ But Jolls recognizes that the actual distributive consequences of a mandate depends on whether it effectively constrains employers from discriminating against the protected group in hiring or pay.⁷⁴ If it does, the law will have the intended positive distributive effect on the protected group; if it does not, the law will have a negative distributive effect on the protected group.⁷⁵

⁷² See Jolls, *supra* note 19, at 240-53.

⁷³ See *id.*

⁷⁴ See *id.* at 254-61.

⁷⁵ *Id.*

Jolls explains that because of the ineffectiveness of protections against hiring discrimination,⁷⁶ we can assume that, in the general case, only the ban on wage discrimination constrains.⁷⁷ If wage but not hiring discrimination bans are effective, the employment levels of the protected workers will fall.⁷⁸ But in cases of significant occupational segregation, such as by sex, we can expect that hiring but not wage discrimination bans are effective.⁷⁹ In such cases, we can instead expect antidiscrimination mandates to leave the employment level of the protected group relatively unaffected, but to reduce wages.⁸⁰ Those interested in the antisubordination goals of employment discrimination law would be quite rightly concerned about a law with either of these negative distributive consequences.

Note that these consequences turn on the protected trait being discernible to the employer. If a trait is highly visible, like sex, decisionmakers can easily make hiring or pay decisions on the basis of the trait (so long as the law is not constraining). If a trait is not highly visible, this is made more difficult. When a protected trait is truly invisible, even an asymmetrical antidiscrimination mandate will not have the negative consequence on the protected group that Professor Jolls posits. Of the traits under analysis, disability is the most affected by visibility, as some instances of disability are invisible or difficult to discern.⁸¹ While this impairs decisionmakers' ability to discriminate perfectly, they can still discriminate against those with discernible disabilities, in which case Jolls's analysis applies.⁸² I follow Jolls in assuming that a sufficiently large number of disabilities are visible such that an asymmetrical law would lead to negative employment consequences for disabled persons.⁸³

It is important to note that Jolls applies her analysis of targeted accommodation mandates even to symmetrical laws that cover all workers

⁷⁶ *Id.* at 263-71; see also Naomi Schoenbaum, *It's Time that You Know: The Shortcomings of Ignorance as Fairness in Employment Law and the Need for an Information-Shifting Model*, 30 HARV. J.L. & GENDER 99, 125-26 (2007) (documenting reasons why bans on hiring discrimination are ineffective).

⁷⁷ Jolls, *supra* note 19, at 228.

⁷⁸ *Id.*

⁷⁹ See *id.* at 268-70. When an occupation is filled with primarily women, employers will continue to hire women, but will be able to pay them less because they will have few male comparators that would allow them to prove a wage discrimination claim.

⁸⁰ See *id.* at 290-99.

⁸¹ Many physical conditions that might be considered disabilities are not visible, including diabetes, high blood pressure, epilepsy, HIV/AIDS, and cystic fibrosis, as are a host of mental disabilities.

⁸² Note that the ADA bans inquiries about ability and disability at the hiring stage except as to the ability of an applicant to perform job-related functions. 42 U.S.C. § 12112(d)(2).

⁸³ See Jolls, *supra* note 19, at 273-82.

if such laws are used disproportionately by one group. This means that she includes as an accommodation mandate the Family and Medical Leave Act (FMLA),⁸⁴ even though it is symmetrical, because women use the law's parental leave accommodation more than men.⁸⁵ In so doing, Jolls relies on a rational actor model that assumes not only that employers know the law, but that they know the usage of the law, and incorporate this knowledge into their decisionmaking. Under this view, so long as one group disproportionately relies on an antidiscrimination mandate, the fact that the mandate is formally symmetrical is not relevant in analyzing the employer's response to the law and the resulting distributive consequences.

Here is where I part company with Jolls. I assume instead a model of bounded rationality, under which information is costly,⁸⁶ and "human cognitive abilities are not infinite."⁸⁷ The perceptions of boundedly rational decisionmakers then are shaped by limited access to information and subject to cognitive shortcomings that bias the processing of information.⁸⁸ Under this view, a symmetrical as compared with an asymmetrical law can prompt different employer responses, and thus can have different distributive consequences, even if one group of employees disproportionately uses the law. If a decisionmaker *believes* that members of the advantaged group make equivalent or substantial use of a symmetrical law, regardless of whether they actually do, this is enough to reduce or eliminate the negative distribute consequences.

Importantly, this beneficial impact of symmetry does not turn on an employer believing that the advantaged and disadvantaged groups use the

⁸⁴ 29 U.S.C. §§ 2611-54.

⁸⁵ Jolls, *supra* note 19, at 232, 290. While more women take FMLA leave following the birth of a child, the FMLA also allows employees to take leave to care for older children, spouses, and parents, 29 U.S.C. § 2612(a)(1)(C), as well as for their own medical conditions, *id.* § 2612(a)(1)(D). Between these forms of leave, FMLA leave is now taken in almost equal measure by women and men: 56% women and 44% men. Nat'l P'ship for Women & Families, *A Look at the U.S. Department of Labor's 2012 FMLA Surveys*, NAT'L P'SHIP (Feb. 2013), <http://www.nationalpartnership.org/research-library/work-family/fmla/dol-fmla-survey-key-findings-2012.pdf>.

⁸⁶ Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. L. 211, 214 (1995).

⁸⁷ Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477 (1998). Given that Jolls's later research includes some of the seminal work incorporating behavioral economics into legal analysis, *see generally id.*, she may not disagree with my application of bounded rationality here. Her earlier work simply does not consider these arguments.

⁸⁸ *Id.* (describing how such shortcomings mean that "actual decisions" under bounded rationality "often violate the axioms of expected utility theory"); Eisenberg, *supra* note 86, at 214 (explaining that "human rationality is normally bounded by limited information and limited information processing" and thus that "actors will adopt selective search and processing procedures").

antidiscrimination law in exactly equal measure. Symmetry can mitigate the negative distributive consequences of an antidiscrimination law so long as the employer believes that the advantaged group uses the law, even if with less frequency than the disadvantaged group. Any use by the advantaged group will increase the cost of employing members of that group, closing the gap between the cost of employing the advantaged and disadvantaged groups, and thereby reducing the disincentive to hire the disadvantaged group. So even if an employer does not believe, for example, that white employees are as likely to sue under Title VII as black employees, the benefit of symmetry is not fully lost so long as the employer believes that whites make some use of the law. The amount of the benefit derived from symmetry will turn on the employer's perception of how often the advantaged group relies on the law, with a perception of more substantial usage associated with a more substantial benefit.

Despite bounded rationality, there is good reason to believe that decisionmakers would be informed about the basic provisions of the law that governs their decisionmaking, including whether a law is symmetrical or asymmetrical. This information is easy to acquire, and would likely be part of an employer's equal employment opportunity training.⁸⁹ By contrast, decisionmakers are far less likely to have information about the actual usage of symmetrical employment discrimination laws. As an initial matter, this data is not easily accessible.⁹⁰ And because making hiring or pay decisions on the basis of protected traits is unlawful, the employer is unlikely to include this data or guidance on how to act on it in any employer policy or training session. Rather, the decision not to hire someone or to pay them less on the basis of a protected identity trait is likely to be made in a decentralized way based on each decisionmaker's perception of the probability of a lawsuit or other costs associated with employing members of the different groups. It is unlikely that an individual decisionmaker acting in this capacity will access data about the probability of a lawsuit or other costs. Expensive information-search is made even more costly here where discovering the fact of the search could serve as evidence of discrimination that would subject the employer to liability. Finally, as a general matter, decisionmakers tend to disregard probability when making a

⁸⁹ See generally Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (discussing the role of employer practices, including such trainings, in employment discrimination law).

⁹⁰ The data is not available on the EEOC's website. It took even this employment discrimination law scholar some time to find current statistics. In 2012, approximately 4,000 of the 33,000 race discrimination claims were filed by white individuals and approximately 6,300 of the 30,000 sex discrimination claims were filed by men. See Katie Kuehner-Hebert, *How to Avoid Reverse Discrimination*, TALENT MGMT. (Oct. 16, 2013), <http://www.talentmgt.com/articles/how-to-avoid-reverse-discrimination>.

decision under uncertainty.⁹¹ Therefore, information about actual usage of symmetrical laws will not be determinative of how employers respond to antidiscrimination mandates.

Instead, these decisions will depend on how decisionmakers *perceive* the usage of the law.⁹² The perception of the usage of antidiscrimination law will differ by protected trait. One factor that matters is the perception of how often the advantaged group faces discrimination. For age, this is likely to lead to a perception of significant usage of antidiscrimination law by young workers. Decisionmakers will be aware of the generally low status accorded younger workers.⁹³ Because decisionmakers are either young themselves or were once young, they are likely to be familiar with the stereotypes that younger workers face, and the challenges these stereotypes impose.⁹⁴ Indeed, less than half of younger workers believe that they are treated fairly on the job,⁹⁵ and younger workers are more likely to report experiencing age-related prejudice than older workers.⁹⁶

Another factor that affects perception is media attention, and for this reason, decisionmakers would also likely perceive a significant volume of suits raised by men. Discrimination suits by men have been on the rise, accounting now for 20% of sex discrimination claims.⁹⁷ But more than the actual number of suits, the media attention to this increase in litigation matters.⁹⁸ Given the everyday nature of sex discrimination against women,

⁹¹ See JONATHAN BARRON, *THINKING AND DECIDING* 353 (2d ed. 1994) (discussing the phenomenon of “neglect of probability” and conditions under which it holds).

⁹² We can expect that decisionmakers’ perception will approximate public perception. Given that human resources managers or EEO compliance officers are not typically making routine hiring and pay decisions, it is unlikely that decisionmakers will be systematically more informed than the average person.

⁹³ See Graham Snowdon, *Young and Older People Experience Age Discrimination at Work*, THE GUARDIAN (Jan. 16, 2012 10:05 AM), <http://www.theguardian.com/money/2012/jan/16/young-older-people-age-discrimination-work> (citing study finding that workers in their forties are viewed as having the highest status, while workers in their twenties are viewed as lower status than workers in their seventies).

⁹⁴ See *infra* notes 143-54 and accompanying text.

⁹⁵ See Stephanie Armour, *Young Workers Say Their Age Holds Them Back*, USA TODAY (Oct. 7, 2003 11:20 PM), http://usatoday30.usatoday.com/money/workplace/2003-10-07-reverseage_x.htm (citing survey finding that just 44% of employees ages eighteen to twenty-four believe they are treated fairly).

⁹⁶ See Snowdon, *supra* note 93 (citing research finding those under twenty-five are at least twice as likely to have experienced age discrimination as other age groups).

⁹⁷ See Kuehner-Hebert, *supra* note 90.

⁹⁸ See Alice Gomstyn, *Sexual Harassment Claims by Men Growing*, ABC NEWS (Mar. 26, 2010), <http://abcnews.go.com/Business/TheLaw/sexual-harassment-claims-men-growing-equal/story?id=10198753>. The Associated Press, *Workplace Sexual Harassment Claims by Men Are on the Rise*, DAILY NEWS (Mar. 4, 2010, 11:32 AM),

suits brought by men garner outside attention, as we can see by the publicity afforded to a variety of claims that men bring: challenges to discriminatory family-leave policies,⁹⁹ sexual harassment,¹⁰⁰ and exclusions based on customer preferences.¹⁰¹ Because of the availability heuristic,¹⁰² media attention has been known to bias our predictive capacities,¹⁰³ making

<http://www.nydailynews.com/life-style/workplace-sexual-harrasment-claims-men-rise-article-1.170550>.

⁹⁹ See, e.g., Jennifer O’Neill, *Meet the Man Who Sued His Boss to Spend More Time with His Kids*, YAHOO (Mar. 5, 2015), <https://www.yahoo.com/parenting/meet-the-man-who-sued-his-boss-to-spend-more-time-112737108717.html>; Rich Calder, *Man Sues Employer for Alleged Firing over Paternity Leave*, NEW YORK POST (Apr. 23, 2014, 8:56 PM), <http://nypost.com/2014/04/23/man-sues-employer-for-alleged-firing-over-paternity-leave>; *Today: Male CNN Reporter Sues Over Parental Leave Policy* (NBC television broadcast Nov. 11, 2013), available at <http://www.today.com/video/today/53520438>.

¹⁰⁰ See, e.g., Howard Koplowitz, *Texas Man Wins Sexual Harassment Case Against Female Boss: Jury Awards James Gist \$567K in Pam Matranga Case*, INT’L BUS. TRIB. (Mar. 24, 2014, 10:39 AM), <http://www.ibtimes.com/texas-man-wins-sexual-harassment-case-against-female-boss-jury-awards-james-gist-567k-pam-matranga>; Dave Jamieson, *LensCrafters Settles Female-on-Male Sexual Harassment Case*, HUFFINGTON POST (June 20, 2011, 5:08 PM), http://www.huffingtonpost.com/2011/06/20/lenscrafters-settles-fema_n_880709.html; Andrea Chang, *Cheesecake Factory Sued by Male Workers*, L.A. TIMES (July 11, 2008), <http://articles.latimes.com/2008/jul/11/business/fi-cheesecake11>; Gomstyn, *supra* note 98; The Associated Press, *supra* note 98; Evan Tahmincioglu, *Male Sexual Harassment Is Not a Joke*, NBC NEWS (July 10, 2007, 9:49 AM), <http://www.nbcnews.com/id/19536167/ns/business-careers/t/male-sexual-harassment-not-joke/#.Vcifm2RVikp>; Henry Weinstein & Lisa Girion, *Gay Man’s Sexual Harassment Lawsuit Ruled Worthy of Trial*, L.A. TIMES (Sept. 25, 2002), <http://articles.latimes.com/2002/sep/25/local/me-harass25>.

¹⁰¹ See, e.g., Brittany Bronson, *Money, Sex, and Las Vegas Pool Parties*, N.Y. TIMES, July 12, 2015, at SR11, available at <http://www.nytimes.com/2015/07/12/opinion/sunday/money-sex-and-las-vegas-pool-parties.html> (referring to lawsuits brought by men challenging female hiring preferences at Las Vegas resorts); Nicole Pasulka, *Men are Suing Ruby Tuesday Over Sexism*, YAHOO NEWS (Jan. 23, 2015, 7:49 PM), <http://news.yahoo.com/men-suing-ruby-tuesday-over-sexism-may-actually-004903899.html>; Robert Jablon, *Lawry’s Settles Men’s Sex Discrimination Suit*, HUFFINGTON POST (Nov. 2, 2009, 5:20 PM), <http://www.huffingtonpost.com/huff-wires/20091102/us-lawry-s-gender-discrimination>; *Texas Man Settles Discrimination Lawsuit Against Hooters for Not Hiring Male Waiters*, FOX NEWS (Apr. 21, 2009), <http://www.foxnews.com/story/2009/04/21/texas-man-settles-discrimination-lawsuit-against-hooters-for-not-hiring-male.html>.

¹⁰² See Jolls, Sunstein, & Thaler, *supra* note 87, at 1477 (explaining that “the availability heuristic—in which the frequency of some event is estimated by judging how easy it is to recall other instances of this type—leads us to erroneous conclusions”).

¹⁰³ See Karen Riddle, *Always on My Mind: Exploring How Frequent, Recent, and Vivid Television Portrayals Are Used in the Formation of Social Reality Judgments*, 13 MEDIA PSYCH. 155 (2010) (finding that more frequent viewing of violent media led subjects to give higher estimates of the prevalence of crime); L.J. Shrun, *Media Consumption and Perceptions of Social Reality*, in MEDIA EFFECTS 69, 72-76 (Jennings

decisionmakers likely to perceive men to be significant users of a symmetrical sex discrimination law.

As for race, a decisionmaker might also perceive whites to use employment discrimination law based on the perception of the prevalence of so-called “reverse” race discrimination. White Americans now view anti-white bias as more prevalent and a bigger societal problem than anti-black bias.¹⁰⁴ Americans overestimate the impact of affirmative action on historically advantaged groups, supporting a popular conception that white workers are frequently harmed by such policies, which give rise to reverse discrimination lawsuits.¹⁰⁵ This perception is not limited to formal affirmative action policies, but to other forms of reverse discrimination as well.¹⁰⁶ The perception of these types of lawsuits is likely to be all the more skewed by the salience of these issues in the media and the public generally,¹⁰⁷ as well as by large damages awards.¹⁰⁸

Bryant & Dolf Zillman eds., 2002) (collecting studies finding this effect and explaining it as the impact of media attention on perceptions of frequency, recency, and vividness); S. Lichtenstein, et al., *Judged Frequency of Lethal Events*, 6 J. EXP. PSYCH. 551, 551 (1978) (finding that 80% of subjects estimated death from accident more likely than death from stroke, even though strokes cause 85% more death than accidents, and attributing this error in part to media attention).

¹⁰⁴ Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSPECTIVES ON PSYCH. SCI. 215, 215-16 (2011).

¹⁰⁵ See Carol R. Goforth, *‘What Is She?’ How Race Matters and Why It Shouldn’t*, 46 DEPAUL L. REV. 1, 75 (1996) (noting that the perception that white males have been denied equal opportunities “has become a cause celebre”); Brian S. Lowery, et al., *Concern for the In-Group and Opposition to Affirmative Action*, 90 J. PERS. & SOC. PSYCH. 961 (2006) (finding that opposition to affirmative action is driven by desire to avoid harm to whites); Scott Plous, *Ten Myths About Affirmative Action*, 52 J. SOC. ISSUES 25 (2003) (listing as commonly believed myth that whites are widely adversely affected by affirmative action); Ronald Walters, *Affirmative Action and the Politics of Concept Appropriation*, 38 HOW. L.J. 587, 604 (1995) (noting claims that “some white males suffer a disadvantage from the implementation of affirmative action laws to such a degree that they have become a new ‘o p p r e s s e d c l a s s ’ ”).

