

IDIOSYNCRATIC EXCELLENCES

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ABSTRACT

This Article contributes to legal, political, and philosophical debates concerned with the legitimacy of race-conscious admissions programs. It examines and interrogates the concept of idiosyncratic excellences as a target of meritocratic selection. It maintains that the concept supports the articulation of an appropriate message in support of race-conscious admissions programs but also insists on further clarification regarding the nature of those excellences and raises concerns about the differential burdens that their instrumentalization imposes on particular sets of applicants and matriculants. The Article ultimately concludes that marginalized members of American society exhibit idiosyncratic excellences essential for the Nation's spiritual and democratic aspirations without ignoring the perhaps unavoidable psychological toll taken by various forms of epistemic exploitation.

INTRODUCTION

Justice O'Connor's majority opinion in *Grutter v. Bollinger*¹ leads Laurence Thomas to introduce the concept of idiosyncratic excellences.² What bothers him about the opinion is the Justice's willingness to trade excellence for diversity if doing so furthers social peace and productivity. Somewhat counterintuitively, Thomas contends both that "the idea of idiosyncratic excellence is extremely important" *and* that O'Connor probably "had something like it in mind when she voted to uphold [the University of Michigan School of Law's] admissions policy."³ In other words, the Justice seems to endorse the notion of idiosyncratic

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1. 539 U.S. 306 (2003).

2. *Id.* at 306.

3. Laurence Thomas, *Equality and the Mantra of Diversity*, 72 U. CIN. L. REV. 931, 938 (2004).

excellences even as she fails to engage with them when she considers Michigan Law's race-conscious admission program.⁴

What are idiosyncratic excellences? What does Thomas have in mind? And why, given that Justice O'Connor likewise has them in mind, does Thomas criticize her opinion? First, imagine a "certain special quality that shows itself among students" with low standardized test scores and GPAs.⁵ A special quality that Black applicants "are more likely to showcase" but that "whites also exhibit..."⁶ Second, observe that Thomas has in mind a special quality or cluster of qualities that traditional criteria tend to miss and the presence of which robs those students who do "exceptionally well by the traditional criteria" of grounds for complaint whenever they find themselves outshined by those contributing *non-traditional* and, therefore, idiosyncratic excellences.⁷ Finally, note that there is no necessary tradeoff between diversity and excellence, but only between different excellences. The "hallmark" of Michigan Law's policy, O'Connor observes, "is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential 'to contribute to the learning of those around them.'"⁸

Why, given O'Connor's "hallmark" verbiage, does the Grutter majority opinion fall short for Thomas? What Justice O'Connor seems to

4. *Id.* at 938–39.

5. *Id.* at 936. (quoting Thomas J.).

6. *Id.*

7. *Id.*

8. *Grutter v. Bollinger*, 539 U.S. 306, 315 (2003).

miss, according to Thomas, is (1) that the idiosyncratically excellent applicant and matriculant needs something more specific and detailed to hang her hat on; (2) that “idiosyncratic excellence cannot be limited to race”; and (3) that there is no indication that it was the pursuit of idiosyncratic excellences that inspired Michigan Law to admit minority students with less stellar (though not necessarily less *than* stellar) academic profiles. What Thomas laments is Michigan Law’s (presumed) failure to consider whether these lower-scoring minority applicants had, for instance, “performed outstanding community service,” written “several novels exhibiting ingenious depth and subtlety of plot,” or “shown extraordinary determination.”⁹

Some difficulties with Thomas’s conception of selection on the basis of idiosyncratic excellences are immediately apparent. First, however, I should say that I suspect he is correct with respect to (1) and (2). Practically speaking, the idiosyncratically excellent applicant and matriculant *does* need something to hang her hat on. For her own sake and

9. Thomas, *supra* note 3, at 938–39. It is not clear why Thomas fails to credit and contend with the following observations from Justice O’Connor regarding Michigan Law’s race-conscious admissions plan:

“The Law School does not...limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity. To the contrary, the 1992 policy makes clear ‘[t]here are many possible bases for diversity admissions,’ and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields. The Law School seriously considers each ‘applicant’s promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic—e.g., an unusual intellectual achievement, employment experience, nonacademic performance, or personal background.’ All applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.” *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003).

in the interest of the university at large, she needs to know that Michigan Law was in the market for *her* and not (simply) the color of her skin or even her racialized status.¹⁰ Thomas is also quite right to conclude that “idiosyncratic excellence cannot be limited to race”; any conclusion otherwise would be as dangerous as it is absurd. Idiosyncratic excellences are, by definition, idiosyncratic, but nevertheless human. It may be true, and Thomas certainly hopes it is, that Black individuals and other underrepresented minority (URM) applicants are “more likely to showcase this special quality,”¹¹ but it is obviously true that low-scoring white applicants might likewise perform outstanding community service, write novels, and exhibit extraordinary determination. Indeed, even if URMs are more likely to present such a profile, the math suggests that their performances would be overwhelmed by a sea of idiosyncratically excellent non-URMs in the applicant pool.

Thomas may also be correct when it comes to (3), but part of the blessing/curse of holistic admissions is that there is often no way to tell.¹² It is entirely possible that both Justice O’Connor and Michigan Law take the pursuit of idiosyncratic excellences seriously, and neither Thomas nor anyone else can know for sure whether they did or did not heed this

10. See Benjamin Eidelson, *Treating People as Individuals*, in PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 214 (Deborah Hellman & Sophia Moreau eds., 2013).

