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Respect, Individualism, and Colorblindness

ABSTRACT. What principle underlies the Supreme Court's "colorblind" or "anticlassification" approach to race and equal protection? According to the Court and many commentators, the answer lies in a kind of individualism—a conviction that people should be treated as individuals, not as instances of racial types. Yet the Court has said almost nothing about what it means to treat someone "as an individual." By excavating the philosophical foundations of that idea, this Article offers a framework for understanding, and then evaluating, the claim that the government fails to treat people as individuals when it classifies them by race.

Rightly understood, the Article argues, treating people as individuals means showing respect for their individuality, a central facet of their moral standing as persons. To evaluate the claimed link between individualism and colorblindness, then, one first has to consider what respect for a person's individuality involves. Drawing on the philosophical literatures on respect and autonomy, the Article offers an answer to that question: treating someone as an individual requires taking due account of the information conveyed by her self-defining choices. But that answer entails that respect for a person's individuality does not inherently require, or even favor, disregard of information carried by her race. The Article thus offers an internal critique of the Supreme Court's avowedly "individualistic" approach to race and equal protection; it shows that the central moral argument for colorblindness rests on too shallow an account of what individualism itself demands.

Building on that conclusion, the Article then turns to suggestions that racial distinctions—whatever their intrinsic moral status—are nonetheless stamped with social meanings that render them disrespectful of a person's individuality. Even if such meanings might justify limiting integrative race-based state action, the Article contends, the recognition that no more basic moral wrong is at work should transform the colorblindness project. It should prompt the Court to enforce colorblindness, if it does, with regret rather than indignation. And it should lead the Court to decide cases, and write opinions, in ways that avoid further entrenching social meanings that stand in the way of racial repair.

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INTRODUCTION

Nobody knows quite what the Supreme Court's equal-protection jurisprudence will look like in the era after Justice Kennedy, but those who favor integrative, race-conscious state action are understandably pessimistic.[1] Although Justice Kennedy could be a fierce critic of governmental consideration of race, he also resisted, at key moments, the "all-too-unyielding" colorblindness embraced by those to his right.[2] Unless another member of the Court's conservative majority steps into that role, the proverbial dam will break. In doctrinal terms, more ways of accounting for race will be subjected to strict scrutiny and that scrutiny will more often prove to be "fatal in fact."[3] In practical terms, affirmative-action policies, disparate-impact prohibitions, and race-conscious decisions about school sites and attendance zones all appear under renewed threat.[4]

This moment of transition invites varied responses, but central among them should be a renewed effort to engage the case for colorblindness on its own philosophical terms. For decades, scholars have debated, and mainly criticized, the modern Court's "choice to privilege individualism as a core equal protection

1. *See, e.g.*, Adam Liptak, *How Brett Kavanaugh Would Transform the Supreme Court*, N.Y. TIMES (Sept. 2, 2018), https://www.nytimes.com/2018/09/02/us/politics/judge-kavanaugh-supreme-court-justices.html [https://perma.cc/9JQM-MT78] (collecting predictions about the Court's path after Justice Kennedy's retirement).

2. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment). For accounts of the distinctive middle path forged by Justice Kennedy in equal-protection cases, see, for example, Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After* Inclusive Communities, 101 CORNELL L. REV. 1115, 1116-30 (2016); Mitchell N. Berman & David Peters, *Kennedy's Legacy: A Principled Justice*, 46 HASTINGS CONST. L.Q. 311, 373 (2019); and Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011).

3. *Compare* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (citation omitted)), *with Parents Involved*, 551 U.S. at 833-34 (Breyer, J., dissenting) ("Today's opinion reveals that the plurality would . . . transform[] the 'strict scrutiny' test into a rule that is fatal in fact across the board.").

4. Each of these practices was recently approved by the Supreme Court, but with Justice Kennedy casting the deciding vote and writing the controlling opinion. *See* Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198 (2016) (upholding a race-conscious admissions program); Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015) (concluding that disparate-impact liability can be circumscribed in ways "that avoid the serious constitutional questions that might [otherwise] arise"); *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment) (suggesting that school districts may consider race in some forms to achieve integration).

value."[5] But it now seems clear that, for better or worse, this basic outlook will continue to shape equal-protection law for the foreseeable future. And so it is particularly important now to ask not only what values ought, in principle, to orient equal-protection law but also whether the "individualistic" orientation embraced by the Court would justify its doubling down on colorblindness in the way that many expect.

This Article takes up the latter question and argues that the answer is "no." It advances that claim by offering a new analytical framework for understanding, and then evaluating, a central pillar in the standard case for colorblindness: the claim that race-based state action wrongfully fails to treat people *as individuals*.[6] That charge will be familiar to any reader of the Court's equal-protection cases; it has become a kind of mantra in opinions condemning race-based state action. As the Court's colorblindness advocates have most often put it:

> [A]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as *individuals*, not as simply components of a racial, religious, sexual or national class.[7]

According to this line of thought, race-based differential treatment is at odds with proper respect for a person's standing *as* a person, because it treats her as a mere instance of an unchosen racial type instead. Race-based state action, in other words, "causes 'fundamental injury' to the 'individual rights of a person'"[8]

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5. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 554 (2003). For a sampling of important contributions to that critical literature, see *infra* note 16. For defenses of the Court's "individualistic" approach, see *infra* note 11.

6. For another recent examination of "the Supreme Court's notion of the right to be treated as an individual rather than as a member of a group," see Patrick S. Shin, *Treatment as an Individual and the Priority of Persons over Groups in Antidiscrimination Law*, 12 DUKE J. CONST. L. & PUB. POL'Y 107, 109 (2016).

7. *Parents Involved*, 551 U.S. at 730 (plurality opinion) (emphasis added) (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)); *see, e.g.*, *Fisher II*, 136 S. Ct. at 2220-21 (Alito, J., dissenting); Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 316 (2013) (Thomas, J., concurring); Ricci v. DeStefano, 557 U.S. 557, 595 (2009) (Scalia, J., concurring); Missouri v. Jenkins, 515 U.S. 70, 120-21 (1995) (Thomas, J., concurring); *Miller*, 515 U.S. at 911; J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 152-53 (1994) (Kennedy, J., concurring in the judgment); Metro Broad., Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting); *see also* Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1083 (1983) (Powell, J., concurring in part and dissenting in part) ("Title VII requires employers to treat their employees as *individuals*, not 'as simply components of a racial, religious, sexual, or national class.'" (quoting City of L.A., Dep't. of Water & Power v. Manhart, 435 U.S. 702, 708 (1978))).

8. Shaw v. Hunt, 517 U.S. 899, 908 (1996) (quoting Goodman v. Lukens Steel Co., 482 U.S. 656, 661 (1987)).

because it "treat[s] individuals as the product of their race,"[9] fails to show "respect based on the unique personality each of us possesses,"[10] and so infringes the "'personal right[]' to be treated with equal dignity and respect."[11]

This argument from respect for a person's individuality does vital work in justifying the anticlassification approach to race and equal protection. It roots that doctrine in the intuitive "[r]evulsion [that] starts up at the instant the state reduces a person to her race in deciding how to treat her."[12] At the same time, it responds to the need to "provide some *explanation* of why racial generalizations are so bad," something beyond the flat assertion that they are "intrinsically evil."[13] The core of that explanation, the Court has suggested, is that race-based state actions show a fundamental kind of disrespect for each person's standing as an autonomous, self-defining individual.[14]

Yet the argument linking colorblindness to respect for people's individuality remains highly opaque. Modern equal-protection law may have "forced lawyers

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9. *Miller*, 515 U.S. at 920 (quoting *Metro Broad.*, 497 U.S. at 604).

10. Rice v. Cayetano, 528 U.S. 495, 517 (2000).

11. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948)). For academic variations on this theme, see, for example, J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 292 (1979); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 214-17, 264-65 (2011); William Bradford Reynolds, *Individualism vs. Group Rights: The Legacy of* Brown, 93 YALE L.J. 995, 996-1001 (1984); Dawinder S. Sidhu, *Racial Mirroring*, 17 U. PA. J. CONST. L. 1335, 1354 (2015); and Charles Fried, Comment, Metro Broadcasting, Inc. v. FCC*: Two Concepts of Equality*, 104 HARV. L. REV. 107, 107-08 (1990).

12. Frank I. Michelman, *Reflection*, 82 TEX. L. REV. 1737, 1747 (2004).

13. David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 131-32 (emphasis added).

14. Of course, there are other arguments for colorblindness as well. Racial classifications are sometimes said to breed divisiveness, or to raise the social salience of race, or to indicate invidious motives. For the most part, this Article does not engage those arguments. *Cf.* Julie C. Suk, *Quotas and Consequences*, *in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 228, 231-34 (Deborah Hellman & Sophia Moreau eds., 2013) (drawing a like distinction between arguments resting on "the individual's right to respect as an individual" and those resting on a policy's "undesirable consequences"); Siegel, *supra* note 2, at 1282 (arguing that concerns over social balkanization are "analytically distinct from the value of individualism associated with colorblindness"). It bears noting, however, that the argument from respect for individuality has at least one significant feature that the other arguments lack: it purports to identify a *personal wrong* someone suffers *whenever* she is subjected to race-based differential treatment. That is, it does not treat the plaintiff as merely a kind of private attorney general vindicating larger social concerns, and it does not treat colorblindness as a mere prophylactic rule prohibiting actions that, judged on their own merits, might well be unimpeachable. The argument from respect for individuality thus offers at least putative support for significant features of equal-protection doctrine, *see infra* note 171 and accompanying text, that the other arguments cannot readily explain.

to become philosophers,"[15] but it has not forced them to show their philosophical work. Most notably, the Court has made hardly any effort to explain *how* race-based state action fails to treat or respect people as individuals—or, for that matter, what treating someone "as an individual" even means. Meanwhile, dissenters from colorblindness have long criticized it as too individualistic, too inattentive to questions of group hierarchy and status.[16] But they, too, have often given short shrift to the same, more basic question: what does treating someone respectfully as an individual involve in the first place, and when and why might race-based differential treatment be (or be thought to be) at odds with it?

By squarely tackling that foundational question, I hope to make the principled objection to race-based state action tractable to analysis and internal critique. And in so doing, I also hope to surface a new set of questions—questions internal to the Court majority's normative commitments—that should be of interest to readers who approach equal-protection law from a variety of different perspectives. Put another way, by opening up the philosophical black box of the Court's avowed individualism, this Article aims to advance a debate that has long pitted a conservative Court majority that views colorblindness as a moral imperative, on the one hand, against a chorus of academic critics who reject the "individualistic" premises of the Court's approach to equality altogether, on the other.

To break that impasse, the Article first seeks to open up a logical space between two distinct ideas that I have already introduced in passing: the principle that people should be treated as individuals, and the colorblind (or "anticlassification") conception of equal protection. The key to opening that space is taking

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15. ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 14 (1996).

16. For influential criticisms of colorblindness that cast it as an entailment or natural outgrowth of "liberal individualism," see, for example, ROBERT BLAUNER, RACIAL OPPRESSION IN AMERICA 266-68 (1972); GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 112 (2003); Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1052-53 (2007); and Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 767-69, 772 & n.25. More broadly, the leading intellectual tradition opposed to colorblindness, known as antisubordination theory, has long distinguished between an "individualistic" understanding of equal protection that prohibits the use of race as a ground of classification, on the one hand, and a "group-centric" understanding that prohibits practices that contribute to the subordination of social groups, on the other. *See generally* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976) (arguing that the prevailing understanding of the Equal Protection Clause embodies a "very limited conception of equality" that is "highly individualistic," and advocating an approach focused on the subordination of social groups instead). Important works in this tradition include Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 36-66 (1991); and Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

the asserted obligation to "treat people as individuals" seriously enough to recognize it as one member of a broader family of moral norms. Like the obligation to treat people *as equals* (emphasized by Ronald Dworkin),[17] or the obligation to treat people *as ends in themselves* (famously posited by Immanuel Kant),[18] claims of an obligation to treat people *as individuals* assert that one should act toward a person only in ways that account for an important facet of her personhood—in this instance, her individuality. So understood, "treating people as individuals" is not just a slogan for, or otherwise synonymous with, colorblindness; rather, it is a recognizable moral norm with distinct, if uncertain, content. And once we see the operative norm in this broader perspective, we can also see that a commitment to treating people as individuals does not *necessarily* require inattention to race, as even opponents of colorblindness have sometimes supposed. Rather, whether colorblindness draws support from a moral commitment to individualism depends on what respect for a person's individuality, as a general matter, involves—a deep question that the Court has never squarely posed, let alone answered.

The second project of the Article is thus to offer an affirmative account of what treating people respectfully as individuals does require, both in general and in the distinctive context of racial classifications and inferences. In offering such an account, I do not claim that whether some practice treats people as individuals *ought* to be a predominant concern of equal-protection law. Rather, I set out to investigate what plausibly follows *if* the demands of equal protection are interpreted through the lens of an imperative to treat or respect people as individuals, as the Court's proponents of colorblindness have urged.[19] My answer draws on what I have elsewhere called "the autonomy account" of the moral obligation to treat people as individuals, which itself builds on the rich philosophical literature

17. RONALD DWORKIN, A MATTER OF PRINCIPLE 190 (1985).

18. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 38 (Mary Gregor ed. & trans., 1998) (1785).

19. To put the point another way: I understand the Court's colorblindness advocates as adopting a kind of Dworkinian "moral reading" of equal protection—namely, one that takes the Equal Protection Clause to incorporate the principle that people should be treated as individuals—and I am evaluating their account of what that principle, in turn, requires. *See* RONALD DWORKIN, FREEDOM'S LAW 2-12 (1996) (describing the "moral reading" approach); *cf. id.* at 3 ("Conservatives strongly disapprove, on moral grounds, the affirmative action programs . . . [that] give certain advantages to minority applicants for universities or jobs, and conservative justices have not hesitated to follow their understanding of what the moral reading required in such cases."). Although I doubt that these Justices would embrace that characterization of their approach, their opinions bear it out. *See infra* Section I.C and notes 29, 86.

on autonomy.[20] The basic picture is simple. Because a person's individuality takes its moral significance from her autonomy—her capacity to shape her own life—treating or respecting a person *as an individual* is best understood to require treating her *as autonomous*. Due recognition of someone's autonomy, in turn, requires paying attention to relevant evidence of her self-defining choices. But it does not require eschewing relevant information, because there is no inconsistency between recognizing someone as autonomous and making fully informed, suitably humble predictions and inferences about her. Thus, respect for people as autonomous individuals sometimes may require *including* certain facts in one's judgments, but it never requires *excluding* true and relevant facts from consideration.

This account taps the central intuition underlying the moral argument for colorblindness—the sense that "it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own . . . essential qualities"[21]—but it does not vindicate claims that a blanket ban on race-consciousness should follow. For one thing, policies that attend both to a person's race *and* to her self-defining choices—such as the university affirmative-action policies approved by the Court's existing jurisprudence—do treat people respectfully as autonomous individuals. Indeed, in a society characterized by racial bias, attending to race will often be *necessary* to treating a person respectfully as an individual—because race will mediate evidential connections between her record of choices or achievements and what the Court calls "her own essential qualities." Colorblindness, which is so often justified as a way of respecting people as individuals, thus stands in the way of doing exactly that.

Finally, the Article has a third aim that builds on and complements the other two. The autonomy account shows that—as a matter of basic moral principles—race-based generalizations and decision-making need not be at odds with proper regard for a person's individuality. But both daily experience and a large body of scholarship teach that respect is not only a matter of abstract moral principles; it also requires observance of culturally contingent social norms that inscribe particular acts with artificial meanings they need not have had. Think of failing to make eye contact, or wearing dark makeup as part of a Halloween costume in-

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20. BENJAMIN EIDELSON, DISCRIMINATION AND DISRESPECT 127-70 (2015) [hereinafter EIDELSON, DISCRIMINATION AND DISRESPECT]; *see also* Benjamin Eidelson, *Treating People as Individuals*, *in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 203 (Deborah Hellman & Sophia Moreau eds., 2013) [hereinafter Eidelson, *Treating People as Individuals*] (offering some additional examples). For another effort to use that account of treating people as individuals to interpret and evaluate equal-protection doctrine, see Shin, *supra* note 6, at 119-22, 127-28.

21. Rice v. Cayetano, 528 U.S. 495, 517 (2000).

spired by a black celebrity, or segregating schools by race. Each can be profoundly disrespectful, but the disrespect may derive from contingent facts about the way the action "is usually interpreted,"[22] rather than from any bedrock normative principle operating alone. Interpreted most charitably, then, the Court can be understood as insisting that the government should not act in ways that are *socially marked* as expressing disrespect for people's individuality, regardless of whether the action would have had anything wrong with it in the absence of the relevant social convention. The Article's final aim is to untangle the predicament that this interpretation of the case for colorblindness, when joined with the lessons of the autonomy account, suggests.

The nub of the quandary is this: what should we do—and what should the Court do—when "overbroad" social conventions mark as disrespectful, and thus may *make* disrespectful, valuable courses of action that would otherwise be morally and constitutionally benign? Analogizing to the debate over "anti-commodification" objections to potentially life-saving markets, the Article highlights the element of tragedy in such cases—here, in social norms that may actually, but unnecessarily, make even integrative uses of race operate as marks of disrespect for people's individuality. If that is our situation, then even someone firmly convinced of the offensive quality of race-based differential treatment should be able to recognize the norms themselves as proper objects of regret and, indeed, as potentially in need of repair.

In that spirit, the Article concludes by drawing out three ways in which a Court committed to colorblindness, but cognizant that the respect norm it is enforcing often corresponds to no deeper or more universal moral wrong, might approach its work differently. To begin, such a Court would eschew moralistic rhetoric—such as comparisons of affirmative action to white supremacy or apartheid—that serves only to entrench the assertedly insulting social meaning of integrative race-based state action. More ambitiously, such a Court might also seize opportunities to use its own influence over ambiguous social meanings to neutralize obstacles to race-based interventions—offering a kind of "saving construction," but of a law's social meaning, rather than its text. Finally, a Court that candidly acknowledged colorblindness as a rule marking no intrinsic wrong would thereby deny itself the option of dismissing any particular claim of felt racial disrespect on the ground that it involves no such wrong. Such a Court could therefore be expected to strictly scrutinize practices, such as the use of race in suspect descriptions, that many people of color perceive as signifying disrespect for their individuality—even if (as the autonomy account suggests) these practices are not inherently at odds with due moral respect.

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22. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (internal quotation marks omitted); *see infra* note 269 and accompanying text.

Of course, none of this is to say that the Supreme Court's equal-protection doctrine is *likely* to evolve in these ways in the hands of the Court's new working majority. I hope to show that it should—and, more precisely, that it should by the lights of the principles that, according to the Court's cases, lie "[a]t the heart of the Constitution's guarantee of equal protection."[23] But even a deliberately internal argument of this kind will only work if the asserted premises were driving the conclusions—rather than vice versa—to begin with.[24] And given the arc of the law in this area, and especially its alignment with historical and political forces favoring the racial status quo, many understandably doubt that the Court has been operating in that kind of good faith (or, presumably, that its newest members will be any different).[25] If that is so, one might ask, what is the point?

This is not the place to weigh up the evidence for and against those doubts, so I will just offer this: even if one concludes that the Justices themselves are not operating in good faith, it hardly follows that all who might be drawn to their vision of equal protection are not either. And so long as some people are sincerely trying to make up their minds about the demands of equal protection, it matters what story we tell and teach about the normative foundations of the alternatives on offer. As I hope to show, the prevailing story—the one that asks the hearer to choose between the principle "that the Government must treat citizens as individuals,"[26] on the one hand, and the demands of racial justice, on the other—is significantly misconceived, *regardless* of the conscious or unconscious motives of the Justices advocating the former view. Thus, in the larger effort to grapple with

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23. Miller v. Johnson, 515 U.S. 900, 911 (1995) (citations omitted); *see supra* note 7.

24. For relevant discussions of good faith in constitutional argument, see Richard H. Fallon, Jr., *Arguing in Good Faith About the Constitution: Ideology, Methodology, and Reflective Equilibrium*, 84 U. CHI. L. REV. 123, 142 (2017); David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 948-50 (2016); and Louis Michael Seidman, Substitute Arguments in Constitutional Law (July 17, 2015) (unpublished manuscript), http://ssrn.com/abstract=2631119 [https://perma.cc/WJ8D-QSET].

25. *See, e.g.*, Haney López, *supra* note 16, at 992-95 (offering "a history of the ideas about race and racism in the United States used in the 1970s by legal elites, meaning leading constitutional scholars and Supreme Court Justices, to justify the claim that under our Constitution race-conscious remedies and racial subordination are equal evils"); Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 3-4 (2013) (arguing that the Court "changed constitutional law in response to resistance the civil rights project aroused," that contemporary doctrine is "divided into two racially marked branches that demonstrate . . . different solicitude toward citizens' expectations of fairness," and that these branches reflect "differences in empathy").

26. *Miller*, 515 U.S. at 911 (citations omitted); *see supra* note 7.

colorblindness, projects that historicize the Court's approach make one important contribution, but projects that assume good faith, the better to meet the approach on its merits, make another.[27]

The Article unfolds as follows. Part I lays the conceptual and doctrinal foundation for the arguments that follow. It offers a preliminary conceptual analysis of the notion of treating people as individuals, introduces a distinction between two different ways of understanding the moral demands of respect (one resting on judgments of moral principle, the other resting on social conventions and foreseeable felt meanings), and then argues that the leading cases advocating colorblindness are best read as asserting that race-based state action disrespects people in both of these ways. Part II articulates and refines the autonomy account mentioned above and then explains how that account undermines suggestions that all or nearly all race-based distinctions manifest a basic failure to relate to people in a way that respects their individuality. Finally, Part III turns to the significance of the fact that race-based inferences and distinctions may bear social meanings that turn out to correspond to no more basic moral requirements. If the Court's advocates of colorblindness came to view the core of their objection as turning on social norms of that kind, Part III argues, they would have reason to pursue their project in a more self-conscious, cautious, and ambivalent way than they have thus far. And those same lessons, I will suggest along the way, cast light on a host of other political and constitutional controversies, past and present, that implicate claims of respect and dignity—normative concepts that lie at the intersection of universal moral principles and contingent, evolving social norms.