¹⁰⁶ By the 1990s, more than 70% of whites were convinced that reverse discrimination was a rampant problem, see C.E. “Chuck” Williams, *Affirmative Action Doesn’t Involve Quotas/Initiative 200--Preference or Prejudice*, THE COLUMBIAN, Nov. 1, 1998, at B11, and by the 2000s, whites viewed racism against whites as more common and a bigger problem than racism against blacks, see Norton & Sommers, *supra* note 104, at 216; see generally Anne Laurent, *The Great Divide*, GOVERNMENT EXECUTIVE, Apr. 1, 1996 (discussing the growing perception among whites that they are wrongfully denied positions or promotions because of their race).

¹⁰⁷ See RORIE SPILL SOLBERG & ERIC N. WALTENBURG, *THE MEDIA, THE COURT, AND MISREPRESENTATION: THE NEW MYTH OF THE COURT* 66-68 (2010) (one-quarter of news stories on the Supreme Court cover civil rights cases, and half of these stories are about affirmative action). For example, *Ricci v. DeStefano*, 557 U.S. 557 (2009), a race discrimination suit brought by white employees, garnered substantial media attention. See SOLBERG & WALTENBURG, *supra*, at 68.

As for disability, there would be little reason to expect that decisionmakers would believe that members of the advantaged group would engage in any significant usage of a symmetrical antidiscrimination law. Preferences for those with disabilities are still too rare.¹⁰⁹ However, if the reasonable accommodation mandate of disability law were made available to a universal protected class, such that anybody could seek a needed accommodation, one could expect such a law to be used widely across the spectrum of employees.¹¹⁰

I have so far relied on the relevant theoretical literature to explore the impact of a symmetrical or asymmetrical design on the distributive consequences of antidiscrimination mandates. We can also draw lessons from empirical research on the consequences of symmetrical and asymmetrical antidiscrimination laws. Although data is limited, it tends to confirm the conclusions posited above.

Starting with asymmetrical antidiscrimination laws, the ADEA and the ADA have both been shown to reduce the employment levels of the groups they protect. As for the ADEA, the law's initial impact may have been favorable to older workers, primarily because it banned the then common practice of advertising age limits for jobs, and perhaps because it helped to change social norms regarding age.¹¹¹ Research on the later effects of the ADEA paint a far less rosy picture. While the ADEA may help older workers retain jobs, it has also been linked to a reduction in their employment levels.¹¹² As for the ADA, research has likewise shown that this law too has hurt the workers it intended to help by significantly reducing employment levels of disabled workers.¹¹³

¹⁰⁸ See, e.g., *White Firefighters Awarded \$2.5 Million in Discrimination Case*, NBC NEWS (Feb. 9, 2012, 12:44 PM), http://usnews.nbcnews.com/_news/2012/02/09/10362607-white-firefighters-awarded-25-million-in-discrimination-case.

¹⁰⁹ See *infra* notes 267-68 and accompanying text for examples.

¹¹⁰ I discuss this possibility in greater detail when addressing how the analysis in Part II applies specifically to disability. See *infra* notes 272-76 and accompanying text.

¹¹¹ See Lahey, *supra* note 69, at 685.

¹¹² See Michael C. Harper, *A Gap in the Agenda: Enhancing the Regulation of Age Discrimination in Employment*, in *EMPLOYMENT LAW INITIATIVES UNDER THE OBAMA ADMINISTRATION 608-09* (Zev Eigen & Samuel Estreicher eds., 2011); Lahey, *supra* note 69, at 685. One study found these employment effects only for men. *Id.* at 686. This may be because, as Jolls predicted, occupational segregation may mean that the effect of the mandate on women is on wages rather than employment levels. See *supra* note 19 and accompanying text. These studies did not assess effects on wages.

¹¹³ See Christine Jolls & J.J. Prescott, *The Effects Of "Reasonable Accommodations" Requirements And Firing Costs On The Employment Of Individuals With Disabilities* (2004) (unpublished manuscript) (identifying the ADA as the causal mechanism behind the decline in the disability employment rate following the passage of the ADA); Acemoglu & Angrist, *supra* note 69, at 915 (finding a "sharp drop in the employment of disabled

As for symmetrical antidiscrimination law, since the passage of Title VII in 1964, women and individuals of color have made great strides in the workplace.¹¹⁴ The challenge is assigning the causal mechanism of this progress, given the increase in human capital by these groups, as well as changes in societal attitudes towards these groups.¹¹⁵ It is possible that Title VII served some countervailing function in hindering the progress of disadvantaged groups in the fashion that Jolls's analysis would predict, but that these other changes overcame this impact.¹¹⁶ It is thus quite difficult to assess whether Title VII has had any negative impact on these groups.

Another data point comes from the FMLA, which provides leave for the birth or care of a newborn symmetrically to men and women.¹¹⁷ The data on the FMLA is mixed, but gives some reason to believe that the symmetrical design of the FMLA has protected women from the adverse consequences of a more targeted mandate.¹¹⁸ The literature suggests that the FMLA has had a modest positive effect on women's employment

workers after the ADA went into effect"); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RESOURCES 693 (2000) (finding that after the passage of the ADA, "employment rates of men with disabilities decreased dramatically"); Jolls, *supra* note 19, at 276; *see also* Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527, 533-34, 538-39 (2004) (documenting that employment levels of the disabled "declined dramatically" after the passage of the ADA).

Several scholars have sought to undermine these conclusions by offering an alternative account of this data. *See* David H. Autor & Mark G. Duggan, *The Rise in the Disability Rolls and the Decline in Unemployment*, 118 Q. J. ECON. 157 (2003); Peter Blanck, et al., *Calibrating the Impact of the ADA's Employment Provisions*, 14 STAN. L. & POL'Y REV. 267 (2003); Douglas Kruse & Lisa Schur, *Employment of People with Disabilities Following the ADA*, 42 INDUS. REL. 31 (2003). As disability law scholar Sam Bagenstos has argued, however, these scholars have either unjustifiably critiqued the data on which the initial studies relied, Bagenstos, *supra*, at 540-50, or wrongly placed too much blame on an alternative cause for the decline, *id.* at 553-55. Bagenstos instead reads the data as showing that the ADA *did* have a negative impact on the employment of those with disabilities, although he limits the decline to those persons whose disability limits the kind or amount of work they can do. *See id.* at 555.

¹¹⁴ *See, e.g.*, John J. Donohue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LIT. 1603, 1604 (1991).

¹¹⁵ *Id.* at 1605-06.

¹¹⁶ And these potential causes are not independent; there may be interaction between Title VII and the achievement of human capital as well as changes in societal attitudes.

¹¹⁷ 29 U.S.C. §§ 2612(a)(1)(A), (B).

¹¹⁸ If the FMLA does not have adverse consequences on women, it will be hard to disentangle the effect of making child-care leave symmetrical, as compared with the availability of other forms of leave under the law, such as self-care leave, that men are more likely to take than child-care leave. *See supra* note 85.

levels.¹¹⁹ Given occupational segregation, this is not surprising under Jolls's analysis.¹²⁰ The question then is whether the FMLA has had a negative impact on women's wages. One study showed that women did not suffer any negative impact on wages after the passage of the FMLA.¹²¹ However, this study suffers from the fact that many female workers were entitled by state law or firm policy to FMLA-type benefits prior to the FMLA's passage.¹²² Other research, though perhaps relevant, is less helpful. A study of the impact of European leave policies found that short-term (three months) of even paid leave did not reduce women's wages, but this study lumped together leave policies that applied only to women and those that applied to both women and men.¹²³ Yet another study found that the FMLA had a negative impact on the wages of women who took leave, but did not assess whether the FMLA affected the wages of women of child-bearing age more generally.¹²⁴ But we might not be too surprised with any findings of negative distributive consequences of the FMLA from studies conducted in the 1990s, when decisionmakers would be more likely to assume that women would use the law more than men.¹²⁵

b. Interlocking Stereotypes

Symmetry furthers antidisubordination goals by combating harmful stereotypes that contribute to the subordination of disadvantaged groups. The stereotypes that apply to a disadvantaged group are often also

¹¹⁹ Lester, *supra* note 69, at 37-38 (collecting studies).

¹²⁰ See *supra* notes 79-80 and accompanying text.

¹²¹ Jane Waldfogel, *The Impact of the Family and Medical Leave Act*, 18 J. POL'Y ANALYSIS & MGMT. 281, 295-96 (1999).

¹²² Jolls, *supra* note 19, at 297.

¹²³ See Christopher J. Ruhm, *The Economic Consequences of Parental Leave Mandates: Lessons from Europe*, 113 Q.J. ECON. 285, 285 & n.1 (1998).

¹²⁴ SANDRA L. HOFFERTH & SALLY C. CURTIN, OECD SOCIAL, EMPLOYMENT AND MIGRATION WORKING PAPER SERIES NO. 7, THE IMPACT OF PARENTAL LEAVE ON MATERNAL RETURN TO WORK AFTER CHILDBIRTH IN THE UNITED STATES 14 tbl.1, 17 tbl.3 (2003). In analyzing these results, one must be aware of an additional effect of the FMLA: that it may push women into and keep them in higher-paying jobs. Therefore, a finding of no impact on women's wages might mask more complex dynamics of at least some women improving their employment, which counteracts wage discrimination. See Jolls, *supra* note 19, at 299 (explaining that the FMLA "may have a sort of composite effect, moving women into, or keeping them, in better, higher-paying jobs").

¹²⁵ Even though the FMLA provides for both self-care and family-care leave, see *supra* note 85, if decisionmakers assume that self-care leave is taken by equal numbers of men and women, and that family-care leave is taken by many more women, then the FMLA would have a negative impact on women. This is especially so because the family-care provision of the FMLA is likely to be more salient to decisionmakers than the self-care provision.

manifested—in mirror-image form—in the stereotypes applied to the advantaged group. Effectively dismantling these stereotypes requires the ability to challenge them from both sides, which only a symmetrical law permits.

This phenomenon of interlocking stereotypes is perhaps easiest to see in the context of sex, where heterosexual marriage means that stereotypes about women’s proper family roles (and workplace limitations) are often the flip side of the stereotypes about men’s proper family roles (and workplace expectations). Take the case of a male police officer who sought leave as a primary caregiver under state law. His employer insisted that “God made women to have babies, and unless [he] could have a baby, there is no way [he] could be [the] primary care [giver]” unless his wife was “in a coma or dead.”¹²⁶ This example, and others like it,¹²⁷ demonstrate how sex stereotypes that limit women at work are instantiated not only through the stereotyping of women as mothers first and workers second, but equally through stereotypes of men as workers first and fathers second. Moreover, these stereotypes make it harder for men to participate meaningfully in family life, which in turn contributes to women doing more care work, further reinforcing sex-role stereotypes and limiting women’s workplace opportunities.¹²⁸ Precisely because of these interlocking stereotypes, women’s rights advocates, including Justice Ruth Bader Ginsburg, have relied on male sex discrimination plaintiffs to combat subordinating stereotypes against women.¹²⁹

Interlocking stereotypes on the basis of sex also arise outside of the family. In the landmark *Price Waterhouse v. Hopkins* case, the Supreme

¹²⁶ *Knussman v. Maryland*, 272 F.3d 625, 629-30 (4th Cir. 2001).

¹²⁷ *See, e.g., Shafer v. Bd. of Public Educ.*, 903 F.2d 243 (3d Cir. 1990) (male plaintiff challenging policy that limited child-rearing leave to female employees); *Wells v. City of Montgomery*, No. 1:04CV425, 2006 WL 1133300, at *3 (S.D. Ohio Apr. 25, 2006) (male plaintiff claiming discrimination for taking leave to care for child based on comment by a superior: “Congratulations for taking the most time off for having a baby and not actually having the baby.”).

¹²⁸ For a further discussion of the intersection of family roles and antidiscrimination law, and especially how antidiscrimination law falls short by failing to address harms to the family, see Naomi Schoenbaum, *The Family and the Market at Wal-Mart*, 62 DEPAUL L. REV. 759 (2013).

¹²⁹ Professor Cary Franklin has argued that fighting sex-role stereotypes is precisely why Justice Ginsburg’s Women’s Rights Project brought so many cases with male plaintiffs when it was pioneering constitutional sex equality jurisprudence. *See* Franklin, *supra* note 9, at 104-06 (arguing that “Ginsburg pressed the claims of male plaintiffs” to challenge stereotypes “that reflected or reinforced traditional conceptions of men’s and women’s roles”). Likewise, Professor Mary Anne Case has argued that suits by men challenging sex stereotypes are critical to the equality of women. *See* Case, *supra* note 27, at 3.

Court held that denying a woman a professional accounting partnership because she was too masculine could violate Title VII.¹³⁰ The employer criticized the plaintiff because she was “macho”; “a lady using foul language”; and a “tough-talking somewhat masculine hard-nosed [manager]”; and for failing to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”¹³¹ As we can see from these criticisms, feminine and masculine stereotypes are mirror images. Being masculine means being macho; using foul language, being tough-talking, and being hard-nosed, and *not* walking femininely, *not* talking femininely, *not* dressing femininely, *not* wearing make-up, *not* styling one’s hair, and *not* wearing jewelry. Being feminine means the opposite: being delicate; *not* using foul language; *not* talking tough; and *not* being hard-nosed; and walking femininely, talking femininely, dressing femininely, wearing make-up, styling one’s hair, and wearing jewelry. These stereotypes place women in a double bind in a range of professions that require stereotypically masculine traits to get ahead: women must act aggressively to do the job well, but must act femininely to meet gender expectations.¹³² While these stereotypes were manifested against a woman in *Price Waterhouse*, they can just as easily arise in cases where men are penalized for being too feminine.¹³³ Dismantling these subordinating stereotypes requires a symmetrical law that allows challenges from both sides.¹³⁴

¹³⁰ 490 U.S. 228 (1989).

¹³¹ *Id.* at 235.

¹³² *Id.* at 251 (“An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.”); *see also, e.g.,* Madeline E. Heilman & Tyler G. Okimoto, *Why Are Women Penalized for Success at Male Tasks?: The Implied Communitarity Deficit*, 92 J. APP. PSYCH. 81 (2007) (finding that women who succeed at male tasks by adopting masculine traits such as aggression are penalized because they are viewed as lacking in feminine traits such as nurturing); Susan T. Fiske, et al., *(Dis)Respecting Versus (Dis)Liking: Status and Interdependence Predict Ambivalent Stereotypes of Competence and Warmth*, 55 J. SOC. ISSUES 473 (1999) (relying on same model).

¹³³ *See e.g.,* Smith v. City of Salem, 378 F.3d 566, 568-69 (6th Cir. 2004) (male firefighter terminated for adopting feminine appearance); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874-75 (9th Cir. 2001) (male waiter harassed for serving “like a woman”); Strailey v. Happy Times Nursery Sch., 608 F.2d 327 (9th Cir. 1979) (male nursery school teacher fired for “effeminate appearance”); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325 (5th Cir. 1978) (“effeminate” male turned down for mailroom position).

¹³⁴ Because of Title VII’s symmetry, an effeminate man can argue that he was discriminated against on the basis of sex because a woman who behaved the same way would be treated differently. *See Case, supra* note 27, at 4 (explaining that adding gender to the list of Title VII’s protected traits is not necessary to protect the effeminate man for this reason). While male plaintiffs have historically faced obstacles in bringing these

We can see interlocking stereotypes for other protected traits as well. Take age, for example. A Department of Labor report that formed the basis for the passage of the ADEA identified the primary obstacle that older workers face as one of “stereotyping,” and “the perception that older persons cannot do particular jobs.”¹³⁵ The stereotypes that hold older workers back include the view that older workers are less flexible, more resistant to change, and not as competent with new or fast-changing technologies.¹³⁶ Younger workers face the flip side of these stereotypes. If older workers are viewed as too slow and stuck in the past, younger workers are viewed as too quick and not stuck enough: great with new technology, but less committed, less reliable, and less talented with traditional skills like in-person interviewing and writing.¹³⁷ Again, a symmetrical law that allows these stereotypes to be challenged from both sides will be far more effective at rooting them out.

Interlocking stereotypes are present for other protected identity traits like race and national origin, albeit less pervasively. The weaker presence of interlocking stereotypes in these contexts may be due to the difference between binary traits, on the one hand, and discrete traits on the other. For

claims, *id.* at 49-51 (collecting cases), such claims are now gaining ground, *see, e.g.*, Smith, 378 F.3d at 572 (male plaintiff can proceed on discrimination claim based on feminine appearance); Nichols, 256 F.3d at 874-75 (same for harassment based on femininity).

¹³⁵ U.S. DEP’T. OF LABOR, THE OLDER AMERICAN WORKER, AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, at 2 (1965) (finding that employers make “assumptions about the effect of age on [an individual’s] ability to do a job when there is in fact no basis for [such] assumptions.”).

¹³⁶ *See* Scott J. Adams & David Neumark, *Age Discrimination in U.S. Labor Markets: A Review of the Evidence*, in HANDBOOK ON THE ECONOMICS OF DISCRIMINATION 187, 190 (W.M. Rodgers, ed. 2006); HRM, *Age Discrimination Against Younger Workers*, HC ONLINE (Jan. 9, 2013), <http://www.hcamag.com/hr-news/age-discrimination-against-younger-workers-147776.aspx> (citing survey of hiring managers finding that they believe older workers need to improve their technological skills); *see also, e.g.*, Hartsel v. Keys, 87 F.3d 795, 802 (6th Cir. 1996) (explaining that the belief that “older workers are more resistant to change and are adverse to learning new methods . . . is the very type of ageist stereotype that the ADEA was enacted to address”); Peterson v. Mid-State Grp., Inc., 54 F. Supp. 3d 1039, 1044 (E.D. Wis. 2014) (allowing ADEA plaintiff to survive summary judgment because employer’s professed nondiscriminatory reasons for termination—that employee was unable to adapt to the computer system and was resistant to change—were consistent with ageist stereotypes).

¹³⁷ *See* HRM, *supra* note 136 (citing survey of hiring managers finding that younger workers are viewed as less reliable and less professional); Armour, *supra* note 95 (discussing stereotype of younger workers as “slackers who tend to be less loyal to the company”); *see also, e.g.*, Bergen Commercial Bank v. Sisler, 723 A.2d 944 (N.J. 1999) (reverse age discrimination claim based on maturity concerns); Nishi v. Siemens AG, 290 F. Supp. 2d 772, 777 (E.D. Mich. 2003) (same).

binary traits, it is easy to view one group as the opposite of, or “not” the other. This is so for sex, and while age is a continuous trait, it may be *perceived* as binary (old and young). In the context of discrete traits, by contrast, there are multiple different groups that fall within the protected identity trait, and so no group serves as the foil for the other group. Nonetheless, interlocking stereotypes do exist in this context as well.

