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The Symmetry Principle

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BRADLEY A. AREHEART

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THE SYMMETRY PRINCIPLE

BRADLEY A. AREHEART*

Abstract: Title VII provides symmetrical protection against discrimination in that both blacks and whites, and men and women may avail themselves of the law's protections. In contrast, the Age Discrimination in Employment Act operates asymmetrically, shielding workers over the age of forty from discrimination yet offering no reciprocal protection for younger workers. Why do some antidiscrimination laws protect symmetrically while others do not? More importantly, why does this design choice matter? These are questions that scholars, courts, and legislators have generally ignored. This Article proceeds in two parts. First, it identifies symmetry as an important, yet frequently overlooked, way in which American antidiscrimination laws differ. Second, it proposes the "symmetry principle" as a major normative theory for analyzing and evaluating the design of antidiscrimination laws. Symmetrical laws have unique expressive, tactical, and substantive strengths. For example, symmetrical laws promote solidarity, are more politically palatable, can more effectively challenge stereotypes, and are capacious enough to respond to unanticipated forms of bias. This Article defends symmetry as a default rule to be applied when addressing traits such as sex, age, and genetic information. To comprehensively combat discrimination, however, the law cannot rely exclusively on symmetry; rather, asymmetrical laws can under certain circumstances be uniquely beneficial. Sometimes a trait is not universally held and is most intelligible as an asymmetric measure, such as in the case of disability. At other times, protecting symmetrically would mean giving advantaged groups a "reverse" cause of action that might further subordinate an already disadvantaged group, such as in the case of disability. Accordingly, this Article defends asymmetrical approaches to disability as well as several race-based policies and doctrines. Taken together, the symmetry principle is capable of imposing some degree of order on the wide-ranging policies and practices in antidiscrimination doctrine. In addition to addressing this previously neglected design choice, and considering how current laws might be modified to better pre-

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vent and rectify subordination, the symmetry principle and its analytical framework may also assist future legislative bodies in crafting new antidiscrimination measures that are directed toward formerly unprotected groups.

INTRODUCTION

In 2015, the Equal Employment Opportunity Commission (EEOC) determined that sexual orientation discrimination is, by its very nature, discrimination “because of sex.”¹ Less than a year later, the EEOC filed two lawsuits challenging discrimination on the basis of sexual orientation in the private sector.² These breakthroughs were the result of nearly three decades of evolution in the interpretation of Title VII,³ beginning with *Price Waterhouse v. Hopkins*.⁴

The text of Title VII protects against discrimination on the basis of “sex,” and for the first couple of decades this was understood unambiguously as biological sex.⁵ Courts interpreted the statute to protect against the relatively simple act of preferring men over women—or vice versa.⁶ But *Hopkins* dramatically expanded the protection of simple sex discrimination to provide recourse for the more complex phenomenon of sex-based stereotyping.⁷ This innovation meant that masculine women and effeminate men now had a cause of action not just for discrimination due to their *sex*, but also for discrimination due to

¹ Baldwin, EEOC Appeal No. 0120133080, Agency No. 2012-24738-FAA-03 (July 15, 2015).

² See Press Release, Equal Emp’t. Opportunity Comm’n, EEOC Files First Suits Challenging Sexual Orientation Discrimination as Sex Discrimination (Mar. 1, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/3-1-16.cfm> [<https://perma.cc/BJL8-NMHX>] (stressing the “critical” importance of all U.S. courts recognizing the right of individuals to not be discriminated against in workplaces because of their sexual orientation).

³ See generally KIMBERLY A. YURACKO, GENDER NONCONFORMITY AND THE LAW (2016) (discussing the evolution of U.S. sex discrimination jurisprudence during the twenty-first century).

⁴ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (finding Title VII allows women to escape “an intolerable and impermissible catch 22” where possessing a trait, such as aggressiveness, may be both essential to professional success and grounds for dismissal at the whim of a prejudiced employer).

⁵ See, e.g., *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145, 156 (1976) (holding discrimination based on sex referred only to “traditional” practices that divided men and women along the axis of biological sex); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661–63 (9th Cir. 1977) (dismissing claim by transgender appellant on basis that “Congress had only the traditional notions of ‘sex’ in mind” when it passed Title VII).

⁶ See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (finding the plain meaning of Title VII’s prohibition of sex discrimination impliedly applies to both men and women); *Holloway*, 566 F.2d at 663 (asserting that Title VII’s prohibition of sex discrimination was meant to ensure equality of men and women, unless there was a “bona fide relationship between” job qualifications and an employee’s sex).

⁷ See *Hopkins*, 490 U.S. at 250 (stating that where an employee’s gender would be cited as a factor in an employer’s hiring choice, the Court would find “that gender played a motivating part” in that employer’s decision).

their *gender*.⁸ In other words, even if an employer did not generally discriminate against women, that employer could still be liable for sex discrimination if it discriminated against women who did not fit certain gender norms.⁹ Additionally, since *Hopkins* was decided, nearly all federal courts have come to recognize that transgender discrimination is also sex discrimination based on sex stereotyping.¹⁰ Furthermore, gay and lesbian individuals have sometimes found a safe harbor in Title VII's protections for gender non-conformance.¹¹ All of these developments further the antidiscrimination project by breaking down sex-related stereotypes and barriers to opportunity.

These advances would not have been possible without a structural mechanism in the law, hidden in plain sight, which this Article identifies as the "symmetry principle." Had Title VII been crafted narrowly to protect only women, it would never have reached some of the unanticipated and emerging forms of bias outlined above. Instead, Congress drafted the statute broadly and symmetrically to prohibit discrimination on the basis of "sex." This equanimity in protection for men and women has allowed Title VII the elasticity to protect various permutations of gender and sex. Such symmetrical breadth has kept the statute timely and relevant in grappling with emerging iterations of sex-based animus.

This Article advances the symmetry principle as a new heuristic for understanding the design of antidiscrimination laws and, in turn, analyzing their effectiveness. The symmetry principle mandates that once certain attributes or characteristics are identified as worthy of antidiscrimination protection, all *groups* within that universal *ground* must be protected. For example, Title VII protects the universal trait of race, and it does so for all groups, including not

⁸ See, e.g., *Nichols v. Azteca Restaurant Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (holding that *Hopkins* "applies with equal force to a man who is discriminated against for acting too feminine"). See generally Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995) (arguing for robust protection of "gender" under Title VII).

⁹ Though many people use "sex" and "gender" interchangeably, feminists have distinguished between the terms since the late 1960s, when they appropriated the term "gender" to emphasize the socially constructed nature of sex and counter the viewpoint that biology is destiny. Toril Moi, *What Is a Woman? Sex, Gender, and the Body in Feminist Theory*, in *WHAT IS A WOMAN? AND OTHER ESSAYS* 3, 5 (2001); Mari Mikkola, *Feminist Perspectives on Sex and Gender*, STANFORD ENCYCLOPEDIA OF PHIL. (Jan. 29, 2016), <https://plato.stanford.edu/entries/feminism-gender/> [<https://perma.cc/M8PW-EZ3E>].

¹⁰ *Glenn v. Brumby*, 663 F.3d 1312, 1317–18, 1318 n.5 (11th Cir. 2011); see, e.g., *Barnes v. Cincinnati*, 401 F.3d 729, 737, 738 (6th Cir. 2005) (finding plaintiff who did not conform to sex stereotypes had established prima facie sex discrimination claim).

¹¹ Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 402–07 (2004). Often, however, it can be impossible to separate out the bias due to sexual orientation versus gender-nonconformance. *Id.* at 403–04. Moreover, gender non-conformance is often still not protected where it conflicts with an employer-imposed dress, appearance, or grooming code. YURACKO, *supra* note 3, at 2–8.

only blacks and Hispanics, but also whites—a traditionally favored group.¹² Conversely, while discrimination laws protect those the law identifies as disabled, it does not protect those without legally cognizable disabilities.¹³ Such a discrimination law is asymmetrical.

In addition to teasing out the key differences between symmetry and asymmetry, this Article offers a theory about what those different categories accomplish, and what they reflect about our national commitment to antidiscrimination. The symmetry principle is simple, yet unappreciated in the literature as a systematic explanation for how we fashion laws that prevent and provide recourse for subordination.¹⁴ The tenor of the “protectorate”¹⁵—or the protected classes in aggregate—is symmetry.

Symmetrical discrimination laws have many strengths: *expressively*, in promoting solidarity while retaining the moorings of antidiscrimination categories;¹⁶ *tactically*, in securing the political capital necessary for implementation as well as maintaining support through the use of a trait that all people

¹² This is because, in most factual instances and applications, the law concludes that members of different racial groups are all similarly situated. See Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2423 (1994) (noting “the law operates as a ban on formal inequality of the sort that prohibits most explicit distinctions between men and women or blacks and whites”).

¹³ But see *infra* notes 66–75 and accompanying text (noting the circumstances under which people without disabilities are protected under the Americans with Disabilities Act).

¹⁴ Although one author has recently written on the topic of symmetry, the author does so only in the context of four traits (race, sex, age, and disability) and principally through a different lens (labor economics), and reaches a different conclusion altogether (symmetry is always warranted for discrimination laws). See generally Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 WISC. L. REV. 69. In contrast, this Article addresses a full range of traits (in both statutory and constitutional law), applies a variety of lenses (including expressive, tactical, substantive, and philosophical), and concludes that both symmetrical and asymmetrical protections are warranted, depending upon the respective traits and circumstances. Several other scholars have invoked the terms “symmetry” or “asymmetry” to make a more limited point. E.g., William R. Corbett, *Babbling About Employment Discrimination: Does the Master Builder Understand the Blueprint for the Great Tower*, 12 U. PA. J. BUS. L. 683, 686–92 (2010) (arguing the Civil Rights Act of 1991 created some asymmetries between the proof structures for Title VII and the ADEA); Barbara Flagg & Katherine Goldwasser, *Fighting for Truth, Justice, and the Asymmetrical Way*, 76 WASH. U. L. Q. 105, 108 (1998) (outlining the contexts in which they advocate “asymmetrical legal doctrines”); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1296 (1987) (proposing her own path to sexual equality, which she identifies as “essentially asymmetrical”); Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 168–70 (2011) (writing on “[t]he [p]roblem of [s]ymmetry” in the equal protection context); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 558–68 (1998) (characterizing two approaches to equal protection as “symmetrical” and “asymmetrical” and ultimately favoring the implicitly-asymmetrical “political powerlessness”).

¹⁵ “Protectorate” was a term coined by Owen Fiss and refers to the beneficiaries of discrimination law—those who discrimination law protects. Owen M. Fiss, *The Fate of an Idea Whose Time Has Come: Anti-Discrimination Law in the Second Law After Brown v. Board of Education*, 41 U. CHI. L. REV. 742, 748–52 (1974).

¹⁶ See *infra* notes 128–162 and accompanying text.

share;¹⁷ and *substantively*, in robustly attacking discrimination while avoiding the impossibly complex issue of forecasting which groups will require protection in the future—a virtue this article terms “adaptive breadth.”¹⁸

Symmetrical laws, however, also have weaknesses along all three of these lines.¹⁹ In the wake of Donald Trump’s election to the U.S. presidency, especially, one might question whether symmetrical antidiscrimination norms are just a way of reconsolidating power and enervating the sense that certain groups are more subordinated than others. For example, some scholars have critiqued racial symmetry under Equal Protection doctrine by arguing that treating state actions that impact race equivalently simply preserves racial hierarchies.²⁰ Further, some opponents of symmetrical laws have critiqued them as providing only formal equality, on the theory that parceling out legal benefits according to egalitarian distributive principles may not result in just outcomes.²¹ They argue, in effect, that symmetry is fair in form, but not result.²²

The symmetry principle may call to mind other ongoing scholarly dialogues and theories regarding *why* and *how* we protect against discrimination. These theories include anticlassification,²³ antisubordination,²⁴ antibalkanization,²⁵ and universalism.²⁶ The symmetry principle is not coextensive with an-

¹⁷ See *infra* notes 163–223 and accompanying text.

¹⁸ See *infra* notes 224–272 and accompanying text.

¹⁹ See *infra* notes 128–308 and accompanying text.

²⁰ E.g., Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1620–21 (2009) (categorizing Chief Justice Roberts’s *Parents Involved* opinion that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race” as a perfect example of his moral-equivalence stance).

²¹ Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1144 (1986).

²² See, e.g., Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 993–1001 (1993) (arguing against the current symmetrical treatment of race under the Equal Protection Clause and in favor of employing heightened scrutiny only when a facially neutral practice disadvantages non-whites); Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119–220 (1996) (arguing that facial neutrality of a race- or gender-specific law may mask the nature of the harm they are inflicting).

²³ See, e.g., Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 78 (2000) (noting the distinction between anticlassification and antisubordination has dominated arguments for over two decades).

²⁴ See, e.g., Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976) (arguing the Equal Protection Clause proscribes laws or official practices that “aggravate the subordinate position of [a specially disadvantaged group]”); Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CALIF. L. REV. 935, 960 (1994) (explaining the principle of antisubordination maintains that specific groups of people should not be deemed “socially, culturally, or materially” inferior to other groups).

²⁵ See Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1280–86 (2011) (articulating the principle of antibalkanization in the context of equal protection jurisprudence).

²⁶ Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2847 (2014) (“[U]niversalistic approaches to civil rights problems have had

ticlassification²⁷ or these other theories and, as illustrated in Part II, harnesses a unique mix of their strengths. This makes the symmetry principle a critical, though underappreciated, part of understanding equality in the antidiscrimination tradition.

Ultimately, this Article argues that discrimination law needs both symmetrical and asymmetrical approaches to comprehensively combat discrimination. If symmetry is a default rule, this Article insists upon asymmetrical exceptions and attempts to delineate the principles under which asymmetry is warranted. The case for symmetry is strongest where traits are universally held, such as in the case of sex and age. At other times, the zero-sum impact of protecting symmetrically is an affront to equality, justifying asymmetry. For example, disparate impact jurisprudence and some race-based measures under the Equal Protection Clause involve intrinsic zero-sum tradeoffs that may warrant asymmetric treatment. This Article thus defends asymmetrical approaches for disability and certain race-based measures, including affirmative action.²⁸ If the Holy Grail for antidiscrimination theory is a “coherent normative foundation upon which discrimination law can securely rest,”²⁹ the symmetry principle is one step further in the refinement of that goal.³⁰

This Article proceeds in four parts. Part I defines the symmetry principle and argues that symmetry is a defining feature of discrimination law.³¹ Part II

many influential advocates in recent years”); e.g., Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1341–55 (2012) (arguing in favor of “extra-discrimination remedies” that would protect everyone against discrimination); Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CALIF. L. REV. 1037, 1037–38 (1996) (arguing for class-based affirmative action to address the legacy of discrimination); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748–49 (2011) (defending a universalistic approach to the interpretation of the Fourteenth Amendment).

²⁷ Part I.C explains in detail the difference between symmetry and anticlassification (*infra* notes 94–121 and accompanying text), but one quick example illustrates the distinction. While disparate impact is in clear contradiction with anticlassification principles (since it requires people to be classified into racial groups, with liability hinging on how the statuses of those groups compare), disparate impact protects all groups, which makes the protection plainly symmetrical.

²⁸ See *infra* notes 273–308 and accompanying text.

²⁹ TARUNABH KHAITAN, *A THEORY OF DISCRIMINATION LAW* 6 (2015).

³⁰ That a coherent normative foundation is the Holy Grail for antidiscrimination theory is evidenced by the scores of books and articles that have been written to unearth such a foundation. See generally JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* (2014); DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* (2008); *PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW* (Deborah Hellman & Sophia Moreau eds., 2013); ROBERT POST ET AL., *PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW* (2001); ALEXANDER SOMEK, *ENGINEERING EQUALITY: AN ESSAY ON EUROPEAN ANTI-DISCRIMINATION LAW* (2011); Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes and Proxies*, 141 U. PA. L. REV. 149 (1992); Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Sophia Moreau, *What Is Discrimination?*, 38 PHIL. & PUB. AFF. 143 (2010); Sunstein, *supra* note 12 (proposing an “anticaste principle” as a foundational means to interpret equality).