I. THE IDEA OF TREATING PEOPLE AS INDIVIDUALS

What is the Court saying when it insists that "the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class"?[28] This Part employs a mix of philosophical and doctrinal analysis

27. *Cf.* Pozen, *supra* note 24, at 948-50 (cataloging costs of "bad faith talk" in constitutional discourse, including that "constitutional debate in the United States is often as much about the motives of the participants as it is about the substance of their positions"); Seidman, *supra* note 24, at 39 (suggesting that "[a] claim of unconscious motivation substitutes ad hominem attack for reasoned refutation," such that "both sides will then be left bickering over mental states instead of grappling with substantive disagreement").

28. *Miller*, 515 U.S. at 911 (citations omitted); *see supra* note 7.

to get a handle on that central idea and its place in the case law, laying the foundation for the sustained critique that follows.[29]

The first step is to mark a distinction between two different ways the notion of "treating people as individuals" functions, both in the law and in ordinary life.[30] In one familiar usage, to say that an act or practice treats people as individuals is just to say that it involves a relatively granular, case-by-case kind of decision-making. But in another usage, treating people as individuals means affording them an important kind of moral respect; it is a way of talking about "the inherent dignity of being treated as an individual agent," or affording "respect for individuality."[31] It is in this second sense that treating people *as individuals* parallels other familiar demands of respect, such as treating people *as equals* or *as ends-in-themselves*. Such respect may sometimes require case-by-case decision-making, or abjuring particular generalizations—but if so, that is a substantive moral conclusion, not a semantic or conceptual truth.

Once we have analyzed the notion of treating people as individuals in terms of respect for their individuality, it will emerge that we also need a working understanding of respect itself.[32] Drawing on relevant work in moral theory, I will suggest that respect involves recognizing something as the kind of thing it is and treating it consistently with its value. And I will offer a high-level sketch of how social conventions contribute to determining what such treatment requires in the domain of respect for persons. Here, again, familiar ways of talking obscure an important distinction. Some demands of respect arise *independently* of social

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29. Let me try to assuage one possible worry from the get-go. In light of the structure of existing equal-protection doctrine, scholars and litigants alike are more prone to ask whether some policy "classifies on the basis of race"—and if so, is "narrowly tailored" to a "compelling interest"—than whether it treats people as individuals. Does that make a close study of the latter idea unnecessary? I think not. As the materials canvassed below will show, the Court turns to individualism (as it understands it) to guide the application of these doctrinal formulae at every stage. *See infra* Section I.C. That is hardly a deep realist insight; as I noted at the outset, the Court has often announced that the "simple command" to treat people as individuals serves as the doctrine's theoretical engine. *See supra* note 7 and accompanying text; *see also* Primus, *supra* note 5, at 514-15 (positing that courts "find classifications in cases in which they have reached the conclusion that something harmful is afoot"); Stephen M. Rich, *Inferred Classifications*, 99 VA. L. REV. 1525, 1527-31 (2013) (arguing that "even facially neutral measures intended to serve benign purposes may be subject to strict scrutiny if they are found to offend constitutional equality values"); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1542-43 (2004) ("[J]udgments about whether practices are constitutionally suspect classifications are normative as well as positive."); *infra* note 86.

30. *See infra* Section I.A.

31. Rao, *supra* note 11, at 216, 265.

32. *See infra* Section I.B.

conventions about what is disrespectful — because relating to a person in a certain way is, by its nature, inconsistent with recognizing some aspect of the value of persons. Other demands of respect, by contrast, derive from shared beliefs that *make* actions disrespectful when they otherwise would not be.

With these distinctions in our toolkit, we will be equipped to parse and organize what the Court is saying about individualism and colorblindness in equal-protection cases.[33] As we will see, the overarching thrust of the modern colorblindness cases has been that race-based distinctions and inferences fail to treat people as individuals in the *respect-based* sense (although, interestingly, it was not always thus). And while the Court has not clearly distinguished between the intrinsic and convention-dependent varieties of disrespect, it is best read as suggesting that *both* kinds of disrespect are at issue. That is, the Court takes race-based treatment by government to evince both a defective moral relationship to a person, independent of our contingent social norms marking race-based action *as* disrespectful, and also an improper transgression of those very symbolic conventions. Getting that view on the table will allow us to critique its two aspects in Part II and Part III, respectively.

A. Two Concepts of Treating People as Individuals

The idea of treating people as individuals plays an important role in constitutional law, but it has its roots in ordinary moral thought. As the philosopher Erin Beeghly says, "It is commonly assumed that we ought to treat persons as individuals and that failing to do so is morally problematic."[34] We see this reflected in the way people voice moral convictions — especially, but not only, about stereotyping and discrimination. But as I suggested a moment ago, we need to distinguish two different ways of understanding this central idea in order to make sense of it.

To see the first of these two distinct concepts at work, consider a simple, nonlegal example. According to the English football player David James, Harry

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33. *See infra* Section I.C.

34. Erin Beeghly, *Failing to Treat People as Individuals*, 5 ERGO 687, 688 (2018). There is a growing philosophical literature addressed to the question of what the apparent obligation to treat people as individuals might involve. *See, e.g.*, LAWRENCE BLUM, "I'M NOT A RACIST, BUT . . .": THE MORAL QUANDARY OF RACE 79 (2002); SARAH MOSS, PROBABILISTIC KNOWLEDGE 220 (2018); Beeghly, *supra*, at 688; Eidelson, *Treating People as Individuals*, *supra* note 20; Kasper Lippert-Rasmussen, *"We Are All Different": Statistical Discrimination and the Right to Be Treated as an Individual*, 15 J. ETHICS 47 (2011).

Redknapp, a celebrated team manager, is so successful because "he treats everyone as an individual."[35] As James explains, Redknapp makes decisions about training regimens and other matters "on a case-by-case basis," and he is "always . . . happy to make exceptions."[36] "The genius of it," James says, "is how often he gets it right."[37]

When James says that Redknapp "treats everyone as an individual," he is invoking what I will call the *thin* sense of that idea. Treating people as individuals in this first sense means making decisions in a relatively granular and information-intensive way, using narrower reference classes rather than wider ones. To adapt a distinction of Ronald Dworkin's, this sense of treating people "as individuals" is more or less synonymous with treating or evaluating them "individually."[38] In fact, treating *people* as individuals, understood in this first way, is not fundamentally different than treating or evaluating *any* class of things in the same manner. For instance, we might likewise say—in that same, thin sense—that an ordinance requiring safety tests for all dogs treats or considers each dog as an individual, whereas an ordinance that bans all and only dogs of certain breeds does not.[39]

As with Redknapp's deft management, treating or evaluating people individually (or "as individuals" in the thin sense) often has the virtue of "get[ting] it right"—that is, of ensuring a close fit between one's operative criteria and ultimate goals.[40] Think, for instance, of the Supreme Court's instruction that a

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35. David James, *Old-School Charm and New-School Nous Make Harry Redknapp England's No. 1*, GUARDIAN (Feb. 11, 2012, 5:58 PM), https://www.theguardian.com/football/blog/2012/feb/11/england-fabio-capello-harry-redknapp [https://perma.cc/4NBV-RQGV].

36. *Id.*

37. *Id.*

38. *Cf.* DWORKIN, *supra* note 17, at 190 (distinguishing between treating people "equally" and "as equals").

39. The dog-regulation example highlights that "treatment as an individual" in the thin sense is relative and contextual. When an ordinance requiring safety tests for dogs is juxtaposed with a breed-specific ban, the safety-testing ordinance is naturally said to treat each dog as an individual. But insofar as that ordinance requires safety tests for all and only dogs, there is also a respect in which it does not treat each animal as an individual; it bases their treatment (i.e., their subjection to the safety-testing requirement) simply on the fact of being dogs as opposed to, say, cats. For an instructive discussion of a related example involving targeted regulation of pit bulls, see FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 55-78 (2003).

40. *Cf.* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949) (explaining how constitutional analysis sometimes tests for this kind of connection between the "trait" and the "mischief"). For a detailed treatment of the advantages and disadvantages of this kind of particularist decision-making, see SCHAUER, *supra* note 39.

sentencing judge should "consider every convicted person as an individual."[41] The apparent point is two-fold: (1) the sentencing judge should ensure that the punishment fits the offense and offender, and (2) this requires understanding the particular facts of a person's case, rather than proceeding by rough-and-ready heuristics. Similarly, in *New York City Transit Authority v. Beazer*, the Supreme Court held that a transit authority's policy of refusing to employ anyone receiving methadone treatment was constitutional—because the ban did not "impl[y] disrespect for the excluded subclass"—but nonetheless observed that it was "probably unwise" for the authority "to rely on a general rule instead of individualized consideration of every job applicant."[42]

In other circumstances, however, getting the right results or treating like cases alike may just not be very important, and thus treating people (or other things) individually may not have much to recommend it. For example, the individualized dog-licensing scheme may not be worth the trouble, if many dogs of particular breeds are dangerous, most other dogs are not, and the costs of each kind of error are modest. And in yet other circumstances, treating people individually will carry its own affirmative costs, even apart from the extra work involved.[43] For present purposes, the point is that the normative pros and cons of treating people (or other things) individually—or as individuals in the thin sense—will depend on a number of context-specific factors, most prominently the costs of different kinds of assessments and different kinds of errors.[44]

This sketch of the thin concept of treating people as individuals allows us to see, in the negative, that there is a good deal more to the idea—a distinct, *thick* concept not captured by the notion just outlined. To get a fix on this second concept, start by noting the resemblance between the purported obligation to treat

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41. Koon v. United States, 518 U.S. 81, 113 (1996).

42. 440 U.S. 568, 592 (1979).

43. *See* SCHAUER, *supra* note 39, at 290-91.

44. The thin concept that I am sketching here tracks an important strand of ordinary usage, but it has some fuzzy edges that, happily, we do not need to render precise here. Most importantly, I mean to leave unresolved whether there is some information that a decision-maker must *exclude* in order to treat people or other things individually (or "as individuals" in this sense), or whether treating people or things this way only ever requires integrating *more* information. To the extent the former interpretation has some linguistic purchase, we could understand that as an application of the same basic preference for granularity, joined with the implicit premise (whether plausible or not) that certain attributes simply lack any residual significance once others have been taken into account. *Cf.* Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 92 (2000) (positing that "within color blindness or formal-race discourse, to judge persons 'without regard to race' is to judge persons on the basis of socially relevant or meritocratic criteria, or to judge them 'as individuals,'" and that such discourse "views these various socially relevant properties . . . as distinct and distinguishable from 'race' as such").

people as individuals and other norms that tell us to "treat people as" one thing or another—for instance, *as equals* or, in Kant's famous maxim, *as ends in themselves*.[45] All of these norms are naturally understood as commanding respect for some feature of persons, where respect requires (to a first approximation) that one recognize something and regulate one's action accordingly.[46] Seen in this light, the claim that people should be treated *as individuals* can be understood as saying that the fact of their individuality should be acknowledged and afforded its due significance, whatever that in turn requires. And indeed, some complaints about asserted failures to treat people as individuals clearly sound in the key of respect in this way. That is, people often demand treatment as "an individual" not just in the name of fairness or accuracy—as the frustrated owner of a perfectly safe but forbidden dog might—but in order to avoid being demeaned or reduced to something less than they are.

Consider Anna Jones, a woman who describes herself as overweight in an essay about weight stigma and medicine.[47] When she says, "I wished my physician treated me as an individual and not as my weight," she does not appear to be saying simply that the doctor neglected relevant information or used overbroad categories in making treatment decisions. Rather, Jones seems to be saying that the doctor misrelated to her, by regarding or acting toward her as though there were nothing significant about her other than her weight—as she puts it, as if she *were* her weight.[48] Or consider a recent ad campaign run by the Washington, D.C., bus system. Each ad pictures a bus driver and includes a quote of the form: "I'm a husband, a father, a Navy veteran, and a Metrobus driver. I hope

45. The list could go on: for example, Dworkin suggested that governments must also treat their citizens "as free" and "as independent." DWORKIN, *supra* note 17, at 191.

46. I will offer a fuller account of respect and disrespect below. *See infra* Section I.B.

47. Anna Jones, *The Juxtaposition of Weight Stigma and Obesity*, U. MICH. SCH. PUB. HEALTH: THE PURSUIT (May 1, 2018), https://sph.umich.edu/pursuit/2018posts/the-juxtaposition-of-weight-stigma-and-obesity.html [https://perma.cc/5NFZ-QBHQ].

48. *Id.* Advocates of the turn toward patient-centered care have placed particular stress on the importance of respect for patients as individuals, making medicine a particularly rich source of examples of this moral concern. In the United Kingdom, for instance, the official licensing body for physicians admonishes that doctors must "treat patients as individuals and respect their dignity." GEN. MED. COUNCIL, GOOD MEDICAL PRACTICE 16 (2013), https://www.gmc-uk.org/-/media/documents/good-medical-practice---english-20200128_pdf-51527435.pdf [https://perma.cc/C8S7-WEWR]. According to another recent report, "treat[ing] people with dignity, and as individuals," is now understood to be a "core principle[] of the basic human rights of patients." Bridget Johnston et al., *The Dignified Approach to Care: A Pilot Study Using the Patient Dignity Question as an Intervention to Enhance Dignity and Person-Centred Care for People with Palliative Care Needs in the Acute Hospital Setting*, BMC PALLIATIVE CARE 10 (2015), https://bmcpalliatcare.biomedcentral.com/track/pdf/10.1186/s12904-015-0013-3 [https://perma.cc/J8B6-G6TN].

you'll see *all* the things I am and respect me, like I respect you."[49] The ads do not say, in so many words, that the riders should see or treat bus drivers *as individuals* rather than as fungible service workers, but it seems clear that they convey the same gist as if they did. And yet, here again, the point is not about insufficient granularity in any decision-making, as if the bus riders were team managers choosing which drivers to put in the game. All of this suggests that when a discriminatory act or policy is criticized on the ground that it fails to treat people as individuals, that objection can naturally be heard in a similar way—that is, as objecting to a perceived reductionism that somehow fails to account for the fact that the people involved are full-blown individuals and not simply tokens of one or another social (paradigmatically, racial) type.[50]

Having teased apart the thick and thin concepts of treating people as individuals, we can see that they bear only a contingent connection. The way to respect someone's individuality might be to adopt a granular mode of decision-making, but it might not be. That will depend on one's more general understanding of what respect for a person's individuality involves, which in turn will depend on one's understanding of what a person's individuality amounts to in the first place. I will offer answers to those questions in Part II. For the moment, the critical point is simply that there are two distinct ideas at work when we talk about treating people "as individuals" or about the asserted normative importance of doing so. And insofar as invocations of this norm appeal to our sense that some respect is owed to people in virtue of their individuality, what that kind of respect involves is a substantive, open question; the thin concept that evokes evaluating a matter in a granular way, as one might assess a dog's dangerousness or a football player's training needs, does not answer it.

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49. *See* WMATA, *Protecting Our Employees* (2019), https://www.wmata.com/rider-guide/safety/protecting-our-employees.cfm [https://perma.cc/XRX8-WQDQ].

50. Justice Murphy's dissent in *Korematsu v. United States* offers another instructive example. *See* 323 U.S. 214, 233-42 (1944) (Murphy, J., dissenting). When Murphy faulted the government for its "failure to treat these Japanese Americans *on an individual basis* by holding investigations and hearings to separate the loyal from the disloyal," *id.* at 240-41 (emphasis added), he was identifying a failure to treat people individually, or as individuals in the *thin* sense. But he took issue with that failure on two rather different grounds—first, that the government's generalization about Japanese Americans was just too weak to justify the burdens that internment imposed, and second, that the government's inference of disloyalty was at odds with "the dignity of the individual." *Id.* at 235-40. The second objection amounts to saying that, by failing to treat Japanese Americans individually in this setting, the government also failed to treat them as individuals in the thick, respect-based sense.

B. Respect and Social Conventions

Because we have now interpreted treating people as individuals (in one important sense) in terms of respect, we need to think more closely about the concept of respect as well. As I suggested above (and will explain more fully below), the Court routinely asserts that racial classifications do not treat people as individuals in the thick, respect-based sense—that they are "not consistent with respect based on the unique personality each of us possesses."[51] We cannot analyze and assess that claim without a working understanding of respect in general, and especially of how social conventions play into determining respect's demands.

We can begin from the widely held view that respect is, at its conceptual root, an attitude—a way a person regards something.[52] People thus *have* or *lack* respect for things. The object of respect (or disrespect, which is just respect's absence) could be the Mona Lisa, or the office of the presidency, or a particular person; or it could be an attribute *of* any of these things, such as a person's equality or individuality. Whether a given person has or lacks respect for any of those potential objects of respect depends on how that person thinks about, and is disposed to think about, that object—as Joseph Raz puts it, whether the person "regard[s] objects in ways consistent with their value."[53] But at the same time, respect is also a feature of actions; it is not just in people's heads. Specifically, an *action* is respectful when it arises from and is consistent with the attitude of respect—meaning, roughly, that the actor gave the normatively significant features of the

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51. Rice v. Cayetano, 528 U.S. 495, 517 (2000); *see infra* Section I.C.

52. Perhaps the most influential view along these lines is Stephen Darwall's account of "recognition respect." *See* Stephen L. Darwall, *Two Kinds of Respect*, 88 ETHICS 36, 38 (1977). T.M. Scanlon similarly understands whether an action expresses respect as turning on "what an agent . . . count[s] as reasons." T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 100, 117-18 (2008). And Joseph Raz posits that "respect in general is a species of recognising and being disposed to respond to value, and thereby to reason." JOSEPH RAZ, VALUE, RESPECT, AND ATTACHMENT 160 (2001). The sizable literature on expressive theories of law and morality also speaks to many of the same questions; respect is central among the attitudes that expressive theorists hold one should express. *See, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1509-10, 1519 (2003); Deborah Hellman, *Equal Protection in the Key of Respect*, 123 YALE L.J. 3036, 3058-59 (2014).

53. RAZ, *supra* note 52, at 161; *cf.* Darwall, *supra* note 52, at 45 ("To have recognition respect for someone as a person is to give appropriate weight to the fact that he or she is a person by being willing to constrain one's behavior in ways required by that fact.").

object of respect their due weight.[54] And an action is disrespectful when, instead, it stems from the actor's failure to regard the object as respect requires.

This fairly simple story about respect does not yet say anything about social conventions or the perceived or felt meanings of actions. But, as we all know, facts of that kind play a critical role in the way we think and talk about respect as well. To understand respect adequately, we have to unpack how this connection between social conventions and respect works.

In part, that connection just reflects the fact that the *appearance* of being respectful or disrespectful matters, and appearances are partly constituted by social conventions. Suppose, for instance, that Jones spits in Smith's direction at close quarters. But suppose also that Jones is not trying to communicate contempt for Smith: Smith is just standing in the most convenient place for Jones to spit. That quirk about Jones's motives does not change the fact that Jones's action is predictably going to signal that he does not think of Smith in a way consistent with Smith's value. And that signal matters for reasons independent of its truth: it may injure Smith's self-respect, cause estrangement between the two, affect how others look at Smith, and so forth.[55] As Rima Basu suggests, such signals of disrespect will be especially consequential for those who are "more dependent than others on external validation for the maintenance of self-respect and self-esteem," perhaps including "members of historically oppressed groups" who must contend with one or another form of double-consciousness.[56] But the broader point is just that social conventions about how people with respect ordinarily do and do not act will contribute to determining whether an action *appears* to be

54. *See* HARRY G. FRANKFURT, NECESSITY, VOLITION, AND LOVE 153 (1999) ("Failing to respect someone is a matter of ignoring the relevance of some aspect of his nature or of his situation."); SCANLON, *supra* note 52, at 118 (suggesting that "whether an action involves treating a person as an end in himself depends on what the agent saw as reasons").

55. As Robert Post observes, "If others . . . persistently violate the norms that define my dignity, I find myself threatened, demeaned, perhaps even deranged." Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 476 (1997). For more general discussions of the moral significance of appearances, see, for example, Marcia Baron, *The Moral Significance of How Things Seem,* 60 MD. L. REV. 607 (2001); Sarah Buss, *Appearing Respectful: The Moral Significance of Manners*, 109 ETHICS 795 (1999); and Deborah Hellman, *Judging by Appearances: Professional Ethics, Expressive Government, and the Moral Significance of How Things Seem,* 60 MD. L. REV. 653 (2001).

56. Rima Basu, *What We Epistemically Owe to Each Other*, 176 PHIL. STUD. 915, 924 (2019). This suggestion draws on W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 5 (1903); and Desirée H. Melton, *The Vulnerable Self: Enabling the Recognition of Racial Inequality*, *in* FEMINIST ETHICS AND SOCIAL AND POLITICAL PHILOSOPHY: THEORIZING THE NON-IDEAL 149 (Lisa Tessman ed., 2009). Basu's point is about beliefs, not manifested indications of disrespect, so I am adapting it a bit here.

respectful—regardless of the attitudes the action *actually* arises from—and that this appearance is itself often a matter of normative consequence.

