TREATMENT AS AN INDIVIDUAL AND THE PRIORITY OF PERSONS OVER GROUPS IN ANTIDISCRIMINATION LAW

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The Supreme Court has said that the Equal Protection Clause of the Constitution and Title VII's prohibition of discrimination require that all persons be treated as individuals and that the laws operate primarily to protect "persons, not groups." This article shows that the legal requirement of individual treatment has two distinct components: a rule invalidating inferences about persons based on their membership in protected groups and a rule prohibiting disparate treatment for the sake of group interests or intergroup equality. The first rule is rooted in moral principles of respect for individual autonomy. The second rule is a principle that gives lexical priority to individual rights over group welfare. Both are formal, anti-classification rules that abjure reliance on group concerns, and both are central to antidiscrimination law. Neither rule, however, mandates group-blindness or entails the categorical irrelevance of group classifications. Antidiscrimination law cannot be completely understood without reference to goals of substantive intergroup equality. The rules of individual treatment and the protection of "persons, not groups" represent formal constraints on the means by which substantive equality can be sought. They should not be mistaken as substitutes for it.

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INTRODUCTION

Given certain social conditions, treating racial groups differently could increase equality and efficiency. For example, if two racial groups in a society have unequal representation in a selective college, and if this inequality is unjust, an obvious way to reverse this inequality would be to reserve a certain number of seats in each class for the underrepresented group. Or, if members of one racial group engage in a particular unwanted illegal behavior at a much higher rate than members of another group, and if the government has limited resources to police that behavior, efficiency would seem to dictate expending more resources on monitoring members of the racial group that exhibits the higher rate of the unwanted behavior. Similarly, if valid statistics show that members of one racial group perform better at a particular employment-relevant task than members of another, efficiency might likewise support giving preference to the higher-performing group in selective hiring processes.

But, of course, antidiscrimination law prohibits or places significant constraints on these sorts of "obvious" solutions. It is illegal to remedy racially disproportionate representation in university student bodies through outright racial rebalancing or quota-based selection procedures.[1] Racial profiling, at least in its crudest form, arguably violates the Equal Protection Clause.[2] And employment practices cannot be based on generalizations – even empirically supportable ones – about work-related attributes of members of a particular racial group.[3]

In general, our antidiscrimination frameworks, especially in the context of race, make it problematic to pick out individuals for different treatment based solely on the justification that this would increase

1. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 334 (2003); Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 307 (1978) (plurality) (Powell, J.).

2. *See* Whren v. United States, 517 U.S. 806, 813 (1996) (dictum) ("[T]he Constitution prohibits selective enforcement of the law based on considerations such as race."); United States v. Montero-Camargo, 208 F.3d 1122, 1134–35 (9th Cir. 2000). *But cf.* United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976) (holding that border officials do not violate Fourth Amendment by considering the "apparent Mexican ancestry" of a vehicle's occupants as a factor in requiring the vehicle to pull over to a secondary inspection area).

3. *See* L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (invalidating sex-differentiated pension contribution requirements based on statistical data showing that women live longer than men); *cf.* Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989) (holding that employer cannot make generalizations about behavior based on sex); Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (suggesting that the "reality" of a race-based disadvantage does not make it a valid reason for decision making). *See generally* Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 851–52 (2003).

intergroup equality, or on the basis of generalizations about a particular group's behavior. As the Supreme Court has said, both the Equal Protection Clause and the antidiscrimination provisions of Title VII operate to protect "persons, not groups."[4] Antidiscrimination law frowns upon regarding persons as merely fungible instances of the groups to which they belong and requires instead that persons be treated "as individuals"[5] and be given "individualized consideration"[6] in decisions involving differential distributions of benefits and burdens.

This article examines the Supreme Court's notion of the right to be treated as an individual rather than as a member of a group. What exactly does this right require or prohibit? What normative or moral commitments does the right embody? In Part I, I explain why the law's prioritization of persons over groups cannot be reduced to a simple rule of "group blindness" dictating the absolute irrelevance of group membership to individual treatment. In Part II, I survey some of the cases in which the idea of protecting individuals has been invoked, and I tease out two distinct concerns that animate the Court's insistence on treating persons as individuals. In Part III, I propose two principles that capture those concerns. In Part IV, I develop an account of individual treatment rooted in the moral values of respect for autonomy and the inviolability of rights and show how these values can explain certain shared intuitions and legal doctrines in controversial contexts such as racial profiling and affirmative action. I conclude with some observations about the role and significance of the notion of individual treatment within the broader context of antidiscrimination law as a whole.

I. AVOIDING OVERSTATEMENT OF THE IRRELEVANCE OF GROUPS

The ideas that all persons have a right to be treated as individuals rather than as members of groups and that antidiscrimination law protects persons, not groups might at first suggest a broad rule that all group classifications must be disregarded in determining the treatment

4. In the constitutional context, see Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 742–43 (2007); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989); Shelley v. Kraemer, 334 U.S. 1, 22 (1948). In the Title VII context, *see* Connecticut v. Teal, 457 U.S. 440 (1982); *Manhart*, 435 U.S. at 702.

5. Miller v. Johnson, 515 U.S. 900, 911 (1995) (Equal Protection Clause); Ariz. Governing Comm. v. Norris, 463 U.S. 1073, 1083 (1983) (Title VII) (quoting *Manhart*, 435 U.S. at 708).

6. *Grutter*, 539 U.S. at 336; *see* Johnson v. Transp. Agency of Santa Clara, 480 U.S. 616, 638 (1987).

to which a person is entitled. What is meant by treatment as an individual rather than as a member of a group, one might hypothesize, is that groups and group classifications are always irrelevant to the operation of our antidiscrimination laws, and that a person's membership in a particular group can never be regarded as a relevant reason for giving a benefit to or imposing a burden on a person. But this would prove too much. Whatever the right to individual treatment means, it cannot plausibly be interpreted as a commitment to absolute group blindness.

As a descriptive matter, antidiscrimination law does not in fact disallow the use of all group classifications. Group classifications are pervasive, and most do not trigger any legal concern whatsoever. There is nothing objectionable, for example, about a university admissions policy that automatically rejects all applicants who failed to complete high school. No one would raise an individual treatment objection to a singing group's exclusion of all people who are tone-deaf. Any process of selection based on discernible criteria necessarily entails classification of people by groups defined by the operative criteria.[7] Because reliance on group classifications is inherent to any selection process, the right to be treated as an individual cannot be interpreted to mean that a person's treatment can never be based on consideration of group membership.[8]

One might reply that the idea of treating persons as individuals rather than on the basis of their group membership should be interpreted to prohibit only actions based on *irrelevant* group classifications. But this, too, will not work. If an employer decided to act on "an irrational animus against people who are six feet tall, who are from St. Louis, or who root for the Blue Devils,"[9] it is unlikely that antidiscrimination law as it exists today would have anything to say about it. Title VII law does not contain any general prohibition against reliance on irrelevant group classifications,[10] and any such general constraints imposed by rational-basis review under the Equal

7. *See* Ronald Dworkin, *Bakke's Case: Are Quotas Unfair?*, *in* THE AFFIRMATIVE ACTION DEBATE 109 (Steven M. Cahn ed., 2002).