³¹ See *infra* notes 35–121 and accompanying text.

examines and systematizes the strengths and weaknesses of symmetrical discrimination laws.³² Part III then explains how and under what circumstances an asymmetrical protectorate may better achieve equality.³³ Part IV briefly examines several laws, which are rightly or wrongly formulated and, in turn, considers what the symmetry principle may tell us about the future of the protectorate.³⁴

I. SYMMETRY AND ASYMMETRY IN ANTIDISCRIMINATION LAW

A. A Working Definition of Symmetry

The tenor of discrimination law is symmetry, which is illuminated through examination of the *design* of such measures. Generally, discrimination law prohibits certain acts, or mandates other acts, when they are connected to certain attributes or grounds.³⁵ Beyond that, there is a structural design choice when it comes to defining the protected class to encompass only one group or protecting “all people along a certain axis of identity.”³⁶ This puts *groups* and *grounds* at the center of how best to define the protectorate.³⁷

This Article defines a paradigmatically symmetrical approach to discrimination law as one where all *groups* within a *universal ground* are protected by the law. Conversely, a purely asymmetrical approach is one where only some *groups* within a *universal ground* are protected.

In a recent book, Professor Tarunabh Khaitan constructs a painstakingly theoretical defense of discrimination law.³⁸ While symmetry is not the focus of his book, he briefly posits that discrimination law is “largely asymmetrical” in that disadvantaged groups “benefit” or receive “greater protection” than relatively advantaged groups.³⁹ Khaitan thus characterizes discrimination laws as asymmetrical using an “as-applied” frame, or by focusing on the distributive effects of such laws.⁴⁰

This Article instead contends that the *facial* protection (or not) of certain groups is a better way of thinking about symmetry in the antidiscrimination

³² See *infra* notes 122–272 and accompanying text.

³³ See *infra* notes 273–309 and accompanying text.

³⁴ See *infra* notes 310–349 and accompanying text.

³⁵ KHAITAN, *supra* note 29, at 29.

³⁶ Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 464–65 (2006) (discussing the ADA’s rationale for protecting only those with disability, in comparison to Title VII, which protects all those discriminated against on the basis of sex or race).

³⁷ KHAITAN, *supra* note 29, at 62.

³⁸ See generally *id.* (fleshing out his theory of antidiscrimination law as based in groups and grounds distinctions).

³⁹ *Id.* at 61–62 (contending discrimination law is largely asymmetric).

⁴⁰ *Id.* at 40 (positing that discrimination law’s benefits are asymmetrically distributed among social groups).

context, and for several reasons. First, under Khaitan's theory, a law could never *really* be symmetrical since certain groups will always make more use than others of any particular discrimination law. Second, Khaitan's categorization of certain laws would require an empirical judgment about who is making the most use of certain protections; but his project is admittedly non-empirical.⁴¹ Moreover, determining whether certain groups make more use of certain laws would always be fraught with peril since there are different ways to think about deriving benefits from such laws. Would we measure the benefit derived by how many lawsuits certain groups file, what percentage of those cases get settled or won, or by analyzing the expressive benefits from such laws? Under Khaitan's formulation, there is no obvious bright-line means for determining whether a law is symmetrical or asymmetrical.

Further, to the extent we are concerned about the benefit or distributive effect of such laws, we should primarily be concerned with the *perceived* benefit or distributive effect.⁴² As Part III indicates, many benefits of symmetrical laws do not depend upon how such laws actually get used.⁴³ This is because while the people who are responsible for acting on antidiscrimination mandates will likely be informed about the basic provisions of discrimination laws, they are unlikely to have (or acquire) actual information about the probability of a lawsuit or other costs.⁴⁴ Accordingly, while it may be important (for expressive and tactical benefits) whether society in general, and employers in particular, *perceive* that certain groups make disproportionate usage of certain laws, "usage" or "benefiting" is a non-optimal basis for categorizing discrimination laws as symmetrical or asymmetrical.⁴⁵

Khaitan's aims are admittedly different, broader,⁴⁶ and he is not focused on analyzing symmetry in any systematic way. Still, thinking about the benefits and costs of symmetry establishes that facial—and not "as applied"—symmetry is a better basis for establishing a new normative theory. The next section will establish concretely that the symmetry principle is a defining feature of American antidiscrimination law.

⁴¹ *Id.* at 124 (stating his project is "theoretical rather than empirical").

⁴² Schoenbaum, *supra* note 14, at 91.

⁴³ *See infra* notes 273–309 and accompanying text.

⁴⁴ Schoenbaum, *supra* note 14, at 90–92.

⁴⁵ Even perceived usage can be difficult to judge, due to availability heuristics and always changing demographics. *See* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477 (1998) (explaining that the "availability heuristic" is misleading in that one's perceived frequency of an occurrence is based solely upon the ease of recalling similar occurrences).

⁴⁶ For example, he is looking at the law from five common law jurisdictions. KHAITAN, *supra* note 29, at 1–19.

B. Identifying Symmetry and Asymmetry

Symmetry is a firmly rooted principle in discrimination laws.⁴⁷ The most prominent illustration of the symmetry principle is Title VII of the Civil Rights Act of 1964 (Title VII).⁴⁸ Title VII protects people from employment discrimination on the basis of race, sex, color, religion, and national origin, and it generally does so for all groups within each of these universal grounds. Title VII's legislative history notes its intent to "cover white men and white women and all Americans"⁴⁹—an intent which has been demonstrated repeatedly in case law. For example, Title VII has been interpreted to prohibit race discrimination against majority group members,⁵⁰ sex discrimination against men,⁵¹ color discrimination against those who are white,⁵² and national origin discrimination against those born in America.⁵³

Even the one protection of Title VII that appears to be limited—religion—is *nearly* symmetrical in that it protects almost everyone from discrimination on that basis. The statute defines religion to include "all aspects of religious observance and practice, as well as belief."⁵⁴ But the EEOC defines religious practices to "include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious beliefs."⁵⁵ The result is that one is not required to be "religious" in any conventional way in order to be protected under Title VII. The law has been interpreted to protect white supremacists,⁵⁶ atheists,⁵⁷ and witches.⁵⁸ Title VII's protec-

⁴⁷ Cf. Corbett, *supra* note 14, at 689–91 (arguing the Civil Rights Act of 1991 created asymmetries in the proof structures for different discrimination laws).

⁴⁸ Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2012 & Supp. 2017)).

⁴⁹ 110 CONG. REC. 2578 (1964) (statement of Rep. Celler).

⁵⁰ McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 286 (1976) (rejecting the argument that white citizens are not protected by Title VII).

⁵¹ See, e.g., Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 78 (1998) (finding Title VII's protection against sex discrimination applies equally to men and women).

⁵² "Everyone is protected from race and color discrimination[:] Whites, Blacks, Asians, Latinos, Arabs, American Indians, Alaska Natives, Native Hawaiians, Pacific Islanders, persons of more than one race, and all other persons, whatever their race, color, or ethnicity." *Questions and Answers About Race and Color Discrimination in Employment*, EQUAL EMP'T. OPPORTUNITY COMM'N (May 16, 2006), https://www.eeoc.gov/policy/docs/qanda_race_color.html [<https://perma.cc/QB5T-P5L2>].

⁵³ See, e.g., Chaiffetz v. Robertson Research Holding, Ltd., 798 F.2d 731, 733 (5th Cir. 1986) (finding Title VII's prohibition of national origin discrimination applies to all nations, including the United States).

⁵⁴ 42 U.S.C. § 2000e(j).

⁵⁵ "Religious" Nature of a Practice or Belief, 29 C.F.R. § 1605.1 (2016).

⁵⁶ Peterson v. Wilmur Commc'ns, Inc., 205 F. Supp. 2d 1014, 1022 (E.D. Wis. 2002) (finding a group promulgating white supremacy and denying the Holocaust constituted a protected "religion").

⁵⁷ Reed v. Great Lakes Cos., 330 F.3d 931, 934 (7th Cir. 2003) (finding that under Title VII "'religion' includes antipathy to religion.").

⁵⁸ See generally Van Koten v. Family Health Mgmt., Inc., 134 F.3d 375 (7th Cir. 1998) (treating Wicca as protected under "religion").

tion of religion is thus, with few exceptions,⁵⁹ symmetrical. In much the same way, the Equal Pay Act⁶⁰ protects both men and women,⁶¹ and Section 1981, which forbids race discrimination in the making of contracts, protects people of all races.⁶²

The most recent statutory instantiation of the symmetry principle is the Genetic Information Nondiscrimination Act (GINA).⁶³ This statute makes it illegal to discriminate against applicants, employees, and former employees on the basis of genetic information.⁶⁴ GINA covers all forms of genetic information, and because every individual has a genetic makeup, GINA effectively covers everyone.⁶⁵

Symmetry is such a strong norm that it sometimes appears unexpectedly. For instance, it might seem intuitive that under the Americans with Disabilities Act (ADA)⁶⁶ only some people have legally-cognizable disabilities, making the statute asymmetrical.⁶⁷ To be entitled to rights under the ADA, one must

⁵⁹ Generally speaking, “religion” does *not* protect those with a belief system that is purely personal, political, social, idiosyncratic, and/or too informal. MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 256–58 (1988); *see* Am. Postal Workers Union v. Postmaster Gen., 781 F.2d 772, 777 (9th Cir. 1986) (finding postal worker’s strong opposition to war a religious belief); *Wessling v. Kroger Co.*, 554 F. Supp. 548, 552 (E.D. Mich. 1982) (finding participation in preparing for a play in a church hall was social and not religious); *Brown v. Pena*, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977) (finding that eating cat food was not a religious practice because it was not a belief “based on a theory of ‘man’s nature or his place in the Universe’”).

⁶⁰ Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (2012)).

⁶¹ Though the Equal Pay Act (EPA) was created to address the lesser bargaining power of female employees, the language of the EPA applies equally to men and women. Basic Applicability of the Equal Pay Act, 29 C.F.R. § 1620.1(c) (2017).

⁶² 42 U.S.C. § 1981; *McDonald*, 427 U.S. at 286 (rejecting the argument that white citizens are not protected by 42 U.S.C. § 1981).

⁶³ Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (codified as amended in scattered sections of 26, 29, 42 U.S.C.).

⁶⁴ 42 U.S.C. § 2000ff-1.

⁶⁵ Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 986 (2012).

⁶⁶ American with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012 & Supp. 2017)).

⁶⁷ This Article treats the Americans with Disabilities Act as asymmetrical, even though the 2008 ADA Amendments Act (ADAAA) moved the statute *closer* to protecting all groups. Under the Amendments, the statute now explicitly provides that a “regarded as” plaintiff need only prove an employer made an adverse employment decision due to the plaintiff’s real or perceived impairment; there is now no requirement, as there once was under the ADA, that the employer regard the impairment as sufficiently serious or stigmatizing. *See* 42 U.S.C. § 12102(3)(A) (“An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”). This change to the “regarded as” prong means that almost anyone who believes they have experienced discrimination can bring a discrimination claim under the ADA. *See id.* Professor Michelle Travis has observed that we might now describe the “‘regarded as’ prong as a form of legal protection for individuals *without* disabilities.” Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937, 998 (2012).

generally be a person with a disability, have a record of a disability, or be regarded as having a disability.⁶⁸ These protections facially apply to only certain groups.

The ADA, however, (like most antidiscrimination statutes) contains symmetrical protections for association,⁶⁹ mistaken perception,⁷⁰ and retaliation.⁷¹ These protections serve all groups. So under the ADA, individuals *without disabilities* are protected from discrimination due to a mistakenly perceived disability,⁷² because of their relationship with someone who is disabled,⁷³ or for opposing conduct that violates the statute.⁷⁴ The ADA also protects individuals without disabilities through provisions prohibiting or limiting the use of medical examinations at certain times in the job application process.⁷⁵

Even seemingly asymmetrical statutes may belie their core commitment to symmetry. For example, the Pregnancy Discrimination Act (PDA)⁷⁶ amended Title VII to redefine the terms “because of sex” and “on the basis of sex” to

⁶⁸ 42 U.S.C. § 12101(a)(1).

⁶⁹ *E.g.*, *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892–93 (11th Cir. 1986) (holding discrimination because of an interracial marriage or interracial association was, in essence, discrimination based on race).

⁷⁰ *E.g.*, *Arsham v. Mayor of Balt.*, 85 F. Supp. 3d 841, 848 (D. Md. 2015) (holding employer’s action based on employer’s perception that plaintiff was Indian or Native American, even though he was not, served as proper basis for a Title VII claim); *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1299–1300 (11th Cir. 2012) (holding that “a harasser’s use of epithets associated with a different ethnic or racial minority than the plaintiff[s] will not necessarily shield an employer from liability for a hostile work environment” where an African-American employee was referred to as a Native American); *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 401 (5th Cir. 2007) (finding a party may claim national origin discrimination even if the discrimination does not accurately identify their true national origin); *Estate of Amos ex rel. Amos v. City of Page*, 257 F.3d 1086, 1094 (9th Cir. 2001) (interpreting Section 1983 to allow a claim against a municipality for discrimination based on the mistaken assumption that a plaintiff was Native American).

⁷¹ All antidiscrimination statutes include protections against retaliation for taking steps to enforce the statutes. These protections typically include retaliation armor for opposing a practice one believes to be unlawful, filing a charge, or participating in an investigation, proceeding, or hearing. *E.g.*, 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. §§ 2000e-3(a), 12203 (Title VII and ADA, respectively).

⁷² *See* Travis, *supra* note 67, at 948–49 (discussing how courts required proof of an employers’ mistaken perception under the “regarded as” prong). *But see* Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U.L. REV. 101, 132–35 (2017) (chronicling how the ADA’s “regarded as” prong has been ineffective).

⁷³ 42 U.S.C. § 12112(b)(4) (2012) (defining discrimination to include “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association”); *e.g.*, *Barker v. Int’l Paper Co.*, 993 F. Supp. 10, 15–16 (D. Me. 1998) (holding that nondisabled employee set forth an ADA retaliation claim by claiming he was fired for seeking accommodation for his disabled wife).

⁷⁴ 42 U.S.C. § 12203(a) (prohibiting discrimination against anyone who opposes unlawful conduct—defined by the ADA—or participates in any ADA “investigation, proceeding, or hearing”).

⁷⁵ 42 U.S.C. § 12112(d).

⁷⁶ Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)).

explicitly include pregnancy, childbirth, or related medical conditions.⁷⁷ Under the PDA, an employer cannot use pregnancy as a reason to fire a worker, cut pay, or deny health benefits. While only one group of workers (women) is protected under this amendment to Title VII, the PDA exists to ensure women are covered equitably under “sex.”⁷⁸ To the extent that the PDA is merely ensuring complete coverage under a category (sex) that is symmetrical, the PDA is furthering symmetry.

Symmetry is also exemplified in the way the Supreme Court interprets and applies the Equal Protection Clause of the U.S. Constitution. State action is subject to differing levels of scrutiny (strict, intermediate, or rational basis) depending upon the ground, but the level of scrutiny does not change based on the particular group implicated.⁷⁹ For example, there is only one level of scrutiny for race. As a result, whether a law directly impacts Native Americans or Whites or Blacks, courts scrutinize the action *strictly*—and they do so whether the motivation for the state action is hostile, benign, or neither.⁸⁰

In *Regents of the University of California v. Bakke*, the Court reasoned that attempting to apply different levels of judicial review to different races was a nonstarter.⁸¹ In holding that all races must receive the same level of judicial scrutiny, the Court noted that there was no principled basis for deciding which groups merited “heightened judicial solicitude.”⁸² In particular, the Court said that trying to evaluate the extent of bias suffered by various groups would be an exercise in sociological and political analysis, which falls outside the realm of judicial competence.⁸³ The Court asserted that its role is to discern principles that are “sufficiently absolute to give them roots throughout the community and continuity over significant periods of time.”⁸⁴ In much the same way, the breadth of the symmetry principle gives social and temporal stability to antidiscrimination measures. For example, the universal scope of the protectorate under a statute like GINA is not just responsive to the concerns of particular places and times, but will have traction and continuity over a period of time—and even as there are advances in our knowledge of the human

⁷⁷ *Id.*

⁷⁸ See Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187, 1203–04 (2016) (citing the Pregnancy Discrimination Act as one example of Congress’s attempt to ensure equal opportunities for historically disfavored groups, such as women).