In two different ways, however, social conventions about respect may also matter to whether an action *is* respectful and not simply to whether it appears to be so. First, in a case like the one I just described, Jones's spitting in Smith's direction with foreknowledge of the signal it will send (and the effects the signal will have) may itself *be* disrespectful in the attitude-derived sense defined above. That is because regarding Smith in a way consistent with her value plausibly means taking harms to Smith as weighing against an action and perhaps also seeing estrangement from Smith as regrettable.[57] If so, then choosing to spit in Smith's direction—absent a good, countervailing reason for it— will be not just apparently but *actually* disrespectful of Smith: it will be inconsistent with regarding her in the way respect involves. The prospect of *apparent* disrespect thus contributes to determining whether an action involves *actual* disrespect, because that prospect has consequences to which a person with actual respect must assign significance.[58] Importantly, this connection between apparent and actual disrespect offers at least a partial explanation of how social conventions contribute to determining what is disrespectful without departing from the premise that whether an action is disrespectful depends ultimately on the attitude, or way of responding to reasons, that underlies it.[59]

But there is also a way of talking about or understanding respect and disrespect that *does* depart from that premise and instead affords the social or conventional meaning of an action constitutive significance. In this usage, to call an action "disrespectful" is to say something about the attitude it is *apt to be understood* to manifest in light of prevailing social norms and beliefs—irrespective of whether it actually *does* manifest that attitude in the particular case. Suppose, for instance, that a child raises her middle finger at a stranger on the subway, and her mortified parent says, "That's very disrespectful!" The parent's description of the action as "disrespectful" is not wrong or unwarranted, even if the child had no idea of the gesture's significance (and so exhibited no *actual* attitude of

57. *See, e.g.*, Hellman, *supra* note 52, at 3058.

58. *Cf.* Anderson & Pildes, *supra* note 52, at 1511 ("[E]xpressive norms regulate actions by regulating the acceptable justifications for doing them." (emphasis omitted)).

59. This understanding of the connection between respect and social conventions thus does not depend on the controversial thesis that one can "say without inference about the reasoning of the agent that the meaning of this act is that the act or the agent expresses disrespect (contempt) for some other persons." Richard Ekins, *Equal Protection and Social Meaning*, 57 AM. J. JURIS. 21, 27 (2012); *see id.* at 27-48 (arguing that there are no "social meanings" in a sense that would license such claims).

disrespect), and even if the parent knows this.[60] Simon Blackburn describes an analogous category when he notes that "[w]e can say that a person can express a belief or attitude that she does not hold," and in particular that "[s]he can do this by adopting appropriate means of expression that would normally, or conventionally, or customarily, or in some way be thought to indicate a mental state, although on this occasion there is no such mental state."[61] To accommodate and isolate this way of talking about respect, we can say that an action is disrespectful *in the conventional sense* if and only if—by the lights of operative social conventions within a community—it is likely to be understood to indicate disrespect (in the more basic, attitude-derived sense). For an act to be disrespectful in this sense is conceptually akin to its being a violation of etiquette or manners, although the stakes can be much higher than those ideas connote. Meanwhile, we can call the other sense of disrespect—the more fundamental one, described above, that does turn on an agent's attitude—disrespect *in the basic sense*.[62]

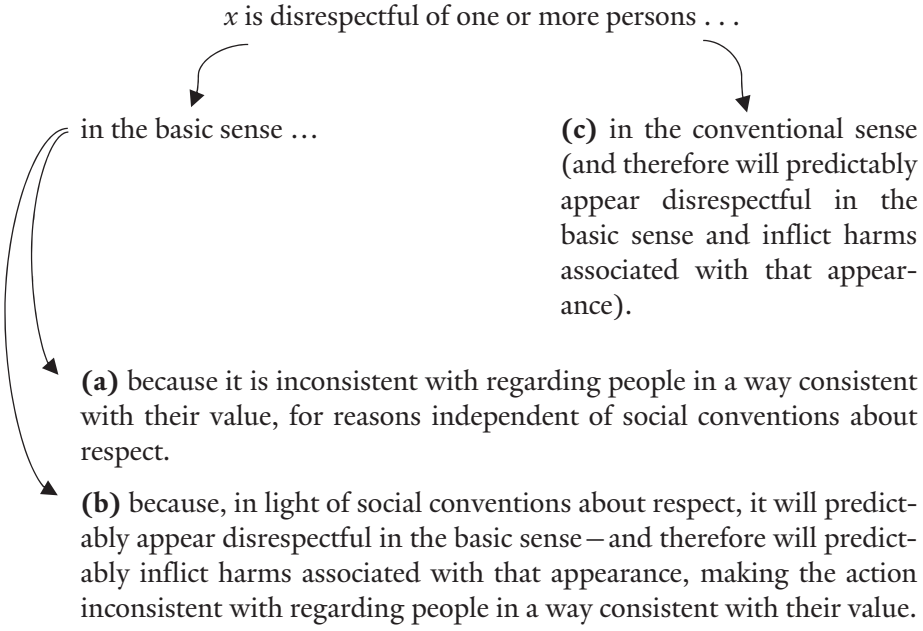
This emerging picture suggests one more cross-cutting distinction, one that will prove particularly useful in understanding claims about race and respect. Consider the assertion "*x* is disrespectful of one or more persons," voiced as a criticism of an action *x*. The *x* here could be pretty much anything—spitting in someone's direction, wearing blackface, considering race in assigning children to schools, reckless driving, using lethal force to apprehend a criminal suspect, and so on. For any such statement, we can now divide up the main possible meanings of that claim as follows:

60. Joshua Glasgow employs a similar example for different purposes. *See* Joshua Glasgow, *Racism as Disrespect*, 120 ETHICS 64, 83 (2009); *see also* EIDELSON, DISCRIMINATION AND DISRESPECT, *supra* note 20, at 84 (discussing the same example).

61. Simon Blackburn, *Group Minds and Expressive Harm*, 60 MD. L. REV. 467, 474 (2001). This same sense of the word underlies Darwall's observation that one can "'be respectful' of something without having any respect for it." Darwall, *supra* note 52, at 40-41.

62. An analogous distinction is drawn in EIDELSON, DISCRIMINATION AND DISRESPECT, *supra* note 20, at 84.

FIGURE 1.



Statements (b) and (c) have something important in common: insofar as they state a criticism of *x*, that criticism depends on the fact that social conventions mark *x* as disrespectful. In other words, the point could be (c) that in light of social conventions, the action is apt to appear to be disrespectful in the basic sense—and so threatens certain harms—or it could be (b) that the act really is disrespectful in the basic sense in light of insensitivity to those harms.[63] But in either event, the criticism of the action depends on harms that themselves arise only because of the convention. Thus, the criticism and the instance of disrespect that it identifies (whether "disrespect" there is understood in the basic or conventional sense) are *convention-dependent*. The criticism of *x* identified in statement (a), by contrast, does not turn on a community's social conventions about respect; that criticism and the disrespect it identifies are *convention-independent*.

All of this will become clearer when we see the various categories in action in the Court's race cases. But a few additional examples may also help to fix ideas. At one extreme, the spitting case described above is an easy example of *convention-dependent* disrespect: but for the social convention that spitting indicates

63. I assume here that disrespect in the conventional sense is not of any moral importance apart from its effects. *See* EIDELSON, DISCRIMINATION AND DISRESPECT, *supra* note 20, at 84-90; *see also* RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW 240-48 (2015) (developing a similar critique of "expressive" theories that assign basic significance to how a reasonable observer would interpret an action).

disrespect, Jones would have no reason not to spit in whatever direction he likes. And at the other extreme, many homicides offer easy examples of acts that show *convention-independent* disrespect. Think of a sentencing judge who says that a murderer showed a "lack of respect for human life": the truth of that claim does not depend on social conventions *about* what actions show respect or disrespect.[64]

Many cases will involve both kinds of disrespect.[65] Consider, for instance, the exclusion of same-sex couples from marriage. That practice was plausibly disrespectful in two different ways. First, it often reflected a faulty understanding among legislators of the value of same-sex couples or their relationships, an error of evaluative judgment that did not depend on what the exclusion was apt to be understood by anyone else to signify or express.[66] But, second, the exclusion was *also* disrespectful in that it reflected a failure by those same legislators to afford the correct significance to the harms that flowed from the social meaning that the exclusion had.[67] These two concerns are tightly interwoven; the social meaning that underlies the second form of disrespect is rooted in a social perception of the evaluative judgment that constitutes the first form. Still, their distinctness is both practically and conceptually significant.

Why? For one thing, even a legislator who is not guilty of the first form of disrespect—the failure to recognize the value of same-sex relationships—can still be guilty of the second form—the failure to respond appropriately to the fact that the exclusion is in fact understood to reflect such a judgment of inferiority. Or, to vary the example, think of someone who wears blackface as part of a Halloween costume, but without the attitude of racial contempt that underlay the original Jim Crow minstrel shows. That person can still readily be faulted for a kind of disrespect: the disrespect just lies in insensitivity to the harms that flow from

64. *E.g.*, Kelly v. Brown, 851 F.3d 686, 687 (7th Cir. 2017); *cf.* RAZ, *supra* note 52, at 170 ("[Respect's] two aspects: acknowledging the value in word and deed, and preserving it, are products of nothing more than that the valuable is valuable.").

65. As Raz puts it, "[A]cts which have other, 'real' significance to people can *also* become symbolic expressions of respect or disrespect"; in particular, "[t]hey are symbolic if"—or to the extent that—"they carry meaning because they are understood to have that meaning." RAZ, *supra* note 52, at 172 (emphasis added).

66. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (discussing the impoverished understanding of same-sex relationships reflected in the legislative history of the Defense of Marriage Act).

67. *See, e.g.*, *id.* at 2693 (discussing the Defense of Marriage Act's "practical effect" of imposing a "stigma").

the meaning the action has absorbed through its association with a contemptuous attitude, rather than in that contemptuous attitude itself.[68] Understanding the distinction between convention-dependent and convention-independent disrespect allows us to think clearly about these different wrongs and the different responses they may warrant.

But, as we will see more fully later on, attending to the distinction between convention-independent and convention-dependent disrespect also matters for a second, perhaps more important, reason. If a given practice threatens to inflict only the convention-dependent kind of disrespect—and if the practice serves valuable ends—it will often follow that the moral situation could more effectively be improved by *reforming the meaning* of the disrespectful practice than by abandoning the practice itself.[69] That, I will suggest, carries important lessons for those who see racial nondifferentiation as a norm of respect for people's individuality—and especially important lessons for institutions, such as the Supreme Court, that exert a pull on the content of respect conventions themselves.[70]

C. The Supreme Court's Account of Treating People as Individuals

With these distinctions in view, we can see that the modern Court's main interest has been in the respect-based concept of treating people as individuals, and that the Court appears to regard race-based state action as disrespectful on both convention-dependent and convention-independent grounds.

To be sure, the Court's interest in the respect-based concept is not exclusive. Most notably, the express right "to be treated as an individual" in the context of race-conscious admissions programs—an element of the narrow-tailoring inquiry devised by Justice Powell in *Regents of the University of California v.*

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68. This is precisely the category in which both Virginia's Attorney General, Mark Herring, and Canada's Prime Minister, Justin Trudeau, sought to place themselves in apologizing for wearing blackface as young adults. Herring described his error as involving "callous[ness]" and "minimization of a horrific history." Statement of Mark R. Herring, Va. Att'y Gen., Feb. 6, 2019, https://www.oag.state.va.us/media-center/news-releases/1384-february-6-2019-statement-of-attorney-general-mark-r-herring [https://perma.cc/6LWS-BZX6]. And Trudeau said he was "so deeply disappointed in himself" because he failed to appreciate at the time that the practice "is very hurtful" and "racist." Peter Zimonjic, *Trudeau Says He is 'Deeply Sorry' He Appeared in Brownface at School Gala in 2001*, CBC NEWS (Sept. 18, 2019, 7:11 PM EST), https://www.cbc.ca/news/politics/trudeau-brownface-arabian-nights-1.5289165 [https://perma.cc/NE4L-MMSP].

69. *See infra* Section III.B.

70. *See infra* Section III.C.

Bakke[71]—is, at least on its face, an entitlement to granular evaluations and comparisons. Under Justice Powell's analysis, later embraced by the Court, racial quotas or set-asides are impermissible because they fail to "treat[] each applicant as an individual in the admissions process," in the sense that they violate a "right to individualized consideration."[72] Powell's core concern was exemplified by a hypothetical white applicant who would further the goals of affirmative action—or at least the approved goal of "beneficial educational pluralism"—but whose own "history of overcoming disadvantage" or "exceptional personal talents" would never be weighed against those of a black candidate in allocating one of the set-aside seats.[73] To avoid that arbitrariness, Justice Powell explained, an admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the *particular* qualifications of *each* applicant."[74] The basic logic of this argument parallels a claim that dogs should be evaluated individually so that a safe dog of a problematic breed (like a white student who would better contribute to overall diversity) is not gratuitously excluded. In other words, it is a requirement formally rooted in claims about accuracy, fairness, and instrumental rationality, not in an articulated concern that a different procedure would fail to respect a person's individuality.

But the larger thrust of the Court's case law over the past few decades has articulated just that concern: race-based distinctions are thought to show disrespect for people's standing as individuals and thus to fail to treat them as individuals in that distinct sense. Even the "individualized consideration" requirement originating in *Bakke* has been reglossed so as to rest less on the importance of fit between means and ends, and more on the imperative to respect applicants as "unique persons."[75] The Court has thus objected to admissions practices "that make[] an applicant's race or ethnicity the *defining feature* of his or her application,"[76] and Justices have expressed alarm about admissions officers seeming to treat members of a given racial group not as whole persons but as fungible tokens to meet a numerical goal.[77] In their moral tenor, these "individualistic" concerns

71. 438 U.S. 265, 318 (1978) (opinion of Powell, J.).

72. *Id.* at 318 & n.52.

73. *Id.* at 317.

74. *Id.* (emphasis added).

75. Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 71-75 (2003) (describing the concerns animating *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003)).

76. *Fisher I*, 570 U.S. 297, 309 (2013) (emphasis added) (quoting *Grutter*, 539 U.S. at 337).

77. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 722 (2007) (plurality opinion) ("The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of

have less in common with the complaint of a frustrated dog owner and more in common with the bus driver who asks riders to "see *all* the things I am," or the patient who complains that doctors do not treat her as an individual and instead see only her weight.[78] Over time, the Court's colorblindness advocates have come to see race-based state action as defective in much the same way.

This evolution or something like it was probably inevitable, because the charge that race-based decision-making is insufficiently individualized offered no stable foundation for equal-protection doctrine. As defenders of affirmative action have long argued, the notion that a white applicant "has a right to be judged as an 'individual'" rather than "as a member of some group that is being judged as a whole" appears flatly inconsistent with the widespread use of *other* generalizations in all manner of government decisions, including university admissions.[79] And the normative concerns naturally associated with claims to be treated as an individual in the thin sense—roughly, fairness and means-ends rationality—lack the resources to explain why race and these other characteristics are relevantly different.[80] By contrast, the notion that race-based decision-making distinctively fails to treat people as individuals in the *thick* sense (that is, that it shows disrespect for their individuality) holds out the implicit promise of explaining why race is indeed special.[81] Regardless of how one fleshes out the details, it is easy enough to grasp the intuitive sense that race-based decisions are

a particular racial group."); *Grutter*, 539 U.S. at 391-92 (Kennedy, J., dissenting); *see also* Suk, *supra* note 14, at 231 ("In short, quotas are thought to reduce individuals to morally irrelevant groups, in contrast with forms of consideration that take the unique traits of each person into account.").

78. *See supra* Section I.A.

79. Ronald Dworkin, *Why Bakke Has No Case*, N.Y. REV. BOOKS (Nov. 10, 1977), https://www.nybooks.com/articles/1977/11/10/why-bakke-has-no-case [https://perma.cc/8G3N-R49X]. For similar arguments framed in more general terms, see, for example, Siegel, *supra* note 29, at 1540 & n.240; and Strauss, *supra* note 13, at 119-20.

80. *See, e.g.*, Richard Primus, *Second Redemption, Third Reconstruction*, 106 CALIF. L. REV. 1987, 1993 (2018) ("Without more, the value of individualism cannot sort the unproblematic bases of classification from the disfavored ones."); Strauss, *supra* note 13, at 131-32.

81. And it holds out at least the promise of doing this without narrowing the normative concern *too* much, such that it would pertain to discrimination against subordinated groups but not others defined by the same trait. *Cf.* Primus, *supra* note 80, at 1993 ("Why, for example, should equal protection care more about discrimination on the basis of race and sex than discrimination on the basis of the first letter of one's last name? A theory that grounds equal protection in a concern for redressing unjust social hierarchies can answer that question: it is because some axes of difference map unjust social hierarchies and others do not.").

differently related to concerns of respect, dignity, and individuality than are most other decisions that rely on generalizations about classes of people.[82]

Although the Court has done little to explain or formalize that intuition linking race and respect, the connection lies at the intellectual and rhetorical foundations of the modern colorblindness doctrine. One of the clearest statements of the disrespect-based attack on racial classifications came when, in *Rice v. Cayetano*, the Court struck down Hawaii's ancestry-based limit on the electorate for trustees of a trust for Native Hawaiians.[83] As Justice Kennedy wrote for the Court,

> One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.[84]

This basic thought—that racial classifications disrespect a person's individuality or "unique personality"—appears to take two main forms in the case law, which roughly correspond to two distinct kinds of discrimination.[85] In cases where race is employed as a proxy for some other trait of interest, such as a person's viewpoint, the Court takes the *drawing of a race-based inference* to be demeaning or disrespectful. This is the familiar form of disrespect that we (and the Court) often describe as "stereotyping." By contrast, in cases where a policy aims at achieving a particular kind of racial distribution or composition for other reasons, the Court appears to take either that goal itself, or the very fact of race-differentiated treatment, as a manifestation of disrespect. In the balance of this Part, I will offer some examples of each of these ideas at work. That survey will

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82. As I explore below, that intuitive difference can be explained in terms of either of the two different understandings of respect we have developed—that is, in terms of a convention-independent theory of what respect for a person's individuality involves, *see infra* Section II.B, or in terms of contingent social understandings about the answer to that question, *see infra* Section III.A.

83. 528 U.S. 495 (2000).

84. *Id.* at 517.

85. For a helpful explication of this distinction among kinds of discrimination, see Deborah Hellman, *Two Types of Discrimination: The Familiar and the Forgotten*, 86 CALIF. L. REV. 315 (1998).

allow us to evaluate, in Parts II and III, the understanding of the demands of respect that the cases reveal.[86]

1. *Proxy Cases*

The most familiar application of the idea that race-based distinctions disrespect people's individuality arises in cases involving race-based inferences. Consider *Metro Broadcasting, Inc. v. FCC*, where the Court confronted an FCC policy that conferred certain preferences on minority-owned businesses with respect to broadcast licenses.[87] Applying a now-defunct form of intermediate scrutiny, the Court upheld the preferences as appropriate remedial measures that substantially advanced a legitimate interest in broadcast diversity.[88] But the dissenters, applying the standard of review that would apply today, found the premise of the program obnoxious to principles of racial respect.[89]

In particular, Justice O'Connor objected that the FCC's policy transgressed "the simple command" with which this Article began: that "the Government must treat citizens as *individuals,* not 'as simply components of a racial, religious, sexual or national class.'"[90] The policy flouted that command, she argued, because it "allocate[d] benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think."[91] Justice Kennedy wrote separately, joined only by Justice Scalia, but made much the same point. "Although the majority disclaims it," he said, "the FCC policy seems based

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86. The case-law survey that follows should also cement a basic premise of my inquiry here—that the anticlassification approach to equal protection has been explicated and justified with reference to a normative principle that people should be treated or respected as individuals. The idea of treating people as individuals, in other words, is not a mere label for the nonuse of racial classifications (although a variant of the "thin" concept of treating people as individuals does allow that usage, *see supra* note 44, and has thereby perhaps obscured this point at times). Rather, the idea of treating or respecting people as individuals is a driving force in the identification and justification of the rule requiring such nonuse; it is a principal value that the anticlassification interpretation of the Equal Protection Clause is thought to serve. *See also supra* note 29 (collecting academic commentary stressing the normative character of the "classification" inquiry).

87. 497 U.S. 547, 552 (1990).

88. *Id.* at 566.

89. *Id.* at 602 (O'Connor, J., dissenting); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (overruling *Metro Broadcasting*'s standard-of-review holding).

90. *Metro Broad.*, 497 U.S. at 603 (O'Connor, J., dissenting) (quoting Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1083 (1983)).

91. *Id.* Of course, the policy did not actually need to make that assumption; it rested on a claim about correlation, not causation.

on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens."[92] The kind of "'stereotypical thinking' that prompts policies such as the FCC rules here," Kennedy argued, was at odds with "the cardinal rule that our Constitution protects each citizen as an individual, not as a member of a group."[93]

The same anti-inference or antistereotyping rule dominates the Court's thinking about the role of race in jury selection, an arena that seems otherwise very different. In *Batson v. Kentucky*, the Court held that race-based peremptory strikes could not be justified by a prosecutor's "assumption—or his intuitive judgment—that [jurors] would be partial to the defendant because of their shared race."[94] "[S]uch assumptions, which arise solely from the jurors' race," threatened to render "[t]he core guarantee of equal protection . . . meaningless."[95] In then expanding the *Batson* right—first to defendants of a different race than that of the struck jurors,[96] then to civil litigants[97]—the Court made clear that race-based inferences about a juror's likely views are forbidden because they involve impermissible disrespect. Whatever hunches litigants may have about the likely predispositions of prospective jurors, the Court has insisted, these must "be explored in a rational way that *consists with respect for the dignity of persons*, without the use of classifications based on ancestry or skin color."[98] Thus, as Justice Thomas recently observed, "[t]he Court's *Batson* jurisprudence seems to conceive of jury selection more as a project for affirming 'the dignity of persons' than as a process for providing a jury that is, including in the parties' view, fairer."[99]

And the same dignitary themes recur in the many cases dealing with the intersection of race and politics as well. In *Miller v. Johnson*, for example, the Court held that districting schemes are subject to strict scrutiny when race is a "predominant" factor in their formulation.[100] Once again, it was racialized thinking

92. *Id.* at 636 (Kennedy, J., dissenting).