8. *See* BENJAMIN EIDELSON, DISCRIMINATION AND DISRESPECT 134 (Oxford Univ. Press 2015); FREDERICK SCHAUER, PROFILES, PROBABILITIES AND STEREOTYPES 19 (Harvard Univ. Press 2003); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 125–26 (Harvard Univ. Press 1999) (arguing that equality principles do not forbid classificatory judgments per se, and "almost all classifications involve 'groups'" of some kind).

9. Bagenstos, *supra* note 3, at 846.

10. *See id*.

Protection Clause are weak at best.[11] Thus, the idea of treatment as an individual cannot accurately be formulated as a principle that dictates the irrelevance of group classifications nor as a principle that prohibits reliance on group classifications that are irrelevant.

A less sweeping approach that is closer to the truth would conceptualize the requirement of individual treatment as a principle dictating the legal irrelevance of a selected set of group classifications of which the law has good reason to be wary. Both Title VII and the Supreme Court's constitutional equality jurisprudence presuppose that some group classifications – those that have either been recognized as constitutionally suspect or are specifically enumerated in Title VII and other antidiscrimination statutes – have greater significance than others, for various reasons.[12] Although antidiscrimination law cannot be interpreted to require that all group classifications be disregarded, it does seem to say that these "enumerated" group classifications must be regarded as irrelevant in selective processes that pick out individuals for preferential or adverse treatment.[13]

Recognizing that antidiscrimination law requires some but not all group classifications to be regarded as irrelevant does not prove, however, that the law is blind to the interests of groups defined by the enumerated classifications. On the contrary, the fact that antidiscrimination law dictates irrelevance for only a select set of enumerated group classifications strongly suggests that group-based concerns are relevant to the purposes of the law itself.[14] The ascription of categorical irrelevance to some classifications but not others is justified by concerns about the groups bearing those classifications. For example, antidiscrimination law goes out of its way to forbid consideration of membership in racial groups but not other classifications that might be just as irrelevant (e.g., height, eye color) or

11. *See* Deborah Hellman, *Two Concepts of Discrimination*, 102 VA. L. REV. 895 (2016).

12. *Cf.* Bagenstos, *supra* note 3, at 846; *see also* Patrick S. Shin, *Is There a Unitary Concept of Discrimination?*, *in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW (Deborah Hellman & Sophia Moreau eds., 2013).

13. In other writings, I have used the term "enumerated factors" to refer to the group classifications that are singled out by positive federal antidiscrimination law for special scrutiny – which would include at least race, color, religion, sex, national origin. *See* Shin, *supra* note 12, at 167.

14. For a very similar point, see William D. Araiza, *Constitutional Rules and Institutional Roles: The Fate of the Equal Protection Class of One and What It Means For Congressional Power to Enforce Constitutional Rights*, 62 SMU L. REV. 27, 36 (2009) (arguing that while the Supreme Court has insisted on the "personal" nature of equal protection rights, "standard equal protection law *does* in fact turn on groups, or at least on the classification traits (such as race and gender) that define group membership").

consideration of which might exacerbate existing injustices (e.g., socioeconomic status). Why? The most plausible justification is that the enumerated classifications pick out categories of persistent unjust inequality that afflict our society and, because of their social and psychological salience, require special monitoring.[15] In short, the law's prohibition of treatment on the basis of race is a response to, and an attempt to rectify, actual and potential racial injustice and inequality. Antidiscrimination law's selective prohibition of group classifications is thus predicated upon concerns about particular groups in our society.

In summary, the right to be treated as an individual rather than as a member of a group is not a general right against treatment on the basis of group classification, but rather a right not be treated on the basis of any of the legally enumerated classifications. The justification of the enumerated classification approach is itself based on group-based concerns, such as the existence of unjust inequality among racial groups. Thus, the right to be treated as an individual is in part a function of such group concerns, rather than a rejection of their normative significance. The important upshot is that although the right to be treated as an individual imposes constraints on how the law can address concerns of comparative group welfare and inequality, that right cannot be asserted as a basis for repudiating such concerns.

II. THE TWO CONCERNS UNDERLYING THE RIGHT TO INDIVIDUAL TREATMENT

If the right to be treated as an individual is not reducible to a rejection of group-based concerns, then what exactly are the normative commitments underlying that right? In this section, I tease apart two distinct ideas that tend to be packed together within the common dictum that every person has a right to be treated as an individual rather than as a member of a group. Identifying these somewhat different concerns will help clarify the values that lie beneath this right.

The first concern tends to arise in connection with actions that involve the use of generalizations about a prohibited group as a basis for the treatment of a particular individual. This category of actions would include racial stereotyping,[16] the consideration of race as a proxy for work-relevant attributes ("statistical discrimination"),[17] the

15. *See* Shin, *supra* note 12, at 169–72; *see also* Tommie Shelby, *Race and Ethnicity, Race and Social Justice: Rawlsian Considerations*, 72 FORDHAM L. REV. 1697, 1707 (2004).

16. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989).

17. *See generally* David A. Strauss, *The Law and Economics of Racial Discrimination in*

conflation of racial group membership with particular viewpoints or political preferences,[18] and racial profiling.[19] The concern typically expressed about such actions is that they fail to respect persons as individuals, treating them as if they were nothing more than "the product of their race."[20] Consider, for example, the well known case of *Los Angeles Department of Water and Power v. Manhart*.[21] In *Manhart*, the employer implemented a policy requiring female employees to make larger pension contributions than male employees, based on actuarial statistics that showed that women generally live longer than men and hence would be likely to receive higher total payouts from the pension fund.[22] The Court invalidated the sex-differentiated pension policy, asserting that under Title VII, "employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females."[23] It held that the law "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class" and, therefore, "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."[24] The rule that emerges from *Manhart* and similar cases is that the treatment of a person should not be based on a likelihood that the person fits a generalization – even if the generalization is statistically supportable – about the racial or gender group (or other enumerated class) to which the person belongs.

The second distinct concern contained in the idea of treatment as an individual rather than as a member of a group arises in a slightly different category of disputed treatment. This second category includes the use of quotas or quota-like mechanisms to increase minority

Employment: The Case for Numerical Standards, 79 GEO. L.J. 1619 (1991). Strauss defines statistical discrimination as "the use of race as a proxy for characteristics related to productivity." *Id.* at 1639; *see also* Bagenstos, *supra* note 3.

18. *See* Metro Broadcasting v. FCC, 497 U.S. 547, 621 (O'Connor, J., dissenting); Miller v. Johnson, 515 U.S. 911, 911–912 (1995).

19. I employ the term "racial profiling" in this article to refer to the law enforcement practice of focusing investigative resources on individuals of a particular race, based on statistical evidence (valid or spurious) that members of that racial group are more likely than non-members to engage in criminal activity. *Cf.* EIDELSON, *supra* note 8, at 178.

20. *Miller*, 515 U.S. at 912 (quoting *Metro Broadcasting*, 497 U.S. at 604 (O'Connor, J., dissenting) (internal quotation marks omitted)).

21. 435 U.S. 702 (1978).

22. *See id.*

23. *Id.* at 707.