⁷⁹ *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (applying strict scrutiny to all race- or national origin-based claims, regardless of which race or national origin is implicated).

⁸⁰ Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 397–98 (1989) (observing we must approach state action with the same “presumptions, suspicions, and level of scrutiny,” regardless of the group advantaged and independent of the reason for the law).

⁸¹ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 294–96 (1978).

⁸² *Id.* at 296.

⁸³ *Id.* at 297.

⁸⁴ *Id.* at 299 (quoting ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 114 (1976)).

genome. Although some groups may have a greater need for antidiscrimination protection than other groups, under a symmetrical approach, all groups are protected.

Asymmetry is sometimes still found in U.S. discrimination laws; the Age Discrimination in Employment Act (ADEA),⁸⁵ which protects only those over the age of forty, is the most paradigmatic case. Under the ADEA, there is an asymmetry in coverage between those who are under, and over, the age of forty even though we all have an age. The design of the statute was intended to be inclusive toward relatively older groups and exclusive toward relatively younger groups.

The doctrine of affirmative action is also fundamentally asymmetrical. Whether voluntarily adopted or court imposed, affirmative action plans are directed only at groups that have been previously excluded by a company or within an industry.⁸⁶ The idea is that a company may take “affirmative action” pursuant to a plan or program to remedy past exclusion. The steps may be designed as “race, color, sex or ethnic ‘conscious,’” and may include special recruitment programs or preference methods that give certain groups priority in hiring.⁸⁷ Still, affirmative action is—except in the context of government contractors⁸⁸ or a court order⁸⁹—a non-mandatory and thus less prominent feature of the antidiscrimination landscape.

The symmetry principle does not rely on a rigid binary distinction between symmetry and asymmetry; I have defined the two, not all antidiscrimination measures will slot squarely into one category or the other. The starting point for analyzing the remainder of antidiscrimination measures is the recognition that not all grounds are universally held. For example, only some people have qualifying military service under the Uniformed Services Employment and Reemployment Rights Act (USERRA),⁹⁰ a legally-cognizable disability under the ADA, or a medical or familial situation that would precipitate a right to leave under the Family and Medical Leave Act (FMLA).⁹¹ We might intuitively call such statutes asymmetrical, but they are not very exclusive; while

⁸⁵ Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (2012 & Supp. 2017)).

⁸⁶ Establishing Affirmative Action Plans, 29 C.F.R. § 1608.4(a)–(b) (2017).

⁸⁷ *Id.* § 1608.4(c).

⁸⁸ General Purpose and Contents of Affirmative Action Programs, 41 C.F.R. § 60-2.10(c) (2017) (requiring contractors to keep and “make available” records of affirmative action compliance).

⁸⁹ 42 U.S.C. § 2000e-5(g)(1) (noting that if a court finds an employer has intentionally discriminated, the court may “order such affirmative action as may be appropriate”).

⁹⁰ Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 108 Stat. 3149 (codified as amended at 5 U.S.C. § 8432b and 38 U.S.C. §§ 4301–4333 (2012 & Supp. 2017)).

⁹¹ Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 5 U.S.C. §§ 6381–6387 and 29 U.S.C. §§ 2601, 2611–2619, 2631–2636, 2651–1654 (2012)).

not everyone *has* a right to nondiscrimination on the basis of leave taken or military service, not everyone *needs* these rights.

In such cases, the exclusionary effect is muted since most non-universal grounds may either be chosen or will be held eventually. For example, many people have the capacity to choose military service or to adopt or foster a child, and take leave from work. Were someone to make those choices, they would be protected from discrimination under USERRA or FMLA, respectively. Alternatively, we will all be protected on the basis of age (under the ADEA) if we live to the age of forty, and on the basis of disability (under the ADA), if we live long enough.⁹² This dampens any exclusion under these regimes since it means that very few are born into a world where they are necessarily excluded from the protective contour of these statutes. The parsing out of the definition of the symmetry principle, and its pervasiveness throughout the corpus of discrimination law, indicates how antidiscrimination laws are fundamentally inclusive—even in cases where they are not purely symmetrical.

At its base, the symmetry principle is a code of inclusion. Once a state or federal legislature has settled on a trait or characteristic that should be off limits for certain types of distributional decisions (in domains such as housing, employment, or education) the symmetry principle means that all are included, and none are excluded, in the extension of that protection.⁹³ Of course, in practice, some groups will partake more than others in certain types of protections. But when it comes to the opportunistic structure of antidiscrimination law, the symmetry principle means that all are protected under the law in the pursuit of certain types of opportunities.

C. Symmetry as Unique Design Compromise

Symmetry may be seen as a design compromise between group-consciousness and universalism in fashioning laws to prevent and rectify subordination. On one end of the spectrum are group-conscious or targeted approaches which are typically focused on challenging the oppression of historically oppressed groups.⁹⁴ Group-conscious approaches embrace both *grounds*

⁹² Nearly everyone will eventually be disabled since the prevalence of impairments increase as one ages. Bradley A. Areheart, *GINA, Privacy, and Antisubordination*, 46 GA. L. REV. 705, 716 (2012). Consider that 13% of people ages twenty-one to sixty-four have a disability, but 53% of persons over age seventy-five have a disability. PAUL T. JAEGER, *DISABILITY AND THE INTERNET: CONFRONTING A DIGITAL DIVIDE* 18 (Ronald J. Berger ed., 2012).

⁹³ While this may sound reminiscent of the anticlassification principle, symmetry is different as is explained in Part I.C. See *infra* notes 94–121 and accompanying text.

⁹⁴ Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1472–73 (2004). Cass Sunstein has similarly argued against certain types of stereotyping by observing that “the most elementary antidiscrimination principle singles out one kind of economically rational stereotyping and condemns it, on the theory

and *groups*, but dispense with formal equality on the theory that disadvantaged classes are not similarly situated to privileged classes.⁹⁵ In practice, this may mean that a particular group should be treated more favorably than a more privileged class to remedy a lack of opportunities.⁹⁶ Targeted approaches encourages policy-makers to address the structural effects of discrimination by implementing certain asymmetrical practices, such as affirmative action or reparations, which stand to effect the distribution of resources.⁹⁷ Group-conscious approaches have the virtue of efficiently and transparently attempting to aid or shelter certain groups, who are often the people who need it most.

On the other end of the spectrum are universalist approaches, which ignore both *groups* and *grounds*, and instead guarantee certain rights or benefits to “a broad group of people not defined according to the identity axes . . . highlighted by our antidiscrimination laws.”⁹⁸ Over the last twenty years, numerous esteemed scholars have advocated for universal workplace protections to address certain beleaguering issues of discrimination. For instance, scholars have sought expansion of sexual harassment jurisprudence to cover all forms of harassment.⁹⁹ Theorists have also proposed expanding leave policies to extend beyond family responsibilities.¹⁰⁰ Even more broadly, some scholars have ar-

that such stereotyping has the harmful long-term consequence of perpetuating group-based inequalities.” Sunstein, *supra* note 12, at 2418.

⁹⁵ Areheart, *supra* note 65, at 963–64.

⁹⁶ *Id.* at 964.

⁹⁷ See Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1398–99 (1991) (noting strategies such as affirmative action, reparations, and restrictions of hate speech all “recognize that ours is a non-neutral world in which legal attention to past and present injustice requires rules that work against the flood of structural subordination”).

⁹⁸ Bagenstos, *supra* note 26, at 2842.

⁹⁹ See, e.g., Brady Coleman, *Shame, Rage and Freedom of Speech: Should the United States Adopt European “Mobbing” Laws?*, 35 GA. J. INT’L & COMP. L. 53, 62–63 (2006); William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 96 (2003); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 3–6 (1999); Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73, 75 (2001); Susan Harthill, *The Need for a Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act*, 78 U. CIN. L. REV. 1250, 1253 (2010); David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL’Y J. 251, 253 (2010).

¹⁰⁰ See, e.g., Chai R. Feldblum, *Policy Challenges and Opportunities for Workplace Flexibility: The State of Play*, in WORK-LIFE POLICIES 251, 270 (Ann C. Crouter & Alan Booth eds., 2009); Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1108–12 (2010); Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1765–66 (2001); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 181–87 (2001); Deborah L. Rhode, *Balanced Lives*, 102 COLUM. L. REV. 834, 835 (2002); Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1882–86 (2000).

gued that vulnerability is a universal part of the human experience and the state should develop structures to address the disadvantage that accompanies vulnerability.¹⁰¹

Universalist solutions to discrimination have several advantages. They may avoid political backlashes and help ensure broad judicial implementation.¹⁰² They may also help avert what Professor Kenji Yoshino has termed “pluralism anxiety,” in which people are anxious about our increasing demographic diversity.¹⁰³ Yoshino notes that speaking of rights in a “universal register” can help prevent our further breaking up into “fiefs” that do not communicate.¹⁰⁴

Symmetry offers a compromise between antidiscrimination policies that are narrowly tailored to a specific group (e.g., protecting only African Americans or women) and those that create generic rights (e.g., requiring termination be for “just cause”). The benefits of this compromise will be explored further in Part II, but it is worth preliminarily sketching them here.

On the one hand, the symmetry principle retains the moorings of identity just like targeted approaches. This affirms the social salience of identity and allows for some tailoring, which can, for tactical reasons, make such laws more effective.¹⁰⁵ Symmetry also avoids creating generic or universal rights that either do not align well with the harms suffered by specific groups or require assimilation into existing forms of privilege.¹⁰⁶ Symmetry, like group-consciousness and unlike universalism, also facilitates the invocation of rights. Such invocations are powerful: they raise people’s consciousness regarding particular social issues,¹⁰⁷ they change what employers feel they must provide and what employees feel they deserve from employers,¹⁰⁸ and they change how corporate counsel advise clients to avoid liability.¹⁰⁹

On the other hand, symmetry harnesses many of the benefits of universal approaches. Symmetry is broad enough to foster a sense of solidarity, not back-

¹⁰¹ Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 1, 19–22 (2008). See generally Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 WASH. L. REV. 513 (2008) (applying Fineman’s theory to disability).

¹⁰² Bagenstos, *supra* note 26, at 2847–50.

¹⁰³ Yoshino, *supra* note 26, at 751.

¹⁰⁴ See *id.* at 747, 792–93.

¹⁰⁵ See, e.g., *infra* notes 181–200 and accompanying text (referring to Part II.B.2, “Goodwill and Dilution,” which details how more targeted antidiscrimination initiatives may avoid diluting the goodwill available for such measures).

¹⁰⁶ See *infra* notes 151–154 and accompanying text.

¹⁰⁷ Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77, 114 (2003).

¹⁰⁸ *Id.* at 121.

¹⁰⁹ *Id.*

lash, when it comes to fighting certain types of bias.¹¹⁰ Symmetry, like universalism, emphasizes people's commonalities rather than their differences.¹¹¹ Symmetry also aids with matters of proof, where narrowly tailored measures often result in a heavy dose of protected class gatekeeping.¹¹² Further, symmetry avoids the negative distributive effects (namely hurting labor market participation) that sometimes accrue to group-conscious approaches.¹¹³ Finally, symmetrical protections allow a more complete challenge to stereotypes, where more targeted protections may not.¹¹⁴

As noted in the Introduction, the symmetry principle is not coextensive with existing theories, though it overlaps in times and places with anticlassification.¹¹⁵ Still, the vision of symmetry is altogether unique. Under the anticlassification principle, institutions ought to make decisions without regard to certain characteristics, much like when orchestras hold auditions with the musician separated by a screen to ensure the performance is only evaluated based on musical merit.¹¹⁶ The anticlassification model is intended to "blind" our ability, over time, to meaningfully distinguish certain traits by prohibiting the very consideration of those traits—ideally resulting in a culture that is, for example, colorblind, sex-blind, or genome-blind.¹¹⁷

Symmetry has a different theoretical aim than anticlassification because it does not aspire to blindness. For example, Title VII protects sex symmetrically and robustly. The evolved vision of Title VII is not that we should ignore sex and its gendered performativity, but instead that we should be suspicious of all gendered practices. In other words, we should spotlight sex and gender in order to treat concomitant stereotypes with skepticism.¹¹⁸

¹¹⁰ See *infra* notes 163–180, 201–213 and accompanying text (referring to "Interest Convergence" and "Backlash").

¹¹¹ See *infra* notes 133–140 and accompanying text (referring to "Commonality and Solidarity").

¹¹² See generally Clarke, *supra* note 72 (discussing how protected class gatekeeping undermines the goals of antidiscrimination laws).

¹¹³ See *infra* notes 256–268 and accompanying text (referring to "Distributive Effects").

¹¹⁴ See *infra* notes 237–255 and accompanying text (referring to "Challenging Stereotypes").

¹¹⁵ Various scholars have used antidiscrimination to mean anticlassification. See, e.g., Brest, *supra* note 30, at 1; Fiss, *supra* note 24, at 108. I, however, have used the word "antidiscrimination" as a holistic term that refers to the general purposes underlying antidiscrimination law. See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003) ("In hindsight, [Fiss's] . . . choice of words was quite unfortunate, because there is no particular reason to think that antidiscrimination law or the principle of antidiscrimination is primarily concerned with classification or differentiation as opposed to subordination and the denial of equal citizenship. Both antisubordination and anticlassification might be understood as possible ways of fleshing out the meaning of the antidiscrimination principle, and thus as candidates for the 'true' principle underlying antidiscrimination law.").

¹¹⁶ Clarke, *supra* note 72, at 143 (citing Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 716 (2000)).

¹¹⁷ Areheart, *supra* note 65, at 963.

¹¹⁸ I thank Jessica Clarke for raising this point.

Symmetry also diverges doctrinally in that some antidiscrimination approaches require us to consider and classify on the basis of traits (an affront to anticlassification), but the protections they extend apply to all groups (and are thus symmetrical). For example, Title VII contains a cause of action for disparate impact, which provides recourse when a facially neutral standard or practice has a disproportionate impact on one group when it comes to hiring, firing, or promotion. Disparate impact requires people to be classified into racial groups, with liability hinging on how the statuses of those groups compare; such classification is a clear affront to the anticlassification principle.¹¹⁹ Disparate impact, however, also protects all groups, making the protection plainly symmetrical.¹²⁰

Similarly, Title VII's solution to the problem of religious discrimination is not simply to force employers to ignore religious beliefs. Instead, the statute goes beyond the anticlassification principle to require employers be religion-conscious at times by accommodating religious practices. At the same time, because "religion" has been defined so broadly, encompassing atheists and white supremacists and nearly everyone, the right to religious accommodations is in harmony with the symmetry principle.¹²¹ Symmetry does not prescribe the form of protection (and in particular, whether it "classifies" or not), making it a principle that wholly encompasses, and is more fulsome than, anticlassification.

II. THE CASE FOR SYMMETRY

This Part makes the case for symmetry as a customary feature of the anti-discrimination landscape. Symmetry combines many of the strengths of anti-

¹¹⁹ Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 508 (2003) ("If the substance of an express racial classification is an express command that people be classified by race, then Title VII's disparate impact provision surely qualifies.").

¹²⁰ *E.g.*, *Meditz v. City of Newark*, 658 F.3d 364, 367 (3d Cir. 2011) (allowing white plaintiff to challenge city residency requirement that had disparate impact on non-Hispanic white applicants); *Craig v. Ala. State Univ.*, 804 F.2d 682, 688 (11th Cir. 1986) (upholding disparate impact claim by white applicant where historically black university staff was already mostly black due to hiring preference program); *Ferrell v. Johnson*, No. 4:09-CV-40, 2011 WL 1225907, at *5 (E.D. Tenn. Mar. 30, 2011) (rejecting defendant's argument that white plaintiff could not advance a disparate impact claim under Title VII); *Johnson v. Metro. Gov't of Nashville & Davidson Cty.*, Nos. 3:07-0979, 3:08-0031, 2008 WL 3163531, at *6 (M.D. Tenn. Aug. 4, 2008) (noting white male plaintiffs "convincingly argue[d]" disparate impact claim); *Hannon v. Chater*, 887 F. Supp. 1303, 1316–18 (N.D. Cal. 1995) (evaluating, and not dismissing out of hand, disparate impact claim by white male plaintiff); *see also* e. christi cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 448–49 (1998) (observing disparate impact protects white male employees). *But see* *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252–53 (10th Cir. 1986) (rejecting a claim that a maximum height restriction had a disparate impact on men while observing men were not a "historically disfavored group").