11. Thomas, *supra* note 3, at 936.

12. See *Gratz v. Bollinger*, 539 U.S. 244, 305 (2003) (Ginsburg, J., dissenting) (stating “If honesty is the best policy, surely Michigan’s accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.”); see also, Ian Ayres & Sydney Foster, *Don’t Tell, Don’t Ask: Narrow Tailoring after Grutter and Gratz*, 85 TEX. L. REV. 517, 540 (2007); Vinay Harpalani, *Secret Admissions*, 48 J.C. & U.L. 325, 343 (2023).

imperative. More important, however, is the obvious correlation between wealth and non-URM status and superlative academic credentials, *as well as* the obvious correlation between wealth, non-URM status, and superlative *non-academic* credentials. In other words, just how idiosyncratic are idiosyncratic excellences if they are highly correlated with non-idiosyncratic excellences that are in turn highly correlated with family wealth and parental education? The set of novel-writing, low-academic-profile students might not be empty, but it is surely small, and there may be no reason to expect it to disproportionately feature non-URMs. One of the major problems with meritocratic selection, whether it is or isn't sensitive to idiosyncratic excellences, is that the well-resourced always win. Come up with any system you like, and they can and will game it—that's just what being well-resourced enables meritocrats to do.¹³

Why, then, have I bothered to examine idiosyncratic excellences?

First, and somewhat superficially, I happen to have a great deal of respect for Thomas and cannot shake his concerns. Second, and more importantly, I concede that he is tapping into something crucial. Justice O'Connor commits an unforced error whenever she references and highlights a “quality-versus-diversity dilemma” in this space.¹⁴ Such a dilemma, the

13. See DANIEL MARKOVITS, *THE MERITOCRACY TRAP* 111–56 (2019); MICHAEL J. SANDEL, *THE TYRANNY OF MERIT* 155–96 (2020); Peter Arcidiacono, Josh Kinsler & Tyler Ransom, *Legacy and Athlete Preferences at Harvard*, 40 J. LABOR ECON. 133 (2022); Uma Mazyck Jayakumar, William C. Kidder, Eddie Comeaux & Sherod Thaxton, *Race and Privilege Misunderstood: Athletics and Selective College Admissions in (and Beyond) the Supreme Court Affirmative Action Cases*, 70 UCLA L. REV. DISCOURSE 230, 252 (2022).

14. See Sandra Day O'Connor & Stewart Schwab, *Affirmative Action in Higher Education over the Next Twenty-Five Years: A Need for Study and Action*, in *THE NEXT TWENTY-FIVE YEARS: AFFIRMATIVE ACTION IN HIGHER EDUCATION IN THE UNITED STATES AND SOUTH AFRICA* 58, 63 (David L. Featherman, Martin Hall & Marvin Krislov eds., 2010).

Justice fails to recognize, is a contingent rather than an inherent feature of race-conscious admissions plans. The diversity imperative or, better yet, the imperative of integration, need not produce any such dilemma.¹⁵ One astoundingly powerful source of “quality” is the texture of one’s experiences, and the texture of one’s experiences is, in *this* society, heavily influenced by one’s racialized status.¹⁶ Justice O’Connor’s rhetoric is eloquent and powerful: “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”¹⁷ What she does not always appear to recognize, however, are the profound implications of both her keen observations and her quite moving declarations.

With Justice O’Connor in mind, an analogy to gender might help us along. Consider, for instance, that women are indispensable and irreplaceable in part because they have experience being women. URM, like women, have access to what we might call “Unknown Knowns.” Donald Rumsfeld famously—or notoriously—distinguishes between “Known Knowns,” “Known Unknowns,” and “Unknown Unknowns.”¹⁸ His unique contribution is to highlight the “Unknown Unknowns,” the

15. See Elizabeth Anderson, *The Imperative of Integration* 112-34 (2010).

16. See Lily Hu & Issa Kohler-Hausmann, *What is Perceived When Race is Perceived and Why It Matters for Causal Inference and Discrimination Studies*, 59 L. & SOCIETY REV. 239, 250–51 (2025); Julie R. Posselt & Steve Desir, *How Are Admissions Decisions Racialized?*, in RETHINKING COLLEGE ADMISSIONS: RESEARCH BASED PRACTICE AND POLICY 83 (Oi Yan Poon & Michael Bastedo eds., 2022); see also, Tommie Shelby, *Race*, in THE OXFORD HANDBOOK OF POLITICAL PHILOSOPHY 336 (David Estlund ed., 2012); Bernard R. Boxill, *Race*, in THE OXFORD HANDBOOK OF DISTRIBUTIVE JUSTICE 498 (Serena Olsaretti ed., 2018).

17. *Grutter v. Bollinger*, 539 U.S. 306, 315 (2003).