24. *Id.* at 708.

presence,[25] contested forms of affirmative action,[26] and attempts to justify race-conscious action by appeal to group consequences.[27] For example, in *Connecticut v. Teal*,[28] two minority employees had failed a written examination used by the employer as a qualifying step for eligibility for promotion to the position of supervisor. The plaintiffs challenged the employer's use of the examination on a Title VII disparate impact theory.[29] The employer's response was that any racial disparate impact created by the written exam was more than counterbalanced by the fact that the employer promoted minorities on the eligibility list at a significantly higher rate than whites, resulting in an absence of disparate impact at the "bottom line."[30] Writing for the Court, Justice Brennan rejected the employer's argument, asserting that "[t]he principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole."[31]

Another case that provides an example of the second concern is *Parents Involved*.[32] There, in response to Justice Breyer's argument that the race-conscious school assignment policy at issue could be justified[33] on the grounds that the policy would "improve conditions of race"[34] and help bring about the integration of racial groups,[35] Chief Justice Roberts asserted that these group-based consequences were not valid reasons for giving preferred school assignments to particular individuals on the basis of race.[36] Putting racial classifications to use for the purpose of group benefits would be "fundamentally at odds," he wrote, with the clearly established rule that the Constitution protects "*persons*, not *groups*."[37] The second concern underlying the idea of the right to be treated as an individual, then, is that a person's treatment

25. Gratz v. Bollinger, 539 U.S. 244 (2003); Regents of Univ. of Calif. v. Bakke, 438 U.S. 265 (1978) (Powell, J., concurring).

26. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995).

27. *See* Connecticut v. Teal, 457 U.S. 440, 453–54 (1982); Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

28. 457 U.S. 440 (1982).

29. *See id.* at 444, 446–47.

30. *See id.* at 453.

31. *Id.* at 453–54.

32. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

33. Or at least should not be subjected to constitutional strict scrutiny.

34. *See id.* at 828 (Breyer, J., dissenting).

35. *See id.* at 828–29.

36. *See id.* at 742–43.

37. *Id.* (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)) (italics in original) (internal quotation marks omitted).

cannot be justified solely based on the expected consequences for group welfare or equality.

In short, the two concerns that animate the idea of treatment as an individual are (1) a concern about people being treated differently on the basis of inferences derived from their membership in enumerated groups; and (2) a concern about the subordination of individual rights to the collective interests of an enumerated group or to considerations of intergroup equality.

III. THE PRINCIPLES OF INDIVIDUALIZED CONSIDERATION AND INDIVIDUAL PRIORITY

In this section, I attempt to crystallize the two concerns discussed in section II into two specific principles that jointly embody the right to be treated as an individual rather than as a member of a group. As discussed in section I, these principles do not require absolute group-blindness. Rather, they reflect the law's actual approach: selective ascription of irrelevance to certain enumerated classifications, namely, the group classifications listed in Title VII and suspect classifications in the Supreme Court's Equal Protection Clause jurisprudence. And, pursuant to the discussion in section II, the principles give expression to both an anti-generalization concern and a concern about the subordination of individual to group interests.

The first proposed principle says that people should not be treated adversely or preferentially on the basis of generalizations about the enumerated groups to which they may belong. In other words, people are entitled to consideration as individual persons, not as fungible tokens of any suspect class. This idea, which I will label the Principle of Individual Consideration, can be formulated as follows:

> *Individual Consideration*. Adverse or preferential treatment of a person cannot be justified by an inference about the person derived from the person's membership in an enumerated group.

The second principle is one that emphasizes the priority of the individual over concerns pertaining to the welfare of an enumerated group or the promotion of intergroup equality. I believe that this is the principle that animates the slogan that the law protects "persons, not groups." This second principle, which I will refer to as the Principle of Individual Priority, can be articulated as follows:

> *Individual Priority.* Adverse 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.

These two principles, when combined, give content to the right to be treated as an individual rather than as a member of a group, as well as the notion that antidiscrimination law primarily protects persons, not groups.[38] I will refer to the compound principle comprised by merging the Principles of Individual Consideration and of Individual Priority as the Principle of Treatment as an Individual, which can be stated like this:

> *Treatment as an Individual.* Adverse or preferential treatment of a person cannot be justified by (1) an inference about the person derived from the person's membership in an enumerated group; or (2) an expectation that such treatment would benefit an enumerated group or would improve or not worsen conditions of equality between such groups.

The general Principle of Treatment as an Individual can be narrowed in particular contexts of group classification. For example, in the specific context of racial classification, the Principle of Treatment as an Individual might be formulated in the following way:

> *Treatment as an Individual Without Regard to Race.* Adverse or preferential treatment of a person cannot be justified by (1) an inference about the person derived from the person's race; or (2) an expectation that such treatment would benefit members of some racial group or would improve or not worsen conditions of equality between racial groups.

To limit the scope of the discussion in the remainder of this article, my focus in the sections below will be on the Principle of Treatment as an Individual Without Regard to Race, and my arguments will be based in part on examples and problems that are somewhat specific to the domain of racial classification. Where the context is otherwise clear, I will refer to the race-specific version of the principle simply as the Principle of Treatment as an Individual. Although I believe that the conclusions that I draw from my discussion in the context of race

38. I do not claim that these principles exhaust the legal concept of discrimination. For example, intentionally harming someone because of pure racial hatred would surely count as discrimination, even if the act's rationale did not violate either of these principles. My goal in this article is not to define discrimination generally but rather to examine one particular antidiscrimination concept, the principle of individual treatment, especially as invoked to constrain actions that are putatively rational.

should apply more generally to contexts involving other enumerated classifications, I leave open whether the principle is more or less plausible in the context of race than in the contexts of sex, religion, national origin, and other enumerated classifications.

IV. EXPLORING THE NORMATIVE FOUNDATIONS OF THE RIGHT TO TREATMENT AS AN INDIVIDUAL

As discussed in Section II, the Supreme Court regularly asserts the Principle of Treatment as an Individual (or its individual components) as an axiom of antidiscrimination law. In order to gain a better understanding of the normative foundations of the Principle, I test its application in two contexts: the use of racial classifications in law enforcement activities and race-based affirmative action. In each context, I consider potential counterexamples, i.e., examples of treatment that arguably violate the Principle but are nevertheless permissible under existing law.[39] By reflecting on the substantive moral distinctions between these apparent counterexamples and actions that are more clearly prohibited, I attempt to shed light on the substantive values that underlie the Principle's verbiage.

A. Racial Profiling v. Racialized Suspect Description

An important problem for discrimination theory is distinguishing between the objectionable use of "racial profiling" in law enforcement and the common practice of using race in the context of criminal suspect descriptions.[40] Most people would agree that the former constitutes wrongful discrimination, but the latter does not.[41] Consider two hypothetical cases.

> "*Profile.*" While investigating a drug trafficking operation, law enforcement officers receive a tip that two tall males have been sent as couriers to pick up a shipment of drugs at a crowded train station. The tip does not contain information about the race of the couriers, but reliable historical evidence shows that most persons who engage in this kind of work in the relevant region are of a particular

39. Such cases would be counterexamples to the claim that the Principle of Treatment as an Individual accurately represents existing antidiscrimination law.

40. For citations to key articles in the literature, see EIDELSON, *supra* note 8, at 246–47 nn.7–8.

41. *See id.* at 186; R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1083–88 (2001).