¹²¹ *Supra* notes 54–59 and accompanying text.

classification, antisubordination, antibalkanization, and universalism.¹²² Professor Sam Bagenstos has recently outlined a model set of concerns (*Expressive*, *Tactical*, and *Substantive*) that might be analyzed in considering *how* best to address discriminatory harms.¹²³ This Part evaluates the arguments for and against symmetry under the same headings. *Expressive* concerns are examined through the messages a symmetrical law sends to the public. *Tactical* concerns address symmetry's role in currying political goodwill and avoiding political backlash. *Substantive* concerns explore how the symmetrical design of the protectorate may be an effective policy tool for addressing injustice. Though addressed separately, there is no impermeable boundary between these categories of analysis.¹²⁴

The strengths and weaknesses outlined in this Part are theoretical.¹²⁵ Any particular policy must be analyzed in context to determine whether it will yield certain advantages or disadvantages.¹²⁶ Accordingly, it is impossible to conclude in the abstract that symmetrical protections are better than asymmetrical ones, or vice versa. An asymmetrical policy may make more sense if the harms are one-sided (as they often are in the case of disability or race), and the polity is willing to accept the risks of essentialism.¹²⁷ Accordingly, the strengths and weaknesses outlined below are presumptive but may be rebutted by a contextual examination of specific initiatives.

A. Expressively

Symmetry has several expressive advantages. By expressive, I am referring to the fact that laws do more than secure material rights and deter certain behaviors.¹²⁸ Rather, they reflect social values and send messages to the public about both *what* society should value and *how* the relevant subject should be valued.¹²⁹ Laws are constitutive of who we are,¹³⁰ as well as pervasively ex-

¹²² For example, symmetry captures some of the advantages of universalism, such as avoiding dangerous political dynamics and protecting a broad swath of citizens. But unlike universalist solutions, it avoids the dilution of rights through keeping grounds salient.

¹²³ See generally Bagenstos, *supra* note 26 (evaluating the arguments for and against universalism by examining Tactics, Substance, and Expressivism).

¹²⁴ For example, an *expressive* dimension of symmetry may well influence a *tactical* dynamic, which in turn helps or hurts the *substantive* effectiveness of the law.

¹²⁵ Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1240 (2011) (making a similar observation about universalism).

¹²⁶ *Id.*

¹²⁷ See *infra* notes 273–309 and accompanying text (referencing Part III which further explains where asymmetrical protections are sensible).

¹²⁸ See generally RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* (2015) (discussing the law's capacity to do more than punish, legitimize, or deter).

¹²⁹ See generally Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504–06 (2000); Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 43 (2002); Lawrence Lessig, *The New Chicago*

pressive.¹³¹ While determining the expressive meaning of a particular measure is unavoidably complex,¹³² it is worthwhile to consider the expressive potential of antidiscrimination measures, especially since such expressions may impact social norms and overall support for the law.

1. Commonality and Solidarity

One expressive benefit of symmetry in law is its emphasis on people's commonalities rather than their differences.¹³³ Naturally, this can help build solidarity on particular issues.¹³⁴ For example, a contributing factor in building support in the U.S. around the immorality of race discrimination in the 1960s was the sense that *all* race discrimination—whether it was against blacks, whites, or Hispanics—was wrong. Symmetry as a principle of antidiscrimination signals that we are not fundamentally different. Instead, we all have complex identities and certain features of those identities (such as race or sex or genetic coding) are always protected from discrimination.

Here, we might consider Professor Reva Siegel's work on antibalkanization, an approach under which legal interventions should be designed to promote solidarity and social cohesion.¹³⁵ Even though antibalkanization may sometimes support race-conscious asymmetry, Siegel argues such interventions are only justified when they are formulated to affirm commonality and minimize the appearance of partiality.¹³⁶ When protections are targeted toward one specific group, they may send the message "that we should think of ourselves as defined by our membership in particular, socially salient groups."¹³⁷

Another scholar has argued for broader protection from harassment.¹³⁸ When the law focuses on sexual harassment as women's problem it misses the fact that "workplace harassment, sexualized or nonsexualized, injures the dig-

School, 27 J. LEGAL STUD. 661, 662–72 (1998); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–25 (1996) (exploring "the function of law in 'making statements' as opposed to controlling behavior directly").

¹³⁰ Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109–13 (1984) (writing on "[l]aw as [c]onstitutive of [c]onsciousness").

¹³¹ Anderson & Pildes, *supra* note 129, at 1504; Geisinger, *supra* note 129, at 40–41.

¹³² Anderson & Pildes, *supra* note 129, at 1504 (acknowledging the complexity of determining "expressive meaning").

¹³³ *E.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part) ("To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.").

¹³⁴ Advocates of universalist measures have made a similar argument in favor of such approaches. Bagenstos, *supra* note 26, at 2864.

¹³⁵ Siegel, *supra* note 25, at 1280–86.

¹³⁶ *Id.* at 1302, 1354, 1358–59.

¹³⁷ Bagenstos, *supra* note 26, at 2864.

¹³⁸ Ehrenreich, *supra* note 99, at 4.

nitary interests of individual harassment victims, regardless of their sex and regardless of the sex of their harassers.”¹³⁹ Therefore, harassing female employees is unethical not due to their sex, but their status as humans.¹⁴⁰

The symmetry principle is a consistent signal that antidiscrimination protections advance the *human* cause—but without the drawbacks, which will be explained below, of a universal frame. Symmetry affirms the dignitary interests of all groups without the need to say whose rights are more important. Finally, symmetry encourages people to think of themselves as part of a broad group with a shared and noncompetitive interest in nondiscrimination.

2. Ground Salience and Rights Talk

A second expressive benefit of symmetry is that it retains the moorings of antidiscrimination categories, such as disability, race, sex, and age. There is a trend to dispense with such grounds and create “generic rights.”¹⁴¹ Scholars have advanced universalist approaches to Equal Protection,¹⁴² voting,¹⁴³ workplace accommodations,¹⁴⁴ and employment discrimination.¹⁴⁵ But grounds or classes of identity serve important social functions, including “rights talk,” the discourse that determines how society understands civil rights.¹⁴⁶ Claiming rights can inspire structural changes “in complex and iterative ways” beyond the courtroom.¹⁴⁷

There are at least two risks to identity-neutral, or “generic,” rights. First, generic rights may not redress—or may actually worsen—the specific harms

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Clarke, *supra* note 125, at 1220, 1245–46.

¹⁴² See Yoshino, *supra* note 26, at 748–49 (arguing for a shift from group-based equality claims to universal liberty-based claims).

¹⁴³ Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 100, 119 (2013) (proposing “smart disclosure” regime that would apply to all voting changes); Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741, 743–44 (2006) (defending a universalist approach to voting rights).

¹⁴⁴ Michael Ashley Stein, Anita Silvers, Bradley A. Areheart & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 693 (2014) (arguing for an ADA-type reasonable accommodation mandate to apply to all work-capable members of the general population for whom accommodation is necessary to enable their ability to work); see SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 53–54 (2009); Arnow-Richman, *supra* note 100, at 1108–12.

¹⁴⁵ Eyer, *supra* note 26, at 1341 (arguing for “extra-discrimination remedies” to address discriminatory conduct in the workplace).

¹⁴⁶ I borrow the term “rights talk” here from Mary Ann Glendon. See generally MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991) (stressing the importance of “overcoming our disdain for politics,” accepting responsibility for social progress, and embracing an inclusive approach to the ongoing discourse of civil rights in the United States).

¹⁴⁷ Williams & Segal, *supra* note 107, at 121; see Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C. L. REV. 401, 405–06 (1987) (defending the language of rights for people of color as empowering and useful).

suffered by certain groups. For instance, a universal right to workplace leave may be politically palatable and help normalize leave. It may actually widen the gender gap, however, if men and women make different uses of such leave. Some scholars have long observed that women often use workplace leave to take care of family, while men often use the time to make themselves better workers.¹⁴⁸

Similarly, providing universal redress for harassment or bullying may not accurately address the harms suffered by women. While women are often seen as prototypical victims of sexual harassment, employers and courts may apply different standards for men and women when it comes to what constitutes “general” bullying. For example, social scientists and legal scholars have long contended that aggression in the workplace is a virtue for men and a liability for women.¹⁴⁹ If aggression is normative for men, people may apply a lower threshold when it comes to what constitutes bullying or harassment by women. Accordingly, generic anti-bullying rules may not only fail to help women but may instead cast them unexpectedly into the position of bully.¹⁵⁰

Second, generic rights may undermine the goal of equality by requiring assimilation into “the mold of the privileged group.”¹⁵¹ For example, under the Texas Ten Percent Plan, which guarantees seniors in the top ten percent of their high school classes admission to any public university in Texas,¹⁵² class rank is a facially neutral standard. The underlying economic and cultural differences that help shape one’s educational opportunities prior to high school, however, are not neutral.¹⁵³ In other words, the opportunity under a policy like this requires assimilation into the mold of what privileged groups are doing to help

¹⁴⁸ Clarke, *supra* note 125, at 1275–77; Joan C. Williams, *Reconstructive Feminism: Changing the Way We Talk About Gender and Work Thirty Years After the PDA*, 21 YALE J.L. & FEMINISM, 79, 89 (2009).

¹⁴⁹ See JOYCE K. FLETCHER, DISAPPEARING ACTS: GENDER, POWER, AND RELATIONAL PRACTICE AT WORK 107–112 (2001); JUDITH LORBER, PARADOXES OF GENDER 236–44 (1995); Alice H. Eagly et al., *Gender and the Evaluation of Leaders: A Meta-Analysis*, 111 PSYCHOL. BULL. 3, 18 (1992) (concluding women tend to be devalued in leadership capacities when those duties are carried out in ways that are stereotypically masculine).

¹⁵⁰ Professor Jessica Clarke notes there is already a tendency in the media to paint women as prototypical workplace bullies. Clarke, *supra* note 125, at 1253–54.

¹⁵¹ *Id.* at 1246.

¹⁵² Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C. L. L. REV. 245, 253–62 (1999).

¹⁵³ While it might be tempting to view class rank as the natural outcome of inherent academic talent, all behavioral outcomes are a delicate and multi-faceted composition. See FISHKIN, *supra* note 30, at 94–104. According to Fishkin, any physiological aptitude must be activated by a person’s environment, which encompasses everything from parents to one’s economic class to one’s interactions with a social world not blind to difference. *Id.* at 94–95. So when we question how it is that someone has achieved the status of, for example, “top ten percent,” the answer is that there has been “a multi-staged, ‘iterative process of interaction between a person and her environment.’” *Id.* at 104.

their children advance educationally. Even if the legal rule is blind to difference, the economy of opportunities is not.¹⁵⁴

Symmetry offers a compromise between antidiscrimination policies that are narrowly tailored to a specific group and those that would abandon the moorings of identity by creating generic rights. On the one hand, the symmetry principle makes grounds less prominent than group-conscious approaches, by encompassing all groups. On the other hand, symmetry retains the protected class moorings of identity, unlike universal approaches. Group-conscious approaches evoke Chief Justice Harry Blackmun's view that "[i]n order to get beyond racism, we must first take account of race [I]n order to treat some persons equally, we must treat them differently."¹⁵⁵ Universal approaches summon to mind Chief Justice Roberts statement that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."¹⁵⁶ In this context, symmetry strikes a balance between making race too salient and not salient enough. It calls neither for people to ignore race, nor for differential treatment. Symmetry might thus be seen as a middle ground to approaching the social salience of grounds.

Symmetry also facilitates the discourse of rights, where universal approaches do not. If the goal of discrimination law is social change on behalf of subordinated groups, we must not overlook opportunities to effect "norm cascades" through the language of rights.¹⁵⁷ Universal approaches simply do not—beyond the most general appeals—provide the same opportunities for rights talk.

3. Objections

One objection to the expressive strengths outlined above is that symmetry may attenuate the message. Many times, we are not attempting to say that a particular type of discrimination is wrong; rather, that a particular group has been subordinated and that the law ought to do something about the subordination. For example, when the Supreme Court was asked in *General Dynamics Land Systems, Inc. v. Cline* to consider whether the ADEA covered younger workers, or only those over forty, the Court did not spend any time assessing the unitary wrongness of age discrimination.¹⁵⁸ Age discrimination was wrong,

¹⁵⁴ Clarke, *supra* note 125, at 1246.

¹⁵⁵ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

¹⁵⁶ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion).

¹⁵⁷ See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996) (arguing social norms are "fragile" and that successful norm change can lead to "norm cascades," which involve rapid shifts in social mores).

¹⁵⁸ *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594–96 (2004).

according to the Court, when it had a tendency to subordinate workers.¹⁵⁹ In that light, the evidence clearly counseled in favor of protection for older—but not younger—workers. Because there is sometimes a zero-sum relationship between protecting younger and older workers, respectively, one might read *Cline* as focused on the greater disadvantage faced by older workers. Extrapolating from *Cline*, one might view antisubordination as a trump card, which—where there is a zero-sum relationship—may favor asymmetrical protections designed to cover only specific groups who have suffered past discrimination.

One might counter, however, that group-specific signaling is near-sighted. For instance, in the case of age, there is a growing literature that chronicles how millennials are suffering from unwarranted stereotypes and frequently experiencing discrimination.¹⁶⁰ Commentators have recently uncovered discrimination against those under the age of forty in the technology sector¹⁶¹ and television broadcasting.¹⁶² If the ADEA was crafted to cover age generally—instead of only workers over the age of 40—the statute would have had greater adaptive promise for addressing emerging forms of age bias.

B. Tactically

The *tactical* realm addresses symmetry's role in currying political goodwill and avoiding social and judicial backlash. Tactical support is critical at two different phases: passage and implementation. While a law must have strong political support in order to be enacted, it must also avoid strong levels of backlash for its message to be accepted and integrated into society. Given that implementation of discrimination law depends on judges *and* voluntary compliance by individuals, we must consider the matter of support across political, judicial, and social realms. This section first considers symmetry as a form of interest convergence by design. Symmetry also plays a centrist role in

¹⁵⁹ In *Cline*, Justice Souter stated that though the ADEA's protection of only those over the age of forty may initially seem "odd," it is in fact based on reason. *Id.* at 605. "Congress could easily conclude" that younger workers are highly likely to find employment elsewhere after being dismissed for "irrational age discrimination," whereas older workers would likely encounter more difficulties recovering from such a dismissal. *See id.*

¹⁶⁰ *See, e.g.,* JESSICA KRIEGLER, UNFAIRLY LABELED: HOW YOUR WORKPLACE CAN BENEFIT FROM DITCHING GENERATIONAL STEREOTYPES 54–60, 75–86, 99–102 (2016) (chronicling the discrimination faced by "millennials"); Ellen Powell, *Study: Millennials Really Are Making Less Than Their Parents Did*, CHRISTIAN SCI. MONITOR (Jan. 13, 2017), <http://www.csmonitor.com/Business/2017/0113/Study-Millennials-really-are-making-less-than-their-parents-did> [<https://perma.cc/G9R4-UMYS>].

¹⁶¹ *See generally* DAN LYONS, DISRUPTED: MY MISADVENTURE IN THE START-UP BUBBLE (2016) (writing about age discrimination at start-ups and noting that age discrimination affects even younger employees within the technology sector).

¹⁶² *E.g.,* Kirsten Acuna, *Age Discrimination on TV: 10 Anchors Who Were Replaced by Younger Women*, BUS. INSIDER (Aug. 8, 2012), <http://www.businessinsider.com/age-discrimination-on-tv-10-anchors-who-were-replaced-by-younger-women-2012-8> [<https://perma.cc/DAY9-VAC5>].

managing the limited amount of goodwill that exists for antidiscrimination causes and avoiding social backlash.