For example, one common stereotype of black workers is that they are cool, stylish, and hip, whereas a common stereotype of white workers is that they are the opposite: uncool and behind-the-times.¹³⁸ Even this seemingly benign stereotype of black workers is subordinating because it may limit employers’ conceptions of the types of jobs that are a good match for black workers. For example, a successful black advertising executive may be poised for a promotion to be the first black vice president at his firm, only to learn that he is to head up the new “urban” division at the company.¹³⁹ If white workers denied positions in the “urban” division are not allowed to challenge these decisions, the interlocking racial stereotypes that confine black workers to narrower paths for success are fought less effectively, from only one side.

¹³⁸ Compare ANTHONY J. CORTESE, PROVACATEUR 117 (2008) (noting that “black people have traditionally set trends in fashion style, language, and particularly, entertainment” and that “black images are often used to impart what is considered ‘cool,’ ‘stylish,’ ‘hip’”), with Lori Kendall, “White and Nerdy”: Computers, Race, and the Nerd Stereotype, 44 J. POP. CULTURE 505 (2011) (explaining how whiteness has been linked with nerdiness and uncoolness). Interlocking racial stereotypes also arise in athletics. See Jeff Stone, et al., “White Men Can’t Jump”: Evidence for Perceptual Confirmation of Stereotypes Following a Basketball Game, 19 BASIC & APP. SOC. PSYCH. 291 (1997) (finding that subjects stereotyped black basketball players as more athletic and naturally talented and white players as more intelligent and hustling more); see also, e.g., Heike v. Guevara, 519 F. App’x 911, 919 (6th Cir. 2013) (white athlete claiming race discrimination based on basketball coach’s preference for “thug” or “ghetto” players).

Interlocking stereotypes have also been identified in Native American and white identities. Whites have long been stereotyped as embracing modern civilization, whereas Native Americans face both an idealized stereotype of avoiding the evils of this civilization, as well as a “negative stereotype of Indians [as] the dupes of missionaries, the drunk ‘hang around the fort’ Indians.” Tod Swanson *Through Family Eyes: Towards a More Adequate Perspective for Viewing Native American Religious Life*, 21 AM. IND. Q. 57, 57-58 (1997). These “mirror image stereotypes” of whites and Native Americans “feed off each other,” and “work[] together [to] create a destructive system of meaning.” *Id.* at 58, 64.

¹³⁹ I draw this example from the television show *Blackish*. See BLACKISH: PILOT (ABC television broadcast Sept. 24, 2104); see also ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS 80-82 (1993) (describing how many black executives are steered into “black” jobs in areas such as “community relations” or “minority affairs”).

c. Heterogeneity of Disadvantage

This next argument varies from the last two in that the antisubordination purpose that is achieved is not in the form of benefits to a historically subordinated group, but in recognizing the variety of manifestations that disadvantage can take. The antisubordination view relies on a clean division between the advantaged group and the disadvantaged group.¹⁴⁰ The early scholarship developing the theory was focused on governmental policies related to race, and it seemed straightforward that blacks were disadvantaged and whites were advantaged.¹⁴¹ But in the employment context, stereotypes of even subordinated groups may systematically work to their advantage in pockets of the labor market. Moreover, the circumstances of subordinated groups and the labor market have changed substantially since the antisubordination theory was developed, calling into question the neat division of advantaged and disadvantaged groups.

For some traits, there are reasons to believe that both “sides” of a protected trait face substantial systematic subordination, but in different ways. The prime example is age. While the ADEA focused on the negative stereotypes that older workers face,¹⁴² younger workers too face negative stereotypes that arguably hold them back just as much. When it comes to skills, younger workers may be viewed as less competent.¹⁴³ As for personal characteristics, younger workers are thought to be less reliable, professional, and less committed to the job,¹⁴⁴ as well as less affable, with lower moral standards.¹⁴⁵ The stereotype of the irresponsible younger worker is only magnified with young adults’ delayed independence from their families of origin well into adulthood.¹⁴⁶ And younger workers feel the impact of these stereotypes. Younger workers are more likely than older workers to report experiencing age-related prejudice, with those under twenty-five at least twice as likely to have experienced it as other age groups.¹⁴⁷ Just 44% of employees ages eighteen to twenty-four believe they

¹⁴⁰ See *supra* notes 66-67 and accompanying text.

¹⁴¹ See generally Fiss, *supra* note 14 (relying on state action based on race to develop seminal antisubordination theory).

¹⁴² See *supra* notes 135-36 and accompanying text.

¹⁴³ See Snowdon, *supra* note 93; HRM, *supra* note 136 (noting in particular writing ability). Note that age-based competency stereotypes may vary based on the type of job. See Adams & Neumark, *supra* note 136, at 190 (reviewing study finding preference for older worker for stamp and coin salesperson and younger worker for CD salesperson).

¹⁴⁴ See Armour, *supra* note 95; HRM, *supra* note 136.

¹⁴⁵ See Snowdon, *supra* note 93.

¹⁴⁶ See Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens through the Twenties*, 55 AM. PSYCH. 469 (2000).

¹⁴⁷ See Snowdon, *supra* note 93 (reporting on results of 2012 survey).

are treated fairly on the job, compared with 64% of employees ages forty-five to fifty-five.¹⁴⁸ The negative stereotypes that younger workers face have been particularly problematic in positions seen to require authority.¹⁴⁹

For these reasons, it is not entirely clear that older workers are more subordinated than younger workers. It may be that both groups are equally subordinated, but in different ways. Even the history of the ADEA acknowledges that older workers were “frequently preferred over younger workers when it came to promotions and treatment within the workplace,” whereas “older *applicants* were treated with disdain.”¹⁵⁰ According to one recent study, people in their forties were viewed as having the highest status in the workplace, while those over seventy were given a higher status than those in their twenties.¹⁵¹ Older workers out-earn younger workers.¹⁵² And when it comes to unemployment of older workers, perhaps the primary concern of the ADEA,¹⁵³ workers between the ages of twenty-five and thirty-four now have a higher unemployment rate (5.8%) than workers fifty-five years and older (4.0%).¹⁵⁴ In circumstances like these, it is especially

¹⁴⁸ Armour, *supra* note 95 (reporting on results of 2002 survey).

¹⁴⁹ See, e.g., *Bergen Commercial Bank v. Sisler*, 723 A.2d 944 (N.J. 1999) (twenty-five-year-old bank vice president demoted after employer learned of his age). In an anecdote reported by Armour, *supra* note 95, when a twenty-nine-year-old lawyer stood to argue his case, the judge joked, “‘Is it bring-your-kids-to-work day?’” and asked if his dad would be arguing the motion.

¹⁵⁰ See *Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor, 90th Cong. 7, 154 (1967)* (statement of William D. Bechill, Commissioner on Aging).

¹⁵¹ See Snowdon, *supra* note 93.

¹⁵² See Christine Jolls, *Hands-Tying and the Age Discrimination in Employment Act*, 74 TEX. L. REV. 1813 (1996). In light of rising wages for older workers, Christine Jolls has argued that the primary purpose of the ADEA may not be civil rights but employer hands-tying. Under this view of the ADEA, what underlies the law is a bargain between employers and employees, premised on an unstated agreement of rising wages over the course of an employee’s career with the firm. This rising wage is less than the employee’s productivity early on, but more than productivity later in the career. Without protection against termination at the later stage, however, employers would be free to breach the bargain by terminating employees when wages exceed productivity. Under the hands-tying view, the ADEA prevents this. While this may or may not explain current law, compare Jolls, *supra*, with Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination? The ADEA’s Unnatural Solution*, 72 N.Y.U. L. REV. 780, 800 (1997) (finding this an unsatisfying justification for the ADEA), it is orthogonal to an analysis of how an age discrimination law aimed at promoting antisubordination purposes should be designed.

¹⁵³ See Issacharoff & Harris, *supra* note 152, at 783-84 (explaining that the ADEA was motivated by the problem of long-term unemployment among the elderly and legislative findings that “the burden of unemployment was falling disproportionately on older workers”).

¹⁵⁴ Bureau of Labor Statistics, *Labor Force Statistics from the Current Population*

troubling to wall off a group's ability to challenge discrimination.

Like age, the neat division of subordination by sex, with men at the top and women at the bottom, has become more muddled in recent years.¹⁵⁵ Men now attend college at lower rates than women,¹⁵⁶ and skills associated with traditional male jobs are not as valued in the current economy.¹⁵⁷ This does not mean that men in general are moving towards taking on the subordinated position in the labor market, but that a bimodal distribution of male workers may be emerging. Men have remained stably privileged at the highest levels of the labor market, in top management and professional jobs, but are also overrepresented at the bottom of the labor market, leaving them less represented in the middle.¹⁵⁸ While this trend is still emerging, the trajectory should lead us to question our confidence in rigid demarcations of subordination by sex in the labor market, as well as any law that would recognize disadvantage only of women workers.

Occupational segregation by race and sex also challenges the neat division of subordinated groups.¹⁵⁹ While the bulk of this segregation

Survey, BUREAU OF LABOR STATISTICS (last modified July 2, 2015), <http://www.bls.gov/web/emp/sit/cpseea10.htm>.

¹⁵⁵ See generally HANNA ROSIN, *THE END OF MEN* (2012) (chronicling how women are surpassing men in a number of domains, including many measures of education and labor market achievement); LIZA MUNDY, *THE RICHER SEX* (2012) (discussing how soon more households will be supported by women than men and the consequences).

¹⁵⁶ See ROSIN, *supra* note 155, at 8 (“In the United States, for every two men who will receive a BA this year, for example, three women will do the same.”); Gary S. Becker, et al., *Explaining the Worldwide Boom in Higher Education of Women*, 4 J. HUM. CAPITAL 203 (2010) (documenting and explaining this phenomenon).

¹⁵⁷ See ROSIN, *supra* note 155, at 8 (“Of the fifteen job categories projected to grow the most in the United States over the next decade, twelve are occupied primarily by women.”). The decline of men in the labor force is explained by “sweeping structural changes in rich economies [that] have reduced the demand for all less-skilled workers.” *Decline of the Working Man*, THE ECONOMIST, Apr. 28, 2011, at 20, *available at* <http://www.economist.com/node/18618613>. “Men have been hit harder than women by these shifts,” because “[t]hey are likelier to work in manufacturing,” whereas “women have been better represented in sectors, such as health care and education, where most job growth has taken place.” *Id.*; see also ROSIN, *supra* note 155, at 9 (“In the past, men derived their advantage largely from size and strength, but the postindustrial economy is indifferent to brawn,” as “[a] service and information economy rewards precisely the opposite qualities—the ones that can’t be easily replaced by a machine.”).

¹⁵⁸ See ROY F. BAUMEISTER, *IS THERE ANYTHING GOOD ABOUT MEN?* 16-19 (2010) (arguing that male distribution across many measures is bimodal: that men occupy both the top and bottom levels of achievement); Stephanie Coontz, *The Myth of Male Decline*, N.Y. TIMES, Sept. 30, 2012, at SR1, *available at* <http://www.nytimes.com/2012/09/30/opinion/sunday/the-myth-of-male-decline.html> (critiquing Rosin, *supra* note 154, and Mundy, *supra* note 154, for failing to disaggregate the top of the labor market, where men continue to surpass women).

¹⁵⁹ See O. Alonso-Villar, et al., *The Extent of Occupational Segregation in the United*

operates to maintain traditional identity-based hierarchies,¹⁶⁰ this is not always the case. Occupational segregation can also lead an advantaged group to be systematically excluded from desirable occupations. Only a symmetrical law allows this type of disadvantage to be challenged.

When it comes to occupational segregation by sex, there are numerous desirable occupations that are dominated by women. Table 2 below provides examples of female-dominated occupations where the median weekly earnings for men in these occupations substantially exceed the national average of median weekly earnings for men, which was \$841 in 2014.¹⁶¹ Of course, earnings are not the only relevant factor for making an occupation desirable (I return to this point below), but earnings provide a simple measure to demonstrate that there are occupations that men might desire to enter that are harder for them to enter than women.

Occupation	Percent Female	Median Weekly Male Earnings¹⁶²
Dental Hygienist	94%	\$957
Nurse Practitioner	90%	\$1683*
Registered Nurse	90%	\$1236
Occupational Therapist	90%	\$1146*
Event Planner	82%	\$997*
Social Worker	82%	\$892
Elementary and Middle School Teachers	80%	\$1096

TABLE 2¹⁶³

One might quibble with my conclusion that men in these desirable

States: Differences by Race, Ethnicity, and Gender, 51 INDUS. RELS. 179, 187-92 (2012) (documenting significant amount of segregation).

¹⁶⁰ *Id.* at 181 (noting that jobs dominated by women and minorities pay less); see also Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1074-75 (1992) (“Job segregation is not a separate-but-equal arrangement; minorities and women are concentrated in work offering lower wages, less status, and fewer opportunities for advancement.”).

¹⁶¹ Bureau of Labor Statistics, *Household Data Annual Averages*, BUREAU OF LABOR STATISTICS (last visited Aug. 5, 2015), <http://www.bls.gov/cps/cpsaat39.pdf>.

¹⁶² This measure disaggregates the median weekly earnings of men in these occupations as compared with women in these occupations because men earn substantially more. The figures in this column with asterisks represent median weekly earnings for men and women combined, because figures for men alone are unavailable.

¹⁶³ All data is from 2014 and derived from Bureau of Labor Statistics, *supra* note 161.

female occupations are disadvantaged relative to women. First, most of these occupations require an advanced degree, and men with the same level of education could earn more in another (male-dominated) occupation. While men (and women) with the same level of education could earn more in other jobs, even an antisubordination absolutist would likely measure disadvantage not only in earnings potential, but in life opportunities. Even if a man could get a master's degree in information technology and earn more than if he had pursued a master's degree in nursing, this does not negate the fact that some men might prefer nursing to information technology. If men as a group systematically face obstacles to entering nursing, they should be regarded as disadvantaged with regard to this occupation.

Second, men earn more than women in these occupations, and thus they appear to be advantaged in these jobs. Much of the earnings gap in any occupation is attributable to the fact that men work more hours and enjoy fewer interruptions in their careers.¹⁶⁴ Even if men in these professions earn more, this does not negate the existence of systematic barriers to men entering and remaining in these professions.¹⁶⁵ And, importantly, the

¹⁶⁴ See Paula England, *Gender Inequality in Labor Markets: The Role of Motherhood and Segregation*, 12 SOC. POLS. 264, 270-72 (2005).

¹⁶⁵ Much of the research comes from the field of nursing. See Christiana Kouta & Charis P. Kaite, *Gender Discrimination and Nursing: A Literature Review*, 27 J. PROF'L NURSING 59, 59-60 (2011) (cataloguing stereotyping of men in nursing and its consequences, including that male nurses are held back because of inequitable treatment in nursing school, as well as workplace stereotypes, such as that men are "considered to lack the capacity to provide mothering and caring," and reporting that men resign from nursing during the first four years after graduation more frequently than women); see also, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (holding that denying males the right to enroll in the state nursing school violates equal protection); *Evans v. Principi*, No. Civ.A. 02-2258(GK), 2005 WL 485743, at *1 (D.D.C. Feb. 17, 2005) (male nurse suing for sex discrimination alleging that his supervisor told him that he "'d[id]n't belong here'" and that he was treated far worse than his female colleagues). Another example comes from the obstetrics and gynecology field, which has become so female-dominated that it is now difficult for men to enter the field. See Tamar Lewin, *Women's Health Is No Longer a Man's World*, N.Y. TIMES, Feb. 7, 2001, at A14, available at <http://www.nytimes.com/2001/02/07/us/women-s-health-is-no-longer-a-man-s-world.html> (quoting chairman of the Council on Resident Education in Obstetrics and Gynecology that this "'a huge issue for male medical students'"); see also, e.g., *Veleanu v. Beth Isr. Med. Ctr.*, 98 Civ. 7455, 2000 WL 1400965, at *1 (S.D.N.Y. Sept. 25, 2000) (male gynecologist claiming that employer sought to create an all-female staff). And we can see additional examples in other caring professions. See, e.g., *Scott v. Parkview Mem'l Hosp.*, 175 F.3d 523 (7th Cir. 1999) (male social worker claiming that employer favored women by using sex as proxy for caring attitude); *Longariello v. Sch. Bd. of Monroe Cnty.*, 161 F.3d 21 (11th Cir. 1998) (male teacher claiming failure to hire); *Keller v. Ind. Family & Soc. Servs. Admin.*, 639 F. Supp. 2d 928, 937 (S.D. Ind. 2009) (male employees of mental health facility claiming more favorable treatment of female employees).

disadvantage that men face in these occupations is linked to the ongoing subordination of women: until it is accepted for men to engage in traditionally feminine jobs, these jobs will continue to confer less status and lower pay, which primarily harms women.¹⁶⁶

This pattern of occupational segregation holds less true for other traits. While there is occupational segregation by race, it is less pronounced.¹⁶⁷ And race-based occupational segregation should be distinguished from sex-based occupational segregation on two grounds. First, because these are workers from minority races and national origins, even when they are disproportionately represented in an occupation, they continue to make up a minority of that occupation, as compared to the 90% or greater saturation of women in the most sex-segregated occupations.¹⁶⁸ This means that the degree of exclusion of men in sex-segregated fields is less likely to occur for whites in race-segregated fields. Second, there are fewer occupations that disproportionately employ racial and ethnic minorities that would be deemed desirable by the wage measure relied on above.

One exception is for Asian workers, who are disproportionately represented in a number of desirable occupations, including a variety of technology, mathematical, engineering, and science occupations.¹⁶⁹ My aim is not to suggest that Asian Americans do not face harmful stereotyping

¹⁶⁶ See Case, *supra* note 27, at 34 (describing how the devaluation of the feminine, in women *or* men, will accrue to the disadvantage of women).