18. CNN, *RUMSFELD/ KNOWN*, at 00:10 (YouTube, Mar. 31, 2016), <https://www.youtube.com/watch?v=REWeBzGuzCc>.

things we neither know (the “Known Knowns”) nor know that we don’t know (the “Known Unknowns”). What is missing from Rumsfeld’s schema, however, is the fourth quadrant: the inchoate. Sometimes, I am suggesting, women and URMs recognize that they know things that they did not even know they knew (and comprehend things that others would prefer to ignore) precisely when and because they find themselves in contexts of mixed company¹⁹ and “managed ignorance.”²⁰ These are contexts, like predominantly male or predominantly white institutions (PWIs), in which the dominant group is, without necessarily realizing it (or keeping it top of mind), deeply invested in *not* believing certain things and in *wanting* not to believe certain other things.²¹

My approach, then, will be to hold onto the notion of idiosyncratic excellences even as I critique and revise Thomas’s conception of it. Idiosyncratic excellences *are* crucial, and URMs—like women—*are* more likely to showcase these special qualities, precisely because they grow best in the soil of hermeneutical marginalization.²² Double consciousness might not provide one with twice the consciousness, but it does provide a perspective inaccessible to a single consciousness and fashions one into a source of epistemic friction or discomfort and a prompt for self-

19. ELIZABETH ARIES, THE IMPACT OF COLLEGE DIVERSITY 41–42, 45–48 (2023).

20. See Elizabeth V. Spelman, *Managed Ignorance*, in RACE AND EPISTEMOLOGIES OF IGNORANCE (Shannon Sullivan & Nancy Tuana eds., 2007).

21. *Id.* at 120–21; see also, Jose Medina, THE EPISTEMOLOGY OF RESISTANCE: GENDER AND RACIAL OPPRESSION, EPISTEMIC INJUSTICE, AND RESISTANT IMAGINATIONS 34 (2013).

22. Medina, *supra* note 21, at 45.

estrangement and self-enlargement.²³ URMs, *because* they are URMs, *perceive* things, *know* things, and *feel* things that non-URMs do not.

We have a surfeit of experience with this. This has, for instance, always been true of women in our society. They have always perceived, known, and felt things that men do not. Isn't this the seriousness lurking behind the quip about Ginger doing everything Fred did but backward and in heels? Marginalization is no good thing, but it also never stops producing excellences. The idiosyncratically excellent matriculant does, I agree, need a story to tell. She sees what others miss, and she knows and she feels what others must if American elites are to have any chance at spiritual freedom and democratic competence.

The remainder of this Article proceeds as follows. Section II describes what I call the disease of Black absence, clarifying the epistemic dangers of marginalization and highlighting the unique gifts of hermeneutically marginalized URMs including, but not limited to, Black Americans. Section III couples an understanding of the unique gifts of the hermeneutically marginalized with the reality of American residential segregation. Social learning and moral progress depend upon the moral lessons of the marginalized, and race-conscious admissions programs play a small but important role in ensuring that American elites “are themselves

23. See José Medina, *Ignorance and Racial Insensitivity*, in *THE EPISTEMIC DIMENSIONS OF IGNORANCE* 184, 197 (Rik Peels & Martijn Blaauw eds., 2016); José Medina, *Relational Insensitivity and the Interdependence of Flourishing and Withering*, in *PHILOSOPHY AND HUMAN FLOURISHING* 193, 200 (John J. Stuhr ed., 2023) [hereinafter *Relational Insensitivity*]; Tracy Llanera & Nicholas H. Smith, *A Culture of Egotism: Rorty and Higher Education*, in *THE PROMISE OF THE UNIVERSITY: RECLAIMING HUMANITY, HUMILITY AND HOPE* 55, 58 (Aine Mahon ed., 2021).

diverse, and have been educated together, so that they are equipped to work together as equals.”²⁴ The Court’s recent decision in *SFFA v. Harvard*,²⁵ however, calls into question the nature of individualized racial consideration in admissions.²⁶ Chief Justice Roberts seems to think it is inappropriate to assume that race necessarily affects all URM applicants and the idiosyncratic excellences that they might be expected to possess or develop.

Section IV then acknowledges the reality that selection implies exclusion. Even if we accept the validity and utility of idiosyncratic excellences, we still have before us the task of choosing some over others. My claim is both that we aren’t selecting for mere quirkiness and that some idiosyncratic excellences are more valuable than others. In *this* society, given *our* history, the idiosyncratic excellences exhibited by URMs are substantially more important to see represented in the American elite than concerns over geography, (merely) unique attributes, (merely) unique skills, and so on. Section V acknowledges the extent to which arguments in favor of race-conscious admissions themselves rely upon our capacity and willingness to identify and to capitalize upon interest-convergence between URMs and non-URMs and to walk a fine line between the instrumentalization and the subjectification of URMs. I embrace a straightforwardly meliorist and “beady-eyed” approach to the reality of

24. Elizabeth Anderson & John White, *Elizabeth Anderson Interviewed by John White*, 53 J. PHIL. EDUC. 5, 11 (2019).

25. 600 U.S. 181 (2023).

26. *Id.* at 230–231.

this dynamic that aims to capitalize on interest-convergence, broadly conceived, in the pursuit of rough justice. Finally, Section VI concludes with a meditation on the difficulties faced by the hermeneutically marginalized in the context of institutional settings that cannot function properly without their full participation. To find oneself always teaching when one ought to be learning or relaxing is an onerous and unfair burden. It is, nevertheless, the burden faced by URM's in our non-ideal world, and it is a price that they will no doubt continue to pay precisely because the alternative—giving up—is, though not unthinkable, certainly ill-advised.