> minority race. On the basis of that evidence, officers focus their investigative efforts at the train station by stopping and questioning all tall males matching that racial profile.[42]
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> "*Suspect Description.*"[43] A violent crime has just been reported. Police officers arrive at the scene and separately interview the victim and multiple witnesses. Each person interviewed credibly states that the perpetrator, who has fled the area, was a tall white male. Based on these descriptions, the officers limit their subsequent search for the perpetrator to tall males matching that racial description.[44]

The officers in Profile are clearly violating the anti-generalization component of the Principle of Treatment as an Individual (the Principle of Individual Consideration) with respect to the people they stop at the train station. In picking out members of the minority racial group for questioning, they assume that those individuals are more likely than others, merely by virtue of their racial group membership, to be engaged in illegal drug trafficking. They are thus subjecting those individuals to adverse treatment based on an inference derived from their race.

It is less clear what to say about the officers in Suspect Description. One might argue that they have eliminated non-whites from suspicion merely because such individuals conclusively fail to satisfy the minimal conditions for membership in the class of potential suspects, not because of some inference about them derived from their race; and one might say, by the same token, that whites remain included in the class of potential suspects only insofar as there is no conclusive reason to exclude them from that class, not because of some further race-based inference about them. Yet, even though all of that would be true, it is also true that the officers in Suspect Description, like the officers in Profile, take race into consideration in making determinations about whom to investigate. Indeed, the officers in Suspect Description are making an inference[45] that non-white persons cannot be the

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42. This scenario is a variation of a hypothetical case described in The National Leadership Conference on Civil and Human Rights, *Restoring a National Consensus: the Need to End Racial Profiling in America* 7 (March 2011), http://www.civilrights.org/publications/ reports/racial-profiling2011/racial_profiling2011.pdf.

43. This term has also been used by others. *See, e.g.*, EIDELSON, *supra* note 8, at 178; Priyamvada Sinha, *Police Use of Race in Suspect Descriptions: Constitutional Considerations*, 31 NYU REV. L. & SOCIAL CHANGE 131 (2006); Banks, *supra* note 41, at 1077.

44. *Cf.* Brown v. City of Oneonta, 221 F.3d 329 (2d Cir. 2000).

45. In the hypothetical, the inference is nearly a deductive one. In real-life cases, the inference would be more probabilistic due to the fallible nature of eyewitness testimony and

perpetrator; and this inference is certainly derived from their race. Thus, insofar as the officers are excluding non-whites from suspicion based on their race, they are treating them preferentially based on an inference derived from their race. This appears to be a literal violation of the individual consideration prong of the Principle of Treatment as an Individual.

According to the Principle of Treatment as an Individual, then, both the officers in Profile and Suspect Description are engaged in objectionable discriminatory conduct. Yet, the two cases do not seem equivalent, and most people would find Profile more problematic than Suspect Description.[46] Assuming that the officers' conduct in Suspect Description is legally permissible, the case is a counterexample to the individual consideration prong of the Principle of Treatment as an Individual, insofar as that principle purports to fit existing law. The question, then, is why. Is there some deeper principle or value that explains why the law should permit the conduct in Suspect Description while prohibiting the conduct in Profile? If so, this deeper value could provide a more robust understanding of antidiscrimination law's requirement that persons be treated as individuals.

Some helpful guidance can be found in the work of Benjamin Eidelson on the meaning of treating people as individuals.[47] We can draw profitably on a pair of hypotheticals crafted by Eidelson that I think are worth recounting here. In his first example, Sally, an Asian student who happens to be a mediocre violinist, auditions for her school orchestra. Although she does poorly in her audition, Kevin, the orchestra director, selects Sally anyway, assuming that she is just having a bad day; and Eidelson stipulates that Kevin would not have made this same assumption but for Sally's race.[48] In Eidelson's second case, Mark, a young Black law firm associate who happens to have an interest in wine tasting, goes to lunch with his firm mentor, Jane. During the lunch, Jane brings up the firm's basketball team (in which Mark has no interest) but does not mention the firm's wine tasting club; and it is

considerations of that kind. For purposes of my analysis, I shall stipulate that there is no reasonable basis to doubt the reliability of the racial identification in Suspect Description.

46. *See* EIDELSON, *supra* note 8, at 178; Banks, *supra* note 41, at 1083.

47. Benjamin Eidelson, *Treating People as Individuals, in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW (Deborah Hellman & Sophia Moreau eds., 2013). The idea of treating a person as an individual is an important component of Eidelson's broader theory of discrimination, which he develops in his book, DISCRIMINATION AND DISRESPECT. *See* EIDELSON, *supra* note 8.

48. *See* Eidelson, *supra* note 47, at 205.

stipulated, again, that Jane would have done just the opposite – mentioning the wine club but not the basketball team – if Mark had been white.[49]

Eidelson suggests that we have reason to criticize both Kevin and Jane in the race-based assumptions that they make about Sally and Mark, respectively, and he argues that the particular criticism we would be justified in making is that they both have failed to take Sally and Mark seriously as individuals.[50] The failure to treat Sally and Mark as individuals, Eidelson explains, is not reducible to a mere error of reasoning or simple unfairness. Rather, not treating someone as an individual means failing to give reasonable consideration to that person's history of autonomous choices (the person's "character") or "disparaging" that person's capacity to make future autonomous choices (the person's "agency").[51] Treating people as individuals means "respect[ing] the role they can play and have played in shaping themselves, rather than treating them as determined by demographic categories or other matters of statistical fate."[52] In other words, Kevin and Jane fail to see Sally and Mark as individuals in that they regard them as predictable functions of the racialized social forces to which they have been subjected, rather than as autonomous actors who impose their own choices over time on the social contexts they occupy.

Eidelson's account of what it means to treat someone as an individual helps explain a key difference between racial profiling and suspect description.[53] Racial profiling in law enforcement, as typically characterized, involves imposing higher levels of legal monitoring and scrutiny on individuals of one race relative to another, based on an assumption that individuals of the targeted race are more likely in the aggregate to engage in law breaking activity.[54] This assumption is inconsistent with respect for the autonomy of the individuals burdened by the practice. Using racial classification as a predictor of action

49. *See id.* at 205–06.

50. *See id.* at 208.

51. *See id.* at 215–16.

52. *Id.* at 216; EIDELSON, *supra* note 8, at 145.

53. Surprisingly, Eidelson's own explanation of the moral difference between profiling and suspect description does not rely on his discussion of what it means to treat someone as an individual. Rather, Eidelson argues that racial profiling is morally wrong because it causes a broad array of personal and social *harms*. *See* EIDELSON, *supra* note 8, at 197–219. My view is that the key wrong-making feature of racial profiling is the disrespect expressed by that conduct, regardless of any actual personal or social harm it may bring about.

54. *See, e.g.*, SCHAUER, *supra* note 8, at 191; Mathias Risse & Richard Zeckhauser, *Racial Profiling*, 32 PHIL. & PUB. AFF. 131, 136, 144 (2004).

implies that people are, to the extent predicted, a function of their race. Imposing burdens on a person because of an imputed, race-linked likelihood of criminal behavior is tantamount to a rejection of that person's capacity to make autonomous individual choices.