93. *Id.* (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 516 (1989)).

94. 476 U.S. 79, 97 (1986).

95. *Id.* at 79, 98.

96. Powers v. Ohio, 499 U.S. 400 (1991).

97. Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

98. *Id.* at 631 (emphasis added); *see also Powers*, 499 U.S. at 410 ("Race cannot be a proxy for determining juror bias or competence."); *infra* text accompanying notes 106-108.

99. Flowers v. Mississippi, 139 S. Ct. 2228, 2273 (2019) (Thomas, J., dissenting); *see id.* at 2274. Of course, one can agree with Justice Thomas about the focus of the *Batson* cases—the jurors' dignity, rather than fairness to the parties—without endorsing his conclusion that these cases (or even their dignity-centric rationale) should be reconsidered.

100. 515 U.S. 900, 920 (1995).

about the choices and attitudes of individuals that drew the most fervent criticism. "When the State assigns voters on the basis of race," the Court explained, "it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"[101] To "assume[] from a group of voters' race" how they will vote is therefore to "engage[] in racial stereotyping at odds with equal protection mandates"—indeed, it is to "treat individuals as the product of their race."[102] Thus, as Elizabeth Anderson observes, the *Miller* Court reasoned that "racial assignments inherently deny people's individuality," a "dignitary harm."[103]

Taken together, these various race-as-proxy cases (and others)[104] stand for a fairly straightforward proposition: practices that treat race as predictive of what individual people are likely to think or do show disrespect for the fact that they are individuals, not fungible members of a racial group.[105] But we can also now see that the Court's reasoning in these proxy cases is pervasively ambiguous as between the different kinds of disrespect we have identified.

An exchange in *Powers v. Ohio*, one of the *Batson* cases, offers a nice illustration. *Powers* held that a prosecutor's race-based peremptory strikes of black jurors, in a trial of a white defendant, violated the jurors' equal-protection rights. In dissent, Justice Scalia argued that such strikes simply reflect "the undeniable reality . . . that all groups tend to have particular sympathies and hostilities" and that there was thus "no implied criticism or dishonor to a strike," no "slight or obloquy" that should "deprecate" a person's racial group or thereby "'stigmatize'

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101. *Miller*, 515 U.S. at 911-12 (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993)).

102. *Id.* at 912, 920 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting)).

103. Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1233 (2002); *see also* Anderson & Pildes, *supra* note 52, at 1539 (arguing that this line of cases is concerned with expressive harm, and in particular with the prospect "that certain districts convey the message that political identity is, or should be, predominantly racial").

104. The plurality opinion in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), offers another apt example. *See id.* at 1634 (opinion of Kennedy, J.) ("It cannot be entertained as a serious proposition that all individuals of the same race think alike. Yet that proposition would be a necessary beginning point were the [court of appeals'] formulation to control . . . .").

105. In an instructive recent paper explicating "the idea of treatment as an individual," Patrick Shin describes the rule underlying cases such as these as the "Principle of Individual Consideration." Shin, *supra* note 6, at 115-16. But whatever the principle is called, it is important to appreciate that what is demanded in these cases is, first and foremost, a kind of respect for an aspect of people's moral standing. "Individual consideration" in the thin sense of more granular decision-making is implicated at most indirectly, in that an actor barred from using race might (or might not) then resort to more tailored assessments instead.

his own personality."[106] The majority responded that it "d[id] not believe a victim of the classification would endorse this view; the assumption that no stigma or dishonor attaches contravenes accepted equal protection principles."[107] "Race cannot be a proxy for determining juror bias or competence," the majority declared, and the dissenters' contrary suggestion depended on "the very stereotype the law condemns."[108]

What is the Court saying here about the racial inference that underlies a race-based peremptory strike? Much of the disagreement between the majority and the dissenters is about whether the peremptory strike is disrespectful in the *conventional* sense—that is, whether, according to the operative social conventions, striking the juror indicates a disrespectful attitude. On that point, the majority rests its case on what it believes "a victim of the classification" would say about whether he had been "dishonor[ed]." But, at the same time, the Court does not appear to be merely reporting its sense of current social beliefs about which actions signal respect. Nor does it appear to be simply pointing to the harms that result from the race-based strike *in light of* those beliefs, without regard to whether the beliefs are well-founded. Nor, finally, does the Court's reasoning seem to rest on the disrespect that might be thought to lie in the prosecutor's *disregard for* those just-mentioned harms. Rather, the majority strongly implies that the struck juror would feel insulted because, in a real and basic sense—one prior to and independent of how the action might be perceived—he *had* been. The opinion thus seems to condemn race-based inferences as disrespectful on both convention-dependent and convention-independent grounds, albeit without clearly distinguishing the two.

A similar ambiguity infects the Court's repeated assertions that one or another practice "engages in the *offensive and demeaning* assumption" that people of the same race will share a common viewpoint.[109] Here again, note two very different meanings that this charge could carry. On the one hand, the Court could be saying that this assumption is "offensive" and "demeaning" in the conventional sense, the same sense in which a parent tells a child that raising one's middle finger is "offensive" or "disrespectful." In other words, the Court could be saying that the race-based assumption *is regarded as* offensive "around here"—for reasons that may or may not track more basic moral requirements—and

106. 499 U.S. 400, 424 (1991) (Scalia, J., dissenting). In a similar vein, Justice Thomas has recently criticized the *Batson* cases for placing too much weight on what he describes as "the possibility that a juror will *misperceive* a peremptory strike as threatening his dignity." Flowers v. Mississippi, 139 S. Ct. 2228, 2274 (2019) (Thomas, J., dissenting) (emphasis added).

107. *Powers*, 499 U.S. at 410.

108. *Id.*

109. Miller v. Johnson, 515 U.S. 900, 911-12 (1995) (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993)) (emphasis added); *see supra* text accompanying notes 89-103.

should therefore be eschewed to avoid the consequences that follow when one does something that is so regarded. Alternatively, the Court could be saying that there is something in the nature of the race-based assumption that is at odds with regarding people in a way consistent with their value—and thus that actions based on such assumptions involve convention-independent disrespect. Insofar as people also *find* the assumption offensive, this second view would see that as their accurately appreciating the more basic moral facts. As in *Powers*, the Court seems to be invoking both ideas without recognizing their distinctness.

2. *Non-Proxy Cases*

We can deal more briefly with the second class of cases: those in which race is not employed as a proxy for some other attribute but rather figures in the government's reasons for action directly or simply forms a basis on which people are sorted. The Court has sometimes objected that such policies fail to treat people respectfully as individuals, but the meaning of that charge in these cases is less clear.

Some cases of this kind implicate what Patrick Shin calls "the Principle of Individual Priority"—a rule that, as he puts it, "[a]dverse or preferential treatment of a person cannot be justified by an expectation that such treatment would benefit an enumerated group or would improve or not worsen conditions of equality between such groups."[110] We can hear this concern most clearly in the hostility among some members of the Court toward broadly remedial justifications for affirmative action. Consider, for instance, Justice Scalia's assertion that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction" because the concept of "either a creditor or a debtor race" is "alien to the Constitution's focus upon the individual," a focus allegedly reflected in the "*any person*" language in the Equal Protection Clause.[111]

Claims such as these can be read as demanding respect for people as individuals in two different senses. At one level, Justice Scalia is just making a familiar, generic assertion that individual rights ordinarily may not be compromised in the service of aggregate social goals.[112] Understood in this way, Scalia is taking *as given* that a white person who alleges that he lost an opportunity because of

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110. Shin, *supra* note 6, at 115-16.

111. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).

112. *See* Shin, *supra* note 6, at 129 (similarly suggesting that "[a]t root, the Principle of Individual Priority is an affirmation of the modern concept of individual rights").

affirmative action has a right not to be treated less favorably on account of race, and he is then insisting that aggregate social concerns cannot justify violating that individual right.[113] Fittingly, this sort of reasoning is often accompanied by the maxim that the Constitution protects "*persons*, not *groups*"[114]—a notion that closely parallels the much more general argument, made famous by John Rawls, that utilitarianism fails to respect "the separateness of persons."[115] To the extent this first line of argument deserves to be called "individualistic" at all, it remains little more than a rejection of the notion that, as Chief Justice Roberts put it, "[t]he end justifies the means."[116] It does not embody an account of *why* the means at issue—race-based differential treatment—fails to treat people respectfully as individuals in the first place.

But claims like Justice Scalia's here can also be understood to invoke individualism in another way—one that is more substantive, but less practically significant. According to this second line of thought, a person's race is *morally irrelevant*, in the sense that it says nothing about what she deserves. And in particular, insofar as remedial justifications for affirmative action might hold people responsible for wrongs they did not commit, these policies involve a kind of collective blame potentially at odds with respect for each person's individuality.[117] I will set this line of argument aside here for the simple reason that few (if any) of the policies at issue in contemporary race cases are actually justified on the ground the argument attacks—that is, on the ground that race, in itself, factors into what a person deserves. Rather, real-world affirmative-action or integration policies either employ race as an imperfect proxy for some trait that plainly *is*

113. *See Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520-21 (1989) (Scalia, J., concurring in the judgment); *see also* Reynolds, *supra* note 11, at 1003 (arguing that when school districts employ race-based school assignments in order to achieve integration, "the *real* civil right—the individual student's right to be free from racial discrimination in assignment—is invariably sacrificed").

114. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 743 (2007) (plurality opinion) (citation omitted); *see also id.* (collecting other iterations of the maxim).

115. For leading statements, see JOHN RAWLS, A THEORY OF JUSTICE 26-27 (1971); and ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 32-33 (1974). Michael Klarman aptly describes the "persons, not groups" maxim as "rhetorically resonant, but analytically unsatisfying." Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 231 (1991). The same could be said of the cognate "separateness of persons" idea.

116. *Parents Involved*, 551 U.S. at 743 (plurality opinion).

117. *See* Paul Brest, *The Supreme Court 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 48-52 (1976); *cf.* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1050 (1978) ("Most important, do not demand any remedy involving racial balance or proportionality; to recognize such claims would be racist.").

relevant to individual desert (including the likelihood of suffering certain kinds of disadvantage)[118] or else classify by race in an effort to achieve forward-looking social or pedagogical benefits of racial integration.[119] In neither case do they treat race itself as a ground of "moral culpability"[120] or "personal worth."[121] So if these policies fail to respect people as individuals, the reason must lie elsewhere.

That brings us to a final strand in the Court's working account of how race-based state action fails to treat people respectfully as individuals. At times, the Court or particular Justices have perceived a kind of disrespect to be inherent in either the application of racial labels or the very fact of giving them effect. In *Parents Involved*,[122] for example, two public-school systems employed race as a factor in making school assignments to ensure that the schools were integrated. They did not defend the value of that aim solely, or even primarily, on the basis of assumptions about what people of one or another race are like; rather, they pointed to various social and pedagogical benefits that derive from racial integration as such.[123] But the Court still invalidated the programs, and both Chief Justice Roberts's plurality opinion and Justice Kennedy's controlling concurrence invoked the concern that racial classifications fail to treat or respect students as individuals.[124] It appears to follow that this concern is not limited to state policies that use race as a proxy for a person's other characteristics; rather, it can attach to the use of racial classifications as such.

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118. *Cf.* ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 158-59 (2010) (explaining that, even if race in the most minimal sense is morally or constitutionally irrelevant, "unjust racialization is plainly a characteristic of 'constitutionally permissible interest to government'").

119. *See, e.g.*, Patrick S. Shin, *Diversity v. Colorblindness*, 2009 BYU L. REV. 1175, 1191-99 (explaining the various ways in which racial diversity can be instrumentally valuable).

120. Fullilove v. Klutznick, 448 U.S. 448, 525 (1980) (Stewart, J., dissenting).

121. WILKINSON, *supra* note 11, at 291.

122. 551 U.S. 701.

123. *See* Brief for Respondents at 24-30, *Parents Involved*, 551 U.S. 701 (No. 05-908), 2006 WL 2922956, at *24-30. As Shin explains,

> Although critics tend to conflate the diversity rationale and . . . the race-as-proxy rationale, they are distinct. According to the diversity rationale, the existence of racial diversity in a population activates certain benefits for all individuals in the hosting community. The premise is not that race is a stand-in for some *other* quality or trait that then produces the benefit. Instead, the idea is that the existence of racial diversity itself is a condition that operates on human social psychology in such a way as to result in improved learning environments, reduction of bias and stereotypes, improved productivity in a workplace setting, and so on.

Shin, *supra* note 6, at 127 (footnotes omitted).

124. *See Parents Involved*, 551 U.S at 722 (majority opinion); *id.* at 730, 746 (plurality opinion); *id.* at 782-795 (Kennedy, J., concurring in part and concurring in the judgment).

Justice Kennedy's controlling opinion demonstrates this point most clearly. In explaining why the school districts' approach was unacceptable, he repeatedly emphasized that it involved "official labels proclaiming the race of all persons in a broad class of citizens,"[125] "a systematic, individual typing by race,"[126] and differential treatment "based on the government's systematic classification of each individual by race."[127] It is not clear what "systematic classification" or "typing" means here, other than that the parents registering their children for school were directed to check a box designating their child as "white" or "nonwhite" (in Seattle) or as "black" or "other" (in Louisville). But Justice Kennedy evidently thought that the use of racial categories, at least in a manner that tied a particular person's classification to her school assignment, in and of itself involved an impermissible "[r]eduction of an individual to an assigned racial identity" that was "inconsistent with the dignity of individuals in our society."[128] And Justice Thomas has elsewhere voiced what may be a version of the same objection: "The Constitution abhors classifications based on race," he has argued, "not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."[129]

The upshot for our purposes is that the case law includes suggestions that the very application and use of racial categories can be a site of disrespect—even if they are decoupled from any race-based inferences about people. When no racial inference is involved, however—and setting aside potential concerns about how racial categories are assigned, concerns that seem limited when people are permitted to self-identify or to leave a field blank[130]—it is not clear why these aspects of race-based decision-making are thought to be disrespectful of people as individuals. One important possibility is that the appeals to respect in these cases are best understood solely in convention-dependent terms: that is, they

125. *Id.* at 782 (Kennedy, J., concurring in part and concurring in the judgment).

126. *Id.* at 789.

127. *Id.* at 795. Other Justices have also at times seemed to focus on the very fact of classification as a site of something potentially demeaning (or, at least, unseemly). The extended exchange at oral argument in *Fisher I* about classroom diversity is a good example. *See* Transcript of Oral Argument at 36, *Fisher I*, 570 U.S. 297 (2013) (No. 11-345) ("Chief Justice Roberts: . . . You go back to what they checked on their application form in deciding whether Economics 201 has a sufficient number of African Americans or Hispanics?").

128. *Parents Involved*, 551 U.S. at 795, 797 (Kennedy, J., concurring in part and concurring in the judgment).

129. Grutter v. Bollinger, 539 U.S. 306, 353 (Thomas, J., concurring in part and dissenting in part); *see also* Deborah Hellman, *Two Concepts of Discrimination*, 102 VA. L. REV. 895, 915-17 (2016) (reading Justice Thomas as voicing a blanket dignitary objection to racial classifications).

130. *See infra* note 191.

may be criticizing the race-based state action *only* for the disrespect it is taken to express in light of existing symbolic associations and not for any more basic moral wrong on the part of the state that would exist regardless. If so, that is an important distinction from the proxy cases, but one that the Court, lacking the distinction between convention-dependent and convention-independent disrespect, has not marked.

II. THE AUTONOMY ACCOUNT OF TREATING PEOPLE AS INDIVIDUALS

We have seen so far that (1) the Court has justified its skepticism of race-based state action in terms of the obligation to treat people as individuals in the respect-based sense, and (2) the Court has, and relies upon, a working account of what respect for a person's individuality demands in the context of race—principally forbearance from race-based inferences, but also, perhaps, a refusal to predicate any outcomes on individual racial classifications. This Part will step back and take that account of respect for people's individuality seriously as a philosophical thesis. Specifically, I will take up the Court's suggestions that race-based state action is disrespectful in the *basic* sense, and for convention-independent reasons—that is, for reasons not derivative of the obligation to account for the fact that some will predictably interpret the action in a particular way. I will criticize that theory by articulating an alternative account of the same duty to respect people's individuality, one that should tap into the intuitions underlying the Court's approach but that does not vindicate the Court's conclusions.

My account of that duty, which I have previously called "the autonomy account," comprises three central claims.[131] The first is that respecting people as individuals should be understood to mean respecting people *as autonomous*, because it is in virtue of their autonomy that people are "individuals" in a morally significant sense. The second central claim is that respecting people as autonomous imposes some significant constraints on how we should make judgments about them: it requires us to take their past self-definitional and self-expressive choices seriously, and it requires us to keep their future agency in view. The third claim is the flip side of the last one: treating people as individuals does *not* require eschewing statistical evidence or refusing to draw inferences from any trait a person may have. Setting aside the reasons to abide by existing respect conventions, we respect people's individuality by taking seriously who they, individually, are, not by ignoring relevant information about them.

131. I have developed the account in earlier philosophical work, *see supra* note 20, so I will gloss over some of the more technical details here and focus on what the theory offers as a foil for equal-protection law.

If this account is correct, the Court is mistaken in asserting that colorblindness draws support from a basic moral imperative to treat people as individuals. Race-based inferences are at odds with respect for a person's individuality only when they crowd out *other* relevant information that does manifest a person's exercise of autonomy. Thus, reasonable predictions that minority-owned broadcasters are more likely to air underrepresented viewpoints,[132] or that black voters in a state are likely to form a political bloc,[133] and so forth, do not inherently fail to respect anyone's individuality.[134] Moreover, a failure to take account of race can *itself* amount to a failure to treat people as individuals when it leads an evaluator to misapprehend the available information about a person's character. For example, if there is reason to believe that some significant indicators in the college admissions process are warped by implicit or explicit racial bias—as there in fact is—then a commitment to treating people as individuals would *favor* race-based efforts to cancel out that bias. Finally, nothing in the account vindicates suggestions that race-based differential treatment, in and of itself, entails disrespect for people's standing as individuals.

A. Being an Individual and Being Autonomous

Recall the conception of respect (in the basic sense) developed above: to respect something is to regard it in a way consistent with its value and act accordingly.[135] Understood as a claim about that kind of respect, the idea that we should treat or respect people *as individuals* rests on the premise that people have an attribute, called being an "individual," that has value and so warrants respect. An account of respect for people *as* individuals thus has to start with an account of what that quality is.

This is not altogether obvious. Robin West posits that for "virtually all modern American legal theorists, like most modern moral and political philosophers, . . . the word 'individual' has an uncontested biological meaning, namely that we are each *physically individuated* from every other."[136] That understanding, she argues, is false to the experience and material circumstances of women.[137] For our

132. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting); *see supra* Section I.C.1.

133. Miller v. Johnson, 515 U.S. 900, 911-12 (1995); *see supra* Section I.C.1.

134. Throughout this Part, except where otherwise noted, I will take as given that we are speaking only of convention-independent respect and disrespect.

135. *Supra* Section I.B.

136. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 1-2 (1988) (emphasis added).

137. *See id.* at 2-42.

purposes, physical individuation cannot supply the needed sense of being an "individual"—even aside from any gender-related concern—because lots of things are individuals in that sense, and we do not think of or talk about treating those things *as* individuals. For instance, we speak of multiple, *individual* rocks when they are physically separated, but we would not say that you should treat each rock *as* an individual (except perhaps in the thin sense—say, if you were a geologist cataloging them).[138] Conversely, I take it that even when persons are *not* physically individuated—as, for example, in the case of conjoined twins—we *do* think that they should be treated or respected as individuals. That reflects the fact that we recognize a pair of conjoined twins as two persons, not one, even if they do not have individual (that is, separate) bodies.

We regard conjoined twins that way because we recognize that each twin has her own will and therefore can, in principle, make choices that belong uniquely to her. What individuates persons, in other words, is not physical separateness but mental separateness and, in particular, a kind of mental separateness that is linked to having one's own will. More specifically, an influential family of views holds that the concept of a person is bound up with the capacity for self-reflection—the ability to have not only desires but second-order desires about one's desires.[139] The details are complicated, but the basic point seems safe to take for granted: when we say that persons are *individuals*—in the vague but loaded sense I am trying to convey with those italics—we are saying, at least in part, that they have their own wills and, in particular, that they have their own wills of the kind that make for being a person in the first place.[140]

In philosophical parlance, or at least one important strand of it, this amounts to saying that persons are individuals in the sense that they are *autonomous*. That is because autonomy, in one sense of the word, captures the capacity of reflective choice just described—the mental ability to form an intention in a way that makes it one's own.[141] But it is telling that autonomy also has a second, related sense: not as a capacity, but as a realized condition in which, as Joseph Raz puts it, a person's "life is, in part, of his own making."[142] Autonomy in this second sense is closely associated with the notion of self-authorship or self-definition;

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138. *Cf. supra* note 39 and accompanying text (giving an example involving dogs).

139. *See* GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 20 (1988); Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5, 6 (1971).

140. I say a bit more about the connection between personhood and reflective agency in EIDELSON, DISCRIMINATION AND DISRESPECT, *supra* note 20, at 136-38, 141, 162-63.

141. *See* 3 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF 28 (1989); JOSEPH RAZ, THE MORALITY OF FREEDOM 369-99 (1986); *see also* EIDELSON, DISCRIMINATION AND DISRESPECT, *supra* note 20, at 140-41 (discussing this understanding of autonomy).