1. Interest Convergence

One starting point for understanding the political appeal of symmetry is Derrick Bell's well-known interest convergence theory. As Bell explained, in the context of racial equality, the interests of a subordinated minority are likely to be advanced only when they converge with the interests of a dominant majority.¹⁶³ Securing legal remedies for minority groups may thus depend upon judges and policymakers reaching the conclusion that such remedies "will secure, advance, or at least not harm" majority group interests.¹⁶⁴ Since first articulating interest-convergence in 1980, Bell's theory has been wielded robustly to defend disability accommodations,¹⁶⁵ explain the circumstances under which institutions pursue racial diversity,¹⁶⁶ and defend the earned income tax credit.¹⁶⁷

For example, the "diversity rationale," which emerged from *Grutter v. Bollinger*¹⁶⁸ as the primary justification for affirmative action, has been generally accepted as a form of interest convergence.¹⁶⁹ Professor Nancy Leong has argued that this constitutes a type of "racial capitalism" in which whites derive social and economic value from non-white racial identity.¹⁷⁰ While Leong laments this phenomenon, it has admittedly aided in the implementation of affirmative action.¹⁷¹

We might think of symmetry as interest convergence by design. In particular, symmetry aligns the interests of majority and minority groups in the follow-

¹⁶³ Derrick Bell, *Brown v. Board of Education: Reliving and Learning from Our Racial History*, 66 U. PITT. L. REV. 21, 22 (2004) (arguing that "the interest of blacks in achieving racial equality is accommodated only when that interest converges with the interests of whites in policy-making positions"); Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (explaining *Brown* required policy makers to recognize "the economic and political advances" from desegregation) [hereinafter Bell, Comment].

¹⁶⁴ Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 312 (2009) (quoting Bell, Comment, *supra* note 163, at 523).

¹⁶⁵ See *id.* at 332 (arguing the ADA benefits the nondisabled workforce in effective and meaningful ways).

¹⁶⁶ Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2171–72 (2013) (arguing diversity has historically been sanctioned when whites decide they can derive social or economic value from nonwhiteness).

¹⁶⁷ See Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 798–99 (2007) (arguing tax policies that penalize low-income taxpayers will hurt white taxpayers more than black taxpayers).

¹⁶⁸ *Grutter v. Bollinger*, 539 U.S. 306, 322–25 (2003).

¹⁶⁹ See Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1624 (2003) (arguing "*Grutter* and *Gratz* provide a definitive example of my Interest-Convergence theory").

¹⁷⁰ Leong, *supra* note 166, at 2153.

¹⁷¹ *Id.* at 2155.

ing way: If all groups are protected under a relevant ground, then all groups (including the majority group) have a stake in both the passage and implementation of that protection.¹⁷² The Civil Rights Act of 1964 is a prime example.¹⁷³ Bell observes that the elites of that generation recognized the legislation had widespread popular support,¹⁷⁴ which—along with a combination of social, political, and economic forces—helped ensure its passage.¹⁷⁵ Some have similarly argued that people may be more willing to support universal measures, such as welfare, precisely because they avoid a zero-sum mentality.¹⁷⁶

On the other hand, we might cynically wonder whether symmetry fosters legitimacy by appeal to the dominant group.¹⁷⁷ In other words, perhaps symmetry, in the tactical context, is just about appeasing those with power.¹⁷⁸ While this objection has merit, antidiscrimination laws cannot succeed without social buy-in and support. Even once such laws have passed, judges and institutions (composed of individual people making individual decisions) must implement them. Such support is necessary in order for society to accept the wholesale changes that these laws often imply. Antidiscrimination law is thus premised upon social norm change and voluntary compliance.¹⁷⁹ This observation is true of all laws, but especially true for antidiscrimination laws, which are notoriously difficult to sue under and win.¹⁸⁰

2. Goodwill and Dilution

A second way of analyzing symmetry in the tactical realm is to consider the need to manage the finite amount of support that exists for antidiscrimination causes. If such goodwill is limited, then the expansion of discrimination laws risks “trivializing the more serious harms of discrimination and under-

¹⁷² See Schoenbaum, *supra* note 14, at 75, 116–17 (arguing that symmetrical antidiscrimination statutes tend to be more widely endorsed than racial minority-specific statutes because those in advantaged majority groups realize they will benefit from symmetrical protection against discrimination).

¹⁷³ Derrick A. Bell, Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1053, 1057 (2005).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1057–58 (citing Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 10 (1994)).

¹⁷⁶ See THEDA SKOCPOL, SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE 270–72 (1995).

¹⁷⁷ KHAITAN, *supra* note 29, at 173.

¹⁷⁸ E.g., Flagg & Goldwasser, *supra* note 14, at 111 (asserting that symmetry appeals to advantaged groups because it “reinforces existing systems of privilege” benefitting those powerful groups).

¹⁷⁹ See Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25 L. & SOC. INQUIRY 983, 984 (2000) (emphasizing the importance of “voluntary compliance with the law” to legitimize “legal authorities” in a democracy).

¹⁸⁰ E.g., Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 557–58 (2001).

mining support for antidiscrimination in general.”¹⁸¹ This has led some contemporary theorists to argue against the turn toward universal protections of civil rights.¹⁸²

Professor Richard Ford has written incisively on this subject.¹⁸³ He notes there are limits to how much support individuals will give to civil rights causes, with both economic and non-economic rationales. On the economic side, Ford observes that many antidiscrimination measures impose real costs, whether it is access for people with disabilities or limits on a business’s ability to maintain uniform standards of grooming.¹⁸⁴ There are also non-economic limits to goodwill: “The good-natured humanitarian who listens attentively to the first claim of social injustice will become an impatient curmudgeon after multiple similar admonishments.”¹⁸⁵ More practically, busy executives will sit through only so many sensitivity training sessions.¹⁸⁶ Ford concludes that “if goodwill is exhausted and popular opinion sours, the coercive force of law will be of little effect.”¹⁸⁷

Professor Kenji Yoshino has similarly echoed the “limited goodwill” sentiment through his notion of “pluralism anxiety,” in which he argues people of all stripes are anxious about the idea of ever-increasing and ever-more-complicated diversity.¹⁸⁸ He writes that in the past few decades there has been a proliferation of groups clamoring for increased rights.¹⁸⁹ As this has occurred, commentators on both the left and right have expressed anxiety that we are fracturing into groups too polarized to communicate well.¹⁹⁰ Dilution of rights may thus occur in legislatures, where representatives might be less willing to push for broad antidiscrimination laws, or in the judiciary where judges look for ways to cull their caseloads.¹⁹¹ Yoshino finds pluralism anxiety and dilution present at the highest

¹⁸¹ Clarke, *supra* note 125, at 1247.

¹⁸² *Id.* at 1225 (arguing “those concerned about discrimination should approach the universal turn with caution”); Bagenstos, *supra* note 26, at 2852 (arguing “[c]ompassion fatigue may limit the utility of a universalist response to civil rights problems”).

¹⁸³ See generally RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* (2008) (discussing the difficulty of addressing racism in a purportedly “postracist” era where latent racism is still pervasive).

¹⁸⁴ *Id.* at 175.

¹⁸⁵ *Id.* at 176.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Yoshino, *supra* note 26, at 747–48.

¹⁸⁹ *Id.* Yoshino observes, for example, that we are the most religiously diverse country in world history and that the U.S. Census Bureau now acknowledges sixty-three possible racial identities. *Id.* at 747.

¹⁹⁰ *Id.* Yoshino observes that even liberals decry the nation’s balkanization and are calling us back to ideals of assimilation. *Id.* at 748 (citing, as examples, DAVID A. HOLLINGER, *POSTETHNIC AMERICA: BEYOND MULTICULTURALISM* (2000) and ARTHUR M. SCHLESINGER, *THE DISUNITING OF AMERICA* (W.W. Norton & Co. rev. & enlarged ed. 1998) (1991)).

¹⁹¹ Bagenstos, *supra* note 26, at 2852.

judicial level; he observes that the Supreme Court of the United States has, over the past few decades, “systematically denied constitutional protection to new groups, curtailed it for already covered groups, and limited Congress’s capacity to protect groups through civil rights legislation.”¹⁹²

Professor Jessica Clarke further concretizes the goodwill and dilution arguments by examining proposals to expand sexual harassment law and leave policy.¹⁹³ She argues that universal workplace bullying laws may trivialize sexual harassment by pooling those who experience sexual coercion with those who would base a case on behavior that is merely adolescent and boorish.¹⁹⁴ Clarke also addresses efforts to expand work-family policies to work-life policies. She argues that expanding leave may undermine employer support for such policies.¹⁹⁵ In particular, if any employee may request leave for any reason and employers cannot inquire into the reasons for the leave sought, the easiest way for employers to treat everyone equally may be to stop offering leave.¹⁹⁶

To bring the role of symmetry into focus amidst these critiques of universalism, symmetry may be seen as a targeted means of maintaining goodwill while still providing vigorous redress for discrimination. On one hand, the fact that all groups are protected may facilitate more goodwill, than under an asymmetric measure, through a sense that the law is fair and even-handed.¹⁹⁷ On the other hand, symmetry stops well short of being a universal solution, which may push common understandings of civil rights beyond most people’s limits.¹⁹⁸ Scholars have argued that universal measures may lead to a type of compassion or equality fatigue and thus “be unable to overcome political and judicial resistance to regulating business and state and local governments.”¹⁹⁹ Universalist approaches are “complicated” and will not necessarily preserve the goodwill needed for effective discrimination laws.²⁰⁰ Accordingly, symmetry may be understood as superior to both targeted approaches and universal ones when it comes to maintaining a social appetite for discrimination laws.

¹⁹² Yoshino, *supra* note 26, at 748 (citing a series of cases substantiating these arguments).

¹⁹³ See generally Clarke, *supra* note 125 (arguing that universal workplace protections will not resolve the problems of workplace harassment or inequality).

¹⁹⁴ *Id.* at 1263–66.

¹⁹⁵ *Id.* at 1278–79.

¹⁹⁶ *Id.* at 1279.

¹⁹⁷ Corbett, *supra* note 14, at 691 (observing that symmetrical laws are more likely to be seen as sensible and fair); see also Flagg & Goldwasser, *supra* note 14, at 105 (arguing that symmetry is viewed by many as quintessentially American, embodying the principle of blind justice).

¹⁹⁸ Bagenstos, *supra* note 26, at 2853.

¹⁹⁹ *Id.*; Yoshino, *supra* note 26, at 794.

²⁰⁰ Bagenstos, *supra* note 26, at 2854.

3. Backlash

A third way of considering symmetry's tactical role is through attention to backlash. When antidiscrimination schemes treat people differently, they often resist or label the differential treatment as "special treatment."²⁰¹ Discrimination laws that are targeted toward certain groups may be seen as "vexatious."²⁰² In this light, new rights claims may not merely be dilutive, but also engender regressive conflict.²⁰³ Universal solutions have been thought to avoid backlash on the theory that the measure will be less polarizing and stigmatizing to the recipients.²⁰⁴

The potential for backlash is significant because such a response may impair enforcement. Professor Catherine Fisk has argued that if people have the impression that certain discrimination laws aid only some people, it may fuel a backlash that undermines all antidiscrimination law.²⁰⁵ Other scholars have articulated the "fairness" objection in this way: Because the rule of law carries "a special demand for evenhandedness," a law that "'knows the person' is not law at all, or at least not deserving of respect."²⁰⁶ Furthering the point, studies have shown that the ability to secure voluntary compliance with law is linked to the attitudes of a population.²⁰⁷ Accordingly, we must care about backlash to the extent it underlies a conviction that certain laws are not legitimate.²⁰⁸

Symmetry has some degree of a built-in defense against backlash and claims about special treatment since a symmetrical discrimination law protects all groups from discrimination on the basis of a particular trait. One benefit is less stigmatization of weaker protected groups. In contrast, asymmetrical laws may have stigmatic effects and actually increase discrimination. Consider the pending Pregnant Workers Fairness Act, which would secure an asymmetric, pregnancy-specific right to workplace accommodations.²⁰⁹ I have argued such a measure may revitalize exclusionary and paternalistic attitudes toward preg-

²⁰¹ *Id.*

²⁰² Corbett, *supra* note 14, at 691; *cf.* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

²⁰³ See Clarke, *supra* note 125, at 1243–44 (noting the consequential political effects associated with the law showing favoritism).

²⁰⁴ *Id.* at 1224.

²⁰⁵ Fisk, *supra* note 99, at 93.

²⁰⁶ Flagg & Goldwasser, *supra* note 14, at 109. Flagg and Goldwasser proceed to argue, persuasively, that this objection cannot stand. *Id.* at 109–10.

²⁰⁷ Tyler, *supra* note 179, at 985 (citing several studies for this point).

²⁰⁸ See, e.g., Clarke, *supra* note 125, at 1244–45 (arguing that once affirmative action was viewed by some as fundamentally unfair, the policy could only be revived through reframing it as an ideal of inclusion and diversity).

²⁰⁹ In June 2015, Congress reintroduced the Pregnant Workers Fairness Act, a federal bill that would require employers to make reasonable accommodations for pregnancy, childbirth, and related medical conditions. Pregnant Workers Fairness Act, H.R. 2654, 114th Cong. (2015).

nant employees,²¹⁰ signal an incapacity to work,²¹¹ and increase sex discrimination.²¹² In contrast, a symmetrical regime of parental accommodations (that encompasses pregnancy) would protect both men and women in their roles as parents and aid with both the expressive and tactical dimensions.²¹³

4. Objections

One objection to the tactical strengths outlined above is that if a symmetrical law is understood or “coded” as serving particular groups, this may undercut the benefits associated with a broader frame. The social and political understanding of a law simply may not track its universal form.²¹⁴ Class-based affirmative action may still be seen as a racial remedy²¹⁵ and universally available work arrangements and leave policies may still be viewed as a solution for female workers.²¹⁶

Here, it is critical to consider carefully the type of protection and its social context. Some targeted measures are so controversial that a universal or symmetrical replacement will still be less controversial—even if the universal or symmetrical protection is coded as serving the interests of a particular group.²¹⁷ Further, we might consider whether a symmetrical policy is directly replacing more targeted measures.²¹⁸ If so, the tactical benefits may be muted.²¹⁹ If not, the measure is less likely to be interpreted as targeting only specific groups.²²⁰ Moreover, the benefits of symmetry obtain as long as an employer believes that all groups make at least some use of the law.²²¹ There are good reasons to believe (a) that employers do not actually know if disadvantaged groups make more use of certain laws than privileged groups,²²² and (b) that employers overestimate the proportion of claims brought by advantaged classes.²²³

²¹⁰ Bradley A. Areheart, *Accommodating Pregnancy*, 67 ALA. L. REV. 1125, 1141–44, 1158–59 (2016).

²¹¹ *Id.* at 1160–61.

²¹² *Id.* at 1159–62.

²¹³ *Id.* at 1170–71.

²¹⁴ Bagenstos, *supra* note 26, at 2854.

²¹⁵ See Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1939 (1996).

²¹⁶ Clarke, *supra* note 125, at 1271.

²¹⁷ Bagenstos, *supra* note 26, at 2855.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Infra* notes 265–266 and accompanying text.

²²² *Supra* note 45 and accompanying text.

²²³ *Infra* note 266 and accompanying text.

C. Substantively

The *substantive* realm addresses how the symmetrical design of the protectorate may promote justice. How might symmetrical approaches aid in the pursuit of equality or otherwise augment efforts to redress discrimination?