What, then, is the moral difference between Profile and Suspect Description? We cannot simply say that race is an irrelevant factor in Profile because the race of the potential suspects is unknown, whereas it is relevant in Suspect Description because the race of the suspect is known. The Profile hypothetical stipulates facts that arguably make race a relevant factor in the officers' decision about how to focus their investigatory efforts. Of course, if a practice of racial profiling were based on factually irrelevant considerations of race or undertaken in bad faith, then it would surely be wrong for that reason as well.[55] The question of interest, however, is why racial profiling should be problematic even when it might offer a rational or efficient method[56] of making the most of limited law enforcement resources.[57]

The moral objection to racial profiling based on the failure to respect autonomy provides an answer to this question. This objection does not depend on an irrelevance argument. Racial profiling would be objectionable on grounds of failure to respect autonomy even if we could rule out bad faith and bias, and even if the correlation between racial group membership and unlawful behavior was statistically valid. To be sure, if one accepts the argument that racial profiling violates the right to be treated as an autonomous individual, one might conclude that antidiscrimination law requires race to be treated as an irrelevant consideration in cases like Profile. But this would be a legally constructed irrelevance. We *ascribe* irrelevance to race in cases of racial profiling because we are committed to the requirement of treating persons as autonomous individuals—even if the available evidence could justify our believing that members of a particular group were indeed more likely to engage in particular conduct.[58]

55. *See* Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1046 (2010).

56. *See* Risse & Zeckhauser, *supra* note 54, at 144.

57. For a concise explanation of how consideration of race based on statistical evidence could be economically rational even in the absence of discriminatory "tastes," see Kenneth J. Arrow, *What Has Economics to Say About Racial Discrimination?*, 12 J. ECON. PERSPS. 91, 96 (1998).

58. *Cf.* David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 119.

But if we ascribe irrelevance to race in Profile, why not also in Suspect Description? The difference is that the consideration of race in Suspect Description does not require a repudiation of any person's autonomy. In Suspect Description, race is a fact associated with a particular person alleged to have committed a specific datable act;[59] and it is a fact that aids in picking out the person who committed that act from a larger group of potential suspects. But the act whose perpetrator is being sought in Suspect Description is not regarded as though it were a statistical function of anyone's race. Rather, race serves only as a criterion for determining whether a given suspect and the perpetrator are one and the same person.

Like racial profiling, racialized suspect descriptions can allow criminal investigators to do their work more quickly and efficiently while minimizing the imposition of burdens on innocent parties. But unlike racial profiling, the use of racialized suspect descriptions does not involve treating any persons as though their actions were determined by their race. The focusing of suspicion on people who fit the racialized suspect description does not necessarily involve an autonomy-displacing inference from race to action. It is based, instead on an inference from the observed race of the perpetrator to a conclusion that people of other races cannot be that perpetrator. Thus, the racialized investigation Suspect Description does not involve a failure to treat anyone as an individual under Eidelson's criteria: it does not imply any disparagement of individual autonomy nor disregard anyone's history of past choices or capacity to make future choices.

Although both racial profiling and the use of race in suspect descriptions seem to violate the individual consideration prong of the Principle of Treatment as an Individual, they are distinguishable from the standpoint of the requirement of respecting autonomy. This suggests that an important substantive commitment underlying antidiscrimination law's demand of individual treatment is that all persons be respected as individual moral agents capable of making autonomous choices not dictated by their race.

59. One could alter the facts of Suspect Description to involve a concrete threat of a *future* criminal act without turning it into a case of racial profiling. We could imagine, for example, a scenario in which police receive a reliable report that two Latina women will rob a particular bank tomorrow, and police focus their search for the would-be robbers on Latinas. The case would still be one of suspect description rather than racial profiling so long as the purpose of investigation remains on finding particular suspects who are in the process of attempting a specific datable criminal act.

B. The Contested Nature of Affirmative Action

We can gain further insight into the Principle of Treatment as an Individual—including the individual priority component—by examining a context of controversy in which those ideas have been invoked with great regularity: race-based affirmative action, i.e., the preferential treatment of members of certain racial groups in selection processes in university admissions and employment. In this section, I explore the extent to which the Principle of Individual Consideration and of Individual Priority help us understand antidiscrimination law's approach to affirmative action and the nature of the disagreement about its justification.

First, I address one particularly aggressive version of the argument that affirmative action violates the Principle of Treatment as an Individual. This argument says that there is a moral and legal equivalence between race-based affirmative action on the one hand and racial profiling in law enforcement on the other:[60] "affirmative action and racial profiling are essentially the same."[61] The claim is that although their purposes might seem different insofar as "one [policy] singles out blacks for something desirable and the other singles them out for something undesirable,"[62] they are equally objectionable because both policies involve treating a person based on assumptions or generalizations derived from the person's membership in a racial group.[63] Thus, the argument goes, affirmative action, no less than racial profiling, fails to satisfy the law's demand that every person must be respected as an individual.[64]

This argument fails for two reasons. First, it helps itself to a particular theory of the justification of affirmative action that many might reject. Second, it mistakenly assumes that granting someone a

60. *See* Ilya Somin, *Affirmative Action and Racial Profiling Revisited*, VOLOKH CONSPIRACY (May 8, 2010), http://volokh.com/2010/05/08/affirmative-action-and-racial-profiling-revisited (arguing that affirmative action and racial profiling are open to similar objections); *see also* Richard H. Schuck, *Assessing Affirmative Action*, 20 NAT'L AFF. 76, 90 (2014).

61. Michael Brus, *Proxy War*, *in* JUSTICE: A READER (Michael Sandel ed., 2007).

62. *Id.*

63. *See id.* ("[I]t's safe to say that anyone who is outraged by racial profiling but tolerates affirmative action, or vice versa, has got it wrong.").

64. Victor C. Romero, *Critical Race Theory in Three Acts: Racial Profiling, Affirmative Action, and the Diversity Visa Lottery*, 66 ALBANY L. REV. 375, 376–77 (2003) (asserting that "the use of race in law enforcement" and race-based affirmative action in higher education can be seen as "aspects of a single, broader concept called *racial profiling*"). Romero ultimately argues, however, that race-based affirmative action can be distinguished from racial profiling in law enforcement by appeal to considerations of substantive racial justice. *See id.* at 385–86.

preference because of race necessarily entails a failure to treat the person as an individual.

The first fallacy in the argument that affirmative action and racial profiling are the same is that it assumes that affirmative action can only have one possible rationale. But this is not the case. There are at least three distinct rationales for affirmative action, and the practice as conceived under two of those rationales is not readily susceptible to the racial profiling analogy and is not inconsistent with the Principle of Treatment as an Individual.

One possible justification of affirmative action is the race-as-proxy rationale. This justification for affirmative action says that institutions have reason to give favorable consideration to minority racial status insofar as that status is meaningfully correlated—i.e., serves as a proxy—for some other characteristic that is directly relevant to applicable selection criteria.[65] The second is the diversity rationale, which says that schools and employers have reason to give favorable consideration to minority racial status because the presence of racial diversity in student bodies and workplaces has consequences that benefit the internal goals and values of the school or employer.[66] Third is the remedial justification: schools and employers may have reason to give favorable consideration to an applicant's minority racial status when doing so would reverse or correct the selection effects of their own prior practices of objectionable discrimination.[67] Each of these rationales is subject to different analysis vis-à-vis the requirement of individual consideration and prioritizing persons over groups.