142. RAZ, *supra* note 141, at 204.

it involves "people charting their own course through life, fashioning their character by self-consciously choosing projects and taking up commitments."[143] The two senses or facets of autonomy are closely connected: it is through the exercise of a person's faculty for autonomous agency (the first sense) that, over time, she makes her life her own (the second sense).[144] In other words, "[t]he exercise of the capacity [of autonomy] is what makes a life *mine*."[145]

And thus it comes as no surprise that the idea of people as *individuals*, in a sense that bears some kind of moral significance, seems to partake of the same duality. That is, persons are "individuals" in the capacity-based, separate-will sense with which we began; but, at least when things go well, they come to be "individuals" in the further sense that they also have identities and characters partly of their own making. That is why, if someone is subject to overwhelming pressures of conformity and lacks meaningful freedom of thought, we would hesitate to say that she is a true "individual."[146] Or, to get at the same point, think of the countless middle-school guidance counselors who extol the importance of "being an individual." They are obviously not talking about physical separateness, and they are not really talking about having a will of the kind that individuates persons; they are talking about authoring one's own life, in just the way that autonomy involves.

Of course, this high-level sketch of autonomy and of the related notion of individuality glosses over important questions. Most notably, it says nothing about how traditional conceptions of autonomy might need to be complicated to account for the recognition that our options (and our choices among our options) are themselves shaped by myriad affiliations, influences, constraints, and relationships that we do not choose. But without minimizing the importance of that and other issues, I mean to rely here only on rudiments that should be compatible with a variety of fuller specifications of what it is to be autonomous.[147]

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143. STEVEN WALL, LIBERALISM, PERFECTIONISM AND RESTRAINT 132 (1998); *see* EIDELSON, DISCRIMINATION AND DISRESPECT, *supra* note 20, at 139-40.

144. It takes more than *just* autonomy in the first, capacity-based sense for a person to attain autonomy in the second, realized sense. Overly limited options, for example, will force a wedge between the two. *See* EIDELSON, DISCRIMINATION AND DISRESPECT, *supra* note 20, at 140-41.

145. DWORKIN, *supra* note 139, at 32.

146. *See* RAZ, *supra* note 141, at 372-75 (outlining conditions for autonomy, above and beyond mental capacities); *see also* Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 886-90 (1994) (similar).

147. For a slightly more fleshed-out (but still ecumenical) account, see EIDELSON, DISCRIMINATION AND DISRESPECT, *supra* note 20, at 138-41. Of course, the proposal is not so ecumenical as to be compatible with the view that people simply are not autonomous. But it bears emphasis that such an anti-autonomy conclusion does not necessarily follow from concerns about the inevitability or even value of social influence and constraint. Rather, to recognize persons as

However one fills in the details, autonomy involves, on the one hand, a capacity for critical reflection and intention formation that allows a person to make choices that are recognizably her own; and, on the other hand, a realized condition in which a person's life and character, formed through successive choices of the right kind, are meaningfully (which, again, is not to say entirely)[148] her own as well. And, in answer to our original question, these two familiar facets of autonomy plausibly undergird or constitute the kind of individuality that carries moral weight.

To say that one should treat or respect people *as individuals* is thus to say both that one should regard them as beings with a certain kind of agency and, also, that one should regard them as beings with the partly self-authored lives that this agency has hopefully enabled them to attain. A person who demands to be treated as an individual may be making a claim about the first status, the second one, or both.

B. How to Respect Someone as Autonomous

What, then, does respect for a person as an individual—meaning, we can now suppose, as autonomous—involve? One facet of this relationship, the most familiar one in legal and political theory, is captured by norms of noninterference—what Richard Fallon calls the "negative libertarian" conception of autonomy.[149] Take, for instance, "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."[150] In requiring the state to defer to such choices, we recognize that one person's scheme of values, commitments, and projects may differ from the schemes of others; and we recognize that, when it comes to someone else's life,

autonomous, one need only accept that—as Richard Fallon puts it—"the self, though situated and socially constituted, remains capable of appreciating her situated condition, of assessing and criticizing her assumptions and values, and of revising her goals and commitments." Fallon, *supra* note 146, at 887; *see* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 299-303, 301 n.133 (1990) (arguing that "[t]he dichotomous definitions of autonomy and connection or dependence deserve to be rejected"). Thus, for example, I do not believe the picture I rely on here is in tension with Jennifer Nedelsky's feminist account of "relational autonomy." *See* JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW 123-24 (2011); *see also infra* Section II.C.2 (explaining how respect for individual autonomy can require attention to social identities).

148. *See supra* note 147.

149. Fallon, *supra* note 146, at 880-83. Fallon is referring specifically to what he calls "descriptive" (as opposed to "ascriptive") autonomy. *Id.*

150. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

it would be wrong for us to pursue our aims at the expense of hers. In constitutional terms, autonomy-based duties of this kind are secured by corresponding liberty rights, which are often conceived as dimensions of substantive due process.

But if respect is understood as a kind of recognition or taking-into-account, then respecting someone's autonomy also plausibly requires paying attention to, or seeing her as, the person she has helped to make herself—and not only so as to avoid interfering with her self-defining choices, as the "negative libertarian" conception demands.[151] Consider again the recurring image of autonomy as a form of self-authorship.[152] If that metaphor is onto something, then forming judgments about a person without taking account of his self-defining choices is like sizing up a work of art while disregarding everything the author has done to the raw materials. That seems not to recognize or treat the work *as* a work, something authored, at all. So, too, a judgment about what someone is like that ignores his self-defining choices relates to him as something not authored and hence not autonomous. It cuts out the aspects of him that make him *him* and thus, in Harry Frankfurt's phrase, "deal[s] with [him] as though he is not what he actually is."[153]

To treat or respect someone as an individual, then, one has to take account of and give reasonable weight to evidence of the ways she has exercised her autonomy in shaping her life, at least where this evidence is relevant and reasonably available. That is what I have called the "character condition" of the autonomy account of treating people as individuals.[154] And violations of this norm account for an important part of the wrong in paradigm cases of stereotyping. Making a judgment about someone based only on her race, without regard to relevant and available evidence that reflects her own choices, treats her as though she is not what she is—a person with a character of her own.

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151. *See* EIDELSON, DISCRIMINATION AND DISRESPECT, *supra* note 20, at 142-44.

152. *See supra* notes 142-143 and accompanying text.

153. FRANKFURT, *supra* note 54, at 153 (offering an explanation of why people resent disrespectful treatment).

154. *See* EIDELSON, DISCRIMINATION AND DISRESPECT, *supra* note 20, at 144. The autonomy account also has an "agency condition," which tracks the first facet of autonomy we considered above—that is, the simple fact of having a faculty of reflective choice. *See id.* at 144-45, 147-48, 158-62, 167; *supra* Section II.A. Roughly, that condition holds that to treat someone as an autonomous individual, one must make predictions about her choices in a way that leaves room for the forward-looking exercise of her own agency. Because that requirement speaks less directly to our concerns here, I set it aside.

Many accounts of the felt experience of racial stereotyping call attention to this dimension of respect. For example, Anthony Walton writes of the frustration and indignity of being seen not "as a mild-mannered English major" but as indistinguishable from Willie Horton and of thus coming to conclude that nothing he could do would "make [him] the fabled American individual."[155] George Yancy describes how storekeepers, upon "[s]eeing *a* Black face at the door," often see "*the* Black face at the door," such that a person becomes "fixed, reduced to her body as raced."[156] Laurence Thomas emphasizes a white stranger's obliviousness to his "self-presentational behavior" in subjecting him to a generalization she evidently held about black men generally but whose scope could not possibly be justified.[157]

A critical part of the wrong in these cases, of course, is inseparable from the epistemic frailty of the generalization on which an agent relies and the social meaning it bears. But another important facet of the wrong arises from the sheer failure to treat those who are stereotyped as one would treat individual persons with individual characters. And this lapse of respect is thus not unique to race, or even to social categories often regarded as similar. Consider, for instance, a job or bar applicant who is rejected on the basis of criminal history, in spite of obvious evidence of his successful rehabilitation.[158] The applicant could legitimately object that he had not been treated respectfully *as an individual* in the sense marked by the character condition. That is, he could claim that because his efforts at self-definition were not taken seriously (despite their availability and relevance), his treatment was not just irrational or unfair, but demeaning of his autonomy. The autonomy account and its character condition thus represent a general answer to the question of what respecting someone's individuality, and hence treating her as an individual in the respect-based sense, could plausibly be

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155. Anthony Walton, *Willie Horton and Me*, N.Y. TIMES MAG. (Aug. 20, 1989), https://www.nytimes.com/1989/08/20/magazine/willie-horton-and-me.html [https://perma.cc/7BSC-PSXL]; *see also* EIDELSON, DISCRIMINATION AND DISRESPECT, *supra* note 20, at 153-55; RANDALL KENNEDY, RACE, CRIME, AND THE LAW 158 (1997) (discussing Walton's essay).

156. GEORGE YANCY, BLACK BODIES, WHITE GAZES: THE CONTINUING SIGNIFICANCE OF RACE 54 (2008). In addition to describing his own experience, Yancy draws on Patricia Williams's account of her race-based exclusion from a clothing store. *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 44-47 (1991).

157. Laurence Thomas, *Statistical Badness*, 23 J. SOC. PHIL. 30, 33 (1992).

158. *Cf.* Reginald Dwayne Betts, *Could an Ex-Convict Become an Attorney? I Intended to Find Out*, N.Y. TIMES MAG. (Oct. 16, 2018), https://www.nytimes.com/2018/10/16/magazine/felon-attorney-crime-yale-law.html [https://perma.cc/ZE5G-E3GS] (describing the Connecticut Bar's initial resistance to Betts's admission); *see also* EIDELSON, DISCRIMINATION AND DISRESPECT, *supra* note 20, at 155.

thought to require—apart from any imperatives to treat people in ways they or others will *regard as* respectful.[159]

C. *What the Court Gets Wrong*

Suppose I am right that treating people as individuals is a matter of respecting their individuality, and that such respect is best understood along the lines the autonomy account proposes. It follows that the familiar individualist indictment of race-based state action is misguided in three important respects.[160]

1. *Racial Inferences Need Not Be Disrespectful*

First, the autonomy account casts serious doubt on the notion that race-based generalizations and inferences are by their nature disrespectful of anyone's individuality. Making a judgment based *only* on a person's race, when other available information speaks to the same question, is potentially disrespectful in the way identified above.[161] But appreciating someone's exercise of autonomy calls for including *more* information about her, not excluding relevant information from consideration.

This tension is apparent on the face of the "simple command" that the Court so often invokes. According to that maxim, the "heart" of the Equal Protection Clause is a requirement that the government "treat citizens as individuals, not

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159. As noted above, an "agency condition" fills out the autonomy account but is bracketed here. *See supra* note 154. In addition, the account offered here aims to describe what due recognition of a person's standing as autonomous involves, but it does not directly address the moral concerns arising from an action's forward-looking effects on a person's ability to realize her capacity for autonomy (which I take to pose distinct issues). For further discussion of this contrast, see EIDELSON, DISCRIMINATION AND DISRESPECT, *supra* note 20, at 150-55.

160. Although I focus here on how and why race-based state action can be consistent with a commitment to treating people as individuals, it is also true that many actions that do *not* receive any special scrutiny under equal-protection law *do* fail to treat people as individuals. *See, e.g.*, *supra* note 158 and accompanying text. The underinclusion is less profound here than it was with regard to the simpler objection that people should be evaluated "individually," *see supra* notes 79-82 and accompanying text, but it is substantial nonetheless. Because my point here is to show that race-based decisions are not impeachable on a ground often raised against them, I do not undertake to explain the Court's nonapplication of that same ground to other kinds of classification. In large part, however, the discrepancy likely reflects the influence of the convention-dependent understanding of respect and racial classifications discussed later. *See infra* Part III.

161. *See supra* Section II.B.

'as simply components of a racial, religious, sexual or national class.'"[162] As we can now see, however, the word "simply" here sets up a false dilemma. Treating people as individuals and treating them as members of racial groups are not incompatible: one can take account of both a person's race and his or her self-defining choices. The Court papers over that fact by comparing treatment as an individual, on the one hand, to treatment *simply* as a member of a racial group, on the other. That fudge is what generates the intuitive conflict that gives the "simple command" its rhetorical bite. But the result is a principle that, upon inspection, lends no support to colorblindness. After all, colorblindness is a rule or firm presumption *against* considering race, not an imperative that *requires* considering people's self-defining choices and characters as well.[163]

There is an instructive parallel here to Kant's "Formula of Humanity," which holds that a person should always treat humanity, whether in oneself or in others, as an end and not merely as a means.[164] The first clarification in discussions of this idea is always to stress "*merely* as a means."[165] A person who uses a bus driver as a "means" to get from one place to another, for instance, has not necessarily done anything wrong, because he has not necessarily treated the driver *merely* as a means (or, as the point is sometimes put, as a *mere* means).[166] The same basic issue arises here: the Court's "simple command" is plausible, but only insofar as it holds that the government should treat people as individuals and not *merely* as instances of racial types. In other words, the fact that people are members of racial groups has much the same kind of significance as the fact that they are potential means to our ends. Neither is the basis of their moral worth, but both are true, and in neither case is there any evident disrespect for their worth in recognizing as much.

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162. *E.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 730 (2007) (plurality opinion); *see supra* note 7.

163. Justice Thomas, perhaps recognizing this mismatch, omits the "simply" from his invocations of the same maxim. *See Fisher I*, 570 U.S. 297, 316 (2013) (Thomas J., concurring) ("[T]he government must treat citizens as individuals, *and not as* members of racial, ethnic, or religious groups." (emphasis added) (citation omitted)); Missouri v. Jenkins, 515 U.S. 70, 120-21 (1995) (Thomas, J., concurring). That approach, however, eliminates the tension between the two posited modes of treatment.

164. *See supra* note 18.

165. *See, e.g.*, Robert Johnson & Adam Cureton, *Kant's Moral Philosophy*, STAN. ENCYCLOPEDIA PHIL. (2016), https://plato.stanford.edu/entries/kant-moral/#HumFor [https://perma.cc/SH6X-K9T4] (emphasis added).

166. That is why the ad campaign noted above properly urges bus riders to "respect" drivers by recognizing "*all* the things [they] [are]"—which includes, but is not limited to, "a Metrobus driver." *See supra* note 49.

This line of thought suggests that a commitment to treating people as individuals might well justify hostility to policies that consider *only* race when other characteristics—those that manifest a person's autonomy—are also probative. Indeed, a revisionist account of the Court's strict-scrutiny doctrine might recast it as, at least in part, an indirect means of enforcing the requirement posited by the autonomy account. This suggestion seems most plausible in the context of the university affirmative-action cases. There, the requirement of "individual consideration" amounts to a demand for the *inclusion* of additional factors—factors that will generally operate to ensure that a person is viewed in light of her own character, although the requirement does not in fact distinguish between those facts and others.[167] Even in *Parents Involved*, moreover, Justice Kennedy suggested that the school districts' case would have been stronger if "students were considered for a whole range of their talents . . . with race as just one consideration."[168] According to this potential reconstruction, then, the narrow-tailoring requirement would be seen as a rule that, unless the state excludes race from consideration, it must attend to other epistemically relevant characteristics as well—ensuring, in effect, that a person is not treated "*simply*" as a member of a racial group, or "judged by ancestry *instead of* by his or her own merit and essential qualities."[169]

An understanding of strict scrutiny along these lines would better align the doctrine with the principle that animates it—and, significantly, would vindicate the moderate impulse reflected in the university affirmative-action cases in the process.[170] But I do not deny that such an interpretation would ill-fit other important features of the existing case law. For one, the Court has generally understood race-based generalizations and inferences as involving a kind of disrespect for people as individuals, period—that is, whether or not other factors are also considered. It then uses strict scrutiny to "determine[] whether a compelling governmental interest *justifies* the infliction of that injury."[171] Similarly, the

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167. *See supra* text accompanying notes 71-78.

168. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 793 (2007) (Kennedy, J., concurring in part); *see also id.* at 723 (plurality opinion) ("The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity . . . .").

169. Rice v. Cayetano, 528 U.S. 495, 516-17 (2000) (emphasis added).

170. *See* Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198 (2016) (upholding a race-conscious admissions program under strict scrutiny); Grutter v. Bollinger, 539 U.S. 306 (2003) (same).

171. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 230 (emphasis added); *see also* Fried, *supra* note 11, at 111 ("Strict scrutiny and the insistence on a 'compelling governmental interest' are the appropriate and usual response of constitutional doctrine when a preeminent moral-political principle is at stake."); Michelman, *supra* note 12, at 1747 ("[T]he American constitu-

Court has treated race-based differential treatment as presumptively unconstitutional even when only race is *relevant* to the policy objective at issue in the first place—such as in *Parents Involved*, where race is the only clearly relevant factor in ensuring a racially integrated school.[172] The imperative to treat people as individuals—in the sense of affording due weight to their self-defining choices—could not explain any of that.

The more fundamental point is a simpler one. Insofar as the advocates of a nearly exceptionless prohibition on race-based decision-making have sought to ground *that* rule in the moral principle that people should be treated as individuals, the principle does not plausibly support such a prohibition.

2. *Respect Can Require Racial Inferences*

In fact, interpreting the mandate to treat people as individuals as a warrant for colorblindness is not only unjustified, but backwards. To be sure, refusing to treat the social ascription of a racial category to a person as *significant in itself* is consistent with treating people as individuals. After all, that ascription—a matter of what some call "formal-race" or "minimal race"—is not a self-defining choice or ordinarily reflective of such a choice, so it is not among the attributes that

tional-legal discourse of racial discrimination . . . does not rest with treating race-based discrimination by the state as . . . a losing proposition on the whole, in most cases, and therefore fit for a constitutional-legal presumption of illegality, occasionally rebuttable. The discourse treats it as wrong in all cases, an occasion in all cases—even when the law allows it—for shame or regret, and *therefore* fit for the presumption of unconstitutionality.").

172. *Parents Involved*, 551 U.S. 701; *cf.* Hellman, *supra* note 85, at 328-38 (arguing that the Court mis-analyzes cases of this kind, such as *United States v. Virginia*, 518 U.S. 515 (1996), because it applies a doctrine built for proxy cases).

respect for someone's autonomy would require to be considered.[173] But in a society where race has pervasive significance,[174] it will often be impossible to understand who someone is, in the sense required by the autonomy account, *without* taking account of the racial ascription that has likely loomed large in her experience and presented her with one portfolio of options for self-definition as opposed to another.

Put differently, it is just a social fact that "a set of interpretative codes and racial meanings . . . operate in the interactions of daily life" and that "[r]ules shaped by our perception of race in a comprehensively racial society determine the presentation of self, distinctions of status, and [what are thought to be] appropriate modes of conduct."[175] One does not have to adopt an attitude of endorsement toward these rules and patterns, or toward the practical significance they give to ascribed racial categories, in order to recognize both. And those facts, in turn, mean that accurately understanding someone's character, in the sense linked to respect for her autonomy, can require taking account of her ascribed race—even though it is not itself a self-defining choice.[176]

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173. *See* ANDERSON, *supra* note 118, at 157-59 (defining "minimal race" as a concept characterized by "the following three elements: (1) real or imagined bodily differences (as of skin color and hair texture), marking their bearers as (2) sharing real or imagined ancestors, who (3) have a real or imagined common geographical origin"); LOURY, *supra* note 16, at 151-54; Gotanda, *supra* note 16, at 4 ("[F]ormal-race[ ] refers to socially constructed formal categories. Black and white are seen as neutral, apolitical descriptions, reflecting merely 'skin color' or country of ancestral origin." (footnote omitted)); *see also* Siegel, *supra* note 44, at 91-92 ("[F]rom the standpoint of formal-race discourse, race is a fixed yet radically empty feature of every person's identity."). People do sometimes make choices that affect how they are racially categorized by others—even in the minimal sense linked "merely [to] 'skin color' or country of ancestral origin," Gotanda, *supra* note 16, at 4—but I bracket that circumstance here.

174. A vast literature documents and theorizes the pervasive and continuing significance of racial categories in American life. *See, e.g.*, LOURY, *supra* note 16, at 55-107; MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S 3-13 (2d ed. 1994) (explaining the sociopolitical process of racial formation in the United States and concluding that "the presence of a *system* of racial meanings and stereotypes, of racial ideology, seems to be a permanent feature of US culture"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318, 322 (1987) ("Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role.").

175. Michael Omi & Howard Winant, *Racial Formations*, *in* RACE, CLASS, AND GENDER IN THE UNITED STATES 13, 17 (Paula S. Rothenberg ed., 7th ed. 2007); *see also* LOURY, *supra* note 16, at 111 ("Markings on the bodies of human beings—of no intrinsic significance in themselves—become invested through time with reasonable expectations and powerful social meanings."). *See generally* OMI & WINANT, *supra* note 174 (describing the process of racial formation).

176. This is one way of developing Justice Sotomayor's thesis in her dissent in *Schuette v. Coalition to Defend Affirmative Action*. *See* 572 U.S. 291, 337-92 (2014) (Sotomayor, J., dissenting). In social systems where "race matters," including "for reasons that really are only skin deep," *id.*

Devon Carbado and Cheryl Harris's critique of calls for race blindness in university admissions offers another way of getting at the same point. Focusing on the personal-statement component of many application processes, they note that "[t]he life stories of many people—particularly with regard to describing disadvantage—simply do not make sense without reference to race."[177] Carbado and Harris vividly demonstrate as much by positing a personal statement adapted from Barack Obama's memoir and then offering a redacted version that "excis[es] specific references to his race or the race of his parents."[178] The resulting story is, as they point out, unintelligible.[179] Carbado and Harris's point is that requiring admissions officers to blind themselves to the race of applicants—even when applicants wish to provide this information as valuable context for understanding their efforts at making meaning in their lives—denies some applicants equal or adequate means of self-expression.[180] But if respect for people's individuality is understood in the way I have proposed, we could equally say that these policies stand in the way of treating people *as individuals*: they occlude information that may be essential to understanding a person's character, as constituted by his or her self-defining choices, and to treating him or her accordingly.