¹⁶⁷ See Alonso-Villar, et al., *supra* note 159, at 188.

¹⁶⁸ Bureau of Labor Statistics, *supra* note 161.

¹⁶⁹ See *id.* (listing, *inter alia*, statistician, computer systems analyst, medical scientist, physical scientist, physicians, and pharmacists); Jay McGregor, *2% of Google Employees are Black and Just 30% are Women*, FORBES (May 29, 2014, 10:01 AM), <http://www.forbes.com/sites/jaymcgregor/2014/05/29/2-of-google-employees-are-black-and-just-30-are-women> (citing Google's workforce as 30% Asian). Notably, Asian workers' median weekly earnings are actually higher than white workers' earnings. Press Release, Bureau of Labor Statistics, Usual Weekly Earnings of Wage and Salary Workers Second Quarter (July 21, 2015), *available at* <http://www.bls.gov/news.release/pdf/wkyeng.pdf> (\$966 per week for Asians as compared with \$835 for whites). While Asian workers as a whole out-earn white workers, the distribution of earnings across Asian workers varies, with some subgroups of Asians earning more than whites, and others earning less. See Alonso-Villar, et al., *supra* note 159, at 192. Thus the relative privilege of Asian workers and white workers must be viewed more granularly. And given the numerical supremacy of whites in the workforce, it is still hard to argue that as a general matter, whites are subordinated as compared with even the privileged subset of Asian Americans. Recent lawsuits against elite universities challenging affirmative action policies as unduly limiting Asian as compared with white acceptance rates demonstrate how Asians may continue to be subordinated, even as model minorities. See, e.g., *Harvard's Asian Problem: A Lawsuit Says Racial Preferences Hurt High-Achieving Minorities*, WALL STREET J. (Nov. 21, 2014, 7:19 PM), <http://www.wsj.com/articles/harvards-asian-problem-1416615041>.

or discrimination that limits their employment opportunities,¹⁷⁰ but rather to highlight that whites may not be the most privileged race across all occupations.¹⁷¹ Only a symmetrically designed law allows disadvantage to be challenged in its varied manifestations.

B. Practice

The symmetrical or asymmetrical design of an employment discrimination law matters not only for the purpose of the law, but also for how the law is implemented in practice. Here too there are benefits to symmetry. An asymmetrical law requires a defined protected class. By putting courts in the position of iteratively deciding who is in and who is out of the class, such a requirement runs counter to anticlassification purposes and stands at odds with a more fluid notion of identity that is pressed by transgender and other plaintiffs. Requiring a protected-class determination at the outset of the case unduly restricts understandings of discrimination and plaintiffs' ability to prove their claims. These practical shortcomings of asymmetry are discussed in turn.

With a symmetrical law, there need be no analysis of whether the plaintiff is a member of a protected class. As one court explained in a Title VII case: "By virtue of being a human being, the Plaintiff satisfies the first element—he belongs to a race and national origin: white, Hispanic."¹⁷² By contrast, asymmetrical laws define a protected class.¹⁷³ Courts must then determine at the outset of each lawsuit whether the plaintiff is a member of the protected class. Under the ADEA, the analysis is quite simple, as age is an easily quantifiable trait.¹⁷⁴ However, race, national origin, sex, and

¹⁷⁰ See, e.g., Mitu Gulati & Devon Carbado, *Working Identity*, 85 CORNELL L. REV. 1259, 1268-69 (2000) (discussing how a male Korean American might be stereotyped as being "good at math and science, unassertive, quiet, hardworking, uncreative, and impersonal").

¹⁷¹ See, e.g., *Koehler v. Infosys Techs. Ltd. Inc.*, No. 13-CV-885-PP, 2015 WL 2168886 (E.D. Wis. May 8, 2015) (white plaintiffs alleging discrimination in favor of Asians in technology positions); *Heldt v. Tata Consultancy Servs. Ltd.*, No. 3:15-cv-01696 (N.D. Cal.) (same).

¹⁷² *Padilla v. N. Broward Hosp. Dist.*, No. 06-CIV-60934, 2007 WL 2364332, at *2 (S.D. Fla. Aug. 14, 2007).

¹⁷³ For continuous traits, this is less of a requirement than a sense that an asymmetrical law that is meant to protect the subordinated group would limit the protected class to those within this group. See *supra* note 43 and accompanying text (discussing how ADEA limits the protected class to those over forty).

¹⁷⁴ See Peter Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 YALE L. J. 27, 32 n.22 (1979) ("An age criterion is perhaps the classic example of the "formally realizable rule"—a criterion of decision whose applicability is readily ascertainable by the investigation of relatively unambiguous, objective facts.").

disability can require a more complicated analysis, which might be particularly troubling in the era of Caitlyn Jenner and Rachel Dolezal, when the line between male and female and black and white is increasingly blurred.¹⁷⁵ And because there is no natural or accepted definition of disability, this initial classification decision has come to define the field of disability discrimination litigation.¹⁷⁶

The need for courts to make protected-class determinations at the outset of litigation is troubling. For those who believe antidiscrimination law's purpose is to limit classifications on the basis of protected identity traits, an antidiscrimination law that required these types of classifications would be in stark tension with this goal.¹⁷⁷ Such classifications recall a disturbing history of race and other identity classifications that have been used to exclude and demean.¹⁷⁸ The volume of employment discrimination cases, and thus the volume of classifications, only further underscores this concern.¹⁷⁹

Beyond classification concerns, a protected-class requirement will unduly restrict which theories of discrimination courts cognize and which plaintiffs can proceed on their claims by adding yet one more test to an area of law already littered with formal tests. Scholars have explored how these rigid tests have served as roadblocks to new theories of discrimination and to plaintiffs' ability to establish their claims.¹⁸⁰ As Professor Sandra Sperino has argued, employment discrimination tests, including the protected-class test, have led courts to focus too much on the tests and to "dismiss claims . . . that do not fit neatly within recognized structures."¹⁸¹ Plaintiffs' claims have been dismissed, despite substantial evidence of discrimination, simply because they did not meet the technical bounds of the *prima facie* case.¹⁸²

¹⁷⁵ See Elinor Burkett, *What Makes a Woman*, N.Y. TIMES, June 7, 2015, at SR1; Charles Blow, *The Delusions of Rachel Dolezal*, N.Y. TIMES (June 17, 2015), <http://www.nytimes.com/2015/06/18/opinion/charles-blow-the-delusions-of-dolezal.html>.

¹⁷⁶ See Bagenstos, *supra* note 9, at 398-99 (noting that this inquiry has become the central issue under the ADA).

¹⁷⁷ See *supra* Part II.A.1.

¹⁷⁸ See Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L. J. 1487, 1505 (2000) (explaining how the one-drop rule—that "any person with even a drop of Black blood would have the same legal status as a pure African"—was used to enforce segregation); see also *Buck v. Bell*, 274 U.S. 200, 207 (1927) (in a case authorizing sterilization of disabled women, noting that "[t]hree generations of imbeciles are enough").

¹⁷⁹ See Eisenberg, *supra* note 15, at 5.

¹⁸⁰ See Suzanne Goldberg, *Discrimination By Comparison*, 120 YALE L.J. 728 (2011); Sandra Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69 (2011).

¹⁸¹ Sperino, *supra* note 180, at 71.

¹⁸² See *id.* at 88-91; see, e.g., *Harmon v. Earthgrains Baking Cos.*, No. 08-5227, 2009 WL 332705, at *1 (6th Cir. Feb. 11, 2009) (rejecting an ADEA termination claim despite

While at first blush these concerns might sound in the canonical rules-standards debate,¹⁸³ there are reasons to be particularly concerned about the unduly rigid application of rules here. It is notoriously difficult to gain traction on the central question in disparate treatment claims: whether the employer engaged in conduct *because of* a protected trait, which I refer to as the causation inquiry. In the face of this difficulty, judges decide an enormous volume of discrimination cases under a starting assumption that not much discrimination actually occurs in the world.¹⁸⁴ In light of these circumstances, scholars have shown how courts police the boundaries of employment discrimination claims by applying overly strict tests that allow them to avoid the troubling causation question.¹⁸⁵

Of particular relevance here, we can see the restrictive application of the protected-class test under the ADA. Determining whether a plaintiff is an “individual with a disability”—“has become the most contentious issue in the administration of the statute.”¹⁸⁶ Many scholars agree that “courts have inappropriately applied a restrictive definition of ‘disability’ to squelch

employer comment that “older people are . . . not your best people” because the plaintiff could not show that he had been replaced by a younger worker because his position was eliminated). Professor Suzanne Goldberg raises similar objections to the use of a strict comparator test as part of the plaintiff’s prima facie case. See Goldberg, *supra* note 179, at 747 n.48 (describing how plaintiff must show that “he was treated less favorably . . . than were other similarly situated employees who were not members of the protected class”). She argues that this test has “sharply narrow[ed] . . . the possibility of success for individual litigants,” by “miss[ing] important forms of discrimination and foreclose[ing] many individuals from having even an opportunity to be heard.” *Id.* at 745-48.

¹⁸³ See Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 383-90 (1985), for a recitation of the debate.

¹⁸⁴ See Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1278 (2012) (collecting studies showing that “most people, in most factual circumstances, are unwilling to make robust attributions to discrimination”).

¹⁸⁵ See Goldberg, *supra* note 180, at 790 (explaining that courts’ insistence on the comparator test “provide[s] false certainty to the extent that [it is] treated as elemental, to, or objectively confirmatory of, discrimination,” and that “this false certainty enables courts to elide responsibility for” failing to consider other ways of proving discrimination); Sperino, *supra* note 180, at 71 (explaining that reliance on rigid tests has led to a false certainty as to the dispositive nature of such tests, such that courts “reject new theories of discrimination, without analyzing whether such theories are viable”).

¹⁸⁶ Bagenstos, *supra* note 9, at 398; see also Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 623 (1999) (reporting estimate that disability status is challenged in more than half of ADA cases); Mayerson, *supra* note 50, at 587 (“[N]o issue has generated more controversy and divergence in judicial interpretation than the definition of disability”); Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 352 (1997) (“One of the most contentious aspects of disability law, research and policy involves the definition of disability.”).

ADA cases at the summary judgment stage.”¹⁸⁷ Even when genuine issues of material fact regarding a plaintiff’s disability status arise, courts have kicked out such cases on summary judgment at high rates.¹⁸⁸ And even when the statute itself has taken a more expansive approach to the definition of disability, specifically instructing that individuals who are “regarded as” disabled should be covered, courts still take a quite restrictive approach to the definition of the protected class.¹⁸⁹ All told, this means that a substantial portion of ADA lawsuits are lost at the protected-class stage.¹⁹⁰ While amendments to the ADA were aimed at easing these difficulties, scholars are not optimistic that they will achieve this goal.¹⁹¹

Eliminating protected-class determinations shifts the key inquiry in a discrimination case to causation, where it is better placed.¹⁹² Consider sex discrimination claims raised by transgender individuals. In such cases, courts have to assess the threshold question of whether discrimination because of transgenderism is discrimination because of sex.¹⁹³ Some courts, as well as the EEOC, have answered this question in the affirmative.¹⁹⁴ But the symmetry of Title VII provides a substantial benefit in such cases: courts do not also need to assess whether the plaintiff is a man or a woman to determine whether she is a member of the protected class. This avoided question is one that not only would be quite difficult to answer, but would present a troubling irony for female-to-male transgender individuals: if the plaintiff’s desired gender identity were accepted, he would be outside the protection of an asymmetrical sex discrimination law.

We can also see the benefits of avoiding the protected-class inquiry in the context of race. Consider what Professor Camille Gear Rich has referred to as “elective race”—the recognition that, in addition to racial ascription by others, individuals engage in “voluntary acts . . . [of] race and ethnic performance [that] are equally, if not more, determinative of how an

¹⁸⁷ Bagenstos, *supra* note 9, at 398; *see, e.g.*, Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99–100 (1999); Burgdorf, *supra* note 50, at 536.

¹⁸⁸ Colker, *supra* note 187, at 110-19.

¹⁸⁹ Mayerson, *supra* note 50, at 590-91.

¹⁹⁰ *See* Barbara A. Lee, *A Decade of the Americans with Disabilities Act: Judicial Outcomes and Unresolved Problems*, 42 IND. RELS. 11, 11 (2003).

¹⁹¹ *See, e.g.*, Stein, et al., *supra* note 9, at 721-27; Befort, *supra* note 50, at 2063-66.

¹⁹² *See* 42 U.S.C. § 2000e-2(a)(1) (making discrimination unlawful when it is “because of” a protected trait).

¹⁹³ *See, e.g.*, *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

¹⁹⁴ *See id.* Under a strategic enforcement plan adopted in 2012, the EEOC has taken the position that discrimination on the basis of transgender identity is sex discrimination. *See, e.g.*, *EEOC v. Deluxe Fin. Servs. Corp.*, (D. Minn. Civ. No. 0:15-cv-02646-ADM-SER, filed June 4, 2015); *EEOC v. Lakeland Eye Clinic, P.A.* (M.D. Fla. Civ. No. 8:14-cv-2421-T35 AEP filed Sept. 25, 2014, settled Apr. 9, 2015).

individual is racially categorized by others.”¹⁹⁵ When an individual’s elected race does not comport with her perceived race, courts must decide whether to consider the employee’s elected or perceived race in assessing claims of discrimination.¹⁹⁶

Under a symmetrically designed law, this question is treated as a question of causation rather than as part of the protected-class inquiry.¹⁹⁷ This is a distinction with a difference. The protected-class approach tends to treat identity as a static concept that inheres in an individual. Scholars have questioned this understanding of identity, and instead recognize that identity is more of a process of social construction and ascription. They argue that “society places people into categories with attendant ascribed attributes that effectively constitute a social identity.”¹⁹⁸ This means that a trait like race or national origin is not simply a biological category, but one “constructed along cultural, political, and economic lines.”¹⁹⁹ The process of social identity ascription also includes how others react to an individual’s own identity-related choices and behaviors.²⁰⁰ Given the fluid nature of identity, properly understanding identity requires a more flexible approach that recognizes that identity may shift depending on context. Assessing these questions as a matter of causation rather than protected class provides this flexibility by focusing more on employer conduct rather than on any fixed quality of the employee.

We can see this in the context of racial classifications, where courts have tended to show more flexible conceptions of racial identity when they are addressed as a matter of causation rather than as a matter of protected

¹⁹⁵ Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in an Era of Self-Identification*, 102 GEO. L.J. 1501, 1513 (2014).

¹⁹⁶ See *id.*; Wood v. Freeman Decorating Servs., Inc., No. 3:08-CV-00375-LRH-RAM, 2010 WL 653764, at *4 (D. Nev. Feb. 19, 2010) (in a case alleging harassment on the basis of perceived Native American race, assessing whether the plaintiff could proceed on this theory even though he had elected to identify himself as Hispanic to his employer).

¹⁹⁷ When courts have treated this as part of the prima facie case, plaintiffs have lost. See *Nieves v. Metro. Dade Cnty.*, 598 F. Supp. 955, 962 (S.D. Fla. 1984) (in the case of a racially ambiguous plaintiff claiming discrimination on the basis of perceived Hispanic race, dismissing case because plaintiff had failed to establish that he was in fact Hispanic).

¹⁹⁸ Angela Onwuachi-Willig & Mario Barnes, *By Any Other Name?: On Being “Regarded As” Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1288 n.23; see also Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1158-66 (2004); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27 (1994); see generally ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

¹⁹⁹ López, *supra* note 198, at 27.

²⁰⁰ Rich, *supra* note 195, at 1513.

class. In *Wood v. Freeman Decorating Services*, the plaintiff claimed that he was harassed on the basis of Native American race.²⁰¹ The defendant objected on the ground that the plaintiff “(1) has no evidence establishing himself as American Indian and (2) has previously identified himself as Hispanic rather than American Indian.”²⁰² The court, addressing this as a question of causation—whether the plaintiff was subject to harassing conduct “because of [his] race [or national origin]”—rather than membership in a protected class, focused on the employer’s ascription of the plaintiff’s race, rather than on any inherent notion of plaintiff’s identity.²⁰³ The court paid little heed to the plaintiff’s birth certificate classifying him as white, or to the plaintiff’s previous reporting of his race as Hispanic in employment records.²⁰⁴ Instead, the court focused on the fact that the “defendant’s employees believed that Plaintiff was American Indian.”²⁰⁵ The court reasoned that harassment on the basis of perceived race does not alter the fact that this is harassment on the basis of race, nor lessen the resulting injury to the plaintiff.²⁰⁶

In *Nieves v. Metropolitan Dade County*, by contrast, the restrictive results of a protected-class approach can be seen.²⁰⁷ The plaintiff claimed discrimination on the basis of Hispanic race, although he had indicated that he was Caucasian on his employment application form.²⁰⁸ Even though this case was brought under the symmetrical Title VII,²⁰⁹ the court wrongly treated the plaintiff’s identity as a question of protected class.²¹⁰ Instead of assessing the employer’s behavior with regard to its perception of the plaintiff’s race, the court conducted its *own* analysis of the plaintiff’s race: “the Court notes that neither from observing the Plaintiff nor from listening to his speech patterns, mannerisms and pronunciation of the English language was it apparent that Plaintiff was Hispanic.”²¹¹ In so doing, the court focused on protected-class membership as a fixed characteristic—an objective and static fact—rather than on the employer’s perception and treatment of the employee, and, in so doing, rejected the plaintiff’s claim.

A “regarded as” provision could be added to the definition of the protected class to address these complicated identity-ascription cases. But

²⁰¹ No. 3:08-CV-00375-LRH-RAM, 2010 WL 653764, at *4 (D. Nev. Feb. 19, 2010).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at *4-5.

²⁰⁶ *Id.*

²⁰⁷ 598 F. Supp. 955 (S.D. Fla. 1984).

²⁰⁸ *Id.* at 957.

²⁰⁹ See *supra* notes 29-31 and accompanying text.

²¹⁰ 598 F. Supp. at 962.