The race-as-proxy version of affirmative action is the version that critics who claim an equivalence between affirmative action and racial profiling tend to posit.[68] Typically, the critic will claim that affirmative

65. *Cf.* Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2062 (1996).

66. *See* Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (suggesting that the Supreme Court has neither endorsed nor rejected the diversity rationale as a justification for affirmative action under Title VII).

67. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277–78 (1986); United Steelworkers v. Weber, 443 U.S. 193, 215 (1979); Taxman v. Bd. of Educ., 91 F.3d 1547, 1550 (3d Cir. 1996)*; see also* Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 448–49 (1986) (discussing judicial power under Title VII to order affirmative action as remedy following a finding of discrimination). *See generally* Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 3–4 (2005).

68. Recall the title of the essay that I discussed earlier: "Proxy War." *See* Brus, *supra* note 61, at 261.

action is premised upon regarding race as a proxy for some other trait, such as "racial victimization, poverty, [or] cultural deprivation."[69] And, as the criticism usually goes, the correlation is specious.[70]

This is the sort of thought that may have been behind Justice Alito's line of questioning during oral argument in the first round of *Fisher v. University of Texas*.[71] In that exchange, Justice Alito asked the University to consider a hypothetical in which "you have two applicants who are absolutely the same in every respect . . . [and] both come from affluent backgrounds," but one is a racial minority and one is not.[72] Why, Justice Alito asked, should we think that this hypothetical minority applicant "deserve[s] a leg-up" in the admissions process?[73] Implicit in the question is an assumption that affirmative action seeks to give a leg-up to minorities, because minorities tend to come from social circumstances that place them at an unfair disadvantage relative to non-minority applicants. In other words, Justice Alito assumed that affirmative action relies on racial minority status as a proxy for unfair social disadvantage. This is why he sees the affluent minority applicant as a problematic case for affirmative action proponents: it is a case in which the assumed proxy relationship fails to hold.

As noted, the race-as-proxy rationale tends to be more often articulated by critics than by proponents of affirmative action. Thus, the real action in the contemporary affirmative action debate lies elsewhere. But it is still useful to think about whether race-as-proxy-based affirmative action violates the Principle of Treatment as an Individual. The assumption that a person comes from poverty or has been victimized by discrimination may be true or false, but those are factors largely outside the realm of autonomy or choice, insofar as no one controls the socioeconomic conditions into which one is born. Thus, falsely assuming those things about a person based on his or her race may not necessarily disparage his or her past autonomous choices or future capacity for choice. But erroneously assuming, because of a person's race, that he grew up in challenging social circumstances is likely to be the result of stereotypical associations between minority status and choices or behaviors that contribute to the condition of

69. *Id*.

70. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 236 (1995).

71. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013).

72. Transcript of Oral Argument at 61, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345).

73. *Id.* at 44.

poverty. Obviously, that kind of linkage is an insult to personal autonomy. The use of race as a proxy for low socio-economic status is also open to the additional objections that the proxy relationship is not sufficiently strong to be relied on; and even if it were, since it is not clear what benefit would be gained by relying on the proxy of race rather than giving positive consideration directly to applicants who meet that description, there is no good reason to rely on the proxy.[74]

A slightly different version of the race-as-proxy rationale regards race as a proxy for particular viewpoints that could add to the richness of discourse in an otherwise all-white classroom, or perhaps a contrarian voice that could reduce blind spots or promote out-of-the-box thinking in workplace teams and management deliberations.[75] Being a member of a minority racial group is a proxy, on this view, for a propensity to contribute a dissenting, nonconforming, or contrarian voice to discourse or teamwork that would otherwise be dominated by orthodoxy and groupthink. This rationale is also vulnerable to the objection that it violates the Principle of Individual Consideration, interpreted in light of the requirement of respecting the autonomy of individuals. The rationale regards a person's capacity to make valuable contributions to discourse and deliberation as in part a function of the person's race. When we say that a person's minority racial status gives us reason to believe that the person will express a certain set of viewpoints or engage in certain modes of discourse, we treat the person's thoughts, beliefs, and ways of relating to others – which some would argue lie at the heart of the capacity to make autonomous choices – as determined by something external to the person's agency. Assuming that a person will bring underrepresented viewpoints to a discourse because that person is an underrepresented minority fails to respect that person as an individual, because it implicitly repudiates the person's autonomous capacity to think and speak in ways that might not be expected.[76] Affirmative action, to the extent conceived in terms of the race-as-proxy-for-discourse-enhancing-potential rationale, violates the requirement of individual consideration in ways that are closely analogous to racial profiling.

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74. *See* Samuel R. Bagenstos, *On Class-Not-Race*, *in* A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50 (Samuel Bagenstos & Ellen Katz, eds., 2015) (describing the argument).

75. *See* Volokh, *supra* note 65.

76. *See* Metro Broadcasting v. FCC, 497 U.S. 547, 621 (1990) (O'Connor, J., dissenting) (arguing that the use of "race as a proxy" for underrepresented viewpoints is "the hallmark of an unconstitutional policy").

The diversity rationale for affirmative action is the only one that has been given constitutional validity by the Supreme Court in the university admissions context.[77] Although critics tend to conflate the diversity rationale and one or both versions of 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.[78] 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,[79] and so on.[80]

The diversity rationale is not completely free from worries from the standpoint of treating people as individuals. There may be a concern that admitting a minority student in order to activate certain institutional benefits associated with diversity is tantamount to *using* the student in the same way that a catalyst might be used to trigger a desired chemical reaction. Valuing the student for the contribution he makes to racial diversity may be to regard the student as a "de-biasing" instrument rather than as an individual with a history of autonomous choices and a capacity to make future autonomous choices. And furthermore, even if the presence of a minority student has the beneficial effects intended, one might argue that those benefits come about as a result of psychological processes that largely lie outside of a person's autonomous control.

But at the same time, if there is indeed a worry here, it does not seem to be quite the same as the concern implicated in Eidelson's hypotheticals or in racial profiling. There is a difference between (a) predicting the *actions* that a person will perform based on his racial group membership and (b) predicting how a person's *presence*, in light of his racial group membership, will affect the social psychological dynamics of a given community. Whereas (a) invokes racial classification in a way that tends to displace the significance of the person's autonomous choices, (b) is more a claim that awareness of race

77. *See* Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198 (2016); Grutter v. Bollinger, 539 U.S. 306, 325 (2003).

78. *See Fisher II*, 136 S. Ct. at 2210.

79. The diversity rationale has not been endorsed by the Supreme Court as a basis for affirmative action under Title VII.

80. *See* Patrick Shin & Mitu Gulati, *Cultivating Inclusion*, 112 MICH. L. REV. FIRST IMPRESSIONS 117, 120 (2014).

can, through the operation of our psychologies, have an effect on the quality of our autonomous choices.

Although the diversity rationale may imply that affirmative action entails using people as passive instruments in some sense, this does not necessarily violate the Principle of Treatment as an Individual, as long as all admitted students are also valued for the qualities that are associated with aspects of their autonomous agency. Certainly, there is nothing in Eidelson's account that implies that treating someone as an individual requires valuing a person *only* for those qualities over which the person exercises autonomous choice. Thus, even if the diversity rationale may involve viewing a person's racial group membership in an instrumental way, it does not necessarily entail the treatment of individuals in a way that fails to respect their autonomy.