Moreover, this point generalizes beyond contexts, such as a personal statement, in which people may affirmatively choose to make race salient.[181] To vary the last example, consider a graduate-school admissions committee. A college student's record of forming mentorship relationships with faculty tells such a committee something significant about his or her level of initiative and intellectual engagement—traits of character that partly define who the student is, and which matter to the determination at hand. But what a given record says about those underlying traits cannot properly be estimated without also knowing the student's race, because faculty are substantially more likely to respond to white

at 380-81—that is, for reasons that depend on how a person is racially classified and then treated by others—an effort to treat people as individuals will often fail by its own terms if it does not account for that racial classification.

177. Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, *in* RACIAL FORMATION IN THE TWENTY-FIRST CENTURY 183, 190 (Daniel Martinez HoSang et al. eds., 2012).

178. *See id.* at 194-99.

179. *Id.* at 199. Patricia Williams makes a similar point by recounting a law review's effort to purge her story of race-based exclusion of references to her own race. *See* WILLIAMS, *supra* note 156, at 47-48.

180. Robert Post and Martha Minow, then the Deans of Yale and Harvard Law Schools respectively, also advanced a form of this argument in the *Fisher* litigation. *See* Brief of Dean Robert Post and Dean Martha Minow as Amici Curiae in Support of Respondents at 18-20, *Fisher I*, 570 U.S. 297 (2013) (No. 11-345).

181. *Cf.* Carbado & Harris, *supra* note 177, at 199-200 (describing the costs that enforced colorblindness imposes on "race-positive" applicants who "wish to make race salient").

men seeking to form such relationships.[182] In other words, using faculty mentors as evidence of intellectual engagement will tend to overstate the actual intellectual engagement of white men and understate that of others, unless one corrects for the unobserved racial and gender bias built into the data. This dynamic recurs across many contexts.[183] And it should matter to anyone serious about treating people *as individuals*, at least in the sense marked out by the autonomy account, because it stands in the way of recognizing the individual characters that people actually have. Thus, if there are reasons that weigh against demanding or considering information about race in particular settings where it is evidentially relevant to aspects of character—and there surely are such reasons in some cases—they do not flow from a requirement of basic moral respect for people's individuality; if anything, they appear in tension with it.

The same point about the role of race as a mediating variable reframes one salient aspect of the ongoing litigation over Harvard College's race-conscious admissions program.[184] According to the plaintiffs, Harvard's data reveal a bias against Asian American applicants, including systematically low ratings for those applicants on measures of "personality." Harvard has responded in large part by blaming the disparity on assessors further upstream, such as high-school guidance counselors who may write systematically worse letters for Asian American students.[185] If Harvard is right about that, then the university is not wronging the Asian American students in the way the plaintiffs allege—that is, by holding their ethnicity against them. But it may nonetheless be wronging them by failing to count their ethnicity in their *favor* when it decides how to integrate the guidance counselors' letters into its overall "personal" rating. After all, treating the applicants as individuals would seem to require reasonable efforts to accurately assess how "courageous" and "kind" they really are (assuming, as Harvard does, that these aspects of character are relevant to college admissions). If failing to include an adjustment for ethnicity means systematically misjudging that, then

182. *See* Katherine L. Milkman et al., *What Happens Before? A Field Experiment Exploring How Pay and Representation Differentially Shape Bias on the Pathway into Organizations*, 100 J. APPLIED PSYCHOL. 1678 (2015) (reporting experimental evidence showing this).

183. Much of the other field-experiment evidence involves labor markets rather than education. *See, e.g.*, Devah Pager & Bruce Western, *Identifying Discrimination at Work: The Use of Field Experiments*, 68 J. SOC. ISSUES 221 (2012). For a short summary of some of the relevant evidence, see Sendhil Mullainathan, *Racial Bias, Even When We Have Good Intentions*, N.Y TIMES (Jan. 3, 2015), https://www.nytimes.com/2015/01/04/upshot/the-measuring-sticks-of-racial-bias-.html [https://perma.cc/U78Z-TLND].

184. *See* Students for Fair Admissions, Inc. v. President of Harvard Coll., 397 F. Supp. 3d 126 (D. Mass. 2019), *appeal docketed*, No. 19-2005 (1st Cir. Oct. 11, 2019).

185. *See* Harvard's Proposed Findings of Fact and Conclusions of Law at 33-34 ¶ 139, *Students for Fair Admissions*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 619).

it may also mean failing to treat applicants respectfully as individuals.[186] Thus, a thoroughgoing commitment to treating people as individuals—in the sense of recognizing the "essential qualities" and "unique personalit[ies]"[187] they possess—would often favor, and sometimes even require, the kind of direct consideration of race that it is usually taken to prohibit.[188]

3. *Race-Based Differential Treatment Does Not Inherently Fail to Respect People as Individuals*

Finally, if we understand the obligation to treat people as individuals as an obligation to respect their autonomy, we should reject claims that disrespect for individuality is inherent in the very use of race as a criterion of differential treatment (most notably, again, in forming integrated schools).[189] I suggested above that respect for people's autonomy or individuality imposes constraints on how we form judgments about *what they are like* and *what they are likely to do*.[190] But I do not see an argument that appreciating someone's autonomy is at odds with also recognizing the simple fact that she is placed in a certain racial category by her society, or with affording that fact its actual epistemic and practical significance.[191]

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186. This is a variation on the argument that Kang and Banaji make for interventions that they term "fair measures," such as the use of race as a tiebreaker in settings prone to implicit bias. *See* Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1098-1101 (2006).

187. Rice v. Cayetano, 528 U.S. 495, 517 (2000).

188. As earlier noted, there are surely reasons to be cautious about injecting express racial debiasing into all of the many assessments that are likely to be corrupted by racial bias. For example, doing so might raise the salience of race in certain settings where that ultimately could do more harm than good, or it could take a psychological toll on those who perceive themselves to have been afforded some opportunity because of their race (even if that "because of" must be understood in a narrow and specialized sense). *See, e.g.*, STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 16 (1991) (describing "the pain of being reminded . . . that in the judgment of those with the power to dispose, I was good enough for a top law school only because I happened to be black"). My point here is just that forgoing this information is not a way of treating people as individuals, but rather comes at a cost to efforts to do so.

189. *See supra* Section I.C.2 (noting suggestions to this effect in the cases).

190. *See supra* Section II.B.

191. A commitment to respecting people as autonomous individuals has implications for how a person or a government should *engage in* racial classification: it favors taking people's self-identifications seriously. Even here, though, the requirement is "inclusive" rather than "exclusive." The racial identity someone identifies with, if any, demands attention as part of her character. But the racial group to which she is explicitly or implicitly assigned by others is

A standard justification for the anticlassification approach to race cases is that race-based decision-making wrongs a person by "consider[ing] the individual fungible" and "fail[ing] to honor [a person's] autonomy and distinctiveness,"[192] thereby "diminish[ing] his humanity."[193] A rigid rule against racial classifications is thus said to "protect[] individuals from the harm of categorization by race."[194] But insofar as these claims purport to identify a kind of intrinsic disrespect in racial categorization or inferences—a failure to appreciate a person's individuality, which then underwrites or is reflected in the race-based action—the claims do not represent a plausible rendering of the value they invoke. To be sure, some race-based actions reflect a failure to relate to a person as an autonomous individual, and this is part (although only part)[195] of what is morally wrong with them. But many do not. Even accepting the moral importance of treating people as individuals, then, that value does not support claims of a "'moral [and] constitutional equivalence' between laws designed to subjugate a race and those that distribute benefits on the basis of race [for other reasons]."[196] And if the Court appeals to a general principle of respect for people's individuality to justify a further extension of colorblindness, it will only widen the gap between the doctrine and the principle that is supposed to ground it.

III. SOCIAL MEANING AND TREATING PEOPLE AS INDIVIDUALS

That is an important result, but, as we have already seen, it is far from the whole story. As Part I explained, when the Court insists that race-based state action infringes a "personal right[] to be treated with equal dignity and respect,"[197] it is making a claim not just about the abstract demands of respect but also about the actual social meaning of drawing racial distinctions (or about

epistemically relevant too—because it speaks to how they will treat her—and there is no disrespect for her autonomy inherent in noticing that fact as well.

192. Sidhu, *supra* note 11, at 1354.

193. Hellman, *supra* note 129, at 917 (describing Justice Thomas's view); *see* Grutter v. Bollinger, 539 U.S. 306, 353 (Thomas, J., concurring in part and dissenting in part).

194. Siegel, *supra* note 2, at 1287 (describing the standard justification for "colorblindness claims").

195. In EIDELSON, DISCRIMINATION AND DISRESPECT, *supra* note 20, I defend a pluralist account of the moral wrongfulness of discrimination and argue that disrespect for a person's individuality is one important part of the story. *See id.* at 6-10, 127-70.

196. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) (first alteration in original) (citation omitted).

197. City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 493 (1989) (internal quotation marks omitted).

what respect requires in view of that meaning).[198] That is why, when the respect-based objection to a particular race-dependent action is questioned, the Court points to what it believes "a victim of the classification"[199] would say—to "[t]he perceptions of the excluded class,"[200] or what it believes the state action "tells" the objecting plaintiffs.[201] And it is surely true that many uses of race are demeaning of a person's individuality in the sense that they are so marked by social conventions, even as they may be perfectly consistent with the basic moral demand to recognize and take account of a person's autonomy.

Could it be, then, that the Court's insistence that race-based state actions fail to "treat people as individuals" is ultimately correct—even in the absence of any *convention-independent* disrespect—because a centuries-long history of relentless and invidious racial discrimination has stamped racial distinctions with the meaning that the Court claims? And if so, what legal difference does it make how anyone answers a philosophical question about the demands of respect apart from those conventions?

This Part takes up the notion that even integrative racial classifications are marked by social convention as disrespectful of people's standing as individuals and shows how—even assuming that the Court has reasonably identified the symbolic significance of race-based action—it matters that the more basic moral charge against race-based distinctions and inferences has not been vindicated. That antecedent moral question—the one answered in Part II—determines whether the colorblindness project should be pursued from a place of righteous indignation, as it has been, or with ambivalence and regret. And this in turn has concrete consequences for how the Court should decide cases, both in terms of the results it reaches and in terms of what it should and should not say in its opinions.

Put another way, while *Plessy v. Ferguson* was wrong about many things, it was not wrong to distinguish between harmful social meanings that are rooted in something "found in the act" and those that arise solely because a community "put[s] that construction upon it."[202] Distinguishing convention-dependent and convention-independent disrespect allows us to see that our conventions about respect are themselves proper objects of moral assessment. And courts should relate differently to some such conventions than to others, including based on

198. *See supra* Section I.C.

199. Powers v. Ohio, 499 U.S. 400, 410 (1991).

200. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting).

201. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

202. 163 U.S. 537, 551 (1896); *see infra* note 269.

the relationship they take those conventions to have to more basic moral requirements.

In developing this argument, I will first offer a fuller sketch of the notion that race-based state action fails to treat people respectfully as individuals because it transgresses a firm respect convention.[203] To appreciate the consequences of that idea, we then need to consider more broadly the costs and benefits of respect conventions, including, but not only, in the context of race.[204] As I will explain, respect conventions serve important purposes, and they often create moral reasons in favor of compliance. But there is a critical difference between cases in which a convention about respect tracks an underlying moral wrong, on the one hand, and those in which the convention has the effect of making otherwise innocuous actions wrongful, on the other hand. The autonomy account allows us to see that the asserted convention against race-based differential treatment is, in many of its applications, operating in the latter way.

Finally, I will argue that this recognition bears on how the Court should approach race cases—even assuming both that the Court is right to see race-based action as disrespectful in the conventional sense and that such conventions can ground constitutional prohibitions.[205] In particular, if the disrespect imputed to integrative measures is contingent and morally inessential, the Court should take pains not to harden the conventions it is enforcing, and it should seize opportunities to help in reforming them. The upshot will be both a clearer view of what is happening analytically in equal-protection cases about race and, more broadly, a clearer view of the connection between legal judgments based on culturally contingent notions of respect and philosophical judgments about what respect for persons requires.

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203. *See infra* Section III.A.

204. *See infra* Section III.B.

205. *See infra* Section III.C. I assume these points in order to address the proponents of colorblindness on their own terms and engage the question of what follows from their premises—not because I believe the Court's judgments of social meaning are necessarily correct or that a practice with an individuality-denying social meaning necessarily runs afoul of the Equal Protection Clause. *Cf.* Miller v. Johnson, 515 U.S. 900, 945 (1995) (Ginsburg, J., dissenting) ("The creation of ethnic districts reflecting felt identity is not ordinarily viewed as offensive or demeaning to those included in the delineation."); *see also supra* text accompanying note 19 (explaining the premises of my inquiry here). More broadly, the questions whether the Court can reliably discern social meaning and how it should do so are plainly important but are beyond my scope here. For helpful discussions of those issues, staking out a range of views, see DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 59-85 (2008); Ekins, *supra* note 59, at 29-32; and Tarunabh Khaitan, *Dignity as an Expressive Norm: Neither Vacuous nor a Panacea*, 32 OXFORD J.L. STUD. 1, 5-9 (2012).

A. Colorblindness as a Rule of Convention-Dependent Respect

Many race-related actions are disrespectful in the conventional sense, and this fact about their meaning often gives rise to a powerful moral reason against them. Racial profiling, at least of subordinated groups, is a good example. The autonomy account suggests that giving due epistemic weight to a person's race does not necessarily mean failing to treat her as an individual, putting the symbolic significance of the action to the side. But inferences from race to crime are so redolent of the profound contempt that has long underlain them, and thus are so likely to cause deep hurt, that they should not be used anyway. In other words, their social meaning rules them out-of-bounds even in circumstances in which they may be epistemically unimpeachable and not (otherwise) disrespectful in the basic sense.[206] Note the two-circle structure here. One class of activity (in our example, say, racial profiling that stems from contempt for some people's equal worth or autonomy) just *is* disrespectful in the basic sense, irrespective of conventions, because of the attitude it manifests. A social convention then draws a wider circle that encompasses a larger set of actions (say, all race-based inferences about criminality) and *makes* them disrespectful in the conventional sense, thereby creating convention-dependent moral reasons not to engage in them, either. This two-circle picture, with a convention-independent core and a convention-dependent margin, provides a general model.

And as I have already intimated, this simple model in turn provides a plausible way of understanding the Court's appeal to notions of respect and dignity in justifying colorblindness—even if there is no convention-independent disrespect inherent in much race-based decision-making. That is, the Court can be understood as saying that racial distinctions or inferences have been *so* closely associated with disrespect in the basic sense that the relevant convention about respect now ranges over the entire class of race-based action. Randall Kennedy suggests something like this when he observes that, while "[t]here are many types of classification that negate individual identity, achievement, and dignity," classifications based on race "ha[ve] *come to be viewed* as paradigmatically

206. I describe an example in which a kind of profiling does not involve a lapse of basic respect for someone's autonomy in EIDELSON, DISCRIMINATION AND DISRESPECT, *supra* note 20, at 161-62. For an account of the wrongness of racial profiling that rests on its social meaning, see Deborah Hellman, *Racial Profiling and the Meaning of Racial Categories*, *in* CONTEMPORARY DEBATES IN APPLIED ETHICS 232 (Andrew Cohen & Christopher Wellman eds., 2d ed. 2014). For a related suggestion that racial profiling of certain groups is unjust because it "gives them a reasonable sense of inferior political status" in light of broader patterns, see Adam Omar Hosein, *Racial Profiling and a Reasonable Sense of Inferior Political Status*, 26 J. POL. PHIL. e1, e1 (2018).

offensive to individuality."[207] Similarly, Peter Rubin posits that "to make a decision to grant or deny someone something on the basis of a characteristic such as race, which is loaded with cultural significance, denies a person treatment as an individual in a way that other sorting mechanisms do not."[208] And J. Harvie Wilkinson III gets at much the same point when he argues that the use of racial quotas is impeachable because it involves "so pungent an *historical reminder*" of the "racist outlook" animating slavery and Jim Crow—that is, even if the practice does not actually manifest that outlook.[209]

When the Court insists that race-based state action is disrespectful because it fails to "treat" people as individuals, then, its claim could—in principle—be true as a statement about the socially understood significance of race-based action. And, again in principle, the Court's commitment to colorblindness could then be justified as a rule against a kind of convention-dependent disrespect. Before we can decide what to make of this reconstruction, however, we need to consider more broadly how we should assess the social conventions that may constitute actions as disrespectful in the first place.

B. The Costs of Overbroad Respect Conventions

By their nature, respect conventions sometimes create reasons against doing what one would otherwise have most reason to do. That is because, as we have already seen, these social conventions invest an act with important consequences—most notably, the harmful effects that flow from the appearance of disrespect in the basic sense.[210] Those consequences will sometimes make an action morally problematic when it otherwise would not be. In such cases, the respect convention effectively boxes us in, denying us a degree of moral freedom we would otherwise have had.

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207. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1794 (1989) (emphasis added). In the same discussion, Kennedy stresses the distinct point that racial proxies are "prone to misuse." *Id.*

208. Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny after* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 22 (2000).

209. WILKINSON, *supra* note 11, at 291-92 (emphasis added). In a similar vein, Frank Michelman observes that "there apparently is something intrinsically odious, something immediately repugnant to American civic sensibilities, in the state's allowing a person's race to color its view of her case"—a "[r]evulsion" that is in part "a legacy of *Brown v. Board of Education* and its aftermath." Michelman, *supra* note 12, at 1745, 1747 (footnotes omitted).

210. *See supra* Section I.B.

Of course, it is no great tragedy if, say, a respect convention about spitting at people sometimes denies us the moral option to spit in the most convenient direction. Similarly, the fact that "[o]rdering blacks to sit in the back of the bus is . . . fixed by social convention as an instance of demeaning blacks"[211] does not make anyone's choice situation worse; even in a world without the convention, there would be no reason to issue such an order. And likewise, no significant costs flow from the need to forgo certain Halloween costumes in order to avoid participating in a social practice understood to show profound disrespect.[212]

But matters are different when a socially valuable course of action, and one that is otherwise morally innocent, is rendered potentially wrongful by the fact that it is coded by social convention as a mark of disrespect. In that kind of case, everyone might be better off—and some might be significantly better off—if we could all just agree to narrow, suspend, or extinguish the respect convention.

And, indeed, we execute maneuvers of that kind in social life all the time. That is, we often act in ways that might otherwise be offensive, but, by acknowledging and disavowing that convention-dependent quality of the action, we neutralize it. For instance, suppose I say, "I'm sorry to be disrespectful, but I may check my phone during our meeting because I'm expecting an important message." Despite the surface grammar of the statement, I have not really apologized for *being* disrespectful. Rather, if my speech-act worked as intended, I have made my later phone checking *not* disrespectful, or at least not in any sense that matters, because I have sapped it of the meaning—that your time is unimportant to me—it might otherwise have had. I have revealed to you enough about my thinking to show you that the action does not indicate the attitude that the relevant convention presumes, and I have thereby eliminated the convention-dependent reasons not to do it.[213]

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211. HELLMAN, *supra* note 205, at 40; *see also id.* at 26 (discussing the same example).

212. *See supra* note 68 and accompanying text.

213. Before you try this maneuver at home, note two necessary conditions for success. First, revealing more about one's attitudes will not help if the respect convention is tracking an independently existing moral wrong in the case at hand. For example, yelling to another driver, "I'm sorry to be disrespectful, but I'm going to cut you off (and thereby endanger you) because I'm late for work," will not make the action any more respectful. Second, I can avoid disrespect in the phone-checking example only if there is sufficient trust between us for you to believe my representation about my reasons for checking my phone, and for me to be confident that you will believe it. Otherwise, the appearance-based reason for me not to check my phone will survive my attempt to get rid of it. The absence of such trust between the parties is one reason why efforts to disclaim potential *racial* disrespect are often ineffective. *See infra* note 225; *cf.* Hosein, *supra* note 206, at e11 (noting that "a government that claims to be acting on accurate crime statistics [in conducting racial profiling] would have to ask blacks and [Arab, Middle Eastern, Muslim, and South Asian individuals] to take this in significant part on trust: trust that can reasonably be withheld").

Jason Brennan and Peter Jaworski's recent critique of "anti-commodification" arguments against certain markets highlights much the same point, but on a larger scale.[214] Buying and selling certain goods, such as organs, is often said to communicate or express the wrong attitude toward the goods or people involved, and to be morally objectionable for that reason.[215] But, as Brennan and Jaworski point out, the systems of meaning that make these actions "express" one attitude rather than another are highly contingent and vary dramatically from place to place.[216] According to Herodotus, for instance, the Greeks were offended at the disrespect expressed by eating dead bodies (rather than burning them), and the Callatians were offended at the disrespect expressed by burning dead bodies (rather than eating them).[217] There is similar variation in societal attitudes toward the use of market exchange.[218] So, Brennan and Jaworksi say, if allowing markets in organs would save lives—and bracketing other objections—the fact that such markets are marked by our conventions as disrespectful seems an indictment *of the conventions themselves*, and a powerful reason to reform them.[219]

Crucially, we can recognize Brennan and Jaworski's point even as we maintain that, so long as the conventions exist, they may ground genuine moral reasons not to violate them.[220] In other words, social meanings spin off moral consequences, and yet our "interpretative practices—a culture's semiotics—can

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214. Jason Brennan & Peter Martin Jaworski, *Markets Without Symbolic Limits*, 125 ETHICS 1053 (2015).

215. *See, e.g.*, MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY 9-10, 106, 146 (2012); DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE 4 (2010); Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71 (1990).

216. Brennan & Jaworski, *supra* note 214, at 1062-66.

217. HERODOTUS, THE HISTORIES 185-86 (Robin Waterfield trans., 1998) (c. 440 B.C.E.); *see* Brennan & Jaworski, *supra* note 214, at 1062-63. For additional examples of the contingency of social meanings, see Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 964-72 (1995).