I. THE DISEASE OF BLACK ABSENCE

“Without the presence of Negro American style, our jokes, tall tales, even our sports would be lacking in the sudden turns, shocks and swift changes of pace (all jazz-shaped) that serve to remind us that the world is ever unexplored, and that while a complete mastery of life is mere illusion, the real secret of the game is to make life swing.”²⁷

—Ralph Ellison

Ellison offers a timely (and all-too-evergreen) reminder that the “fantasy of a Blackless America” is “born not merely of racism but of petulance, exasperation, and moral fatigue.”²⁸ It (the fantasy) “is like a boil bursting forth from the impurities in the bloodstream of democracy.”²⁹ Whether taking the form of secession or “benign amputation,” the fantasy of a Blackless America would use Black Americans “as a scapegoat to

27. RALPH ELLISON, *What America Would Be Like Without Blacks*, in THE COLLECTED ESSAYS OF RALPH ELLISON 586 (John F. Callahan ed., 1995).

28. *Id.* at 581.

29. *Id.*

achieve a national catharsis” and both versions, secession and amputation, “would, by way of curing the patient, destroy him.”³⁰

Without Black Americans, Ellison insists, “something irrepressibly hopeful and creative would go out of the American spirit, and the nation might well succumb to the moral slobbism that has always threatened its existence from within.”³¹ Why? Because Black Americans give “creative tension to our struggle for justice” and symbolize American democracy’s “most stringent testing and the possibility of its greatest human freedom.”³²

Ellison is, as usual, right on the money, and I aim to apply his reminder to the race-conscious admissions policies and programs developed and deployed by elite colleges and universities. Borrowing and hopefully improving upon Thomas’s conception of idiosyncratic excellences, I make the case for a Jamesian “commitment to an always-unfinished project of inclusivity.”³³ The idea is that it is only by means of carefully curated interactions with the *simply alien* and the *alienated familiar* that we can avoid epistemic arrogance and undergo (1) the process of self-estrangement that necessarily precedes (2) self-enlargement and (3) the cultivation of democratic solidarity.³⁴

30. *Id.* at 583.

31. *Id.* at 587.

32. *Id.* at 586–87.

33. José Medina, *The Will Not to Believe: Pragmatism, Oppression, and Standpoint Theory*, in *FEMINIST INTERPRETATIONS OF WILLIAM JAMES* 235, 243 (Shannon Sullivan & Erin C. Tarver eds., 2015).

34. *See id.* at 254; *see also*, Llanera & Smith, *supra* note 23, at 58.

Said somewhat more plainly (but also lyrically), we “are each other’s harvests,” and we need one another to flourish.³⁵ It is only by defying the “characteristic opacity of our epistemic lives”—the sense in which “we find ourselves believing” but “hardly know how or why”—that we can refresh, refashion, and revise our understandings of others and ourselves.³⁶ Truly meeting the other is to likewise meet and enlarge ourselves. But first, and often in great pain, comes the self-estrangement. A salutary self-estrangement that coincides with our defiance of the ubiquitous opacity of our epistemic lives and the epistemic friction and discomfort that follows from that very defiance. Travel anywhere, encounter the *simply alien*, and this happens. It is crucial to note, however, that this also happens whenever we truly encounter the *alienated familiar*.

Think, for instance, of Mill’s observations in “The Subjection of Women.”³⁷ He realizes that there is at least one unknown quantity and untapped resource in every English household. She may share a home, a life, and a bed with the patriarch—she is *familiar*—but she is also *alienated* and, therefore, *alien*. The pain and the injustice of this need not reach him; he is blind to his own blindness with respect to her (as well as many other things), and so this need not trouble him. Yet it may. He may not be self-deceived or even simply ignorant, but rather invested in an especially willful form of managed and active ignorance. His could be,

35. See Charles R. Lawrence III, *Each Other’s Harvest: Diversity’s Deeper Meaning*, 31 U.S.F. L. REV. 757, 778 (1997).

36. *Relational Insensitivity*, *supra* note 24, at 204–05.

37. See, generally, JOHN STUART MILL, *The Subjection of Women*, in ON LIBERTY, UTILITARIANISM AND OTHER ESSAYS (Mark Philp & Frederick Rosen eds., 2015).

and often is, a complicated propositional attitude. Better to simply ignore the possibility that her view of the world is unknown, untapped, and invaluable than to entertain the possibility that his kind has hobbled and silenced half the nation's population. What a thing to have done, what a horror to acknowledge. Fingering the jagged edge of that horror is just what made Mill, by way of his wife Harriet Taylor Mill, an epistemic hero.

I trust—and hope—that it is dreadfully or painfully easy to see not only the injustice of male domination but also its distorting and insidious idiocy.³⁸ How many female Mills and Einsteins and (fill-in-the-blanks) have we missed? Where is the fully functioning multiracial democracy that we were promised? Where are the second homes on a terraformed lunar landscape? When will we learn to listen to generation after generation of Cassandras—to the stigmatized, the oppressed, and the hermeneutically marginalized? When will we heed their warnings and allow ourselves to be guided by their insights? Soon, I hope. “People ask me sometimes,” the late Justice Ginsburg once said, “when—when do you think it will be enough? When will there be enough women on the Court?’ And my answer is when there are nine.”³⁹

II. MORAL LESSONS & SOCIAL LEARNING

“Time and again in the history of moral progress, the oppressed have taught moral lessons to the powerful. Time and again, the historical memories of dominant groups erase those events and replace them with an

38. ALLEN BUCHANAN, *Education and Social Moral Epistemology*, in *THE AIMS OF HIGHER EDUCATION: PROBLEMS OF MORALITY AND JUSTICE* 102, 111–112 (Harry Brighouse & Michael McPherson eds., 2015).