Furthermore, if one takes seriously the educational benefits of diversity, one can appreciate a more positive relation between affirmative action and treating persons as individuals. The point of affirmative action, according to the diversity rationale, is that a diverse student body or workplace provides a context in which people can develop more robust connections and collaborations with a wider variety of individuals.[81] The more that stereotypes are broken down and bias reduced, the more it becomes possible for people to mutually recognize and respect others not as mere predictable functions of their given social circumstances, but as individuals with a history of autonomous choices and a capacity to exercise their autonomy in the future. Populating a community in such a way as to foster beneficial racial dynamics helps create conditions in which every member can flourish in the exercise of their individual agency and learn to respect the individuality of others. From this perspective, affirmative action according to the diversity rationale ultimately seeks to realize the value of treating people as individuals, even if it also assumes that people are partly the product of psychological processes that they do not entirely control.

Of the three rationales for affirmative action, the remedial justification for affirmative action is in some ways the most intriguing. It contradicts the Principle of Treatment as an Individual more explicitly than the other two, and yet remains the only justification that has so far been accepted by the Supreme Court in employment cases

81. *See Grutter*, 539 U.S. at 325; Ronald Turner, *Grutter, the Diversity Justification, and Workplace Affirmative Action*, 43 BRANDEIS L.J. 199, 206–07, 233–34 (2005).

under Title VII (private employment) or the Equal Protection Clause (public).[82] The remedial justification permits institutional actors to take race-conscious steps to eradicate current distributional patterns that are traceable to the institution's own past discrimination.[83] In effect, it allows employers to give preference to members of particular racial groups for the sake of improving local conditions of group inequality. This seems to fly in the face of the Principle of Individual Priority, the second prong of the Principle of Treatment as an Individual.[84]

At root, the Principle of Individual Priority is an affirmation of the modern concept of individual rights. The basic idea, familiar from contemporary liberal political philosophy, is that basic individual rights and liberties are lexically prior to considerations of distributive equality. Everyone must be guaranteed equal rights and liberties before any redistribution can be undertaken; and a person's rights and liberties cannot be part of what is redistributed for the sake of equality or group interests. They are, to that extent, inviolable. This is not to say that individual rights can never be justifiably infringed for the sake of group interests, but individual rights would amount to little if they could not generally withstand the countervailing pressures of collective welfare or intergroup equality. The relevant point for purposes of the present discussion is that the Principle of Individual Priority is closely tied to this notion of the inviolability of rights as against claims of group welfare.

Notice that the remedial justification for affirmative action is not directly inconsistent with the Principle of Individual Consideration (as distinguished from the Principle of Individual Priority). Giving racial minorities a preference in selection decisions to reverse "manifest racial imbalance[s]"[85] caused by prior discrimination does not entail

82. There is some dispute about whether *United Steelworkers v. Weber*, 443 U.S. 193 (1979) and *Johnson v. Transp. Agency of Santa Clara*, 480 U.S. 616, 637 (1987) restrict affirmative action under Title VII to purposes that are truly "remedial." For an argument that they do, *see* Estlund, *supra* note 67, at 3–5. For the view that *Weber* and *Johnson* may permit affirmative action under Title VII that is not strictly remedial, *see* Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of Grutter?*, 92 KY. L.J. 263, 274 (2003).

83. *Cf.* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 504–05, 509 (1989).

84. In cases that are "remedial" in the strictest sense – where a defendant is found liable for discrimination and race-conscious measures are imposed as a judicial remedy – the plaintiffs can be regarded as having a legal right to the race-conscious remedial measure. *See* Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 307 (1978). In such circumstances, it becomes difficult to argue that the race-conscious remedy violates any right of individual treatment, since the remedy itself becomes embodied as an individual right. But cases like *Weber* and the context of higher education generally speaking do not present remedial scenarios in this strict sense.

85. *See Weber*, 443 U.S. at 209.

any racially-derived inference that would be inconsistent with respect for anyone's autonomy as an agent. The basis of such a remedial preference is not any generalization about the traits or dispositions of members of a group, but rather the desirability of correcting the consequences of past discriminatory practices that, if allowed to remain, would stand as an enduring emblem of the employer's past failures to respect all persons as individuals.[86]

There does appear to be a rather direct conflict, however, between the remedial justification for affirmative action and the individual priority component of the Principle of Treatment as an Individual. Race-conscious measures that are designed to correct "imbalances" effectively impose a disadvantage on some individuals for the sake of reducing intergroup disparities. This violates the Principle of Individual Priority.[87] Why, then, should remedial affirmative action (as in *Weber*) be permitted?

Just as we compared racial profiling and suspect description to tease out how they might be distinguished vis-à-vis the Principle of Individual Consideration, it is useful to explore how remedial affirmative action is different from a related practice that is clearly impermissible under principles of individual treatment: the use of quotas. To be clear, one should note that quotas are a *mechanism* for producing racial balance or diversity, while the remedial justification for affirmative action is a *rationale* for race-conscious action; so the two practices are in some sense orthogonal. But it is nevertheless instructive to ask, if remedial affirmative action of the kind discussed in *Weber* is legally permissible, then why not quotas? Suppose, for example, that a university with a regrettably low population of black students decides to adopt an admissions policy that sets aside a fixed number of seats

86. *See id.* at 204; *see also* Johnson v. Transp. Agency of Santa Clara, 480 U.S. 616, 637 (1987).

87. In some ways, the remedial justification can be seen as a limited concession to Owen Fiss's anti-subordination theory of equal treatment, according to which affirmative action would be permissible to the extent that it alleviated group inequality and stratification. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976) (suggesting that a law or practice should be regarded as violating constitutional principles of equality only if it "aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group"). The Supreme Court's insistence on the Principle of Individual Priority is an explicit rejection of Fiss's anti-subordination approach. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 223–30 (1995); *see also* Michael C. Dorf, *A Partial Defense of an Anti-Discrimination Principle*, *in* ISSUES IN LEGAL SCHOLARSHIP: THE ORIGINS AND FATE OF ANTISUBORDINATION THEORY (2002) (characterizing Fiss's theory as a "period piece, a relic of a more egalitarian but bygone era").

for black students[88] for the purpose of increasing the diversity of its student body. Such a policy would certainly be a legally impermissible[89] example of failing to respect the priority of the individual over groups.[90] But what are the underlying moral concerns?

The Supreme Court has asserted that the problem with this kind of quota is that it deprives white applicants, solely on the basis of their race, of the opportunity to compete for the seats reserved for black applicants, while black applicants are permitted to compete for all of the seats without limitation.[91] But the practical effect of this purportedly unfair competition boils down to nothing more than a reduction of the admissions chances of white applicants relative to black applicants. In that regard, it is hard to see a clear distinction between quota-based affirmative action and post-*Grutter* policies based on holistic review. An effective holistic affirmative action policy will also have the effect of reducing the admissions chances of whites relative to blacks (otherwise, the policy would be pointless); and a holistic policy that gives significant weight to race could theoretically reduce white admission rates even more than a modest quota-based policy.