218. Brennan & Jaworski, *supra* note 214, at 1064-65.

219. *See id.* at 1068. For a defense of the role of government, in particular, in efforts to reform harmful social norms, see Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 953-65 (1996). *See also id.* at 908, 928, 937, 948 (discussing efforts to reform the social meanings of smoking, drug use, wearing a helmet, condom use, and other activities); Lessig, *supra* note 217, at 964-72 (similar).

220. Brennan and Jaworski somewhat minimize this point by saying that because "[s]emiotic objections have force only in the way manners have force[,] [t]hey hold only for minor markets of little consequence." Brennan & Jaworski, *supra* note 214, at 1075-76. Whether or not that is fair with respect to markets in particular, the harms of violating respect conventions, and especially of the government or public officials doing so, can be immense, as the racial profiling example suggests. *See supra* note 206 and accompanying text.

themselves be judged by the consequences they produce,"[221] including the *moral* consequences they produce. Structurally, the point here is not very different from the familiar thought that there are pro tanto moral reasons to follow the law in a democratic society, whatever it is, and yet also moral grounds for evaluating laws themselves as good or bad, including by virtue of the moral obligations they create.[222] The same is true about conventions of respect.

Before undertaking such an evaluation of the respect convention that may underlie the colorblindness doctrine, it will help to briefly explore one more problem with an analogous structure, but a different ideological valence. Consider, in particular, the complaints voiced in some quarters about a purported culture of "political correctness."[223] These complaints come in three different varieties. First, some are just claiming a moral license to voice their actual, identity-related contempt for other people. Of course, there is no such moral license. Second, many are claiming a moral license to discount the harms of *predictably offending* others, and especially others whose social position is more precarious. There is no basis for that kind of moral license, either.[224] But third, some avowed opponents of "political correctness" appear to be saying something different: not that they should be free to brush aside the harms of violating extant respect conventions, but that our culture has simply *proliferated* overly many or overly broad respect conventions surrounding issues of group identity in the first place, and that these are problematic precisely because they make it *morally* (not just reputationally) treacherous to discuss those subjects candidly. Unlike the other two, that is a coherent complaint, whether or not it is ultimately justified. And, indeed, it is one that closely resembles the critique I will soon mount of colorblindness, understood as a rigid respect convention against race-based decision-making. In either case, the constriction or "chilling effect" that such a complaint

221. Brennan & Jaworski, *supra* note 214, at 1077.

222. *See, e.g.*, Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1198 (2015). As Jeremy Waldron points out, the same is true of promises: the fact of having made a promise has moral consequences, even if the promise is one that ought never have been made. Jeremy Waldron, *Jurisprudence for Hedgehogs* 23-26 (N.Y.U. Pub. Law & Legal Theory Res. Paper Series Working Paper No. 13-45, 2013), https://ssrn.com/abstract=2290309 [https://perma.cc/V79D-9ATU].

223. For a useful definition of "political correctness"—understood as a descriptive term, rather than an epithet—see Dan Moller, *Dilemmas of Political Correctness*, 4 J. PRAC. ETHICS 87, 88 (2016).

224. As we saw above, causing people to perceive themselves to be the subjects of contemptuous attitudes is normally wrong because of the harm it does, including through estrangement and injury to their self-respect. *See supra* notes 56 & 68 and accompanying text.

identifies has to be weighed against the good that these same conventions do in marking pre-existing wrongs and inducing people not to commit them.[225]

Assessing those benefits and costs calls for many of the same kinds of judgments as are involved in more familiar regulatory line drawing. For instance, it may make good sense to maintain a respect convention that is substantially broader than the class of cases involving convention-independent disrespect if this is the only way to make the norm "stick," or if the relative costs of making otherwise innocent conduct morally problematic, as opposed to failing to mark and stigmatize instances of the relevant kind of disrespect, are low.[226] In addition, some respect conventions that end up creating wholly bootstrapped instances of disrespect nonetheless do valuable work in providing people with arbitrary but ready means of signaling respect for one another; and it is impossible to provide that signaling mechanism without *also* creating otherwise-unnecessary moral reasons against failing to act in the ways the conventions demand.[227]

Demanding respect conventions can also serve a related disambiguating function in other kinds of cases. By marking a class of conduct as disrespectful in the conventional sense—and thereby making that type of conduct often disrespectful in the basic sense, too—respect conventions create new wrongs, but they also spare the potential victim of a wrong uncertainty about the significance

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225. Efforts to neutralize norms of "political correctness" offer an instructive contrast to the phone-checking case. People sometimes try to sap potentially offensive assertions about race of their disrespectful quality through disclaimers; they say, "I'm not a racist, but . . . ," or "don't take this the wrong way, but . . . ." But, as we all know, this maneuver generally does not work. Why? For one thing, the speaker's representation about his attitudes often is not credible, in the way that my representation about why I was checking my phone was. *See supra* note 213. For another, the potential disrespect often is not wholly or even mainly convention dependent in these cases; often, that is, the social convention is marking inherently disrespectful ideas about race as disrespectful. And for yet another thing, the explanation that the speaker has to give in these cases to explain *why* the expression does not indicate the attitude that tends to underlie similar assertions is often complex, and it may not be a point of agreement between the speaker and the audience to begin with. (Even worse, the explanation may require *other* statements that are apt to appear disrespectful—which themselves then have to be modified with disclaimers, and so forth and so on.) In this way, too, the situation is unlike the phone-checking case: my maneuver there works because I can be confident that my simple explanation of why I am checking my phone will knock out what we *both* take to be the basis of the potential insult. In other words, respect conventions are harder to neutralize when they rest on an undertheorized, overlapping consensus, rather than a shared understanding of why the wrong underlying the convention is wrong.

226. *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES 135-166 (1993) (outlining costs and benefits of inevitably overinclusive rules); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 969-1003 (1995) (same).

227. *See* Buss, *supra* note 55, at 801 (arguing that codes of manners and politeness are morally valuable "because they enable people to acknowledge one another's special dignity").

of what might otherwise have been a morally ambiguous act. The rise of more rule-like norms about the comments that will be taken as expressions of racial or other identity-related disrespect, often under the rubric of "micro-aggressions," exemplifies this dynamic.[228] Overbroad respect norms thus resemble what Frederick Schauer, following Jeremy Bentham, calls "presumed offenses"[229]: crimes defined by conduct that *tends* to indicate a wrong, where that wrong is otherwise hard to detect and prove.

There is much more worth exploring here about the role of respect conventions in regulating moral reasons, but for our immediate purposes, the larger takeaways are these. First, social conventions about which types of actions are disrespectful may or may not tightly track lapses of respect in the basic sense that would exist regardless. Second, when they do not, the conventions are sometimes costly, including because of the very moral reasons they create (even as they may also promise other benefits). With these features of respect conventions in view, we can see the Court's thoroughgoing enforcement of an asserted respect convention against the use of race-based distinctions or inferences—here, in particular, on the ground that they are socially understood as disrespectful of people's individuality—in a new light.

C. How the Court Should Police Costly Respect Conventions

In Part I, I argued that the Court is best read as taking the view that race-based state actions, and especially race-based inferences, are disrespectful on both convention-dependent and convention-independent grounds. Suppose, though, that the Court came to recognize that the claim of convention-independent disrespect is meritless with respect to many race-based practices, including most integrative ones. That is, suppose that the Court or particular Justices, on reflection, endorsed the account of treating people as individuals that I outlined in Part II—or some other one with a similar bottom line. Having identified the potential costs of overbroad respect norms, we can now see that such a moral judgment would have important bearing on how the implementation of colorblindness, even as a rule focused on *convention-dependent* wrongs or harms, should proceed. The moral judgment has such bearing because the Court's

228. *See, e.g.*, U.C. Santa Cruz, *Tool: Recognizing Microaggressions and the Messages They Send* (2014), https://academicaffairs.ucsc.edu/events/documents/Microaggressions_Examples_Arial_2014_11_12.pdf [https://perma.cc/D74C-VNLB] (listing identity-related comments and the insulting messages they are understood to send).

229. Frederick Schauer, *Bentham on Presumed Offenses*, 23 UTILITAS 363 (2011); *see also* EIDELSON, DISCRIMINATION AND DISRESPECT, *supra* note 20, at 45-47 (discussing the possibility that disparate-impact prohibitions could be understood in this way).

choices can be expected to exert a pull on the relevant conventions themselves, and the Court should use its influence for good rather than for ill. I will flesh out this point and illustrate it with examples below.[230] As these examples demonstrate, focusing intently on social meanings does not obviate the need to take a stance on what treating people respectfully (here, as individuals) actually requires as a matter of basic moral principle.

Finally, and separately, the recognition that only convention-dependent disrespect is at issue in many of the Court's colorblindness cases also matters for another reason. It takes the fact that there is no convention-*independent* disrespect in a particular case off the table as a potential self-complete ground for refusing to enforce the relevant norm. That matters to how courts should approach practices like the use of race in criminal suspect descriptions—which courts have thus far upheld essentially on the ground that they do not involve convention-independent disrespect.[231] That is not a tenable way of resolving these cases if the colorblindness doctrine forbids even wholly convention-dependent disrespect for people's individuality.

1. Avoiding Entrenchment

Supreme Court opinions matter for reasons other than the results they reach or the guidance they provide to lower courts. As Alan David Freeman observed, they also represent "an evolving statement of acceptable public morality," one that "not only reflect[s] dominant societal moral positions, but also serve[s] as part of the process of forming or crystallizing such positions."[232] The dissenters in *Obergefell v. Hodges* implicitly made the same point. The majority's rhetorical denunciations of same-sex marriage bans as expressions of disrespect, these Justices lamented, "will have an effect[] in society"[233]—namely, they will "sully"[234]

230. *See infra* Sections III.C.1-2.

231. *See infra* Section III.C.3.

232. Freeman, *supra* note 117, at 1051 (footnote omitted); *see also* MCADAMS, *supra* note 63, at 171-73 (describing judicial signaling of societal attitudes); William W. Fisher III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 COLUM. L. REV. 1774, 1786-87 (1988) ("Courts influence public opinion . . . [through] their ability, in the justificatory portions of their opinions, to evoke or create symbols; to inculcate (by simultaneously appealing to and modeling) conceptions of 'reasonable' or 'mature' decisionmaking; and to reinforce or modify their audiences' worldviews by showing how particular legal rules fit general moral and political visions."); Siegel, *supra* note 16, at 1143 (arguing that "equal protection doctrine supplies a language and a perceptual framework that shapes popular debates about race and gender equality").

233. Obergefell v. Hodges, 135 S. Ct. 2584, 2626 (2015) (Roberts, C.J., dissenting).

234. *Id.*

and "be used to vilify" opponents of same-sex marriage.[235] One need not share that particular concern to acknowledge the dynamic of influence it presupposes: what the Court says about the morally charged issues that come before it is apt to influence broader public understandings, including about which modes of thought and action either involve or are likely to indicate invidious attitudes.[236]

That dynamic matters to how the Court should write opinions that rest—as important colorblindness cases appear to rest—on claims about convention-dependent disrespect. In particular, it suggests that if the Justices are going to enforce a perceived social convention that race-based distinctions show disregard for people's individuality, then they should aim to do so without entrenching the moral overbreadth of that convention (at least absent reason to think that the overbreadth does more good than harm). And they should try, where possible, to reform the convention or limit its application.

Start with nonentrenchment. At a minimum, attention to the risk of hardening costly respect norms counsels against asserting moral equivalencies that do not exist. Likening efforts to increase the racial diversity of U.S. broadcasters to South African apartheid, for example, tells people that the former practice involves a kind of convention-independent disrespect, when in fact it ordinarily does not.[237] This ratifies the alleged meaning of drawing race-based inferences and compounds the costs that meaning will impose in the future.[238] Similarly, the Court likely should not opine that race-based generalizations about politics or other matters must be "based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens";[239] nor should Justices claim, absent a persuasive

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235. *Id.* at 2642 (Alito, J., dissenting).

236. As Dan Kahan explains, "[T]he devices the Court uses to justify its decisions . . . furnish signals that are received by intermediary groups—including politicians and media commentators—who then amplify and retransmit them," and the Court's analysis can thereby become "the moment at which the status and dignity of an entire community associated with a particular view of the good is adjudicated." Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 74 (2011). Even setting aside contemporaneous media and political commentary on the Court's decisions, moreover, the Court's major opinions are read by many lawyers and law students, some significant fraction of whom are, or go on to be, opinion leaders in one way or another.

237. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 635 (1990) (Kennedy, J., dissenting).

238. *Cf. Obergefell*, 135 S. Ct. at 2642 (Alito, J., dissenting) ("In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent." (citation omitted)).

239. *Metro Broad.*, 497 U.S. at 636 (Kennedy, J., dissenting).

argument rooted in general moral principles, that affirmative-action programs inherently "derogate[] [the plaintiffs'] human dignity and individuality."[240] It is one thing to say that these practices have a certain historically contingent social meaning, in virtue of which they will cause people to suffer a dignitary harm, and that the practices therefore must be limited in certain ways or cannot be allowed. If that is true, it can be said without proclaiming that the sense of grievance some feel is locking onto a deeper moral truth. As a general matter, the Court should say the latter only if it is true; but I have argued above that in many cases it is not, and the Court has never explained why it is.

I say "as a general matter" because we have to acknowledge the possibility that, for the kinds of regulatory-design reasons sketched above,[241] the overbreadth of the colorblindness norm is actually, on balance, a good thing. In its structure, the argument for that conclusion would resemble the case for maintaining the demanding and rigid norms of racial respect derided as "political correctness." Yet I doubt that the Court's entrenchment of colorblindness as a rigid respect convention—through rhetorical denunciations of race-based actions as inconsistent with due regard for people's individuality—could be justified in this way. For starters, it is difficult to believe that fostering the *misimpression* that all racial inferences involve a basic, convention-independent moral wrong could be a legitimate means of promoting even a valuable social belief to that effect. I doubt that any Justice would think it a proper part of his or her role to propagate such "noble lies" in this area, and I doubt that those who condemn race-based practices as inherently demeaning actually understand their project in those terms.[242]

But even setting that question of means aside, the argument that a blanket rule of colorblindness is a valuable respect convention—providing a needed buffer around convention-independent failures to respect people as individuals—does not look promising.[243] In the context of racial inferences, one could

240. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 527 (1989) (Scalia, J., concurring) (quoting ALEXANDER BICKEL, THE MORALITY OF CONSENT 133 (1975)).

241. *See supra* text accompanying notes 225-228.

242. Delving into the "noble lie" question would draw us too far afield here, but accounts of the obligation of judicial candor or sincerity in general offer a useful starting point. *See, e.g.*, Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2269-72 (2017); Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 990-92 (2008).

243. Some suggestions in that general vein have been made. *See, e.g.*, WILKINSON, *supra* note 11, at 290 ("Like old-fashioned chastity, process must remain inviolate. Every person disregarding it gives every other a greater claim to do so."); Richard A. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 24 (suggesting that "[t]he antidiscrimination principle is not only more objective, but *more compelling*," in a categorical form (emphasis added)); *see also* Strauss, *supra* note 13, at 128 (discussing

imagine an argument that the distinction between *considering* race and *failing to consider* people's characters—the distinction that the autonomy account suggests separates respectful from disrespectful action (apart from conventions)—is just too subtle to reliably regulate conduct and put people on notice as to when they have been disrespected. For that reason, the argument would go, there is value in maintaining an overbroad respect norm against *all* racial inferences. Even in the domain of racial inferences, however, it is far from clear that such a norm does more good than harm, particularly when compared with alternatives. A respect convention frowning upon racial inferences that *align with traditional racial stereotypes*, for example, would cover the cases most likely to involve convention-independent failures to treat people as individuals—because such stereotypes are more likely to displace attention to a person's self-defining choices[244]—and would, at the same time, capture a disproportionate share of the potential harm from the appearance of such disrespect.[245] Moreover, any judgment of the optimal breadth of the norm against racial inferences would have to account for the costs of taking valuable and otherwise-innocent policy options off the table. In any case, it is hard to believe that no viable respect convention could do the needed work without also reaching even *noninferential*, integrative uses of race, such as the school assignments at issue in *Parents Involved*.

Indeed, *Parents Involved* offers an especially good example of the risks of entrenching harmful social meanings by enforcing them. Consider Justice Kennedy's assertion that taking account of race in assigning children to schools "tells each student he or she is to be defined by race."[246] There is no indication that the race-based school assignments "tell" children this in the sense that the use of race *indicates* to the students how they are actually thought of by the school district. That is, there is no basis for a claim that the school district actually regards

arguments that "the prohibition against discrimination will lack moral authority if it is not extended to forbid all racial generalizations"). In a more descriptive mode, Frank Michelman has sketched how a constitutional culture might "gravitate[] toward a categorical prejudice against [racial classifications]" in light of the difficulty of making "occasion-specific judgments" about dignitary and expressive harms. Michelman, *supra* note 12, at 1746.

244. *Cf.* Lawrence Blum, *Stereotypes and Stereotyping: A Moral Analysis*, 33 PHIL. PAPERS 251, 271 (2004) ("Stereotyping involves seeing individual members through a narrow and rigid lens of group-based image, rather than being alive to the range of characteristics constituting each member as a distinct individual.").

245. *See supra* note 56 and accompanying text (discussing the potentially heightened costs of apparent disrespect for members of subordinated groups); *cf.* Strauss, *supra* note 13, at 128-30 ("[I]f the objectives of affirmative action are worthwhile and the problem is only one of line-drawing, there is no reason to believe that drawing the line at a prohibition of all racial generalizations is the best way to proceed.").

246. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

the children as "defined by race" in any way at odds with recognizing them as full-blown individuals. So the claim must be about the apparent or conventional meaning of the race-based school assignments—what the students are likely to take the assignments to convey in light of prevailing social understandings about the meaning of race-based decision-making.[247]

But, in fact, it is not at all clear what a race-based school assignment will be understood by a student to convey. Maybe it will be taken to indicate (falsely) that, for all purposes, the school district regards race as the only fact about the student that matters.[248] But, alternatively, maybe it will just be taken to indicate what seems to have been the actual attitude of the school districts in *Parents Involved*: that they regard racial integration as a critical goal, important enough even to make it a significant consideration in school assignments.[249] When the Court proclaims that the assignments have the former meaning, that nominally interpretive judgment seems likely to go some significant distance toward making itself true.[250] That is, it disambiguates an ambiguous signal for the students and their families—affirming (again, falsely) that school districts that consider race thereby treat students as "racial chits,"[251] as opposed to full persons, in some basic, morally important sense. From this point of view, there is a world of difference between an opinion invalidating the program based on a worry that it is apt to be *misunderstood* in ways that cause harm, on the one hand, and an opinion affirming that those who are offended have the best reading of the practice's intrinsic moral significance, on the other.

Although it is impossible to say for sure, the recent Arizona law that prohibited public schools from promoting "ethnic solidarity instead of the treatment of

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247. *See supra* text accompanying notes 59-62; Section III.A.

248. Efforts to integrate schools can also bear other problematic meanings—ones that have little to do with respect for people as individuals and more to do with implications of racial inferiority. *See, e.g.*, RONALD W. WALTERS, WHITE NATIONALISM, BLACK INTERESTS 199 (2003) (discussing opposition to busing among black parents who see it as evincing "the demeaning assumption that Black children had to sit next to White children in order to learn"). I do not take up that distinct concern here.

249. *See* Shin, *supra* note 119, at 1217 ("Given the right conditions, a community's implementation of procedures that aim directly at racial integration and diversity might, I would think, express a commitment to the substantive equality of all of its members.").

250. *Cf.* Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 17-18, 2-22 (1989) (analogizing to the Heisenberg Principle and arguing that the Court should not "ignore its own existence and the impact of its own statements on the situation before it," especially in cases concerning "social meaning").

251. *Parents Involved*, 551 U.S. at 798 (Kennedy, J., concurring in part and concurring in the judgement).

pupils as individuals" may exemplify this pernicious feedback effect.[252] The statute was openly designed to abolish Tucson's Mexican-American Studies program.[253] But Arizona's Attorney General, the law's principal architect, argued that it merely gave effect to a "fundamental philosophical principle that underlies the belief system of the United States of America and its Constitution."[254] Students must be taught "to treat each other as individuals," he explained, whereas an ethnic studies curriculum "does just the opposite."[255] The bill's House sponsor likewise said he felt compelled to act because "students should be taught as individuals" and "should be taught that they are individual members of society."[256]

From the perspective of the moral theory defended above, all of this reflects a misconception of what regard for people's individuality involves. But by insisting for decades that race-based decision-making necessarily means failing to treat people as individuals, the Court surely paved the way for such arguments. The point is that unless there actually is a "fundamental philosophical principle" barring reasonable consideration of race, the Court's concern about the social meaning of race-based action should not lead it to talk as if there is such a principle—thereby enabling efforts by others to read that principle into "the belief system of the United States of America and its Constitution."[257] And the broader lesson is that condemning practices because they bear certain meanings—without testing the soundness of those associations or emphasizing their contingency—will tend to affirm the relevant meanings as it condemns the particular expressions of them.

This dynamic extends to other areas of constitutional law, so it is worth highlighting another example likely to confront the Court in the years ahead. In a handful of recent cases, cisgender high-school students have asserted a substantive-due-process right not to be required to share locker rooms or similar facili-

252. ARIZ. REV. STAT. ANN. § 15-112(A) (2019), *invalidated by* González v. Douglas, 269 F. Supp. 3d 948 (D. Ariz. 2017) (striking down on discriminatory-purpose grounds); *see id.* § 15-111.

253. *See, e.g.*, *Hearing on H.B. 2281 Before the S. Educ. Accountability & Reform Comm.*, 2010 Leg., 49th Sess. 02:11:30-02:12:51 (Ariz. 2010) (statement of Rep. Montenegro), http://azleg.granicus.com/MediaPlayer.php?view_id=17&clip_id=7405 [https://perma.cc/YA83-AJW9] [hereinafter *Hearing on H.B. 2281*].