39. *When will there be enough women on the Supreme Court? Justice Ginsburg answers that question*, PBS (Feb. 5, 2015), <https://www.pbs.org/newshour/show/justice-ginsburg-enough-women-supreme-court>.

imagined rational reconstruction of the acquisition of moral insight through the self-sufficient reasoning of the dominant.”⁴⁰

—Elizabeth Anderson

Segregation deprives elites of the knowledge, skills, and dispositions necessary to effectively serve the entire democratic community. Luckily, and somewhat obviously, integrated education, on terms of mutual respect and equality, has the capacity to provide elites with the knowledge, skills, and dispositions necessary to effectively serve the entire democratic community.⁴¹ The thinking is that if we fully incorporate the marginalized “under conditions of institutionalized support for intergroup cooperation” and on terms of mutual respect and equality, we give ourselves the chance to develop the epistemic resources necessary to address the public and its problems.⁴² “If segregation makes an elite ignorant and incompetent,” Elizabeth Anderson observes correctly, “then integration makes it more knowledgeable and competent.”⁴³

At their best, the race-conscious admissions programs developed and deployed by elite colleges and universities endeavor to address, among other things, the democratic dangers of racial isolation and social network discrimination.⁴⁴ Residential segregation along the lines of race and class

40. Elizabeth Anderson, *The Social Epistemology of Morality*, in *THE EPISTEMIC LIFE OF GROUPS: ESSAYS IN THE EPISTEMOLOGY OF COLLECTIVES* 75, 94 (Michael S. Brady & Miranda Fricker eds., 2016).

41. Elizabeth Anderson, *Fair Opportunity in Education: A Democratic Equality Perspective*, 117 *ETHICS* 595, 611 (2007).

42. *Id.* at 612.

43. *Id.* at 611.

44. Elizabeth S. Anderson, *Racial Integration as a Compelling Interest*, 21 *CONST. COMMENT.* 15, 21 (2004); Chika O. Okafor, *Un-Erasing Race: Introducing Social Network Discrimination to the Law*, 102 *N.C. L. REV.* 1517 (2024); Chika O. Okafor, *Seeing through Color Blindness: Social Networks as a Mechanism for Discrimination*, 68 *J.L. & ECON.* 519, 542 (2025).

ensures that for a great many—white individuals especially—their four years spent at a residential college or university are their first and potentially only opportunity to experience a racially integrated setting specifically designed to enable “participants (students) to meet as formal equals, entitled to set their own agendas.”⁴⁵

If Ellison and Anderson (and others) have this right, if Black people infuse “creative tension” into the American “struggle for justice”, then does the same go for MIT, Amherst, and Stanford? Justin Driver contends that the Court’s recent decision in *SFFA* strikes “at the very heart of elite American education,” compromises “decades of progress,” threatens to “create a lost generation on the nation’s foremost campuses,” and “constitutes a veritable catastrophe not just in higher education but in our larger life.”⁴⁶ However, other legal experts suggest that the decision only means that “universities will no longer be able to advertise that they practice affirmative action” and that they remain “functionally able to make admissions decisions on the basis of race.”⁴⁷ The conceit here is that the numbers need not fall, and that the schools can escape liability, so long as they “no longer admit that they consider race, *qua* race, in their decisions.”⁴⁸ If the numbers tell the story, however, Driver’s seeming alarmism might just be an alarm: MIT’s post-*SFFA* Black enrollment fell

45. Elizabeth Anderson, *Affirmative Action and Fraser’s Redistribution-Recognition Dilemma*, in *ADDING INSULT TO INJURY: NANCY FRASER DEBATES HER CRITICS* 173 (Kevin Olson ed., 2008).

46. JUSTIN DRIVER, *THE FALL OF AFFIRMATIVE ACTION: RACE, THE SUPREME COURT, AND THE FUTURE OF HIGHER EDUCATION* 128, 198, 206, 207 (2025).

47. Peter N. Salib & Guha Krishnamurthi, *Goose and the Gander: How Conservative Precedents Will Save Campus Affirmative Action*, 102 *TEX. L. REV.* 123, 125 (2023).

48. *Id.* at 140.

from 15 percent to 5 percent, Amherst's fell from 11 to 3 percent, and Stanford's fell from 9 to 5 percent.⁴⁹

Chief Justice Roberts's *SFFA* majority opinion, the demographically unworried are quick to note, seems to give with one hand what it takes away with the other. Roberts insists (1) that "[o]ur Constitution is color-blind," and (2) that "[e]liminating racial discrimination means eliminating all of it," but also (3) that nothing in the majority's opinion "should be construed as prohibiting universities from considering an applicant's discussion of how race affected their life, be it through discrimination, inspiration, or otherwise."⁵⁰ "*SFFA*," Russell K. Robinson observes, explicitly "authorized a race-conscious admissions regime of individualized consideration."⁵¹ The Court is clear, however, that "[a] benefit to a student who overcame racial discrimination... must be tied to *that student's* courage and determination."⁵²