1. Adaptive Breadth

One way of analyzing symmetry in the substantive realm is to consider how symmetry's breadth may give it more staying power than tailored measures. While it is relatively easy to identify groups who have experienced widespread discrimination, it may be difficult to predict exactly which groups will need protection from discrimination in the future. In this way, symmetrical laws are prophylactic and less likely to require future amendment for the scope of the protected class. The symmetry principle may give discrimination laws continuity over time since, as new groups face new versions of bigotry on the same grounds, there is no need for a new statute.²²⁴

The best example, noted in the Introduction, is Title VII's protection of "sex."²²⁵ While men were likely not seen as having much need for the statute when it was passed in 1964, this breadth has had positive unintended consequences. In particular, the protection of simple sex discrimination has evolved to provide recourse for sex-based stereotyping, gender non-conformance, and sexual harassment. For example, in 1998, the Supreme Court held that same-sex harassment fell within the protective ambit of Title VII.²²⁶ The Court wrote that while "male-on-male sexual harassment was assuredly not the principal evil Congress was concerned with when it enacted Title VII . . . statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."²²⁷ Had Title VII only protected women, its protections would never have reached a sub-class of men who have demonstrably needed protection from discrimination.²²⁸

In contrast, asymmetrical statutes are more likely to require amendment to ensure they are "broadly remedial."²²⁹ For example, the pre-amendment

²²⁴ See *Bakke*, 438 U.S. at 296–99.

²²⁵ See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998) (finding Title VII's sex discrimination prohibition applies to men and women).

²²⁶ *Id.* at 82.

²²⁷ *Id.* at 79.

²²⁸ See Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 724 (2010) (arguing effeminate men are common targets of harassment and discrimination).

²²⁹ U.S. antidiscrimination statutes are, as a norm, intended by Congress to be broadly remedial, and have consistently been interpreted as such. See, e.g., 42 U.S.C. § 12101(a)(1) (2012) (Congress intended that the ADA "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and provide broad coverage); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982) (noting the "broad remedial intent of Congress embodied

ADA, as interpreted, involved stark asymmetries between those who were disabled and those who were not.²³⁰ Over time, it became increasingly difficult to prove that one was disabled, culminating in a state of affairs where over 95% of ADA claimants in federal trial courts were losing.²³¹ The result was that eighteen years after it was first enacted, the statute had to be amended to dramatically broaden the protected class.²³² Had the ADA been more broadly remedial from the start—perhaps approaching symmetry, as it presently does²³³—the amendment might not have been necessary.

Even with the most paradigmatic of asymmetrical statutes, the ADEA, prophylaxis might have favored a broader crafting when the statute was passed in 1967. At the outset, we might ask whether the nature of the harms experienced by younger workers is qualitatively different than the discrimination faced by older workers.²³⁴ If one reaches the conclusion that both involve the same negative impulse—i.e., unguarded stereotyping on the basis of age—it would have made prophylactic sense to eliminate all age discrimination at the outset. As noted above, there is a growing literature that chronicles how younger workers are suffering from stereotypes and discrimination.²³⁵ Had the ADEA been crafted symmetrically from the beginning, it would now be positioned well to address new and unanticipated forms of age bias.

In sum, symmetry may give a law continuity and reach over time, and especially as new groups requiring protection emerge. As such, symmetry is a

in [the Fair Housing Act]”); *Cormier v. City of Meriden*, No. CIVA.3:03CV1819 (JBA), 2004 WL 2377079 at *7 (D. Conn. Sept. 30, 2004) (observing Congress intended the ADA to be expansive in reach and effect); *Solorzano v. Shell Chemical Co.*, No. Civ.A.99-2831, 2000 WL 1145766 at *5 (E.D. La. Aug. 14, 2000) (observing both Title VII and the Age Discrimination in Employment Act are expansive in reach and effect).

²³⁰ *E.g.*, *Toyota Motor Mfg., Ky., v. Williams*, 534 U.S. 184, 197 (2002) (finding the ADA’s terms must be “interpreted strictly to create a demanding standard for qualifying as disabled”).

²³¹ *See, e.g.*, Amy L. Allbright, *2010 Employment Decisions Under the ADA Titles I and V—Survey Update*, 35 MENTAL & PHYSICAL DISABILITY L. REP. 394, 395 (2011) (reporting a 98.2 percent win rate for employers for cases that were resolved at the time of the survey); Amy L. Allbright, *2009 Employment Decisions Under the ADA Title I—Survey Update*, 34 MENTAL & PHYSICAL DISABILITY L. REP. 339, 340 (2010) (reporting a 97.4 percent win rate for employers for cases that were resolved at the time of the survey).

²³² In the findings of the ADA Amendments Act, Congress rejected the high standard courts had applied to the scope of “disability,” and admonished them to construe the ADA generously to provide expansive coverage and application. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

²³³ *See infra* note 335 and accompanying text.

²³⁴ Here, it is no reply to say that there was no evidence in the legislative history of discrimination against younger workers since (a) that is still not a reason to prohibit discrimination against workers younger than forty; and (b) statutes may well be crafted with a prophylactic purpose in mind—the most notable being the Genetic Information Nondiscrimination Act. *See* Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 VAND. L. REV. 439, 441 (2010) (noting GINA is the first statute in U.S. history that preemptively targets discrimination).

²³⁵ *Supra* notes 160–162 and accompanying text.

“sufficiently absolute” principle that can lift an antidiscrimination measure “above the level of the pragmatic political judgments of a particular place and time.”²³⁶

2. Challenging Stereotypes

As Professor Naomi Schoenbaum has pointed out, where a ground contains two principle groups, symmetry may be critical to challenge the stereotypes associated with the more disadvantaged group.²³⁷ Nowhere is this more apparent than in the case of sex.²³⁸ Ruth Bader Ginsburg, for instance, recognized early on the importance of challenging the gender norms imposed on men in order to further the equality of women.²³⁹ In 1970, Ginsburg made the strategic decision, on behalf of the ACLU, to challenge the constitutionality of sex-based state action by bringing cases with male plaintiffs.²⁴⁰ Despite her successes over the next decade in proving the Fourteenth Amendment reached sex discrimination, legal feminists judged Ginsburg harshly for her reliance on male plaintiffs.²⁴¹ They argued she must be satisfied with formal equality and failing to understand the limitations of a “sex-blind” doctrine.²⁴² Yet it is illuminating to consider who Ginsburg’s plaintiffs were: one was a primary caregiver to an elderly mother; one, a stay-at-home father; several were men who were married to women who were substantial breadwinners.²⁴³ Most of them, simply put, “failed to satisfy masculine gender norms.”²⁴⁴ Professor Cary Franklin argues that Ginsburg’s choice of plaintiffs reflects, among other things, her understanding that the subordination of women was tied to masculine gender norms,²⁴⁵ and, thus, the equality of women requires “liberat[ing] both sexes from prescriptive sex stereotyping.”²⁴⁶

Twenty five years later, Professor Mary Anne Case wrote about the role of unconventional plaintiffs under Title VII in challenging the rigid gender norms that constrain employment opportunities.²⁴⁷ She argued that effeminate

²³⁶ *Bakke*, 438 U.S. at 299 (quoting *COX*, *supra* note 84, at 114).

²³⁷ See Schoenbaum, *supra* note 14, at 98–102.

²³⁸ See *id.* at 98.

²³⁹ See Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 84, 162 (2010) (highlighting anti-abortion activists’ concern that allowing a challenge to the constitutionality of abortion bans would provide Justice Ginsburg with a chance to analyze abortion through an equal protection lens).

²⁴⁰ *Id.* at 84.

²⁴¹ *Id.* at 85.

²⁴² *Id.*

²⁴³ *Id.* at 87.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 104–05.

²⁴⁶ *Id.* at 104.

²⁴⁷ See Case, *supra* note 8, at 3 (arguing that feminists should advocate for antidiscrimination protection for effeminate men as well).

men must be able to challenge adverse treatment on the theory that as long as men were required to take on masculine roles, one might reasonably suppose that feminine traits would continue to be devalued.²⁴⁸ Case presciently argued that the statutory language of Title VII was already capacious enough to protect both effeminate men and masculine women in their departures from conventional gender roles.²⁴⁹ She relatedly pressed the importance of “sex-specific” instances of fashion and conduct, sexual harassment, work that supposedly requires mainly male or female characteristics, “single-sex education,” sexual orientation, and transgenderism.²⁵⁰ All such cases held the potential to challenge the dominant and subversive norms associated with masculinity.

More can now be said about the theoretical value of symmetry for challenging stereotypes. First, symmetry appears to hold the most value when it comes to challenging stereotypes associated with a ground that has a largely binary structure.²⁵¹ With such traits, it is easy to view one group as the opposite of the other.²⁵² So, for example, to be masculine means to not be feminine²⁵³ and to be young means to not embody the traits of those who are older.²⁵⁴ Second, the importance of symmetry for challenging stereotypes is of more limited utility when the ground is non-binary. Where there is a multiplicity of groups under a particular trait, no one group is put necessarily into the position of the foil for another group.²⁵⁵

3. Distributive Effects

Discrimination prevents people from navigating the opportunity structure of life. So, one might naturally assume that prohibiting employment discrimination against certain groups will allow them to more ably traverse work-related opportunities. In this way, antidiscrimination laws may have positive distributive effects on workers by raising their employment levels and wages.²⁵⁶ In theory, this makes sense, but in practice “the actual distributive consequences of a mandate depends on whether it effectively constrains employers

²⁴⁸ *Id.* Professor Case opined that until men “feel free to engage in” certain behaviors, these behaviors will remain practically valueless in society. *Id.* Until “stereotypically feminine” conduct, such as “wearing dresses and jewelry [or] speaking softly or in a high-pitched voice, [or] nurturing or raising children,” is seen as proper conduct for men, it will be relegated to “a female ghetto.” *Id.*

²⁴⁹ *Id.* at 4.

²⁵⁰ *Id.* at 5.

²⁵¹ Schoenbaum, *supra* note 14, at 100–01.

²⁵² *Id.*

²⁵³ See generally ANN C. MCGINLEY, *MASCULINITY AT WORK: EMPLOYMENT DISCRIMINATION THROUGH A DIFFERENT LENS* (2016) (exploring hegemonic import of complying with masculinity norms).

²⁵⁴ See generally JOHN MACNICOL, *AGE DISCRIMINATION: AN HISTORICAL AND CONTEMPORARY ANALYSIS* 48–67 (2006) (exploring hegemony of ageism).

²⁵⁵ Schoenbaum, *supra* note 14, at 101.

²⁵⁶ *Id.* at 86–87.

from discriminating against the protected group in hiring or pay.”²⁵⁷ In advancing this argument on distributive effects, Professor Schoenbaum has pointed out that “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.”²⁵⁸

More to the point, there are stark informational barriers that prevent victims of discrimination from even detecting and bringing failure to hire claims. Any contact between an applicant and an employer is “typically fleeting, the eventual outcome is unknown to the candidate, and the process itself rarely signals exclusionary intent.”²⁵⁹ So victims of hiring discrimination are unlikely to know that they have been discriminated against or to have the information to prove it. Even if they do bring suit, the numbers show that employment discrimination plaintiffs are wildly unsuccessful.²⁶⁰ Employers may thus be deterred by the prospect of liability and choose to discriminate if they perceive the costs of employing a protected individual to outweigh the marginal benefit of hiring the best worker.

Asymmetrical discrimination laws have long been recognized as making targeted groups more expensive to employ, which can in turn harm their employment prospects. The basic economic point is that if you raise the price of a good or service, consumers will buy less.²⁶¹ Nondiscrimination mandates can raise the perceived cost of employing groups due to a fear of litigation, as can accommodation mandates for which the employer must pay.²⁶² The best example is under the ADA, where studies indicate that the employment of people with disabilities has fallen since passage of the statute.²⁶³ The rationale for this

²⁵⁷ *Id.* at 88–89 (citing Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 254–61 (2000)).

²⁵⁸ *Id.* at 86 (citing Jolls, *supra* note 257, at 227).

²⁵⁹ Mark Bendick, Jr. et al., *An Overview of Auditing for Discrimination, in CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA* 1, 14 (Michael Fix & Raymond J. Struyk eds., 1993).

²⁶⁰ Studies have shown that employment discrimination plaintiffs have lower success rates than plaintiffs in other domains when it comes to settlement, pretrial adjudication, and trial. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 131 (2009). The evidence from the appellate stage is even worse. *See id.* at 112. A plaintiff’s prospects of remaining “victorious” on appeal are akin to relying on the flip of a coin. *Id.*

²⁶¹ Thomas DeLeire, *The Unintended Consequences of the Americans with Disabilities Act*, 23 REG. 21, 21 (2000).

²⁶² *See, e.g.*, Jolls, *supra* note 257, at 246–51.

²⁶³ *See* Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 915 (2001) (noting a significant drop in the employment rate of disabled workers since the passage of the ADA); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RESOURCES 693, 698–702 (2000) (finding that employment rates of disabled men saw a significant decline after the passage of the ADA).

effect is straightforward. Many times, people's disabilities are visible and other times someone may be forced to disclose their disability during the hiring process (because, for example, they require a reasonable accommodation to be "qualified" under the ADA). At this point, an employer may perceive such an applicant to be more expensive to employ and choose not to be constrained by the ADA's mandates. The ADEA has had a similar impact. Initially, the ADEA's distributive effects were favorable, due to the immediate elimination of overt age-based discrimination. But over time, the ADEA has been tied to a reduction in the employment levels of older workers.²⁶⁴

Symmetrical laws are well-positioned to mitigate the potential negative effects in the distribution of employment.²⁶⁵ This is because if all groups are entitled to protection on the basis of a ground, the employer may perceive it to be no costlier to employ disadvantaged groups than it is to employ relatively advantaged groups. This point is strongest if an employer believes two or more groups make similar use of a law. While one might intuit that no reasonable employer would think that advantaged groups will use an employment discrimination law as frequently as disadvantaged groups, decisionmakers do not have perfect information and lawsuits brought by majority or advantaged groups often garner outsized attention.²⁶⁶

Moreover, the distributive benefits of symmetry hold even if the employer believes that disadvantaged groups make more use of the law than others.²⁶⁷ By invoking the law, a member of the advantaged group increases the "cost of employing members of that group," which "clos[es] the gap between the cost of employing the advantaged and disadvantaged groups," and thus diminishes "the disincentive to hire the disadvantaged group."²⁶⁸ So even if an employer believes that women are more likely to sue under a symmetrical regime than men, as long as the employer believes men make any use of the law, any cost differential between hiring men and women is less than it would be if the statute only protected women asymmetrically. Symmetry will almost always reduce the economic disincentive to hire members of the disadvantaged group.

²⁶⁴ E.g., Joanna N. Lahey, *International Comparison of Age Discrimination Laws*, 32 RES. ON AGING 679, 684–86 (2010); Jessica Z. Rothenberg & Daniel S. Gardner, *Protecting Older Workers: The Failure of the Age Discrimination in Employment Act of 1967*, 38 J. SOC. & SOC. WELFARE 9, 19–23 (2011).

²⁶⁵ Schoenbaum, *supra* note 14, at 86–91, 96–97.

²⁶⁶ *Id.* at 92–94 (observing that lawsuits brought by men and whites may be more culturally salient due to media reception).

²⁶⁷ *Id.* at 90–91.

²⁶⁸ *Id.* at 91.

4. Objections

One substantive objection, which will be explored in much greater detail below,²⁶⁹ is that symmetrical laws provide only formal equality. Opponents of laws that are symmetrical sometimes argue such measures are fair in form, but not result.²⁷⁰ That argument is most pronounced where there is a zero-sum relationship in protecting one group versus another.²⁷¹ While symmetry may indeed make it difficult or illegal under the law to treat groups differently, this is part of the exchange in purchasing the benefits of symmetry. For example, Title VII might have been formulated to only protect African Americans from disparate treatment, but, arguably, the expressive, tactical, and substantive opportunity cost might have been too great. Protecting all races symmetrically from discrimination has, among other benefits, supported rights talk, while encouraging solidarity; helped maintain a social appetite for Title VII, while avoiding dilution or balkanization; and ensured that other groups such as Hispanics and Native Americans are also protected from employment discrimination. Further, protecting all races from disparate treatment has had critical distributive effects and allows a more comprehensive challenge of racial stereotypes.²⁷²



While this Article takes the position that symmetry is useful in many situations as an antidiscrimination norm, it does not insist on symmetry for all policies. Any particular measure must be analyzed in its historical, legal, and political context. For example, race, sex, and disability are each very different in terms of the expressive, tactical, and substantive challenges confronting them. The preceding discussion provides a template for analyzing how the shape of the protectorate might play a role in affecting the end goals of discrimination law.