²¹¹ *Id.* at 961-62; see also Rich, *supra* note 195, at 1551.

experience with these types of rules as part of the plaintiff's prima facie case should make us skeptical of this approach.²¹² Even tests that were intended to make it *easier* for plaintiffs to pursue their claims have been applied so narrowly as to have precisely the opposite effect.²¹³ And the test-based approach to employment discrimination has led courts to "reject new theories of discrimination, without actually analyzing whether such theories are viable" under the statute.²¹⁴ This is particularly concerning in the context of the protected class, as the law must be able to respond to evolving conceptions of identity.²¹⁵ For these reasons, scholars in the field have consistently advocated a more flexible approach focusing on causation rather than the accretion of still more tests that serve as hurdles to rights-claiming.²¹⁶

C. Politics

A symmetrically designed law also brings political benefits, as the universality of such laws helps to enhance support for them. Several theories of political support relate to what political scientists refer to as "targeted" as compared with "universal" laws.²¹⁷ Mapping their language to our task here, asymmetrical laws are targeted, and symmetrical laws are universal. The first theory, median voter theory, predicts that policy choices will tend to align with the preferences of the median voter, and thus that policies will tend to be moderate, eschewing the preferences on one side of the spectrum or another.²¹⁸ This leads to the "paradox of

²¹² See Mayerson, *supra* note 50, at 590-91 (describing restrictive application of "regarded as" prong under the ADA).

²¹³ See Sperino, *supra* note 180, at 88-91 (explaining how the prima facie case was meant to ease the difficulty of proving causation but has been applied rigidly to make it harder for plaintiffs to establish claims); see Goldberg, *supra* note 180, at 734 (same for comparator test).

²¹⁴ Sperino, *supra* note 180, at 71; Goldberg, *supra* note 180, at 728 (The requirement of comparator evidence "sharply narrow[s] . . . the very meaning of discrimination.").

²¹⁵ See *supra* notes 198-200 and accompanying text discussing evolving conceptions of race.

²¹⁶ See Goldberg, *supra* note 180, at 787-91, 807-12 (advocating for more reliance on the approach taken in the sexual harassment and stereotyping contexts, which flexibly examines the question of causation); Sperino, *supra* note 180, at 115-18 (advocating for a more flexible approach to the core question of discrimination); Stein, et al., *supra* note 9, at 737 (advocating for shifting the focus of the ADA inquiry from the rigid definition of disability to the more flexible causation question).

²¹⁷ See Theda Skocpol, *Targeting Within Universalism: Politically Viable Policies that Combat Poverty in the United States*, in *THE URBAN UNDERCLASS* 411, 412 (Christopher Jencks & Paul E. Peterson eds., 1991).

²¹⁸ The seminal work on the median voter model is ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

redistribution”: that for policies with redistributive consequences, a more universal law will attain more redistribution in the long run because it will garner more political support (by benefiting the median voter).²¹⁹ This would suggest that a symmetrical law, or at least one broad enough to capture the median voter, would garner more support.

The second theory, public choice theory, focuses on the costs of organizing and the problem of collection action. It posits that policies with concentrated benefits are more likely to garner support than those with diffuse benefits because of the free-rider problem.²²⁰ If benefits are diffuse across a larger population of people, many of the beneficiaries will be tempted to free ride, and thus there will be insufficient mobilization in support of the law.²²¹ This suggests that an asymmetrical law, which provides more concentrated benefits, would garner more support than a symmetrical law.

The first and second theories can be critiqued for taking preferences to be stable and exogenous to legal design, and failing to consider how policies shape preferences. The third theory, policy feedback theory, posits that policies create politics.²²² As political scientist Theda Skocpol argues: “[P]olicies, once enacted, restructure subsequent political processes. . . . Policies not only flow from prior institutions and politics; they also reshape institutions and politics, making some future developments more likely and hindering the possibilities for others.”²²³ This is because policy affects resources and incentives for the mobilization of political actors and groups, and generates interpretive effects that shape how we make sense of a complex political world.²²⁴ For these reasons, individuals and groups may come to define themselves in light of policies and thus seek to reinforce them.²²⁵

²¹⁹ See Walter Korpi & Joakim Palme, *The Paradox of Redistribution and Strategies of Equality: Welfare State Institutions, Inequality, and Poverty in Western Countries*, 63 AM. SOC. REV. 661, 681-82 (1998).

²²⁰ See generally MICHAEL T. HAYES, *LOBBYISTS & LEGISLATORS: A THEORY OF POLITICAL MARKETS* (1981); James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357 (James Q. Wilson ed., 1980). Although the dispersion of costs also matters, I focus here simply on the benefits, as the dispersion of costs is relatively constant regardless of symmetry or asymmetry.

²²¹ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 11-12 (1965); Wilson, *supra* 220, at 367.

²²² This is drawn from E.E. Schattschneider’s famous claim that “new policies create a new politics.” E.E. SCHATTSCHNEIDER, *POLITICS, PRESSURES AND THE TARIFF* 288 (1935).

²²³ THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 58, 232 (1992).

²²⁴ See Paul Pierson, *When Effect Becomes Cause: Policy Feedback and Political Change*, 45 WORLD POL. 595 (1993).

²²⁵ *Id.*

It is this third theory that I am particularly interested in. As we can see, both symmetrical and asymmetrical antidiscrimination laws have garnered sufficient support for passage. My aim is to assess how the design of the law—symmetrical or asymmetrical—affects the politics of antidiscrimination law *after* the law has passed. And research suggests that symmetry will have positive effects on politics in ways that must be appreciated.

Scholars of policy feedback, including Skocpol and sociologist William Julius Wilson, have highlighted how universalism can generate more positive forms of policy feedback, in particular in the context of race. Skocpol has documented the failure of more targeted welfare programs in the United States, including poorhouses, pensions, and the “war on poverty” of the 1960s and 70s, and blames their failure on the fact that their limited scope led these programs to be politically unpopular, which resulted in low levels of investments, and prompted public backlash.²²⁶ By contrast, she highlights the success of universal welfare programs, such as civil war benefits, health education services for mothers and children, and Social Security, which have enjoyed more political support and entrenchment.²²⁷ Along similar lines, Wilson has argued that from the perspective of improving the position of black Americans, universal programs rather than race-based programs are more likely to be successful.²²⁸ Wilson suggests that race-based redistributive policies generate animosity towards the beneficiaries of these policies and the policies themselves, and thus that universal programs are more beneficial to minorities.²²⁹ With regard to race, Skocpol extends Wilson’s argument by suggesting that universal programs build “collective solidarity” that will benefit minorities by avoiding “us versus them” thinking.²³⁰ When their own values and needs are met by a law, “larger numbers of middle-class Americans would be prepared to go the extra mile for especially needy minorities.”²³¹

While these scholars were referencing governmental programs aimed at redistribution, we might adopt lessons from these policies in the context of antidiscrimination law. While employment discrimination law does not rely on any public transfers *per se*, they do amount to government mandates on private (and public) employers to redistribute the most significant form of

²²⁶ See THEDA SKOCPOL, SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE 253-74 (1995).

²²⁷ See *id.*

²²⁸ See WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 8, 10-11 (1987).

²²⁹ *Id.*

²³⁰ Skocpol, *supra* note 217, at 432.

²³¹ *Id.* at 434.

private support: work.²³² When viewed in this light, we can see the impact of a symmetrical antidiscrimination law in terms of policy feedback on the basis of the reasoning set forth above. Under this view, a symmetrical antidiscrimination law, by virtue of its universalism, is likely to generate more positive policy feedback, with more successful results. As compared with an asymmetrical law, it is less likely to generate resentment against its beneficiaries, and is more likely to generate a broader sense of solidarity in a universal antidiscrimination project that can bring benefits, at least in theory, to everyone.

In the legal context, we can also see this type of argument working at the level of the individual case, such that a symmetrical law will likely generate more support specifically from judges.²³³ A judge may be more inclined to decide for a plaintiff when that judge is able to identify with that person.²³⁴ Judges, especially the federal judges who decide a large portion of employment discrimination cases, are disproportionately white, able-bodied men. They are thus more likely to identify with a person without disfavored traits with respect to race, gender, and disability (although not age). Hence, we are likely to see, all things equal, a larger volume of more favorable precedent with a symmetrical law. In contrast, with an asymmetrical law, we may well see courts crafting an aversive body of precedent that makes recovery difficult.

Note that it is not the case that positive policy feedback invariably results from universal benefits laws. For example, the FMLA, a law that universally provides unpaid family and self-care leave to workers regardless of sex, has not been considered a very effective policy.²³⁵ Political scientists have attributed the lack of positive policy feedback to weak policy design. The fact that the FMLA is unpaid means that many workers cannot afford to use it, and thus the program did not bring the types of positive changes to beneficiaries' lives that would lead to support.²³⁶ Moreover, the

²³² See generally Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000) (discussing the critical role of work for both material and non-support).

²³³ I thank Aziz Huq for raising this point.

²³⁴ See Carol T. Kulik & Molly B. Pepper, *Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Case Outcomes*, 27 L. & HUM. BEH. 69 (2003); Theodore Ruger, *Supreme Court Forecasting Project: Legal and Political Science Approaches to Supreme Court Decision-Making*, 104 COLUM. L. REV. 1150 (2004).

²³⁵ See CHRISTOPHER HOWARD, *THE WELFARE STATE NOBODY KNOWS: DEBUNKING MYTHS ABOUT U.S. SOCIAL POLICY* 204 (2007).

²³⁶ *Id.* This problematizes the analysis of legal scholar Julie Suk, who blames the FMLA's relative lack of success on its universalism. See Julie Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1 (2010). Suk argues that it was the choice to make the FMLA universal, allowing both men and women to take family leave and self-care leave,

complicated design of the law meant that even seven years after the law was passed, nearly half of all workers had not even heard of it, and half did not know if they were eligible for it.²³⁷ The argument then is that, all else equal, universalism brings political benefits to laws aiming at redistribution.

With this in mind, we can look at our experience with Title VII and the ADA through the lens of policy feedback. The ADA has been far less successful in achieving its goals as compared with Title VII.²³⁸ As Professor Michael Waterstone chronicles, although the ADA garnered a lot of support in Congress, it has not achieved two of its most important goals.²³⁹ First, the ADA was meant to restructure workplaces in a way that would increase the employment rates of the disabled.²⁴⁰ But ADA cases have had abysmally low success rates, and, as discussed above, the employment rates of the disabled fell rather than rose after the passage of the ADA.²⁴¹ Second, the ADA was meant to create a new way of thinking about disability—that those with disabilities are not intrinsically limited, but instead have been held back by environmental features that can be changed.²⁴² Again, this goal has not been achieved. Courts still conceive of disability in the old medical model.²⁴³ Waterstone attributes the ADA's failure—what we might think of as the lack of positive policy feedback—in part to the ADA covering a large, amorphous group of those with disabilities.²⁴⁴ But given the research on policy feedback, it seems more likely that at least one of the factors contributing to the relative failure of the ADA is that its beneficiaries consist of too *targeted* a group rather than too large a group, particularly when compared with the relative success of the universal Title VII.

III. TOWARDS SYMMETRY

Before endorsing a symmetrical approach, the benefits as they apply to

that generated more opposition from business interests and thus weakened the FMLA. But this argument only addresses how universalism shaped the response of the law's opponents, and fails to account for how other design choices in the FMLA meant that it generated little support even from its beneficiaries, despite its universalism.

²³⁷ See HOWARD, *supra* note 235, at 252 n.26.

²³⁸ See Michael Waterstone, *The Costs of Easy Victory*, WM. & MARY L. REV. (forthcoming), manuscript at 6, 24-27, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2588887.

²³⁹ *Id.* at 6, 21 n.87, 22 n.97.

²⁴⁰ *Id.* at 6, 25.

²⁴¹ See *id.* at 25; *supra* note 113 and accompanying text.

²⁴² Waterstone, *supra* note 238, at 6, 25-26.

²⁴³ *Id.* at 27 (collecting cases).

²⁴⁴ *Id.* at 15, 24.

each of the traits under consideration, as well as any costs of symmetry, must be analyzed. This is the task undertaken at the outset of this Part, which concludes that the benefits of symmetry outweigh any costs for each of these traits. And even if we decide that a symmetrical law is preferable, there are still questions as to exactly *how* symmetrical the law should be across various doctrines. This Part next considers these questions, exploring how symmetry should be implemented at the doctrinal level. This has significant implications for current symmetrical law, as the analysis suggests a move towards more symmetry.

To keep the analysis tractable, this Article has focused on symmetry and asymmetry in the context of four protected traits in the area of employment discrimination law. This Part makes clear the broader implications of the analysis. It concludes by applying the insights of this Article to additional contexts: to additional protected traits—appearance and sexual orientation—that have been adopted or are under consideration in several states, and to additional areas of law—housing, education, and constitutional law.

A. Weighing Benefits and Costs

Before proceeding forward with proposals for more symmetry, two issues must be considered: (1) how the analysis of symmetry and asymmetry varies across protected traits, and (2) the possible costs of symmetry. As for the first point, while there are substantial reasons to prefer symmetry to asymmetry in the design of antidiscrimination law, not all of these reasons apply equally to each of the traits under consideration. Therefore, this Part evaluates the arguments for symmetry on a trait-by-trait basis. It concludes that regardless of the trait, there are substantial benefits to symmetry. It then considers the possible costs of symmetry. Because none of the possible costs raise real concerns, this Part concludes that the benefits of symmetry outweigh the costs for each of the traits under consideration.

1. Trait-by-Trait Analysis

a. Age

Perhaps the strongest case for symmetry is in the context of age, a trait that now receives asymmetrical protection. All of the antisubordination reasons supporting symmetry—the cost of the mandate,²⁴⁵ the presence of

²⁴⁵ See *supra* Part II.A.2.a.

interlocking stereotypes,²⁴⁶ and the heterogeneity of disadvantage²⁴⁷—apply strongly to age, in addition to the anticlassification purpose.²⁴⁸ The antisubordination arguments for a symmetrical law are so strong here because it is not entirely clear that, all things considered, older rather than younger workers are the disadvantaged group.²⁴⁹

The practical and political reasons to support a symmetrical law are weaker in the context of age. Of all the protected traits, age is the only one that is easily quantifiable.²⁵⁰ This makes for a neatly defined protected class,²⁵¹ as well as easy determinations about who falls within the class.²⁵² From a political perspective, age is the one trait that might be thought of as universal by nature. We all expect that we will become older workers one day, and thus even younger workers might view the law as benefiting them, in that it will benefit their future selves. Thus, a symmetrical law may not be necessary to garner political benefits. Moreover, the protected group—those over forty—is the advantaged group when it comes to political power. Nonetheless, the overwhelming benefits for the purpose of the law weigh strongly in favor of symmetry.

b. Sex

The purpose arguments—both anticlassification and antisubordination—apply strongly in the context of sex. Because of the strength of interlocking stereotypes between men and women, allowing men to challenge sex stereotypes is critical to dismantling them.²⁵³ Occupational segregation also

²⁴⁶ See *supra* Part II.A.2.b.

²⁴⁷ See *supra* Part II.A.2.c.

²⁴⁸ See *supra* Part II.A.1.

²⁴⁹ See *supra* notes 150-54 and accompanying text.

²⁵⁰ See Schuck, *supra* note 174, at 32 n.22.

²⁵¹ An asymmetrical law would still require policymakers to decide *where* to draw this line, with all of the attendant over- and under-inclusiveness problems associated with line-drawing. See *id.* at 34 & n.28 (“[C]lassifications embracing large populations will be “under-inclusive” or “over-inclusive,” and “[i]n this respect, age classifications do not differ, except perhaps in degree, from those based upon other characteristics.”). We might understand the line-drawing problems to be harder here because there is no age at which we can be reasonably comfortable that significant discrimination on the basis of old age does not apply. See, e.g., Noam Scheiber, *The Brutal Ageism of Tech*, THE NEW REPUBLIC, MAR. 23, 2104, at 20, available at <http://www.newrepublic.com/article/117088/silicon-valleys-brutal-ageism> (reporting on ageism in Silicon Valley starting at age thirty).

²⁵² One more complicated determination is whether protection applies to an individual’s perceived rather than actual age. Current asymmetrical law is silent on this question, and ostensibly excludes claims on this basis. See 29 U.S.C. § 631(a)(1) (limiting application of ADEA “to individuals who are at least 40 years of age”).

²⁵³ See *supra* notes 126-34 and accompanying text.

renders a symmetrical law necessary to address the disadvantage men face in a number of desirable occupations.²⁵⁴ These purpose arguments underscore the key role of symmetry for combatting the subordination of women: if men are not free to express feminine traits, these traits will be maintained in a “female ghetto,” and “may continue to be devalued,” further reinforcing the subordination of women.²⁵⁵ There is also good reason to think that a symmetrical law would reduce the negative distributive consequences of the mandate on women in light of the publicity afforded to the increasing volume of discrimination suits brought by men.²⁵⁶

A symmetrical sex discrimination law also addresses the practical concerns associated with an asymmetrical sex discrimination law that would require determining the sex of transgender plaintiffs. As for politics, one might argue that symmetry is not necessary to gain the support of men because heterosexual marriage intertwines the economic fates of men and women. However, historically marriage has not been enough to lead men to see their economic interests as aligned with women, and the role of marriage here has surely only declined with a decline in marriage rates.²⁵⁷

c. Race and National Origin

When it comes to the purpose of antidiscrimination law, the benefits of symmetry in the context of race are weaker than in the context of age and sex. Interlocking stereotypes and heterogeneity of disadvantage are less present here.²⁵⁸ The benefits of symmetry sound instead in reducing racial classifications,²⁵⁹ and in distributing the cost of the mandate more equally.²⁶⁰ There is good reason to think that a symmetrical law will at least make some dent in the cost of the mandate weighing wholly on minorities because of beliefs about the prevalence of reverse discrimination.²⁶¹ The anticlassification arguments may weigh more strongly in the context of race not only in light of history, but in continuing distinctions in social acceptability of race classifications as compared with age, sex, and

²⁵⁴ See *supra* notes 155-68 and accompanying text.

²⁵⁵ Case, *supra* note 27, at 3.

²⁵⁶ See *supra* notes 97-103 and accompanying text.