49. Driver also observes that "the percentage of Black students at Johns Hopkins declined by a stunning 66 percent" and that Brown, Columbia, Cornell, Carnegie Mellon, Tufts, and Pomona "all experienced declines in Black enrollment of 40 percent or greater." Driver, *supra* note 46 at 20–21; see also, Bloem, Michael D., Ashley Edwards, J. Parker Goyer, Jessica Howell, Xiaowen Hu, Michael Hurwitz, Samuel J. Imlay, Jennifer Ma, and Matea Pender, *College Enrollment Patterns After SFFA v. Harvard*, 40 (EdWorkingPaper No. 26-1392), <https://doi.org/10.26300/6a7w-bq06> (observing "that *SFFA* reduced URM students' access to and representation in highly selective colleges and caused high-achieving URM students to enroll in less selective institutions with slightly worse student outcomes."); Julie J. Park, RACE, CLASS, AND AFFIRMATIVE ACTION: COLLEGE ADMISSIONS IN A NEW ERA 11 (2026) (lamenting the "likely decrease in middle-class Black enrollment at some campuses" in part because such "students are often a critical 'bridge' at historically white institutions, bridging social divides between students from both different economic and racial backgrounds.").

50. *SFFA v. Harvard*, 600 U.S. 181, 206, 230 (2023).

51. Russell K. Robinson, *The Incoherence of the "Colorblind Constitution"*, 113 CAL. L. REV. 993, 1006 (2025); Sonia Starr, *Admissions Essays after SFFA*, 100 IND. L.J. 847, 903 (2025); see also, Benjamin Eidelson & Deborah Hellman, *Unreflective Disequilibrium: Race-Conscious Admissions after SFFA*, 4 AM. J.L. & EQUALITY 295, 324 (2024) ("*SFFA* revealed that the Court's conservative majority could not live with its own abstract commitment to colorblindness" and that it "did not squarely or openly reckon with that predicament.").

52. *Harvard*, 600 U.S. at 230–31 (emphasis in the original).

Admissions officers can and should take race into account so long as they do not give a student credit for the “courage and determination” that it took for *someone else* to overcome racial discrimination. Wait, *what?* When or how did Harvard or UNC give an applicant “a benefit” for *someone else’s* courage and determination? What is it, we might justifiably wonder, that the Chief thinks he’s inoculating against?⁵³ This hypothetical from the *SFFA* oral argument may shed some light:

CHIEF JUSTICE ROBERTS: What do you do with respect to an African American applicant? I mean, you’re concerned about diversity of viewpoint. Let’s say his viewpoints tend to be very close to, you know, the white applicants, he grew up in Grosse Point, you know, had a great upbringing, comfortable, his parents went to Harvard, he’s a legacy, and yet, under your system, when he checks African American, he gets a --a tip. He gets a benefit from that.

Isn’t that -

MR. WAXMAN: So -

CHIEF JUSTICE ROBERTS: --isn’t that very stereotypical on --under the Harvard program?⁵⁴

The Chief seems to be expressing a worry that Harvard might give a “tip” or a “benefit” to an African American applicant who may not be economically disadvantaged and, therefore, does not have any viewpoints (and experiences?) that would distinguish him from his white peers. The thinking seems to be that URMs who grow up in places like Grosse Pointe, have parents who went to schools like Harvard, enjoyed great and comfortable upbringings, and possess, by further stipulation, viewpoints very close to their white peers have not had to face disadvantage.

53. See Issa Kohler-Hausmann, *What Did SFFA Ban? Acting on the Basis of Race and Treating People as Equals*, 66 ARIZ. L. REV. 305, 332 (2024); Robinson, *supra* note 51, at 1016; Eidelson & Hellman, *supra* note 51, at 324.

54. Transcript of Oral Argument at 62, *SFFA v. Harvard*, 600 U.S. 181 (2023) (No. 20-1199).

Therefore, they do not have anything to offer over and above that which could be supplied by whatever he might imagine to be a similarly-situated white applicant.⁵⁵

To give this hypothetical applicant—I call him Grosse Pointe Black (GPB)—a “tip” or a “benefit” is to sever the link between individual “courage and determination” and the “courage and determination” exhibited by, for instance, one’s parents, grandparents, great-grandparents, and so on. Roberts appears to conflate racial and economic disadvantage and then controls for economic disadvantage by telling us that GPB grew up in Grosse Pointe and by stipulating that his childhood was in some unspecified sense “comfortable.” He does not consider whether GPB was economically disadvantaged relative to other residents of Grosse Pointe, nor does he entertain the possibility that GPB was less comfortable than

55. Chief Justice Roberts simply chooses to not to address the following observations made by Justice O’Connor both on and off the Court regarding the value of URM *experiences* rather than merely *viewpoints*:

By virtue of our Nation’s struggle with racial inequality, [URM] students are both likely to have experiences of particular importance to the Law School’s mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences. *Grutter v. Bollinger*, 539 U.S. 306, at 338.

It is widely understood that diversity enriches the college experience both in and out of the classroom. The claim is not so much that members of one race necessarily offer a distinctive viewpoint that others find worth hearing. Rather, it is that, given our diverse society, all students will benefit from learning to interact with and understand individuals of different races. Very often, the invaluable lesson is that we are more similar than different. O’Connor & Schwab, *supra* note 14, at 65.