254. Tom Horne, Az. Att'y Gen., Debate at the University of Arizona Law School 14:28-37 (Mar. 22, 2011), https://www.youtube.com/watch?v=7-1joLIuXvI [https://perma.cc/W6YZ-4LSD].

255. *Id.* at 16:13-22.

256. *Hearing on H.B. 2281*, *supra* note 253, at 02:12:55-02:13:08.

257. Horne, Debate at the University of Arizona Law School, *supra* note 254, at 14:28-37.

ties with someone of a different sex, irrespective of that person's gender identity.[258] The Supreme Court recently denied certiorari in the first of these cases to reach it but only after the petition was distributed for eleven different conferences—a strong indication of interest in the issue on the part of at least one Justice and a particularly notable one in the absence of any serious claim of a circuit split.[259] For present purposes, then, let us jump ahead a few years and assume that the Court does take up the issue. And let us also suppose that a majority of the Court, moved in some way by the students' felt humiliation, decides to recognize their asserted privacy right.

The opinion author would then confront a further choice. One option would be to emphasize the sheer fact of the embarrassment felt by the plaintiffs and explain that, in a society undergoing a profound transition regarding issues of gender, their reaction remains sufficiently rooted in our extant cultural norms to warrant grudging accommodation. The Court might say that, in a real sense, the plaintiffs are not just "choos[ing] to put th[eir] construction upon" the use of gender-based (rather than sex-based) locker rooms;[260] rather, they live in a society that, for better or worse and through no fault of theirs, still invests different-sex nudity with a certain meaning that undergirds their felt distress and so entitles them—at least for now—to relief.[261] But there is a second option: the Court could proclaim the students' reactions entirely natural and appropriate. It could say that being undressed in the presence of a different-sex stranger, regardless of that person's gender identity, is fundamentally humiliating, as every culture from time immemorial has recognized, and that the school district thus

258. *See, e.g.*, Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 525 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019) (mem.); Students & Parents for Privacy v. Sch. Dirs. of Twp. High Sch. Dist. 211, 377 F. Supp. 3d 891, 894-96 (N.D. Ill. 2019).

259. In another recent case, a district court rejected the substantive due-process claim based on existing law but observed that "it would not shock the Court if the Seventh Circuit or Supreme Court one day recognizes the right to bodily privacy that the plaintiff seeks to enforce [in the present case]." *Students & Parents for Privacy*, 377 F. Supp. 3d at 902.

260. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

261. *Cf.* Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 1352 (D. Del. 1978) (upholding a nursing home's refusal to hire male nurse's aides, based on female residents' discomfort, but stating that "the attitudes of the nonconsenting female guests at the Home are undoubtedly attributable to their upbringing and to sexual stereotyping of the past"); *see also* Robert C. Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, *in* PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 34 (2001) ("*Fesel* illustrates how Title VII does not simply displace gender practices, but rather interacts with them in a selective manner.").

gravely wronged the students by casting aside "universally accepted . . . demands inherent in human nature."[262]

These alternatives, of course, track the two different ways of invalidating race-based state action as disrespectful of people's individuality. If the Court takes the latter course in a future locker-room case, that choice can be expected to have some effect on how school administrators, families, and ultimately students make sense of a fact pattern in which existing cultural norms presently remain indefinite. So the Court should not write such an opinion unless it has a convincing argument that, as a matter of moral principle, a culture that did *not* cause students to feel humiliated under these circumstances would be missing something. And for the same reason, it should not announce that otherwise-reasonable race-based state actions show any convention-independent kind of disrespect for people's individuality, absent a comparable moral argument—even if it believes that race is marked by our culture in such a way that, at the moment, its use always or nearly always involves unacceptable disrespect.

2. *Aiding in Reform*

Rather than seeking simply to avoid entrenching costly respect norms, the Court could do something more ambitious: it could seek to aid in modifying or neutralizing them. In particular, the Court could uphold, but offer its own gloss on, state actions that arguably transgress existing social understandings about respect. This will often not be feasible, it will often be difficult to tell whether it is feasible, and it should not be done when it is not feasible. Still, the possibility warrants serious consideration.

The basic idea resembles a saving construction of a statute. In the standard case of such a construction, an ambiguous statutory text is interpreted so as to render it consistent with the Constitution. The most famous recent example is Chief Justice Roberts's construal of the Affordable Care Act's individual mandate provision not as a command to buy insurance, but simply as a tax on those who opt not to do so.[263] He took this tack out of a felt "duty to construe a statute to save it, if fairly possible."[264] But that duty naturally extends to laws that are ambiguous in their social meaning as well as those that are ambiguous in their textual meaning. Just as a suitable explanation of why I am checking my phone can

262. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 730-31 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part); *see id.* at 734; *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2611-12 (2015) (Roberts, C.J., dissenting) (stressing that a different-sex definition of marriage "has persisted in every culture throughout human history").

263. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 574 (2012) (plurality opinion).

264. *Id.*

"save" the act from expressing disrespect, suitable explanations of state policies and their moral significance may sometimes save them as well.[265]

To be sure, in the phone-checking case, I explained my own action—and in some cases a legislative or executive actor could presumably do the same. Still, much the same effect could have been achieved if a trusted third party had told you the same facts about why I might check my phone. Thus, if a state action is constitutionally vulnerable because of its social meaning—but if that meaning nevertheless remains contested or malleable—the Court may have a duty to use its persuasive authority to nudge the action's meaning, insofar as it can, toward one that would allow it to survive. The Court could do this in either of two related ways. First, it could explain why the particular policy at hand, in view of its reasons, does not actually indicate the kind of disrespect that superficially similar policies do; this closely parallels the phone example, and it involves the classic judicial exercise of distinguishing cases with reference to an assumed principle. Second, the Court could make more of a frontal assault on the particular convention in virtue of which it believes the policy would be felt as disrespectful—explaining why, in some more basic way, the convention has marked the wrong class of acts as indicative of disrespect. In its analytic structure, this is more like rejecting a rule of decision.[266]

Importantly, only a court with normative credibility and authority could successfully accomplish either type of saving construction, because the court must actually change how the practice is socially interpreted in order to save it. (This is true in much the same way in the phone-checking case: I can only sap the action of its meaning if you trust what I tell you about my reasons.)[267] And, just as some statutory texts are unsalvageable, many state practices have meanings that are surely too entrenched for any court to budge. In *Obergefell v. Hodges*, for

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265. A textual saving construction only works because the Court, in addition to upholding the statute, authoritatively determines what it means. So too here, a saving construction of the kind I am describing is not possible unless the Court can actually *affect* the social meaning of the law or policy. *See infra* text accompanying notes 267-269. Thus, the suggestion is not that the very fact of ambiguity in the meaning—independent of the potential for the Court to successfully disambiguate it—weighs in favor of upholding the law. And if the Supreme Court can reshape a policy's meaning in a way that lower courts cannot, then the proper disposition of a case may be different in the Supreme Court than in lower courts. *Cf.* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) (acknowledging the same discrepancy with regard to the force of precedent).

266. In the phone example, this alternative might resemble my saying: "I'm going to check my phone during our meeting, but don't be offended: it just takes a second to check, so—despite what I admit is a social norm to the contrary—it's a useless proxy for whether I value your time."

267. *See supra* note 213.

example, the states were in effect asking for an untenable social-meaning saving construction. They asked the Court to recharacterize marriage as a practice fundamentally concerned with linking biological mothers, fathers, and children—and thus not about "bestowing or taking away dignity from anyone"—so that the exclusion of same-sex couples from marriage would not be demeaning.[268] That was a nonstarter because marriage's social meaning—what the States called "marriage as a cultural thing"—plainly would retain its basic shape regardless of how the Court ruled or what it said about the significance of being excluded from the institution.[269]

But the same is not clearly true in a case like *Parents Involved*. If the problem there really was a matter of convention-dependent disrespect for people's individuality, a major opinion persuasively explaining why a student or family should take no offense at the use of race in integrative school assignments could have helped to fix that problem. Such an opinion would have tried to reassure all concerned that, despite a potential symbolic resonance with invidious uses of race, nothing about the practice at hand actually denied the children's moral standing as individuals or dealt with them as mere "racial chits." Given that the practice's meaning was already unclear, such an opinion might have ameliorated any respect-based objection and so rendered it constitutionally acceptable.

Indeed, the Court may have done precisely this—or at least attempted it—in its recent decision rebuffing an Establishment Clause challenge to a World War I memorial in the shape of a Latin cross.[270] In the course of upholding the monument's constitutionality, the Court offered a painstaking explanation of its his-

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268. Transcript of Oral Argument at 71-73, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556).

269. *Id.* at 72. *Plessy* can be seen as, in part, an example of a botched social-meaning saving construction—indeed, as making the very mistake that the States asked the Court to make in *Obergefell*. Insofar as the Court was trying to affirm that segregation should not be taken as "a badge of inferiority," Plessy v. Ferguson, 163 U.S. 537, 551 (1896), that claim on its part was sure to be ineffectual as against the overwhelming contrary understanding, firmly embedded in "the background knowledge of educated men who live in the world," of the practice's social meaning, Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424-26 (1960). And so the Court should have taken the practice's meaning as it (should have) found it, just as it later did in *Brown*. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (emphasizing that "the policy of separating the races is usually interpreted as denoting the inferiority of the negro group" (quoting Findings of Fact and Conclusions of Law, Brown v. Bd. of Educ. (D. Kan. Aug. 3, 1951), Transcript of Record at 245-46, Brown v. Bd. of Educ. (1954) (Case No. 1, Record Group 267, Box 18, Folder 395, National Archives, Washington, D.C.), https://www.clearinghouse.net/chDocs/public/SD-KS-0001-0007.pdf [https://perma.cc/9NKS-LCMC])).

270. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

torical circumstances, emphasizing how the Latin cross "took on an added secular meaning when used in World War I memorials."[271] Officially, that analysis served to describe the memorial's already extant meaning. But the Court's decision also colors the memorial's meaning today, at least for those who know well its history (which now includes a major Supreme Court case about church and state).[272] And some might well be comfortable with the memorial as now glossed by the Supreme Court, even if they would not have been before—let alone if the Court had approved the memorial *as* a thoroughly sectarian symbol, as some urged.[273] In that way, the Court's explanation that Maryland had special reasons for displaying a Latin cross is not so different from my explanation that I had special reasons for checking my phone in a meeting.

Of course, if the Court was indeed attempting to secularize the monument, there is ample room for debate about how far it succeeded.[274] Most who drive by an "immense Latin cross . . . at the center of a busy three-way intersection" will not know what the Court said about its meaning.[275] But in any event, it is notable that no Justice in the *Parents Involved* majority made any analogous attempt to recast the symbol at stake there. Perhaps they did not believe they could meaningfully alter (what they took to be) the meaning of race-based school assignments. But in that case, as explained above, they at least should have tried not to further entrench the community's purported understanding of the program's moral significance.[276]

3. Fairness

Finally, the recognition that many of the colorblindness cases involve no convention-independent disrespect also matters in another way. So long as the Court is committed to vindicating a right against even convention-dependent disrespect, at least in the arena of race, it cannot exclude practices from scrutiny on the simple ground that they do not actually involve disrespect independent

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271. *Id.* at 2089; *see id.* at 2074-90.

272. *Cf. id.* at 2089 (explaining how "the monument has acquired additional layers of historical meaning" over the decades since its construction).

273. *See, e.g.*, *id.* at 2096 (Thomas, J., concurring in part).

274. *Cf. id.* at 2104, 2107 (Ginsburg, J., dissenting) (arguing that the monument "bears a starkly sectarian message" and that Maryland's "attempts to secularize what is unquestionably a sacred symbol defy credibility" (internal quotation marks, alterations, and citations omitted)).

275. *Id.* at 2103; *but cf.* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part) (positing that "the reasonable observer in the endorsement inquiry must be deemed aware of the history and context").

276. *See supra* Section III.C.1.

of their social meanings. It cannot say, in other words, that some practices experienced or socially marked as an affront to people's individuality are constitutionally unproblematic because the wounded individuals are wrong about what respect for their individuality *really*, in a more intrinsic or universal sense, requires.

This point has important implications for various doctrinal problems, but I will focus here on one: the use of race in criminal suspect descriptions. As a matter of basic respect for people's individuality or autonomy, and setting aside social conventions, that practice need not wrong people who are searched or apprehended based on a racial description. As Shin points out, this is one consequence of the autonomy account outlined above; as he puts it, the use of a racial description "does not necessarily involve an autonomy-displacing inference from race to action."[277] Rather, the investigator may simply reason from race to a judgment of personal identity and only from that judgment of identity to a judgment of criminality.[278] In fact, the description (unlike a profile) does its job whether people who are ascribed the relevant racial identity are in general more, equally, or *less* likely to commit the relevant kind of crime.[279] Shin sees this entailment of the autonomy account as helping to explain why courts and commentators differentiate between suspect descriptions and profiles—even though both would seem to involve racial classifications—and thus as supporting the account's fit.[280] And, to the extent that courts have confronted civil-rights claims based on racial suspect descriptions, I do think their reasoning can be understood to draw some version of this distinction.[281]

But that distinction cannot justify giving a pass to the use of race in suspect descriptions if the Court's insistence that the government treat people as individuals extends to cases in which the disrespect for someone's individuality is of the wholly convention-dependent kind. And it seems undeniable that many peo-

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277. Shin, *supra* note 6, at 122.

278. *See* EIDELSON, DISCRIMINATION AND DISRESPECT, *supra* note 20, at 177-87.

279. *See id.*; *see also* Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 243 (1983).

280. Shin, *supra* note 6, at 119-22.

281. *See* Monroe v. City of Charlottesville, 579 F.3d 380 (4th Cir. 2009); Brown v. City of Oneonta, 221 F.3d 329 (2d Cir. 2000), *reh'g en banc denied*, 235 F.3d 769 (2000); Davis v. Metro. Transp. Auth., No. 06-CV-3643, 2010 WL 1049426 (E.D.N.Y. Mar. 22, 2010). For fuller discussions of race-based suspect-apprehension practices, see, for example, R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1085 (2001); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three,* 117 HARV. L. REV. 493, 511-13 (2003); and Siegel, *supra* note 2, at 1361-62.

ple *do* perceive racial suspect descriptions to symbolize a racialized lapse of respect for their individuality. That is, the sheer fact of stopping a person for police questioning because of her race has a symbolic significance that is felt by many to traffic in racial stereotypes and therefore, in Charles Taylor's phrase, to "mirror back to them a confining or demeaning or contemptible picture of themselves."[282]

At the University of Minnesota, for example, a coalition of black students, faculty, and staff recently petitioned the school's administration to avoid including racial descriptors in regular crime reports distributed to the community.[283] At a forum on the issue, a black student described how the "repeated" refrain of "black, black, black suspect[s]" undermined "mental and physical comfort for students on campus" and fueled a stigma of "suspicions."[284] This effect is surely amplified by what Randall Kennedy describes as the "age-old, derogatory images of the Negro as criminal, images that have been revived and deployed in all manner of contexts, from popular entertainment, to scholarship, to political campaigns."[285] In the controversy underlying the Second Circuit's decision upholding race-based suspect descriptions, too, the police encounters "reinforced a sense already shared by many black residents and students that their acceptance in the town was provisional, as though they had been accorded a perpetually probationary status."[286] In sum, despite the power in principle of the distinction between racial profiles and racial suspect descriptions, this is plausibly a case where an "overbroad" respect norm—marking the very fact of predicating suspicion on race as disrespectful, *whether or not* the inference runs through a mediating judgment of personal identity—has taken root.

If so, the use of race in suspect descriptions shares important features with the use of racial labels in integrative school assignments.[287] From the perspective

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282. Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM 25, 25 (Amy Gutmann ed., 1994).

283. *See 'U' Students Want Crime Alerts to Avoid Using Racial Descriptions*, CBS MINN. (Jan. 29, 2014, 11:24 PM), http://minnesota.cbslocal.com/2014/01/29/u-students-want-crime-alerts-to-avoid-using-racial-descriptions [https://perma.cc/ZYH2-DXXF].

284. *Id.*

285. KENNEDY, *supra* note 155, at 154; *see also* LOURY, *supra* note 16, at 57-107 (offering an account of racial stigma).

286. R. Richard Banks, *The Story of* Brown v. City of Oneonta: *The Uncertain Meaning of Racially Discriminatory Policing Under the Equal Protection Clause*, *in* CONSTITUTIONAL LAW STORIES 223, 227 (Michael C. Dorf. ed., 2004).

287. Reva Siegel develops a parallel juxtaposition with regard to the "antibalkanization" concerns that, she argues, helps to explain the decision-making of the Court's swing Justices in race cases. *See* Siegel, *supra* note 2, at 1360-65. If equal-protection law is concerned with combatting state practices that lead to social division or estrangement, she asks, "[w]hy is the Court's

of convention-independent respect, neither practice needs to manifest any failure of recognition for the moral individuality of persons; yet both are nonetheless understood by some people as involving an offensive "[r]eduction of an individual to an assigned racial identity for differential treatment."[288] To the extent that the Court is committed to a convention-dependent understanding of the asserted requirement to treat people as individuals, it would seem its individualism ought to reach both of these practices alike—meaning that race could be included in a suspect description only when there is a compelling interest in apprehending a suspect and race-neutral means are insufficient to accomplish that goal.

At least, that is the appropriate rule unless the Court can offer a social-meaning saving construction in this area.[289] That alternative appears very unrealistic, however, both in view of what Monica Bell calls the "deep[] well of estrangement between poor communities of color and the law,"[290] and in light of the Court's own significantly diminished credibility on issues of race and policing.[291] One way or another, then, courts should not defer to the felt meaning that predominantly white objectors ascribe to integrative school assignments and affirmative-action programs, but tell people of color who experience racial suspect descriptions as an expression of disregard for their individuality that they are just wrong.

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docket not inundated by minority plaintiffs challenging government's use of race in suspect apprehension, as well as by majority plaintiffs challenging government's use of race in affirmative action programs?" *Id.* at 1361. As I explain here, this failure of evenhandedness extends not only to the broadly consequentialist reasoning of "antibalkanization" arguments, *see supra* note 14, but also to the "value of individualism associated with colorblindness," from which "antibalkanization" is "analytically distinct." Siegel, *supra* note 2, at 1282.

288. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 795 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

289. *See supra* Section III.C.2.

290. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2072 (2017); *see id.* at 2083-89 (theorizing this phenomenon "as a problem of legal estrangement: a marginal and ambivalent relationship with society, the law, and predominant social norms that emanates from institutional and legal failure").

291. *See, e.g.*, Utah v. Strieff, 136 S. Ct. 2056, 2070-71 (2016) (Sotomayor, J., dissenting) (arguing that the Court's Fourth Amendment jurisprudence has told those subject to police encounters, and especially people of color, that "your body is subject to invasion while courts excuse the violation of your rights," and "you are not a citizen of a democracy but the subject of a carceral state").

CONCLUSION

For perhaps the first time, a majority of the Court appears poised to embrace colorblindness as a categorical constitutional imperative. The breadth and rigidity of that view reflects the understanding, developed over decades, that race-based differential treatment shows a kind of fundamental disrespect for the individuality, and hence the dignity, of those who are classified or disfavored. But decomposing that idea reveals it to be deeply problematic even if taken on its own analytic terms.

Insofar as the Court is claiming that race-based state action always or nearly always manifests an improper, demeaning way of relating to a person—as the Court's fervent, moralistic rhetoric suggests—that undeveloped moral theory is not convincing. Rather, if we take the idea of treating people as individuals seriously, it plausibly requires the government to deal with people in a way that acknowledges their autonomy and thus, at least in some contexts, to attend to who they are. But there is no inherent inconsistency between doing that and recognizing or affording due significance to their race, too. In fact, refusing to consider race often means refusing to treat people respectfully as individuals, because it means ignoring a factor that illuminates the significance of their choices and experiences. So hostility to practically all race-based distinctions cannot be justified even from a perspective entirely internal to the Court's individualistic conception of equal protection.

Fine, you might say: the real point has always been about the symbolic affront to a person who is denied something based on race *in a culture like ours*—one where racial classifications are marked "by history"[292] as "not consistent with respect based on the unique personality each of us possesses."[293] But, as Martha Nussbaum observes, "[m]any things and people have been stigmatized in our nation's history, often for very bad reasons," and thus "[a]n account of the actual social meaning of a practice is . . . just a door that opens onto the large arena of moral and legal evaluation."[294] Conventions about racial respect lie inside that arena, not outside it. And, as a general rule, if the only thing that makes some valuable action improper is the very belief that it is improper, that is a powerful reason to get rid of that belief.

This means that the Court's proponents of colorblindness cannot responsibly abstain from the basic moral question of whether and when race-based action

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292. Miller v. Johnson, 515 U.S. 900, 912 (1995) (describing race as a "criterion barred to the Government by history and the Constitution").

293. Rice v. Cayetano, 528 U.S. 495, 517 (2000).

294. Martha C. Nussbaum, *"Whether from Reason or Prejudice": Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693, 695 (1998).

wrongs a person *independent of conventions*. They have to decide that question so that they can decide whether to entrench the asserted respect norm, as they have been doing, or help to uproot it. Absent a good reason to think that even integrative race-based state action wrongs people in principle, the Court's explicit and implicit assertions to the effect that there *is* such a reason, and its unwillingness to help in reforming beliefs to the contrary, are not just unjustified but destructive. And so, I have argued, a Justice moved to colorblindness by the convention-dependent disrespect thought to inhere in race-based action should carry the doctrine forward in a very different way. The Court has famously insisted that affirmative action, even if permissible today, represents a regrettable and temporary compromise.[295] A colorblindness doctrine predicated on the proposition that people find even integrative uses of race demeaning, despite the absence of any independent moral defect, warrants a similar ambivalence. And it too should be considered, even by its proponents, a transitional measure pending a kind of social progress.

295. *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003).