²⁵⁷ See Andrew L. Yarrow, *Falling Marriage Rates Reveal Economic Fault Lines*, N.Y. TIMES, Feb. 8, 2015, at ST15, available at <http://www.nytimes.com/2015/02/08/fashion/weddings/falling-marriage-rates-reveal-economic-fault-lines.html> (reporting on Census data showing that the number of married households fell to 50.5% in 2012 from a high of 72% in 1960).

²⁵⁸ See *supra* notes 137-38 and 167-71 and accompanying text.

²⁵⁹ See *supra* Part II.A.1.

²⁶⁰ See *supra* note 104-06 and accompanying text.

²⁶¹ See *id.*

disability classifications.²⁶²

Benefits of a symmetrical race discrimination law can also be seen when it comes to the implementation of the protected class requirement.²⁶³ Given courts' tendency to police cases strictly at the prima facie stage, a symmetrical law that avoids the need for classification would lead courts to adopt fluid rather than fixed notions of identity that make it easier for plaintiffs to proceed on their claims.²⁶⁴ And when it comes to politics, as Wilson and Skocpol argue, universal laws garner more political support, and thus can be more effective than targeted laws at promoting equality.²⁶⁵

d. Disability

Disability presents perhaps the most contested and contingent case for symmetry, at least when it comes to purpose. At first blush, there might not seem to be any reason to implement a symmetrical disability discrimination law even from an anticlassification perspective, as it might be hard to think of instances when an able-bodied worker might use the law. But there are such instances. Aside from affirmative action programs,²⁶⁶ the disabled might be favored when the perceived talents of the disabled match the necessary skills for the job,²⁶⁷ or when a person with a disability is seen as necessary for authenticity or to serve as role model.²⁶⁸ These instances are enough for an anticlassification purist to support symmetry.²⁶⁹

²⁶² See, e.g., Schuck, *supra* note 173, at 31-32 (cataloguing multiple accepted age classifications); Mary Anne Case, *All the World's the Men's Room*, 74 U. CHI. L. REV. 1655, 1656 (2007) (noting that we still accept sex segregation in schools, athletics, and bathrooms). You can see this reflected in varying levels of constitutional scrutiny afforded to these traits, from rational basis review for age and disability, to intermediate scrutiny for sex, to strict scrutiny for race. See *supra* notes 34, 41.

²⁶³ See Jones, *supra* note 178, at 1554 (“Sometimes it is impossible to determine a person's race, national origin, or ethnicity—especially in a social context where there are a number of racial groups and where race-mixing is on the rise.”).

²⁶⁴ See *supra* notes 198-203 and accompanying text.

²⁶⁵ See *supra* notes 226-32 and accompanying text.

²⁶⁶ See 41 C.F.R. § 60.741 (setting forth disability-based affirmative action obligations of federal contractors).

²⁶⁷ See *supra* note 3 and accompanying text (citing examples of deaf workers in factories and autistic workers in certain technical positions).

²⁶⁸ See *Ortner v. Paralyzed Veterans of Am.*, No. 91 CA 3146 (D.C. Super. Ct. Sept. 10, 1992) (paralyzed worker preferred to fill position at Paralyzed Veterans of America); Nick Anderson, *Gallaudet Marks “Deaf President Now,”* WASH. POST (Feb. 7, 2013), http://www.washingtonpost.com/local/education/gallaudet-marks-deaf-president-now/2013/02/07/17666740-6fdc-11e2-8b8d-e0b59a1b8e2a_story.html (deaf president preferred for university for deaf students).

²⁶⁹ An anticlassificationist might still allow an exception if disability is necessary to render the individual “qualified” for the position. See 42 U.S.C. § 12111(8) (permitting

But the few instances of discrimination against the able-bodied means that there is no heterogeneity of disadvantage, and little in the way of interlocking stereotypes manifested in actions against the able-bodied. As for antistatutory purposes then, the primary benefit symmetry can bring is the reduction or elimination of the negative employment consequences of an asymmetrical mandate like the ADA.²⁷⁰ Note that precisely because of the few instances in which the able-bodied are discriminated against, simply making the law symmetrical by allowing anyone to sue on the basis of disability status under the existing definition of disability—e.g., the hearing employee denied a job by an employer with a preference for the deaf²⁷¹— would be insufficient to distribute the cost of the mandate more equally.

Rather, an alternative approach to symmetry, which would universalize the class of who can be considered disabled, is required. This would be achieved by allowing anyone to claim that she had been discriminated against on the basis of any physical or mental impairment, and along with it the right to seek a reasonable accommodation.²⁷² If disability law adopted this type of symmetry, there is good reason to believe that decisionmakers would not assume that visibly disabled workers were systematically more costly than those without a visible disability. A universal approach to reasonable accommodations for antidiscrimination purposes would not be unprecedented, as the right to a reasonable accommodation on the basis of religion applies to all employees, believers and non-believers alike.²⁷³ Scholars have suggested benefits of this approach in the context of disability.²⁷⁴

employers not to hire those with disabilities if such individuals are not “qualified”).

²⁷⁰ See *supra* note 113 (citing studies finding that the ADA substantially reduced employment levels of the disabled).

²⁷¹ See *supra* note 3 and accompanying text.

²⁷² This would also include the ability to raise a claim that the *lack* of a disability resulted in discrimination, as in the role model and disability preference cases.

²⁷³ See, e.g., *Reed v. Great Lakes Cos.*, 330 F.3d 931, 935 (7th Cir. 2003) (noting that a hotel manager could seek an accommodation from meetings with religious representatives delivering bibles if they would “offend [the employee]’s religious or antireligious sensibilities”); *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 621 (9th Cir. 1988) (holding that Title VII prohibits an employer from compelling its atheist employees to attend religious services).

²⁷⁴ Such a view of the ADA was first proposed by Professor Robert L. Burgdorf. See Burgdorf, *supra* note 50, at 536 (arguing, inter alia, that this approach to disability would better comport with civil rights law and that it would avoid the stigma of being labeled “disabled” that might lead some not to make use of the law). Other scholars have also written in favor of this view. See Stein, et al., *supra* note 9, at 750-55 (discussing similar proposal and arguing that it brings structural, expressive, economic, and hedonic benefits, especially in light of an ageing and less able workforce).

The analysis in Part II allows for a reconsideration of the primary objection to this universal approach to disability law, raised by Professor Sam Bagenstos: that it fails to focus on the category of persons with conditions that have historically been subordinated.²⁷⁵ As he writes: “while every person at some point has some physical or mental condition that could be described as an impairment, and many may suffer isolated instances of poor treatment as a result, only a smaller group of people is ‘designated handicapped’ in the process” and subject to “systematic disadvantage through the mechanisms of prejudice, stereotypes, and neglect.”²⁷⁶ Under my analysis, however, the universal approach to disability law is actually *more* antisubordinationist in its effect as compared with a disability law that adopts a more limited protected class. This is because a universal law can reduce or eliminate the harmful impact that the ADA has had on the employment levels of disabled persons.

Finally, a symmetrical disability law would also bring practical and political benefits. The protected-class approach under the ADA has been identified as the key impediment to rights-claiming under the ADA.²⁷⁷ And a key reason for the ADA’s relative lack of success may well be that its asymmetry weakened support for law.²⁷⁸ One might suppose that symmetry is unnecessary for political support in the context of disability on somewhat similar grounds to age: because we all *might* become disabled, we are all potential beneficiaries of the law. However, optimism bias will lead non-disabled individuals not to view themselves as potentially disabled, and thus symmetry would seem to be necessary for broad support.²⁷⁹

2. Concerns

Before advocating for a more symmetrical antidiscrimination law, any costs of symmetry must also be considered. Critics are likely to raise the following concerns: (a) diluting the expressive function of antidiscrimination law; (b) increasing economic costs of an expanded antidiscrimination law; and (c) weakening employers’ antisubordination initiatives, such as voluntary affirmative action programs. This Part discusses these concerns in turn, concluding that none presents a significant objection to symmetry.

²⁷⁵ Bagenstos, *supra* note 9, at 478-81.

²⁷⁶ *Id.* at 479.

²⁷⁷ See *supra* notes 186-91 and accompanying text.

²⁷⁸ See *supra* notes 238-44 and accompanying text.

²⁷⁹ See Jolls, Sunstein, & Thaler, *supra* note 87, at 1524 (“A common feature of human behavior is overoptimism: People tend to think that bad events are far less likely to happen to them than to others.”).

a. Expressive Function

In arguing above that a symmetrical law provides benefits for both the anticlassification and antistatutory purposes of antidiscrimination law, my claims were grounded in the consequences the law would have on the basis of the liability that it imposes on regulated entities. But there may also be values at stake in regulating discrimination that are not fully captured simply by looking at the impact of imposing liability. The *expressive* function of law—that is, the message that a law conveys—is one such value.²⁸⁰ As Professor Cass Sunstein elucidates, the expressive function can be described as important in two distinct regards: for the consequences that the message the law sends has on social norms and behavior, and for the statement in and of itself as “the expression of the appropriate evaluative attitude” consistent with society’s conception of itself.²⁸¹

The expressive function of governmental action has been viewed as particularly important in the area of antidiscrimination law in both regards.²⁸² As for the first function, “[a]ntidiscrimination law is often designed to change norms to ensure that people are treated with a kind of dignity and respect that discriminatory behavior seems to deny.”²⁸³ As for the second function, “[a] society might . . . insist on an antidiscrimination law for expressive reasons even if it does not know whether the law actually helps members of minority groups.”²⁸⁴

Here, the concern that an expressivist would raise is as follows. I make the case above that a symmetrical law better enforces the antistatutory goals of antidiscrimination law.²⁸⁵ But for an antistatutory expressivist, an asymmetrical law better expresses the message that disadvantaged groups are most in need of discrimination protection, or

²⁸⁰ See, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996) [hereinafter Sunstein, *Expressive Function*]; Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994) [hereinafter Sunstein, *Incommensurability*]. But see generally Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000) (critiquing the expressive theory of law).

²⁸¹ Sunstein, *Incommensurability*, *supra* note 280, at 822-23.

²⁸² See *id.* at 829; Adler, *supra* note 280, at 1428; Anderson & Pildes, *supra* note 280, at 1533.

²⁸³ Sunstein, *Expressive Function*, *supra* note 280, at 2044.

²⁸⁴ Sunstein, *Incommensurability*, *supra* note 280, at 823.

²⁸⁵ See *supra* Part II.A.2.

perhaps the even stronger proposition that discrimination is wrongful only when it harms a subordinated group. An expressivist focused purely on the second expressive function—the intrinsic value of the message—might then prefer an asymmetrical antidiscrimination law, regardless of the law’s consequences.

An asymmetrical antidiscrimination law thus presents “the most important testing case[.]” for expressivists, which “arise[s] when (a) people support laws because of the statement made by such laws but (b) the effects of such laws seem bad or ambiguous, even by reference to the values held by their supporters.”²⁸⁶ The way out of this dilemma, Sunstein suggests, is to recognize that “any support for ‘statements’ [made by a law] should be rooted not simply in the intrinsic value of the statement, but also in plausible judgments about its effect on social norms and hence in ‘on balance’ judgments about its consequences.”²⁸⁷

Sunstein illustrates his approach with an example quite close to ours: minimum wage laws. One function of a minimum wage law might be taken to be intrinsically expressive: a statement that human labor is sufficiently valuable that it must be compensated at a particular rate, and that any less compromises human dignity.²⁸⁸ But, as many economists have posited, minimum wage laws may increase unemployment of the most vulnerable workers.²⁸⁹ While Sunstein admits that “[i]t is not easy to know how to weigh the ‘statement’ against the bad consequences,”²⁹⁰ he concludes that “if an increase in minimum wage would really drive vulnerable people out of the workplace in significant numbers, it is hard to see why people should support it.”²⁹¹ On this basis, he rightly regards clinging to the intrinsic expressive value of the law, even in the face of harmful consequences, as expressive “fanaticism.”²⁹² In other words, when expression and effect conflict, expression must give way.²⁹³

²⁸⁶ Sunstein, *Expressive Function*, *supra* note 280, at 2045.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 2046-47.

²⁸⁹ *Id.* at 2047. As Sunstein recognizes, economists disagree on this point. *Id.* at 2047 n.84.

²⁹⁰ Here is where Sunstein’s work on incommensurability becomes relevant, as the expressive value of the statement and the material value of a decline in employment cannot be weighed on the same scale, making it difficult to compare them. *See* Sunstein, *Incommensurability*, *supra* note 280, at 780.

²⁹¹ Sunstein, *Expressive Function*, *supra* note 280, at 2047.

²⁹² *Id.* (concluding that “without desirable effects on social norms, there is not much point in endorsing expressively motivated law”).

²⁹³ An epigraph to Sunstein’s article sums up the point quite well: “We are all Expressionists part of the time. Sometimes we just want to scream loudly at injustice, or to stand up and be counted. These are noble motives, but any serious revolutionist must often deprive himself of the pleasures of self-expression. He must judge his actions by their

In the context of a symmetrical antidiscrimination law, the tension between expression and effect is eased by considering the first function of expression: the effect that the law's message will have on social norms, attitudes, and behaviors. While a symmetrical law may not convey the specific message about discrimination that antistatistionists would most prefer, a symmetrical antidiscrimination law is unlikely to have harmful consequences for social norms regarding the respect and dignity accorded to subordinated groups, as they too are included within a symmetrical law. In fact, even symmetrical antidiscrimination laws like Title VII have had significant positive effects on social attitudes towards subordinated groups.²⁹⁴ Therefore, a symmetrical law should trouble only those antistatistionists who are concerned with the second, but not the first, expressive function of law. And in such cases of tension, expression should give way: the intrinsic expressive objection loses its force when, in fact, "norms are held constant," or even improved, and the circumstances of those persons the law is intended to benefit improve.²⁹⁵

We might also ease the tension between expression and effect by recognizing that even the intrinsic expressive message a law sends may change over time as the consequences of the law become clear. If a symmetrical antidiscrimination law in fact accrues to the benefit of subordinated groups, such laws may come to be seen as incorporating an antistatistion message, or at least a message of respect and dignity for subordinated groups. This has arguably occurred in the context of Title VII. And if a symmetrical law comes to be recognized as *better* at achieving antistatistion aims than an asymmetrical law, as this Article argues, a symmetrical law may even come to embody the antistatistion message better as well.

b. Economic Costs

A symmetrical law, by expanding the universe of who can bring claims and the types of claims that are cognizable, would be expected to increase the number of discrimination claims. This rise in lawsuits raises cost concerns of two kinds—increased costs for judicial administration, and increased costs for employers—which are discussed in turn.

As for judicial administration, the concern is that the rise in discrimination litigation will burden courts and the agencies responsible for administering these laws. Our experience with Title VII should alleviate

ultimate effects on institutions.” *Id.* at 2021 (quoting HERBERT A. SIMON, *MODELS OF MY LIFE* 281 (1991)).

²⁹⁴ *See id.* at 2043.

²⁹⁵ *Id.* at 2046.

some of this concern. Even though Title VII is symmetrical, there has never been an explosion of “reverse” discrimination suits, although they have grown over the years.²⁹⁶ Given the heterogeneity of disadvantage in the context of age, and an expanded right to accommodation under disability law, we might expect more reverse suits in these contexts. But the experience of states that have adopted symmetrical age discrimination laws does not show a swamping of their courts with suits by young workers.²⁹⁷ And the volume of litigation alone should not concern us, particularly if we have reason to believe that employers engage in appreciable amounts of discrimination against the young and against the able-bodied who are impaired. Judicial administration costs are justified if the benefits of allowing such additional suits outweigh the costs, and, as we saw in Part II, the benefits are substantial.

As for the costs imposed on employers, increasing costs for the employer by making the advantaged group as costly as the disadvantaged group—at least as a matter of perception—is precisely one of the goals of a symmetrical law.²⁹⁸ Therefore, we should not be too troubled if the law in fact does increase costs in this way. Moreover, there is little reason to believe that symmetry will bring any explosion of litigation, as we can see under Title VII or symmetrical state age discrimination laws.²⁹⁹

The reasonable accommodation mandate under the ADA imposes costs, and suits under this provision might be the most likely to increase substantially under a symmetrical regime. However, accommodations are not as costly as often assumed,³⁰⁰ and accommodation costs are likely to decline over time.³⁰¹ Moreover, the costs can only be appreciated when assessed along with the benefits, and the benefits are substantial.³⁰²

Of course, it may be the case that whatever costs symmetrical

²⁹⁶ See Kuehner-Hebert, *supra* note 90.

²⁹⁷ See Anne M. Payne, *Litigation for Discrimination Against Younger Persons in Favor of Older Persons*, 138 AM. JUR. TRIALS 105 § 1 (2015). Reputation concerns that would linger longer over a younger worker’s career might be an impediment to suit.

²⁹⁸ See *supra* Part II.A.2.a.

²⁹⁹ See Kuehner-Hebert, *supra* note 90 (citing relatively low figures for reverse discrimination claims under Title VII); Payne, *supra* note 297, at § 1 (discussing research on litigation of reverse age discrimination claims under state law).

³⁰⁰ Michael Ashley Stein, *Labor Markets, Rationality, and Workers with Disabilities*, 21 BERKELEY J. EMP. & LAB. L. 314, 322-23 (2000) (summarizing data on costs of accommodations, which find the typical cost to be \$200).

³⁰¹ See Bagenstos, *supra* note 9, at 556-57.