Here, again, Chief Justice Roberts ignores *Grutter* and pretends that Harvard could base its admissions decisions on a factor about which its admissions officers often do not have any information (skin color):

CHIEF JUSTICE ROBERTS: --put aside the hypothetical about the African American applicant who’s a legacy. Take two African American applicants in the same category, however you want to take it. They both get or both can get a tip, right, based on their race. And yet they may have entirely different views. Some of their views may contribute to diversity from the perspective of Asians or whites. Some of them may not. And yet it’s true that they’re eligible for the same increase in the opportunities for admission based solely on their skin color? Transcript of Oral Argument at 66, *SFFA v. Harvard*, 600 U.S. 181 (2023) (No. 20–1199).

non-Black residents of Grosse Pointe.⁵⁶ Because he assumes that economic disadvantage constitutes the universe of racial disadvantage, the Chief can intimate without justification that GPB has not been disadvantaged at all.⁵⁷

Some Black applicants will have had to overcome racial discrimination, but colleges and universities, Lackland Bloom observes, may no longer simply “assume that race necessarily affects all minority applicants and proceed on that assumption.”⁵⁸ Race does affect *some* minority applicants, but never ones like GPB, for they offer no “report from the pit,”⁵⁹ only upbeat songs from the suburbs. Even if we are convinced by Anderson and Ellison, the intra-racial screening⁶⁰ that necessarily follows from “truly individualized consideration” implies that schools “have a constitutional obligation to decide which of their [B]lack applicants is ‘really’ [B]lack.”⁶¹

56. See Goodwin Liu, *Race, Class, Diversity, Complexity*, 80 NOTRE DAME L. REV. 289, 294–95 (2004); Khiara M. Bridges, *Excavating Race-Based Disadvantage among Class-Privileged People of Color*, 53 HARV. C.R.-C.L. L. REV. 65, 74 (2018).

57. See *id.* at 72. These rhetorical moves by the Chief Justice are not at all new. For more than half a century now critics of affirmative action have suggested that Blacks are either privileged or mismatched. Most Blacks are economically disadvantaged and do not have the qualifications to succeed at elite institutions of higher learning and the few Blacks who aren’t mismatched are so privileged that they don’t deserve any preferential treatment. Critics like these, slide from the claim that qualified Blacks are less deserving than unqualified Blacks to the claim that qualified Blacks aren’t deserving at all; BERNARD BOXILL, *BLACKS & SOCIAL JUSTICE: REVISED EDITION* 150 (1992) (“[I]n their eagerness to demolish the case for preferential treatment the critics have become extraordinarily careless, and have moved from the claim that qualified blacks are the least harmed and wronged blacks to the unsubstantiated claim that qualified blacks are not harmed or wronged at all.”).

58. Lackland H. Bloom, *Reversing Grutter*, 77 SMU L. REV. 305, 319 (2024).

59. JAMES BALDWIN, *Everybody’s Protest Novel*, in *THE PRICE OF THE TICKET* 42 (1985).

60. See, generally, Devon Carbado, *Intraracial Diversity*, 60 UCLA REV. 1130, 1142 (2013).

61. Andrew Koppelman & Donald Rebstock, *On Affirmative Action and Truly Individualized Consideration*, 101 NW. U. L. REV. 1469, 1473 (2007); see also, Cristina M. Rodriguez, *Against Individualized Consideration*, 83 IND. L.J. 1405 (2008).

GPB has not known racial suffering, has not cultivated the “courage and determination” sufficient to overcome that racial suffering, and so has no unique viewpoints to offer the Harvard campus community or the elite institutions into which Harvard feeds. He may be among the most likely African Americans in the country to have the grades and test scores to feature at all on Harvard’s radar, but everything that contributed to those academic achievements also serves to undermine his bona fides as a Black person with something special to offer. GPB might not be mismatched at Harvard, but the high-quality education that he (presumably) has received and the relative safety that he (presumably) has enjoyed render him what conservatives call a “paper-only” minority.⁶² He is the type who realizes that “running away from whiteness (at least on paper) [i]s the best way to get ahead.”⁶³

As ill-informed and repugnant as these conclusions are, they do dance around something valid and important. The subjectification of Black applicants and students can be as offensive and destructive as their objectification, instrumentalization, and commodification.⁶⁴ The message conveyed by race-conscious admissions should be that all of us are irreplaceable and not that Black people alone are damaged by

62. JEREMY CARL, *THE UNPROTECTED CLASS: HOW ANTI-WHITE RACISM IS TEARING AMERICA APART* 88 (2024); *but see* Devon W. Carbado, Kate M. Turetsky & Valerie Purdie-Vaughns, *Privileged Or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 *UCLA L. REV. DISCOURSE* 174 (2016).