The objections that truly drive the law's resistance to quotas lie not in any diminishment of opportunity for majority racial groups, but rather in the perceived risk of negative social consequences associated with their use and, just as importantly, their symbolic meaning. There is, first, a fear that if the law were to permit the use of racial quotas, this would deepen racial divisions in society, create racial resentment, and perpetuate discriminatory attitudes.[92] The problem with quotas, according to this perspective, is that they are likely to result in "racial balkanization."[93]

Second, quotas symbolize a sort of insensitivity to individual differences within groups. What seems to trouble the Court is that in a system of set-asides, people can feel as though they are "reduced to

88. This hypothetical policy is similar to the one that was invalidated in *Bakke*. *See* Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 278–79 (1978) (Powell, J., concurring).

89. *See Grutter*, 539 U.S. at 330 (asserting that fixed set-asides amount to "outright racial balancing, which is patently unconstitutional").

90. *See* Julie C. Suk, *Quotas and Consequences*, *in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 232 (Deborah Hellman & Sophia Moreau eds., 2013).

91. *See Bakke*, 438 U.S. at 319–20.

92. *See* Suk, *supra* note 90, at 233–35 (discussing consequentialist arguments against quotas).

93. *See id.*

pure numbers," to use Justice Kennedy's language in *Fisher II*.[94] Quotas by their nature emphasize quantity as a decisive consideration. The emphasis on quantity evokes a process in which the predominant mode of evaluation is counting. And the notion of counting to fill a quota strongly connotes the fungibility of the members of each quota-limited group. It is perhaps understandable, then, that an adverse selection decision in a quota-based system might be experienced as a denial of respect for individuals, especially in contexts such as higher education where success tends to be associated with personal achievement, character, and promise.[95] A quota-driven rejection might very well feel to the unsuccessful white applicant as if it were predicated upon a negative inference about the applicant's individual character based on his race. From the applicant's perspective, the rejection could be interpreted as a violation not only of the Principle of Individual Priority, but also of the Principle of Individual Consideration.

Thus, although the Supreme Court has authorized race conscious affirmative action to remedy significant intergroup imbalances that are the vestiges of past discriminatory wrongs (such as in *Weber*), quotas remain an impermissible form of such action, because they violate not only the Principle of Individual Priority, but they are also contrary to the norms of respect that underlie the Principle of Individual Consideration. This suggests that race-conscious action that conflicts with the Principle of Individual Priority may be permitted when necessary to correct significant inequalities of opportunity attributable to known past practices of discrimination with respect to those specific opportunities,[96] but only by means of policies that are sufficiently tempered (in duration and manner of implementation) so as not to "unnecessarily trammel the interests"[97] of non-minorities or evince disrespect for individuals.

This conclusion is in some ways similar to the analysis I suggested in the context of racial profiling in law enforcement. There, I argued that adherence to the Principle of Individual Consideration requires

94. 136 S. Ct. at 2210.

95. *See* Suk, *supra* note 90, at 231. Suk quotes Alexander Bickel's strong condemnation of quotas: "[A] racial quota derogates the human dignity and individual of all to whom it is applied." ALEXANDER BICKEL, THE MORALITY OF CONSENT 133 (1974).

96. The Supreme Court has been adamant to reject affirmative action as a remedy for "societal discrimination." *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 731 (2007); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986). To allow race-conscious action whenever necessary to correct disparities attributable to societal discrimination generally would eviscerate the Principle of Individual Priority, since such disparities are ubiquitous.

97. *Weber*, 443 U.S. at 208.

ascribing irrelevance to statistical considerations that might very well be epistemically valid reasons for the allocation of limited law enforcement and monitoring resources. In a somewhat similar way, adherence to the Principle of Individual Consideration requires the rejection of quotas, even though they might be an effective way of accomplishing an otherwise permissible remedial purpose of reducing local group inequalities that stand as vestiges of past discrimination.

CONCLUSION: AUTONOMY AND EQUALITY

The oft-repeated dictum that antidiscrimination law guarantees individual consideration and protects "persons, not groups" can be fleshed out as a compound principle. This principle prohibits treatment of persons based on inferences derived from a person's classification in certain enumerated categories and prohibits reliance on generalizations about groups defined by those classifications, and invalidates justifications of the treatment of persons that appeal to group interests or conditions of intergroup equality. I have tried to show that this framework of constraints is underwritten by a fundamental commitment to a moral requirement of taking people seriously as individuals – autonomous actors who are shaped by their own past choices and have the capacity to exercise their future agency in ways that are not merely a function of the social contexts they occupy, combined with a commitment to the concept of individual rights as bulwarks against countervailing interests of collective welfare or intergroup equality.

A notable aspect of my account of the Principle of Individual Consideration and Individual Priority is that it suggests that these are noncomparative concepts[98] of respect for autonomy and the inviolability of individual rights. They are not truly principles of equality, even though they tend to be frequently invoked as commitments of the Equal Protection Clause. Chief Justice Roberts in *Parents Involved* invoked the "persons not groups" principle in a crucial step of his argument. But in the last part of his opinion, he also quoted from a case in which the Court had said that the problem with treating someone differently based on racial group membership is that it "demeans the [person's] *dignity* and worth."[99] I do not think that the language of dignity occurred accidentally here. Rather, I think that

98. For an illuminating discussion of the difference between comparative and noncomparative conceptions of discrimination, see Hellman, *supra* note 11.

99. *Parents Involved,* 551 U.S. at 746 (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)).

Justice Roberts invoked the value of dignity because that value is intimately connected to respect for autonomy and the inviolability of rights, which in turn, as I have argued, is what underlies the two components of the Principle of Treatment as an Individual.

If that Principle is ultimately a manifestation of respect for autonomy and the inviolability of rights, rather than a principle of equality, it becomes easier to explain why the Principle can seem sometimes at odds with the Supreme Court's willingness to allow the use of racial classifications in the context of diversity-based affirmative action and especially remedial affirmative action. The justification of affirmative action policies is rooted in concerns about distributive equality and remediation of group subordination. Affirmative action, I have suggested, is not necessarily inconsistent with respect for autonomy, but the need for such policies is a reflection of the limits of noncomparative, autonomy- and rights-based approaches to solving the problem of entrenched social inequality.[100]

Finally, the discussion of this article shows that the principles of individual consideration and individual priority are not self-contained, self-justifying theorems of antidiscrimination law. These principles limit themselves, more or less by brute force, to the specific categories that are enumerated as problematic, either in legislative enactments (e.g. Title VII) or in the Court's common law constitutional jurisprudence (e.g. "suspect classification" doctrine). These categories cannot be somehow logically derived from considerations that are completely internal to the principles of individual treatment themselves. Rather, they can only be explained with reference to historically contingent patterns of unjust deprivation, concerns about enduring inequalities, and the politics and priorities of social reform movements.[101] The point, again, is not that the Principle of Treatment as an Individual is wrong as far as it goes, but rather that it cannot itself explain antidiscrimination law in its entirety. Indeed, it is the other way around: it takes a theory of discrimination and equality to explain certain aspects of the Principle. The Principle of Treatment as an Individual, underwritten by the value of respect for autonomy and the inviolability of rights, may capture an important strand of antidiscrimination law, but it cannot by itself purport to be exhaustive of it.

100. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 767 (2011).
101. *See* Bagenstos, *supra* note 3, at 846–48; *see also* Shin, *supra* note 12, at 169–72.