³⁰² See *supra* notes 266-79 and accompanying text (discussing the benefits of symmetry in the context of disability); *supra* note 274 (citing scholars highlighting additional benefits of a universal ADA); Stein, et al., *supra* note 9, at 754 (arguing that a universal ADA would reduce sick leave, workers’ compensation and other insurance claims, and post-injury rehabilitation costs).

antidiscrimination laws impose on employers are passed along to employees in the form of reduced employment and/or wages.³⁰³ While a symmetrical law may depress the employment levels or wages of *all* workers, if one of the key aims of antidiscrimination law is to benefit disadvantaged groups, a symmetrical law at a minimum does not operate *contrary* to its purposes by placing the burden of equality solely on disadvantaged workers, and instead distributes the cost of the mandate equally, across all workers.

c. Antisubordination Initiatives

From an antisubordination perspective, critics might be concerned that a symmetrical law would present a barrier to antisubordination initiatives. If the advantaged group has a right not to be discriminated against, members of that group can challenge as disparate treatment an affirmative action program meant to benefit a disadvantaged group, or any race-, sex-, age-, or disability-conscious measures taken to alleviate a disparate impact on a disadvantaged group. As an initial matter, it is important to remember that symmetry is not synonymous with a ban on all classifications. Current symmetrical law permits employers to implement an affirmative action program, and requires employers to take actions to avoid a disparate impact on disadvantaged groups.³⁰⁴ And a symmetrical law can allow privileged groups to take advantage of the same theories: for example, an employer could apply an affirmative action program to attract male nurses, or a nursing program that relies on word-of-mouth recruiting with a disparate impact on men could be challenged by men.³⁰⁵ With this in mind, the concerns regarding affirmative action and disparate impact will be discussed in turn; there is little cause for concern about either.

As for affirmative action, Title VII permits employers to engage in affirmative action so long as the program is “designed to eliminate manifest [identity] imbalances in traditionally segregated job categories,” and so long as it does not “unnecessarily trammel the rights of [advantaged]

³⁰³ See *supra* notes 70-71 and accompanying text for a discussion of the economic impact of universal mandates on workers.

³⁰⁴ See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (providing for disparate impact liability under Title VII); *Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616 (1987) (permitting affirmative action under Title VII under appropriate circumstances); see Cynthia Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 3-4 (2005) (noting that *Johnson* is the latest Supreme Court pronouncement on affirmative action under Title VII, although it may have been weakened by later case law). Whether disparate impact liability applies to favored groups under Title VII is unclear. See *infra* notes 332-36.

³⁰⁵ See *infra* notes 332-36 for a further discussion of the symmetrical application of disparate impact liability.

employees.”³⁰⁶ Any new symmetrical law could adopt a similar approach. While this would not satisfy an anticlassificationist purist, who might prefer no different standard for affirmative action, this still provides far more protection against classifications than an asymmetrical law.³⁰⁷

The question from the antisubordination perspective is whether employers would be likely to engage in *more* voluntary affirmative action under an asymmetrical law.³⁰⁸ While this is an empirical question, there is little reason to think that there would be substantially more affirmative action under an asymmetrical law.³⁰⁹ Unlike in the education context, where universities have displayed a robust preference to seek diverse student bodies on the basis of voluntary affirmative action programs, employers have never shown this level of enthusiasm for affirmative action.³¹⁰ Most firms, unlike most educational institutions, are driven by profit. Their primary concern is efficiency, not diversity. Most employers would view affirmative action to run contrary to efficiency.³¹¹ And aside from legal barriers to voluntary affirmative action, employers also face social barriers to these programs. Given the contested acceptance of affirmative action by the public generally, firms would rightly be concerned that the adoption of a fulsome affirmative action program might lead to a public backlash against the firm, on the ground that the firm unfairly engages in “reverse” discrimination.³¹² There is little reason then to believe that employers would engage in substantially more affirmative action under an asymmetrical law. There may of course be outlier firms more sensitive

³⁰⁶ Johnson, 480 U.S. at 628.

³⁰⁷ See *supra* note 59 on the divergence between anticlassification concerns and symmetry.

³⁰⁸ Antisubordinationists might also prefer a laxer standard for affirmative action programs under a symmetrical law than the one that currently applies under Title VII. The analysis below suggests that this would not make much difference for an employer’s likelihood of adopting an affirmative action program.

³⁰⁹ For this reason, this Article sidesteps the question of the precise standard under which affirmative action programs are evaluated under employment discrimination law.

³¹⁰ See Estlund, *supra* note 304, at 4-5.

³¹¹ This might not be the case in two scenarios: (1) if irrational discrimination is leading to inefficient employment decisions, and the best way to address this irrational discrimination is through an affirmative action program, or (2) if members of the disadvantaged group perform better in the job (e.g., if deaf factory workers actually outperform hearing factory workers), and a bona fide affirmative action program was a way to get around the ban on discrimination in hiring.

Even if not for efficiency purposes, one might imagine that a concern about disparate impact liability by subordinated groups might press employers to engage in more affirmative action under an asymmetrical regime. But even this concern is not likely to make much of a difference, given how few disparate impact lawsuits are brought, and how still fewer succeed. See Selmi, *supra* note 40, at 738-40.

³¹² See sources cited *supra* note 104-06.

to diversity concerns that would engage in more affirmative action under an asymmetrical regime. But they are too few to alter the conclusion that a symmetrical law would have a minimal effect on affirmative action.

In support of this conclusion, we can look to evidence from current asymmetrical law, and assess whether employers have engaged in substantial affirmative action to benefit older workers or disabled workers. The short answer is no. Aside from the type of mandatory affirmative action that applies to government contractors for all protected traits,³¹³ employers have not engaged in significant affirmative action.³¹⁴ In any event, the bulk of these voluntary programs would pass muster under a symmetrical law with an affirmative action standard like Title VII.³¹⁵

Likewise, a symmetrical law is unlikely to have much effect on employers engaging in measures to eliminate a disparate impact on disadvantaged groups. Alleviating disparate impact is costly,³¹⁶ and thus few employers will engage in it voluntarily for the same reason that few employers will engage in voluntary affirmative action.³¹⁷ As for the legal mandate that employers avoid imposing a disparate impact, even a symmetrical law will not undermine this mandate as it operates in practice. The disparate impact claim was intended with antidisubordination purposes, to target employer policies that have an adverse effect on disadvantaged groups. In theory, a symmetrical law poses a challenge to the disparate impact claim and its antidisubordination aim. This is because an advantaged group can challenge as disparate treatment an employer's protected-trait-conscious actions taken to avoid disparate impact liability. In *Ricci v. DeStefano*, for example, white firefighters challenged the city of New Haven's decision to disregard tests on which the white firefighters had succeeded to avoid a disparate impact on black firefighters.³¹⁸ The Court held that such actions taken to avoid disparate impact constitute disparate treatment unless "the employer can demonstrate a strong basis in evidence

³¹³ See 41 C.F.R. § 60.741 (setting forth affirmative action requirements for federal contractors based on disability similar to other programs for other protected traits).

³¹⁴ This explains the need for law and public campaigns to encourage employers to hire individuals with disabilities. See 26 U.S.C. § 190 (allowing tax deduction for the cost of removing architectural barriers for disabled employees); *id.* § 44 (same for cost of providing access); Carlos Slim Helú & Anthony K. Shriver, *Pledging "I'm in to Hire" Individuals with Intellectual Developmental Disabilities*, FORBES (Oct. 21, 2014, 5:06 PM), <http://www.forbes.com/sites/realspin/2014/10/21/pledging-im-in-to-hire-individuals-with-intellectual-and-developmental-disabilities>.

³¹⁵ See Estlund, *supra* note 304, at 5-6 (discussing how employers seeking diversity could justify an affirmative action program under current law).

³¹⁶ See Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001).

³¹⁷ See *supra* notes 309-12 and accompanying text.

³¹⁸ 557 U.S. 557 (2009).

that, had it not taken the action, it would have been liable under the disparate-impact statute.”³¹⁹

In practice, however, the potential for advantaged groups to challenge an employer’s actions taken to avoid disparate impact liability will have little impact on the antistatutory effect of employment discrimination law. This is because disparate impact liability is already essentially a dead letter: there are few suits, and even fewer that prevail.³²⁰ The *Ricci* context of employment tests is the outlier circumstance in which disparate impact liability has had an effect.³²¹ Any cost to disparate impact liability must be weighed against the beneficial effects of symmetry set forth above. Given the rarity of disparate impact suits, the benefits of symmetry are far more important to the antistatutory impact of employment discrimination law.

A separate question of course is whether the law should *require* employers to engage in more fulsome antistatutory initiatives, such as affirmative action programs, or more intensive analyses of disparate impact. Such a requirement would raise more of a problem under a symmetrical law, and would require more careful balancing of the benefits and costs of symmetry. Notably, advocates of requiring more extensive antistatutory measures have assumed the benefits of asymmetry, and have missed the countervailing benefits of symmetry raised by this Article.³²² In any event, such a requirement is so far from our current approach to antidiscrimination law that it raises only theoretical concerns.

B. Implementation

Beyond the basic choice between symmetry and asymmetry, there are additional questions associated with implementing a move towards symmetry. First, once a law is symmetrical, a question arises as to whether

³¹⁹ *Id.* at 560.

³²⁰ See Selmi, *supra* note 40, at 738-40. For this reason, this Article sidesteps commenting on the appropriate standard for evaluating disparate treatment suits challenging employer’s actions taken to avoid a disparate impact. And there is reason to believe that even *Ricci*, which some have lamented as permitting employers too little latitude to engage in efforts to avoid disparate impact, is not as restrictive as it appears. See Richard A. Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1369 (2010) (arguing that *Ricci* is limited to the exceptional case where the victims of an employer’s efforts to avoid disparate impact are readily apparent).

³²¹ See *id.*

³²² See, e.g., Myrl L. Duncan, *The Future Of Affirmative Action: A Jurisprudential/Legal Critique*, 17 HARV. C.R.-C.L. L. REV. 503 (1982), Alex M. Johnson, Jr., *Defending The Use Of Quotas In Affirmative Action: Attacking Racism In The Nineties*, 1992 U. ILL. L. REV. 1043.

each of the theories of discrimination that the law recognizes—disparate treatment and disparate impact—should permit “reverse” discrimination claims, and, if so, whether they should be subject to the same standards of proof. Second, once a law designates a universal protected class, questions remain as to the causation inquiry, that is, whether an act by the employer was taken “because of” a protected trait. This Part addresses these questions in turn.

1. Degree of Symmetry

Disparate treatment claims are the heartland of employment discrimination law, and a symmetrical law that did not allow reverse claims under this theory could hardly be said to be symmetrical. But a question arises as to whether the primary method of proof for such claims—the *McDonnell Douglas* burden-shifting test—should be applied symmetrically to all claims.³²³ Courts are split on whether reverse discrimination plaintiffs must put forward additional evidence of discrimination—of “background circumstances” that support an inference that the defendant is the “unusual employer who discriminates against the majority”—as part of this test.³²⁴

There are two arguments for some level of asymmetry in the application of this standard, but neither holds water. First, the purpose of the burden-shifting test is to weed out the most common non-discriminatory explanations for an adverse employment action.³²⁵ When the plaintiff is a member of a subordinated group, once these reasons are eliminated, it is

³²³ This test first requires the plaintiff to set forth a prima facie case: (1) that she belongs to a protected class; (2) that she applied to and was qualified for a position for which the employer was seeking applicants; (3) that she was rejected for the position; and (4) that the position remained open after that rejection or the position was offered to someone else. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973). Note that the first prong is meaningless for symmetrical laws. *See supra* note 171 and accompanying text. If the plaintiff sets forth a prima facie case, the burden shifts to the employer to offer a nondiscriminatory reason for the failure to hire, which then foists the burden back on the plaintiff to prove that the employer’s reason is pretextual and that discrimination was the real reason for the decision. *See* 411 U.S. at 804.

³²⁴ *Compare Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 454 (7th Cir. 1999) (requiring additional evidence); *Taken v. Okla. Corp. Comm’n*, 125 F.3d 1366, 1369 (10th Cir. 1997) (same); *Harding v. Gray*, 9 F.3d 150, 152-53 (D.C. Cir. 1993) (same); *Murray v. Thistledown Racing Club*, 770 F.2d 67 (6th Cir. 1985) (same), *with Wilson v. Bailey*, 934 F.2d 301, 304 (11th Cir. 1991) (requiring no additional evidence); *Young v. City of Houston*, 906 F.2d 177, 180 (5th Cir. 1990) (same).

³²⁵ *See Furnco Constr. Co. v. Waters*, 438 U.S. 567 (1978) (“A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.”).

reasonable to infer that the real reason is discrimination, given the prevalence of discrimination against these groups.³²⁶ When the plaintiff is a member of an advantaged group, we might think that weeding out the most common non-discriminatory reasons makes an inference of arbitrary decisionmaking by the employer just as or more justified than an inference of discrimination. For this reason, some have argued in favor of requiring additional proof for reverse suits.³²⁷ But the heterogeneity of disadvantage suggests that a more nuanced analysis is required to assess when a reverse discrimination claim warrants an inference of discrimination without any additional proof. For example, a younger worker might be entitled to such an inference in a promotion case, and a male worker might be entitled to such an inference in occupations where men have been excluded.³²⁸ Because employers who discriminate against advantaged groups in such scenarios are more typical than not, any rule requiring additional evidence that the plaintiff's employer is somehow "unusual" might unfairly limit these suits.³²⁹

Second, for antistatutoryists, the primary purpose of antidiscrimination law is to improve the employment opportunities of subordinated groups. This might support a heightened burden for applying the law outside of its primary purpose.³³⁰ But, as Part II suggests, making it harder to pursue reverse discrimination suits can actually undermine the antistatutory purposes of antidiscrimination law, in two ways. First, applying a stricter proof standard to reverse discrimination plaintiffs would make it more difficult to challenge the interlocking stereotypes that subordinate disadvantaged groups. For example, if the male plaintiff in *Knussman*, whose employer told him that he could not take leave unless his wife was "in a coma or dead,"³³¹ had been subject to a heightened proof requirement, he might not have been able to pursue his claim. The plaintiff was a police officer, and there was no reason to believe that men would have been discriminated against in that workplace. More generally, making it harder for reverse discrimination plaintiffs to pursue claims would also interfere with the ability of a symmetrical law to distribute the cost of the mandate more equally. If it is harder for reverse plaintiffs to win claims, they will bring fewer claims, making it less likely that decisionmakers will perceive them as costly under the mandate.

As for disparate impact suits, it is not clear whether reverse

³²⁶ *Id.*

³²⁷ See Sullivan, *supra* note 9, at 1527.

³²⁸ See *supra* Part II.A.2.c.

³²⁹ Mills, 171 F.3d at 454.

³³⁰ See Onwuachi-Willig, *supra* note 9, at 53.

³³¹ *Knussman v. Maryland*, 272 F.3d 625, 628 (4th Cir. 2001).

discrimination suits are cognizable under currently symmetrical law, like Title VII.³³² Some scholars have argued that permitting reverse disparate impact suits makes no sense in light of the antistatutory origins of the doctrine, which was developed as a way to combat employer policies that disadvantaged black employees.³³³ Putting aside whether an asymmetrical standard here would pass constitutional muster,³³⁴ it is questionable whether an asymmetrical regime for disparate impact suits would further support the antistatutory purposes of the law, except in an expressive way. In fact, there may be instances when symmetry would bring benefits from an antistatutory perspective, for example, a male nurse challenging a word-of-mouth hiring policy.³³⁵ Moreover, walling off a category of liability from reverse claims might undermine the equalizing purposes of a symmetrical law from the perspective of reducing the cost of the mandate born by subordinated groups. But because disparate impact suits are such a small fraction of antidiscrimination litigation, their treatment will not matter much for redistributing the cost of the mandate, and we might not be overly concerned with the resolution of this question.³³⁶

2. Causation

While a universal protected class alleviates the most vexing practical concerns with asymmetrical antidiscrimination laws, it does not avoid the problem of defining the protected trait entirely. Even if everyone is permitted to raise a claim of discrimination on the basis of a protected trait, courts still need to determine causation: whether the employer's action was taken "because of" the trait. This question requires an understanding of which employer justifications fall within the boundaries of the protected trait and which do not. Note that courts already face these types of questions under both symmetrical and asymmetrical laws. For example,

³³² The question has not been before the Supreme Court, and the few cases before appellate courts have resulted in a circuit split. *Compare* *Craig v. Ala. State Univ.*, 804 F.2d 682 (11th Cir. 1986) (permitting disparate impact claim by white employees), *with* *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250 (10th Cir. 1986) (denying disparate impact claim by male employees); *see also* *Sullivan*, *supra* note 9, at 1533.

³³³ *See, e.g., Sullivan*, *supra* note 9, at 1507, 1512 (arguing that "[a]pplying disparate impact beyond minorities and women is profoundly ahistorical and inconsistent with the theoretical underpinnings of the theory" and collecting citations to this effect).

³³⁴ *Compare* *Primus*, *supra* note 11, at 585-86 (suggesting yes), *with* *Sullivan*, *supra* note 9, at 1508 (suggesting no).

³³⁵ *See* *EEOC v. Consol. Serv. Sys.*, 989 F.2d 233 (7th Cir. 1993) (dismissing suit challenging word-of-mouth hiring only on disparate treatment grounds).

³³⁶ Reported cases addressing reverse disparate impact are quite rare. *See* *Sullivan*, *supra* note 9, at 1530-32.

this question arises in the context of what have sometimes been called “performance” cases—cases that entail the expression of an identity trait, such as a black worker wearing braids. In such cases, courts must consider whether an employer’s decision on the basis of an employee’s braided hair is a decision on the basis of race.³³⁷

In a move from asymmetry to symmetry, determining causation will raise the most new questions in the context of disability, because of the ambiguity of what constitutes a “disability.”³³⁸ Scholars who have urged a universal approach to the ADA have proposed that the causation requirement is met when the employer takes an action on the basis of a physical or mental impairment, whether real or perceived, regardless of whether the impairment is substantially limiting or not, long-term or temporary.³³⁹ Accordingly, a denial of reasonable accommodation amounts to unlawful disparate treatment when an employer fails to provide a necessary accommodation for such an impairment.³⁴⁰ To be sure, this approach does not eliminate all questions related to the understanding of causation on the basis of disability, including what constitutes an “impairment,”³⁴¹ and when an accommodation is “needed.”³⁴² Regardless

³³⁷ Courts have split on this question. *Compare, e.g.,* *Hollins v. Atl. Co.*, 188 F.3d 652, 661, 663 (6th Cir. 1999) (yes), *with* *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (no); *see also* *Hazen Paper Co. v. Biggens*, 507 U.S. 604, 609 (1993) (no), holding that employers who act on the basis of seniority have not acted on the basis of age); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (holding that discrimination on the basis of transgenderism is discrimination on the basis of sex).