²⁶⁹ See *infra* notes 273–308 and accompanying text.

²⁷⁰ *Supra* note 22 and accompanying text.

²⁷¹ *Infra* notes 292–309 and accompanying text.

²⁷² See Schoenbaum, *supra* note 14, at 101–02 (arguing, through examples, it is important to challenge both “white” and “black” stereotypes in order to dismantle racial clichés).

Figure 1.
The Case for Symmetry

	<i>Arguments for Symmetry</i>	<i>Objections</i>
<i>Expressive</i>	<ul style="list-style-type: none"> ▪ Expresses commonality and solidarity ▪ Affirms the social salience of certain grounds and facilitates the invocation of rights 	<ul style="list-style-type: none"> ▪ Waters down a group-specific message
<i>Tactical</i>	<ul style="list-style-type: none"> ▪ Interest convergence by design ▪ Maintains social appetite for antidiscrimination measures ▪ Minimizes dilution of laws by institutions, legislature, and judiciary ▪ Avoids backlash 	<ul style="list-style-type: none"> ▪ May still become coded as serving particular groups, undercutting tactical strengths
<i>Substantive</i>	<ul style="list-style-type: none"> ▪ Adaptive breadth ensures future responsiveness to subordination and gives discrimination law continuity ▪ Allows unique challenge to stereotypes ▪ Better distributive effects 	<ul style="list-style-type: none"> ▪ Fair in form, but targeted forms would more robustly address group-specific inequalities

III. THE CASE FOR ASYMMETRY

Not all discrimination laws warrant symmetry. Sometimes, antidiscrimination protections are most sensible as asymmetric measures. This Part will describe when and how asymmetry makes sense as a complement to symmetry. The following closely-related rationales help explain why, under the right circumstances, asymmetrical protections are most effective. Satisfying any one of the conditions below is neither necessary nor sufficient to warrant asymmetry. Further, although this Part breaks out separately the circumstances which may support asymmetrical discrimination laws, the rationales overlap and there is no strict boundary between these categories.

A. Where Traits Are Not Universal

The first and simplest explanation for why some laws should protect asymmetrically is that sometimes the trait we are endeavoring to protect is not salient for many or most people. Some asymmetrical protections, such as age, could of course be reformulated to protect symmetrically. But in many instances, it simply does not make sense for the law to protect in a symmetrical way.

In these situations, there simply is no sensible cognate group, corresponding to the disadvantaged group, to protect.

For instance, if we place people who require medical leave under the FMLA on one side of the centerline, should we also protect people who do not require or take medical leave on the other? If we place people with disabilities on one side of an imaginary axis, should we also protect people without disabilities? Even if we reimagine the categories as “disability status” or “leave status,” it would not make intuitive sense for most people to talk of everyone having such “traits.”

Similarly, if one views the protection of pregnancy as asymmetrical,²⁷³ one may see it as justified. In theory, the PDA could have protected men with pregnant partners, but men with pregnant partners are not a socially salient group. Moreover, men with pregnant partners were not advocating for protections when the PDA was passed because they were not facing adverse stereotyping or discrimination on that basis. In stark contrast, during the first half of the twentieth century, state and local governments passed a myriad of laws regulating the work of pregnant women. Such laws “‘protected’ women out of good jobs”²⁷⁴ and led many employers to fire “women who became pregnant.”²⁷⁵ Accordingly, Congress chose to protect pregnant workers, but not the spouses of pregnant workers.

Protecting pregnant employees through a right to workplace accommodations, however, might well be achieved symmetrically. Currently, pregnant employees have no affirmative right to workplace accommodation under statutes like the ADA, PDA, or FMLA; this is why the media has been abuzz with efforts to pass the Pregnant Workers Fairness Act (PWFA).²⁷⁶ I have previously argued in favor of creating a protecting scheme in lieu of the PWFA that would accommodate both pregnancy and parental caregiving under the symmetrical umbrella of “parental accommodations.”²⁷⁷ So whether one views the protec-

²⁷³ As explained above, the best view of the PDA is to see it as symmetrical, in that it merely ensures complete coverage for men and women under “sex.” *Supra* notes 47–93 and accompanying text.

²⁷⁴ Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 982 (2013).

²⁷⁵ Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 335 (1984–85).

²⁷⁶ Areheart, *supra* note 210, at 1133–41.

²⁷⁷ Under a pregnancy-inclusive parental accommodations model, the employee would need to show that he or she (1) “has a pregnancy need or compelling parental obligation” that interferes with a condition of employment, (2) notified his or her employer of the conflict “if possible,” and (3) was the subject of a negative employment action “for failing to comply with the conflicting employment requirement.” Once an employee establishes a prima facie case on these criteria, the employer must show it (1) “made a good faith effort to accommodate the employee’s parental obligations,” or (2) could not “reasonably accommodate” the parental obligation “without experiencing an undue hardship.” *Id.* at 1170–71.

tion of pregnancy as asymmetrical or symmetrical (on the claim that the PDA merely ensures equal coverage under “sex”), accommodation protections could still be formulated symmetrically.

*B. Where Groups Are Manifestly Dissimilarly Situated
Within the Opportunity Structure*

Some laws protect individuals asymmetrically because some groups are dissimilarly situated—and sometimes dramatically so. That similarly situated persons should be treated the same is an archetypal proposition for thinking about unlawful discrimination and the design of the protectorate. Discrimination laws thus aim to rectify situations where similarly situated persons are treated differently. Nevertheless, the utility of this non-specific formulation comes quickly to an end.²⁷⁸

To what extent are people of different races the same? To what extent are women similarly situated to men? Professor Cass Sunstein has observed that for race, the law concludes, in most instances, that blacks and whites and Hispanics are all similarly situated.²⁷⁹ For sex, the law urges that men and women are similarly situated, except for a few circumstances involving past discrimination or reproductive differences.²⁸⁰ These types of identity may thus naturally invite symmetrical protections. At other times, people are very differently situated. In such instances, the law may require that these people be treated differently to achieve equality.²⁸¹

Sometimes, the opportunity structure is so unequal that it counsels in favor of extending rights only to one group.²⁸² For example, disability laws explicitly and implicitly recognize that a variety of barriers—including physical, institutional, and attitudinal—in society prevent people with disabilities from being similarly situated to those without, when it comes to the structure of opportunities.²⁸³ This means that people with disabilities must sometimes be treated differently (e.g., provide special training or extend an accommodation) in order to make them similarly situated for certain purposes, such as employment. This is why an employer may be required, under the ADA, to provide an accommodation for a disabled person even if the accommodation is the only

²⁷⁸ See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982) (arguing this proposition of equality is empty, in that it necessarily requires further value judgments).

²⁷⁹ Sunstein, *supra* note 12, at 2422–23.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 2425.

²⁸² See FISHKIN, *supra* note 30, at 20–22 (arguing antidiscrimination law should be fundamentally about ameliorating severe bottlenecks in the structure of opportunity).

²⁸³ See 42 U.S.C. § 12101(a) (2012) (identifying barriers for people with disabilities in architecture, transportation, housing, public accommodations, and a host of other arenas).

reason the person would be qualified for the job.²⁸⁴ The ADA inherently recognizes that the opportunity structure in society is unequal for people with disabilities and certain positive rights may be necessary to afford genuine equality of opportunity.

Similarly, race-based affirmative action may be understood as a targeted measure to assist in equalizing opportunities for minorities where there is a “manifest imbalance” in certain industries or job categories.²⁸⁵ So while race is generally treated symmetrically in discrimination laws, affirmative action is a *limited* departure from that norm; it may not displace current workers or be a permanent fixture on a firm’s hiring landscape.²⁸⁶ Affirmative action is thus designed to open up the opportunity structure to groups who have historically been excluded. Symmetry, however, is such a strong norm that whether affirmative action will remain politically viable is an open question.²⁸⁷

Finally, there may be no better example, of singling out one group for protection in furtherance of equalizing opportunities, than the PDA’s protection of pregnancy. In the first part of the twentieth century, about half of the states had protective labor laws for female workers.²⁸⁸ There were general restrictions limiting the number of hours women could work, prohibiting night work, and excluding them from hazardous occupations.²⁸⁹ There were also restrictions, prohibiting women from working for a period of time before and after childbirth.²⁹⁰ Such laws created a “bottleneck” in the opportunity struc-

²⁸⁴ See 42 U.S.C. § 12111(8) (defining “qualified individual” as one who can perform the essential functions of a job either with or without an accommodation).

²⁸⁵ *United Steelworkers v. Weber*, 443 U.S. 193, 208–09 (1979). See generally *Establishing Affirmative Action Plans*, 29 C.F.R. § 1608.4(a)–(b) (2017) (discussing the requirements of a “[r]easonable self analysis” and “[r]easonable basis” for affirmative action initiatives).

²⁸⁶ *Weber*, 443 U.S. at 208 (implicitly holding that affirmative action plans may not require the discharge of some workers and replace them with others and that they must be a temporary measure).

²⁸⁷ Supreme Court decisions, as well as recent arguments that affirmative action will have a future sunset, suggests a strong affinity for protecting race symmetrically. See *Grutter v. Bollinger*, 539 U.S. 306, 342–43 (2003) (stating affirmative action must eventually come to an end and suggesting twenty-five years after *Grutter* as that end point). The opinion in *Grutter* is consistent with other Court decisions that have also signaled the importance of ending race-consciousness. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 510–11 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion); *Weber*, 443 U.S. at 208–09; Kimberly Jenkins Robinson, Comment, *Fisher’s Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185, 186 (2016) (stating that Supreme Court jurisprudence on affirmative action requires it to eventually come to an end). This affinity is reflected, for example, in Chief Justice Roberts’ statement that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion).

²⁸⁸ Brief for American Civil Liberties Union et al. as Amici Curiae, *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987) (No-85-494), 1986 WL 728369, at *12–13 [hereinafter *ACLU Brief*].

²⁸⁹ *Id.*

²⁹⁰ Williams, *supra* note 275, at 334.

ture for pregnant employees, and more generally, female workers.²⁹¹ By redefining sex in 1978 to explicitly include pregnancy, childbirth, or related medical conditions, the PDA gave women hope that they could pass through this bottleneck to reach fulfilling opportunities in the employment sector.

*C. Where the Zero-Sum Impact of Protecting Symmetrically
Subordinates an Already Disadvantaged Group*

All opportunities, including those affiliated with employment, are finite. This means that protecting one group from discrimination has the potential to impair opportunities for other groups. Symmetrical discrimination laws thus always contain the seeds of zero-sum tradeoffs. For example, the ADEA protects only those over the age of forty, and it only protects them in relation to younger workers.²⁹² But if the ADEA were formulated symmetrically to protect younger workers, it would be illegal to ever prefer older workers. Accordingly, a symmetrical ADEA might usurp opportunities from older workers. Still the zero-sum dynamic is more accentuated with some discrimination laws than others.

If the ADA were formulated symmetrically to protect people *without* disabilities, it would naturally impair opportunities for people with disabilities. For example, the ADA requires that employers reasonably accommodate people with disabilities, even though the accommodation sought may directly impact other employees. The statute lists “reassignment to a vacant position” as a customary reasonable accommodation even though to do so will exclude other able-bodied persons from that position.²⁹³ Similarly, a disabled person may be entitled to “job restructuring” as a reasonable accommodation even if the restructuring means that other workers are required to perform tasks that are eliminated for the disabled person.²⁹⁴ If the ADA were reformulated to protect symmetrically, people without disabilities could argue correctly that they were discriminated against by the provision of various reasonable accommodations, including the reassignment or restructuring of tasks. Such a right for people without disabilities would usurp the current rights of people with disabilities under the statute.

There are also a variety of areas where protecting race symmetrically may subordinate already disadvantaged groups. The symmetrical norms of the

²⁹¹ See FISHKIN, *supra* note 30, at 13 (describing bottlenecks as narrow spaces in the opportunity structure through which people must pass if they hope to reach a range of opportunities on the other side).

²⁹² See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 581, 584 (2004). (stating that an employer is not prevented from “favoring an older employee over a younger one” by the ADEA and related federal materials and statutes).

²⁹³ 42 U.S.C. § 12111(9) (2012).

²⁹⁴ See *id.*

Equal Protection Clause, for instance, may sometimes clash with race-based (asymmetrical) affirmative action. In *Adarand Constructors, Inc. v. Pena*, a white contractor challenged a federal program that set aside contracts for minority-owned construction companies.²⁹⁵ The contractor argued that choosing the higher bid of the minority-owned company rather than his lower bid violated the Equal Protection Clause.²⁹⁶ The Court, in a five-to-four vote, held that strict scrutiny was warranted and hinted the program was unconstitutional.²⁹⁷ The critical holding of *Adarand* was that all laws employing a racial classification must undergo strict scrutiny, with no exceptions for benign motives.²⁹⁸ The Court's symmetry, in this context, conflicted with the anti-subordination-related factors, i.e., history of discrimination and political powerlessness.²⁹⁹

Professor Barbara Flagg has argued that when strict scrutiny is applied evenly to all races, it is hard for the state to take even benevolent actions that treat people differentially on the basis of race.³⁰⁰ In her view, there are strong reasons to care about and prioritize particular groups that have suffered discrimination, are stigmatized, or face the future prospect of structural barriers.³⁰¹ This may warrant abandoning the current symmetrical treatment of race under the Equal Protection Clause and employing heightened scrutiny only when a facially neutral practice disadvantages non-whites.³⁰²

Disparate impact jurisprudence is also an area of law that features a clear zero-sum relationship in the distribution of opportunities. Assume that two applicants for a job (Ms. Black and Ms. White) are comparable in many respects but must take an employer's test, which factors largely in the hiring decision. Assume further that Ms. Black does poorly relative to Ms. White and that Ms. Black is able to show that the test has a disproportionate impact on other black applicants, and is not required by business necessity. On these facts, the operation of disparate impact doctrine might mean eliminating the test and the reallocation of one position from a white applicant to a black applicant.³⁰³ In this

²⁹⁵ *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 204–10 (1995).

²⁹⁶ *Id.* at 205–06.

²⁹⁷ *Id.* at 235–36; Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. Rev. 1745, 1746 n.8 (1996) (stating that the Supreme Court did not rule the program central to *Adarand* unconstitutional, but did remand that issue to the lower court).

²⁹⁸ *Adarand*, 515 U.S. at 240–41 (Thomas, J., concurring) (stating that although the government may be acting with the best of intentions, the Constitution does not allow for preferences based on race).

²⁹⁹ Yoshino, *supra* note 14, 557–63.

³⁰⁰ Flagg, *supra* note 22, at 969–79.

³⁰¹ *Id.* at 957.

³⁰² *Id.* at 993–1001 (detailing her proposal); Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191, 195–96 (1997) (contesting the Supreme Court's arguments that the Fourteenth Amendment does not allow for positive law aimed at remedying racial injustice).

³⁰³ Primus, *supra* note 119, at 563–65 (giving a similar example).

way, we might see the exercise of disparate impact rights as a reallocation of opportunities to some groups at the expense of others.

Disparate impact is a unique way of redistributing opportunities because it looks past facially neutral standards to dig deeper and structurally toward substantive equality. While some commentators have argued that disparate impact is not available as a claim for whites,³⁰⁴ many courts have interpreted it to give white plaintiffs a remedy.³⁰⁵ Given that we might think of the status quo as an environment that already privileges advantaged groups,³⁰⁶ disparate impact might make sense as a doctrine that is only available to groups that have historically been disadvantaged. Moreover, because Congress has clearly disavowed any requirement of proportional hiring,³⁰⁷ “it is hard to identify the social harm that occurs when a practice not intended to be discriminatory has a statistically disparate impact on whites.”³⁰⁸

Making disparate impact asymmetrical might also help resolve the case of *Ricci v. DeStefano*, in which racially attentive efforts were read to be the potential equivalent of reverse discrimination.³⁰⁹ If disparate impact were refashioned to only protect disadvantaged groups, it might cause the result associated with not certifying test results or eliminating certain practices that have a disparate impact appear less discriminatory toward majority groups. In sum, in all of these situations, one might view symmetry’s capacity to worsen the relative subordination of a disadvantaged group as a reason to depart from the symmetry principle.