³³⁸ *See* Waterstone, *supra* note 238, at 15-16 (explaining that “while no movement is monolithic,” that “the disability community is perhaps exceptional in its diffuseness”; and that despite the “big tent” approach of the ADA that defines disability expansively, there “remain significant divisions across and even within groups”).

³³⁹ *See* Burgdorf, *supra* note 50, at 571-73; Mayerson, *supra* note 50, at 597.

³⁴⁰ *See* Burgdorf, *supra* note 50, at 573; Stein, et al., *supra* note 9, at 737.

³⁴¹ The law could accept the broad definition of impairment included in the regulations implementing the ADA: “(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.” 29 C.F.R. § 1630.2. A broader alternative to “impairment” might be “condition,” but impairment has the benefit of already being used and defined.

³⁴² For example, if a worker chooses to run marathons with the known consequence of soreness that renders her unable to complete her job tasks, does this worker “need” an accommodation? Note that this is not a new problem introduced by a universal protected class, as courts already struggle with when an employer must give an accommodation to a worker whose need for the accommodation might be considered self-induced, such as the failure to take mitigating measures to control disability. *See generally* Jill Hasday,

of these questions, this approach offers the key benefit of focusing on the employer's alleged discriminatory treatment rather than on the plaintiff's identity classification, thereby avoiding the harms associated with treating identity as a static concept inhering in the individual.³⁴³

C. Further Applications

This Article's analysis of symmetry has broader application to different protected traits and areas of law. This Section considers how the analysis applies to two traits that lawmakers are currently considering protecting: appearance and sexual orientation.³⁴⁴ Because these traits receive no heightened scrutiny under the Constitution, lawmakers are free to protect these traits either symmetrically or asymmetrically.³⁴⁵ This Part then turns to areas of antidiscrimination law outside of employment—housing, education, and constitutional law—and provides some thoughts about the extent to which this Article's analysis generalizes to them.

1. Traits

a. Appearance

Appearance is now only protected in a few jurisdictions,³⁴⁶ but there appears to be movement towards more legislation.³⁴⁷ Here, too, symmetry

Mitigation and the Americans with Disabilities Act, 103 MICH. L. REV. 217 (2004) (discussing this problem and arguing for a modified duty to mitigate). Courts have already developed approaches to address how worker choice intersects with an employer's obligation of reasonable accommodation. *See id.* at 219 nn.217-18 (collecting cases on the duty to mitigate). An amendment to the ADA has clarified the question somewhat by establishing that for most disabilities, the individual should be considered in an unmitigated state. 42 U.S.C. § 12102(4)(E)(i).

³⁴³ *See supra* Part II.B.

³⁴⁴ *See* Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013) (bill banning employment discrimination on the basis of sexual orientation); DEBORAH RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* 110 (2010) (citing laws proposing a ban on employment discrimination on the basis of appearance).

³⁴⁵ *See* *Romer v. Evans*, 517 U.S. 620 (1996) (applying rational basis review to sexual orientation classifications); Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 533 (2014) (making clear that rational basis review is the default approach unless a trait has been afforded heightened scrutiny); *supra* notes 32, 39 and accompanying text (discussing relationship between constitutional scrutiny and symmetry).

³⁴⁶ *See* D.C. Code Ann. § 2-1401.02(22); Mich. Comp. Laws Ann. § 37.2202(1)(a).

³⁴⁷ *See, e.g.*, Deborah Rhode, *Hooters Hires Based on Looks. So Do Many Companies. And There's No Law Against It.*, THE NEW REPUBLIC (Aug. 30, 2014), <http://www.newrepublic.com/article/118683/why-we-need-law-protect-against-appearance->

would be beneficial, primarily due to the presence of interlocking stereotypes and heterogeneity of disadvantage, as well as the practical difficulties with a targeted protected class. In the case of appearance, it is of course the unattractive who are the disadvantaged group. Plain people earn less than average-looking people, who earn less than good-looking people.³⁴⁸

Symmetry is needed here to combat interlocking stereotypes. The positive stereotypes that attractive workers benefit from are the flip side of the negative stereotypes that hold unattractive workers back. This is because of the “halo effect”: the better an individual looks, the better a person we think she is.³⁴⁹ We consider attractive people “more sociable, dominant, sexually warm, mentally healthy, intelligent, and socially skilled.”³⁵⁰ The flip-side of this—the negative halo effect—means that we also assume that unattractive people are *less* “sociable dominant, sexually warm, mentally healthy, intelligent, and socially skilled.”³⁵¹

Given the benefits that accrue to attractive workers, there might seem to be few if any occasions for attractive workers to challenge these stereotypes. But the halo effect may not always lead to positive outcomes for workers. While attractive men may be considered better leaders, the “sexually warm” part of the halo effect can work against attractive women, making them less likely to be hired for high-level jobs that require authority.³⁵²

discrimination.

³⁴⁸ See Daniel Hamermesh & Jeff E. Biddle, *Beauty and the Labor Market*, 84 AM. ECON. REV. 1174 (1994) (finding that an attractive worker makes 3-4% more than an unattractive worker, which adds up to an average of \$230,000 over a lifetime; that even an average-looking worker is still likely to earn \$140,000 more over a lifetime over an unattractive worker; that the effect is at least as great for men as women; and that the effect is mostly independent of occupation); Sean P. Salter, et al., *Broker Beauty and Boon: A Study of Physical Attractiveness and Its Effect on Real Estate Brokers’ Income and Productivity*, 22 APP. FIN. ECON. 811, 821 (2012) (finding that attractive real estate agents earn more and achieve higher selling prices and extended marketing times); Markus M. Mobius & Tanya S. Rosenblat, *Why Beauty Matters*, 96 AM. ECON. REV. 222, 225 (2006) (finding that subjects were willing to pay workers of above-average beauty 10% to 15% more than workers of below average beauty, and on this basis commenting that the gap is at least as large as it is for race or gender).

³⁴⁹ See Tonya K. Frevert & Lisa Slattery Walker, *Physical Attractiveness and Social Status*, 8 SOC. COMPASS 313 (2014); Mobius & Rosenblat, *supra* note 345, at 228.

³⁵⁰ Alan Feingold, *Good-Looking People Are Not What We Think*, 111 PSYCH. BULL. 304, 304 (1992); A. H. Eagly, et al., *What Is Beautiful Is Good, But: A Meta-Analytic Review Of Research On The Physical Attractiveness Stereotype*, 110 PSYCH. BULL. 109, 109 (1991).

³⁵¹ See Feingold, *supra* note 350, at 304; Eagly, et al., *supra* note 350, at 109.

³⁵² See Frevert & Slattery-Walker, *supra* note 349, at 320; Elizabeth Dworkin, *Is This Woman Too Hot to Be a Banker?*, VILLAGEVOICE.COM (Jun. 1, 2010),

Other instances in which attractiveness can serve as an impediment in the labor market highlight the need for symmetry. Attractive people may prompt jealousy that holds them back in their careers. Interviewers are less likely to extend an offer to candidates of the same sex deemed to be more attractive than themselves.³⁵³ An attractive worker may even be fired because her appearance makes her boss's spouse jealous.³⁵⁴

And when it comes to implementation, it is not easy to draw a line between an attractive and an unattractive worker.³⁵⁵ This raises a substantial challenge in determining who is in and who is out of the protected class, both as a matter of defining the protected class, and in applying this definition to the plaintiff in each case. Economists who study the labor market impact of appearance use raters to provide assessments of appearance.³⁵⁶ In a lawsuit, this would likely require dueling experts of appearance fighting over whether the plaintiff is attractive. As with concerns raised in the disability context, some plaintiffs might not want to come forward to claim their rights if it required proving that they were unattractive.³⁵⁷

b. Sexual Orientation

Federal legislation to prohibit discrimination on the basis of sexual orientation is proposed almost every year.³⁵⁸ For this discrete trait, multiple

<http://www.villagevoice.com/news/is-this-woman-too-hot-to-be-a-banker-6429442>
(describing lawsuit alleging that female banker was fired because she was too attractive).

³⁵³ See Frevert & Slattery-Walker, *supra* note 349, at 320.

³⁵⁴ See *Nelson v. Knight*, No. 11–1857, 2012 WL 6652747, at *5 (Iowa Dec. 21, 2012), *aff'd on r'hg*, 834 N.W.2d 64 (Iowa 2013) (holding that a married dentist's termination of his dental assistant because he found her an "irresistible attraction" did not violate sex discrimination law).

³⁵⁵ We might think that there is little agreement on what is attractive or unattractive in the first place. But it turns out that beauty is not so much in the eye of the beholder. As economist Daniel Hamermesh who studies the economics of appearance explains: "[M]ost beholders view beauty similarly. Some people are consistently regarded as above-average or even beautiful, while others are generally regarded as plain or even downright homely." Sue Shellenbarger, *On the Job, Beauty Is More than Skin Deep*, WALL ST. J. (Oct. 27, 2011, 9:28 PM), <http://www.wsj.com/articles/SB10001424052970203687504576655331418204842>.

³⁵⁶ See Hamermesh & Biddle, *supra* note 348, at 1174.

³⁵⁷ See Burgdorf, *supra* note 50, at 536.

³⁵⁸ Jennifer C. Pizer, et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 719 (2012). Twenty-one states and the District of Columbia prohibit discrimination on the basis of sexual orientation in employment. See ACLU, *Non-Discrimination Laws: State by State Information – Map*, ACLU (last visited Aug. 5, 2015),

identities would be considered subordinated, including gay men, lesbian women, and bisexual persons. Anticlassification concerns could arise in cases where gay and lesbian workers are preferred, either as role models, or on the basis of stereotypical customer preferences.³⁵⁹ A symmetrical law would be necessary to challenge such employer classifications.

Given the largely invisible nature of sexual orientation, and the phenomenon of “passing,” or “covering,”³⁶⁰ there is a question as to whether the cost of an asymmetrical mandate would be born by the subordinated group. If decisionmakers cannot discern sexual orientation, they will be unable to discriminate against the subordinated group in hiring. In light of changes in attitudes about sexual orientation, as well as the right to gay marriage, it is likely that fewer members of the subordinated group will “pass,” and instead will either overtly indicate membership in the group (e.g., note an affiliation with gay or lesbian groups on a resume, or refer to a same-sex partner), or will fail to “cover” (e.g., allow a wedding announcement of a same-sex marriage or images of a same-sex partner on a social media profile).³⁶¹ The likelihood of the cost of the mandate falling on the subordinated group, and thus the need for a symmetrical law, turns on precisely how apparent sexual orientation has become.

Perhaps the greatest concern in the context of sexual orientation comes in the realm of the practical. A protected-class approach would require pinning down sexual orientation to a static identity. A tendency to recognize sexual orientation as an unchanging biological phenomenon—that one is “born this way”³⁶²—has been associated with a greater recognition of gay rights.³⁶³ Nonetheless, we might still be troubled by a protected-class approach. First, it does not take account of the fluidity of sexual orientation.³⁶⁴ Some would-be plaintiffs may not be willing to accept a static conception of their sexuality. Second, the judicial classification of persons by sexual orientation reinforces traditional

<https://www.aclu.org/map/non-discrimination-laws-state-state-information-map>.

³⁵⁹ See Naomi Schoenbaum, *The Law of Intimate Work*, 90 WASH. L. REV. 1167, 1187 & n.103 (2015) (citing examples).

³⁶⁰ See generally KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006).

³⁶¹ Employers are increasingly conducting social media searches on prospective employees, which can allow them to find out information about job candidates that antidiscrimination laws may bar them from inquiring about. See Yuki Noguchi, *Can't Ask That? Some Job Interviewers Go to Social Media Instead*, NPR (Apr. 11, 2014, 4:06 PM), <http://www.npr.org/sections/alltechconsidered/2014/04/11/301791749/cant-ask-that-some-job-interviewers-go-to-social-media-instead>

³⁶² LADY GAGA, *Born This Way*, on BORN THIS WAY (Interscope Records 2011).

³⁶³ See Shamus Khan, *Not Born This Way*, AEON (July 23, 2015), <http://aeon.co/magazine/society/why-born-gay-is-a-dangerous-idea/>.

³⁶⁴ *Id.*

concepts of sexuality.³⁶⁵ When courts decide an individual's sexual orientation, they tend to equate gay and lesbian identity with expressions of desire that accord with conventional heterosexual notions of intimacy.³⁶⁶ Moreover, there is the risk of "undercounting those who do not fit neatly into the[] category[]" of lesbian, gay, or bisexual.³⁶⁷ When an individual has not openly identified as gay, courts may only be willing to recognize her sexual orientation if she has expressed some form of same-sex desire in the workplace.³⁶⁸ In one case brought under state law, the plaintiff's coworkers harassed him for enjoying "gay boy music" and referred to him as a "dick smoker."³⁶⁹ The court dismissed the claim because the plaintiff testified that he was a "heterosexual male, was married, fathered a child. . . ."³⁷⁰ Of course, this worker could have been harassed on the basis of sexual orientation whether or not he was actually gay. As discussed above, a symmetrical law, which would put the focus on employer conduct rather than membership in a protected class, would address these challenges.³⁷¹

2. Areas of Law

Areas of law outside of the employment context, including education law, housing law, and constitutional law, also face the same design question of symmetry or asymmetry. Certain considerations from the employment context translate better than others to these contexts. As for anticlassification concerns, they apply regardless of the context in which these classifications arise. For anticlassificationists, classifying individuals by protected trait to distribute access to valuable goods is harmful, whether at work, school, or otherwise.³⁷² And the practical and political concerns also transcend domains. The practical concerns stem from conditioning relief on establishing membership in a protected class, which would occur across domains with an asymmetrical law. The political concerns too cut across domains because the policy feedback mechanism could be expected to play out similarly whenever there is redistribution of important goods.

³⁶⁵ See Jessica Clarke, *Inferring Desire*, 63 DUKE L. J. 525, 529 (2013).

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ See *id.* at 618.

³⁶⁹ *Glinski v. Radioshack*, No. 03-CV-930S, 2006 WL 2827870, at *2-3 (W.D.N.Y. Sept. 29, 2006);

³⁷⁰ *Id.* at *11 n.12; see also *Akoidu v. Greyhound Lines, Inc.*, No. B147046, 2002 WL 399476, at *5-7 (Cal. Ct. App. Mar. 15, 2002) (rejecting claim by plaintiff who testified that "he was not homosexual" because he failed to establish that he a member of a protected class).

³⁷¹ See *supra* Part II.B.

³⁷² See Reynolds, *supra* note 13, at 998.

Where the analysis shifts is the antistatutory purpose. The phenomena of interlocking stereotypes and heterogeneity of disadvantage can be seen in other areas of law, and would support at least some measure of symmetry. As noted earlier, in her role as an advocate developing constitutional sex equality jurisprudence, Justice Ginsburg consistently brought cases with male plaintiffs to challenge state rules that relied on interlocking sex-based stereotypes.³⁷³ Heterogeneity of disadvantage can be seen in the education context, where one of the seminal sex discrimination cases involved a man challenging his rejection from an all-female nursing school.³⁷⁴

The real divergence arises when it comes to the cost of the mandate. This is much less of a concern outside of employment. Most employers, unlike most educational institutions, are aiming to maximize profits, making cost a far more salient consideration.³⁷⁵ A decisionmaker in the education context is far less likely to consider a prospective student's cost as a reason not to admit her as compared with a decisionmaker in the employment context. Moreover, many educational institutions are specifically aiming to further diversity.³⁷⁶ Still further, the costs of antidiscrimination mandates are far more salient in the employment context than the education context, and even the housing context, because there is far more employment litigation than education or housing litigation.³⁷⁷ Because of these differences between the employment and education contexts, there is more reason to believe that an asymmetrical law would lead to more progressive and aggressive forms of affirmative action to achieve the diversity that many schools, and many antistatutoryists, prefer.

The bottom line then is that it is harder to reach a conclusion that a symmetrical design is superior in these other areas of antidiscrimination law. While a full analysis and final recommendation for these other contexts is beyond the scope of this paper, the point here is that the design of any antidiscrimination law must take into account the particulars of the

³⁷³ See Franklin, *supra* note 9, at 104-06. We can also see interlocking race-based stereotypes in the context of school-based athletic programs. See Stone, et al., *supra* note 138, at 291 (finding interlocking stereotypes in basketball); Heike v. Guevara, 519 F. App'x 911, 919 (6th Cir. 2013) (white student alleging discrimination by college basketball coach based on interlocking racial stereotypes).

³⁷⁴ See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

³⁷⁵ See *supra* notes 308-12 and accompanying text.

³⁷⁶ One can see this in the volume of amicus briefs filed by educational institutions in support of affirmative action in the seminal *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), cases. See, e.g., Br. for Ass'n of Am. Colls. & Univs., et al., as Amici Curiae Supporting Resps., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

³⁷⁷ See Eisenberg, *supra* note 15, at 5 & n.13.

domain in which it is operating. Reaching a conclusion for constitutional law, which covers public action across multiple domains—employment, education, housing, and beyond—is particularly complex. This suggests that, at least from a normative rather than a purely doctrinal perspective, the choice between symmetry and asymmetry in constitutional law should vary depending on the context. While this is a far cry from current law, it may nonetheless be justifiable from a more purpose-driven interpretive view.

CONCLUSION

This Article offers the first study of the design choice between symmetry and asymmetry in antidiscrimination law. In so doing, it takes steps towards understanding the consequences of an ongoing puzzle of antidiscrimination law: the divide between symmetry and asymmetry. For many proponents of antidiscrimination law, and especially for advocates of subordinated groups, the results are counterintuitive: that a symmetrical employment discrimination law that protects everyone from discrimination in all directions is *more* effective in achieving equality and improving the plight of disadvantaged groups than an asymmetrical law targeted specifically at the group.

This surprising conclusion not only upends longstanding thinking in the area of antidiscrimination law, but also provides an important practical tool for advocates, one that is especially needed in light of ongoing drives for legislation prohibiting discrimination on the basis of sexual orientation, appearance, marital status, and a host of other grounds. For those who are seeking to improve the circumstances of subordinated groups in the labor market through antidiscrimination law, far more serious consideration must be given to the choice between symmetry and asymmetry.