This Article has thus far endeavored to outline and provide a framework for analyzing the stakes associated with protecting all groups, or only some. The result is that any particular antidiscrimination policy must be examined individually in order to draw a principled conclusion about whether the shape of the protectorate should be symmetrical or asymmetrical.

³⁰⁴ See Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1505–08 (2004) (arguing that the purposes of disparate impact doctrine suggest that it is not available for whites, but that an asymmetrical approach would raise constitutional concerns).

³⁰⁵ *Supra* note 120 and accompanying text.

³⁰⁶ Primus, *supra* note 119, at 524 (arguing that privilege is generational and thus “applying neutral criteria to haves and have-nots alike could help keep blacks an underclass in the workforce even if employers held no bias in favor of maintaining that state of affairs.”).

³⁰⁷ See 42 U.S.C. § 2000e-2(j) (2012) (“Preferential treatment not to be granted on account of existing number or percentage imbalance.”).

³⁰⁸ Primus, *supra* note 119, at 530.

³⁰⁹ *Ricci v. DiStefano*, 557 U.S. 557, 585–86 (2009) (holding that, for Title VII purposes, an “employer must have a strong basis in evidence to believe it will be subject to disparate impact liability” before it engages in “intentional discrimination for the . . . purpose of avoiding or remedying” disparate impact discrimination).

IV. THE SYMMETRY PRINCIPLE APPLIED

This Part will apply the insights from Parts II and III to sketch the argument that certain laws are rightly, or wrongly, formulated. This section is not intended to be exhaustive or cover every discrimination law canvassed in this Article. Several examples will suffice to illustrate symmetry's import for current policy, including a few areas that warrant change.

A. Laws Warranting Symmetry

It may be most helpful to first return to a trait that is quintessentially suited for symmetrical protection: sex. Sex is universally held and performed (gender), making it facially fitting for symmetrical treatment. The symmetrical framing of sex has also positively aided in a variety of substantive outcomes. These include its elasticity in protecting various permutations of gender and sex,³¹⁰ its ability to assist in challenging stereotypes,³¹¹ and its likelihood to have more positive distributive effects.³¹² Moreover, protecting women asymmetrically has historically had regressive effects because to do so often typecasts women as physically weaker or implicitly connects their worth more with home than with work.³¹³ Such measures may then underscore stereotypes and further increase the likelihood of future discrimination.³¹⁴ Finally, sex is an area where the concerns of goodwill, backlash, and interest convergence all countenance in favor of symmetrical protections.

Age is also well suited for symmetry. While the ADEA only protects those over the age of forty, this Article's analytical framework supports refashioning the law to symmetrically protect all employees on the basis of age. Beginning with the conditions that may support asymmetry, age is a universal trait and there is no fundamental dissimilarity between a worker who is thirty-five and one who is forty-five. Further, giving younger workers a nondiscrimination right does not engender an unacceptable risk of further subordinating older workers, in part because they are not all that subordinated to start. Far from being a "discrete and insular" minority, older Americans generally are not impoverished or afflicted by disabling social stigmas.³¹⁵ Moreover, older Americans have a disproportionate share of wealth and political power, leading

³¹⁰ See *supra* notes 1–30 and accompanying text.

³¹¹ See *supra* notes 237–255 and accompanying text.

³¹² See *supra* notes 256–268 and accompanying text.

³¹³ ACLU Brief, *supra* note 288, at *17–19.

³¹⁴ See *supra* notes 256–268 and accompanying text (referencing "Distributive Effects"); see also Areheart, *supra* note 210, at 1166 (arguing pregnancy-specific right to accommodation will increase discrimination).

³¹⁵ Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution*, 72 N.Y.U. L. REV. 780, 781 (1997).

some economists to call the ADEA, and especially its elimination of mandatory retirement, a textbook case of “rent-seeking.”³¹⁶

The benefits of symmetry also strongly support protecting age symmetrically. Broadening the ADEA to protect all employees on the basis of age would give the statute permanent adaptive breadth, obviating the need to reconsider the appropriate age threshold every time there are cultural changes, such as increases in longevity or the emergence of industries that prefer older workers.³¹⁷ As noted above, workers of all ages encounter stereotypes and millennials are no exception; certain industries, such as television broadcasting and start-ups, are worse offenders than others.³¹⁸ Protecting symmetrically would also reduce any negative distributive effects on workers over the age of 40.³¹⁹ Further, protecting symmetrically may be critical to challenge the stereotypes associated with older workers. Much as in the case of sex,³²⁰ age is commonly understood as a binary trait (old and young), with both groups facing corresponding stereotypes.³²¹ Older workers may be seen as less flexible or more resistant to change, while younger workers are viewed as too flexible and less committed.³²² A symmetrical law allows these stereotypes to be challenged from both vantage points.

Genetic information also warrants symmetrical treatment and for many of the same reasons profiled above. GINA signals our common humanity, while equipping people with the language of rights, which can raise employers’ consciousness about the impropriety of using this information to distinguish between employees. GINA is different from other protected classes, in that it is missing the history of discrimination that precipitated passage of Title VII, the ADEA, and the ADA.³²³ Its findings section, for example, cites only one specific example of genetic discrimination in the workplace³²⁴ and, instead, focuses on allaying fears related to “the potential for discrimination.”³²⁵ These facts most explain the universal scope of GINA’s protectorate. Still, this symmetrical formulation is prophylactic and elastic, ensuring that GINA will have traction and continuity over time. GINA is also unlikely to prompt backlash or dilute goodwill, in part due to structural interest convergence and in part due to

³¹⁶ *Id.* at 783, 820–30.

³¹⁷ *See supra* notes 224–236 and accompanying text (referring to “Adaptive Breadth”).

³¹⁸ *See supra* notes 158–162 and accompanying text (discussing objections to the “expressive strengths” of symmetry).

³¹⁹ *See supra* notes 256–268 and accompanying text (referring to “Distributive Effects”).

³²⁰ *See supra* notes 236–254 and accompanying text (referring to “Challenging Stereotypes”).

³²¹ Schoenbaum, *supra* note 14, at 100–01.

³²² *Id.* at 100.

³²³ Areheart, *supra* note 65, at 985.

³²⁴ Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified as amended in scattered sections of 26, 29, 42 U.S.C. (2012)).

³²⁵ *Id.*

the fact that no one expects litigation under it to overwhelm the judiciary any time soon.³²⁶

B. Laws Warranting Asymmetry

Disability is a justified departure from the dominant norm of symmetry. First, disability, perhaps more than other areas of identity, is least intelligible as a symmetrical protection.³²⁷ At best, the ADA could be reformulated to protect all mental or physical “traits,” but that would entail a full-scale acceptance of protection from appearance discrimination—something society has not yet proven willing to do.

Second, there is a manifest difference in the way people with disabilities are situated from those without disabilities with respect to work. Even where an employer has no discernible bias toward people with disabilities, the built environment itself excludes.³²⁸ Indeed, when Congress passed the original ADA it highlighted the “discriminatory effects of architectural, transportation, and communication barriers.”³²⁹ Additionally, people with disabilities have been heavily stigmatized for centuries and across different cultures.³³⁰ Throughout history, people with disabilities have been “shunted aside, hidden, and ignored.”³³¹ People with a wide variety of impairments have been segregated in a “collection of congregate institutions,” perpetuating the idea that people with disabilities are incapable of participating in community life.³³² And even non-institutionalized disabled people rarely worked or patronized businesses.³³³ As noted above, we must sometimes treat people with disabilities differently through the provision of reasonable accommodation to achieve genuine equality of opportunity.

Third, protecting symmetrically would yield an enfeebled ADA since giving able-bodied persons a reverse cause of action would inevitably undercut

³²⁶ Cf. *What You Should Know: Questions and Answers About the Genetic Information Nondiscrimination Act (GINA) and Employment*, EQUAL EMP. OPPORTUNITY COMM’N, https://www.eeoc.gov/eeoc/newsroom/wysk/gina_nondiscrimination_act.cfm [<https://perma.cc/X4D6-HSFM>] (last visited Aug. 9, 2017) (stating that since its enactment, 700 charges have been brought under GINA with the EEOC resolving 600 of them).

³²⁷ *Supra* notes 274–277 and accompanying text.

³²⁸ Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1044 n.11 (2004) (defining the “built environment” as physical edifices that are not wheelchair accessible and “the rules, policies, and practices” that provide a social framework which does not account for all kinds of physical needs and abilities).

³²⁹ 42 U.S.C. § 12101(a)(5) (2012).

³³⁰ Areheart, *supra* note 210, at 1149–54.

³³¹ *Alexander v. Choate*, 469 U.S. 287, 296 (1985) (quoting 117 CONG. REC. 45974 (1971) (statement of Rep. Vanik)).

³³² Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 441 (2000).

³³³ Areheart, *supra* note 210, at 1150.

many of the accommodations the law stipulates as reasonable. As noted above, the reassignment and job restructuring accommodations are both ones that require tradeoffs in the treatment of people with and without disabilities. If the ADA were reformulated symmetrically, people without disabilities could win the argument that they were discriminated against in the extension of such accommodations.

The ADA as currently constituted is already less exclusionary than it otherwise might be. As noted in Part I, the ADA protects people *without disabilities* from discrimination due to a mistakenly perceived disability, because of their relationship with someone who is disabled, or for opposing conduct that violates the statute.³³⁴ Moreover, the 2008 ADA Amendments Act vastly expanded the scope of the disability protectorate, leading some commentators to discuss the statute as approaching universality.³³⁵

There is also a variety of race-based protections that warrant asymmetric treatment. While race is a universally held trait, there are several doctrines where protecting race symmetrically may subordinate already disadvantaged groups. Scholars have for decades argued in favor of abandoning the current symmetrical treatment of race under the Equal Protection Clause and employing heightened scrutiny only when a state takes action that subordinates.³³⁶ In one of the pioneering works on the subject, Professor Ruth Colker argues that the value of antisubordination warrants abandoning the symmetrical treatment under the Equal Protection Clause.³³⁷ Under her formulation, a state actor could always use “facially differentiating policies to redress subordination.”³³⁸ In effect, she is proposing that state action be evaluated asymmetrically depending upon whether the impacted race or sex has a history of subordination. She argues the antisubordination perspective is consistent with the Equal Protection Clause’s history and that understanding the doctrine through the lens of antisubordination would provide state actors more flexibility to make use of race or sex-specific remedies.³³⁹ Colker further argues this change in constitutional doctrine is necessary as a matter of substantive justice given the difficul-

³³⁴ *Supra* notes 72–74 and accompanying text.

³³⁵ See, e.g., Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 263 (2010); Travis, *supra* note 67, at 938, 998–1002.

³³⁶ E.g., Fiss, *supra* note 24, at 157 (arguing the Equal Protection Clause proscribes state conduct that further subordinates an already “specially disadvantaged group”); Flagg, *supra* note 22, at 993–1001 (detailing her proposal).

³³⁷ See generally Ruth Colker, *Anti-subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (advocating adopting an antisubordination instead of antidifferentiation approach in equal protection jurisprudence).

³³⁸ *Id.* at 1015.

³³⁹ *Id.* at 1013–14.

ty, demonstrated throughout history, in achieving true equality through race- and sex-neutral measures.³⁴⁰

Similarly, given the zero-sum distribution of opportunities via disparate impact jurisprudence,³⁴¹ it might be reasonably reformulated to protect only those groups that have historically been disadvantaged.³⁴² While less common, it is not hard to imagine facially neutral policies that might aid minorities, while disproportionately disadvantaging white workers. For example, reductions in force, which often disproportionately impact older workers could be reframed as disadvantaging whites.³⁴³ Similarly, city policies in very urban areas that restrict employment to residents might also disparately impact Caucasian workers.³⁴⁴ While symmetrically giving white workers a remedy in such situations would remove any advantage non-white workers might have—in effect, disadvantaging them—many of the benefits associated with symmetry simply do not apply. There are no stereotypes, for instance, uniquely challenged through a “reverse” disparate impact cause of action, nor do the expressive and tactical concerns seem as weighty given that disparate impact applies only to facially neutral standards and practices.

Finally, at certain times and in certain places and industries, there is a manifest difference in the relationship different races have to employment. In the run-up to Donald Trump’s recent election, racial inequities and divisions have been pronounced and heightened. It is hard for many to recall a time where racial injustice has been more on display than the present.³⁴⁵ There is widespread police brutality toward African Americans, heightened and divisive rhetoric directed toward Muslims and Mexicans, and ongoing school and housing segregation.³⁴⁶ Much more is known about implicit bias and the way in which it can “predict racial disparities in employment.”³⁴⁷ It is clear we have not reached a point where race no longer has an outsized effect in the distribution of opportunities.³⁴⁸ The project of building a more just opportunity struc-

³⁴⁰ *Id.* at 1013.

³⁴¹ *Supra* note 303 and accompanying text.

³⁴² *See supra* notes 303–308 and accompanying text (discussing disparate impact jurisprudence as a system of reallocating opportunities).

³⁴³ Sullivan, *supra* note 304, at 1509–11 (observing that the increase of women and minorities in the workforce over the past four decades has resulted in an older workforce that is “disproportionately white and male in many [areas]”).

³⁴⁴ *Id.* at 1509.

³⁴⁵ *See* Elise C. Boddie, *The Future of Affirmative Action*, 130 HARV. L. REV. FORUM 38, 38 (2016), http://harvardlawreview.org/wp-content/uploads/2016/11/Forum_Vol.130_Boddie.pdf [<https://perma.cc/B942-6PE3>].

³⁴⁶ *See id.* at 38–39 (chronicling “problems of racial injustice”).

³⁴⁷ *See* L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 876 (2017) (“[A] meta-analysis of 122 implicit bias studies found evidence that implicit racial biases predict racial disparities in employment and healthcare.”).

³⁴⁸ *See* Cho, *supra* note 20, at 1593 (arguing “post-racialism” is a “dangerous ideology”).

ture “requires a measure of intentionality that only affirmative action can deliver.”³⁴⁹ Accordingly, we might reasonably see asymmetry in the form of race-based affirmative action as warranted to help ameliorate the structural disadvantage that certain minorities have historically faced, and continue to face.

Figure 2.
Application to Select Statutes

	<i>Symmetry Warranted</i>	<i>Asymmetry Warranted</i>
<i>Law is Currently Symmetrical</i>	<ul style="list-style-type: none"> ▫ Sex (Title VII) ▫ Genetic Information (GINA) 	<ul style="list-style-type: none"> ▫ Race (Equal Protection Clause) ▫ Race (Disparate Impact under Title VII)
<i>Law is Currently Asymmetrical</i>	<ul style="list-style-type: none"> ▫ Age (ADEA) 	<ul style="list-style-type: none"> ▫ Disability (ADA) ▫ Race-Based Affirmative Action

CONCLUSION

This Article has argued that the symmetry principle is one of the prevailing antidiscrimination norms. Symmetry has long been hidden in plain sight and is distinct from other major normative theories. This Article has made the case for a presumption in favor of protecting symmetrically in situations where a ground is universally held. There will often be sufficient *expressive*, *tactical*, and *substantive* benefits, associated with protecting all groups, to justify the measure.

Despite these strengths, it is not always sensible or desirable to protect symmetrically. This Article has identified a few situations where asymmetrical laws may be more justified. Sometimes, the protection is most intelligible when formulated asymmetrically due to lack of a cognate group or groups being differently situated within the relevant opportunity structure. At other times, the zero-sum impact of protecting symmetrically would further subordinate in a way that warrants asymmetry.

We need both symmetrical and asymmetrical approaches to comprehensively combat discrimination, because discrimination laws have different purposes and involve qualitatively different types of identity. This Article has sought to install an analytical framework to guide legislative bodies in designing antidiscrimination protections in a rapidly evolving society.

³⁴⁹ Boddie, *supra* note 345, at 39.