63. CARL, *supra* note 62, at 89.

64. *See* David Schraub, *Racism as Subjectification*, 17 *BERKELEY J. AFR.-AM. L. & POL’Y* 3, 5 (2016).

segregation⁶⁵ or that diversity is only important to the extent that it converges with white interests superficially understood.⁶⁶ An overwhelmingly white elite, like an overwhelmingly male elite, represents a clear and present danger to this country's spiritual and democratic interests, and there begins our comprehension and recognition of URM irreplaceability.⁶⁷

What we require is a better understanding of the value of individual applicants and students, and we need to find a better way to articulate and express our understanding of that value. Musing about this new normal and struggling to find a better way to express the message of thoughtfully constructed race-conscious admissions programs is just what led me back to Thomas's idiosyncratic excellences. Among applicants to elite colleges and universities, there will always be some with lower-than-median grades and test scores who are nevertheless excellent and whose presence and full participation within the campus community is essential for the satisfaction of legitimate institutional ends. Merit, it is important to recognize, is not a function of individual abilities, but rather of institutional uses.⁶⁸ How qualified a particular applicant happens to be is always a function of an institution's legitimate ends.

65. See M. Broderick Johnson, *"Trying to Save the White Man's Soul": Perpetually Convergent Interests and Racial Subjugation*, 133 *YALE L. J.* 1335, 1341 (2024).

66. *Id.*, at 1352.

67. See *id.*

68. See generally, Benjamin Baez, *Merit and Difference*, 108 *TEACHERS COLL. REC.* 996 (2006); ROBERT K. FULLINWIDER & JUDITH LICHTENBERG, *LEVELING THE PLAYING FIELD: JUSTICE, POLITICS, AND COLLEGE ADMISSIONS* 17–38 (2004).

I agree that certain forms of idiosyncratic excellence are indeed “forged by the pain of those who ha[ve] been wronged and the concomitant will to survive,”⁶⁹ but I reject the suggestion that the least injured are always the least wronged, that the least wronged are not wronged at all, and that one who overcomes an injury “no longer has a right to compensation” or a role to play in our democratic community.⁷⁰ GPB, for instance, is no less wronged by racial subordination even if it has not injured him as much as some of his fellows and even if he has managed to “overcome” his injuries to the extent that he is able to present an attractive profile to elite colleges and universities.

To imagine, as does Chief Justice Roberts, that GPB’s “viewpoints tend to be very close to, you know, the white applicants” is like assuming that Harriet Taylor Mill’s viewpoints are just like her husband’s. This might be superficially true of the Mill household and even more so of other English households at the time, but surely this is no argument against Mrs. Mill’s inclusion. For one thing, her experiences are entirely different from his, and it matters not that they share a class position, a racialized status, a community, a household, or even a bed. This idea that one can toggle gender or race, while keeping everything else constant, is just a tool for smuggling in one’s preferred—though submerged and undefended—

69. Thomas, *supra* note 3, at 956.

70. Boxill, *supra* note 57, at 148–50.

“sociological account of what [gender or] race is” as well as a “normative [account] of what is owed in light of what [gender or race] is.”⁷¹

It is not so much that the Chief is unaware that GBP is crucially different from GPW in a great many ways, but just that he would enlist us in a tacit “agreement to *misinterpret* the world.”⁷² If anything, GPB’s Blackness is more visible and more top of mind in an overwhelmingly white community and overwhelmingly white classrooms than it would be were he an underperforming resident of Detroit.⁷³ GPB, I submit, is the Chief’s *alienated familiar*, he is every Black kid from the suburbs that Roberts has met or imagined, and he is like every wife in every English household: a purposefully and constructively unknown or ignored quantity. The psychological motivation behind such self-deception and ignorance is painfully obvious: if GPB is oppressed, *if one’s own wife is oppressed*, then the call for help is coming from within one’s community and potentially from one’s very household. If suburbs like Grosse Pointe don’t even the Black–white playing field, then the intolerable worry is that market freedom may not, in fact, produce fairness and democratic legitimacy.

“White people,” James Baldwin observes,

71. Kohler-Hausmann, *supra* note 53, at 354.

72. CHARLES W. MILLS, THE RACIAL CONTRACT 28 (1997) (emphasis in the original).

73. See, e.g., CLAUDE STEELE, WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO (2011); Gregory M. Walton, Steven J. Spencer, & Sam Erman, *Affirmative Meritocracy*, 7 SOC. ISSUES & POL’Y REV. 1 (2013); Sally Haslanger, *Studying While Black: Trust, Opportunity, and Disrespect*, 11 DU BOIS REV. 109 (2014); Sam Erman & Gregory M. Walton, *Stereotype Threat and Antidiscrimination Law: Affirmative Steps to Promote Meritocracy and Racial Equality in Education*, 88 S. CAL. L. REV. 307 (2015); Steven J. Spencer, Christine Logel, & Paul G. Davies, *Stereotype Threat*, 67 ANN. REV. PSYCH. 415 (2016).

are endlessly demanding to be reassured that Birmingham is really on Mars. They don't want to believe, still less to act on the belief, that what is happening in Birmingham...is happening all over the country, and has been for countless generations; *they* don't want to realize that there is not one step, one inch, no distance, morally or actually, between Birmingham and Los Angeles.⁷⁴

Birmingham, I am suggesting, is to Detroit what Los Angeles is to Grosse Pointe and Mars is to Michigan. Also, notice, again, the complicated propositional attitude: *don't want to believe...don't want to realize*. The *alienated familiar* is the human embodiment of the buffer between domination and one's participation in it. God is in His Heaven, GPB (and the rest of the Black middle-class) is "you know...comfortable," and Chief Justice Roberts is as (whitely) ignorant and innocent as a man can be.⁷⁵

III. SELECTION IMPLIES EXCLUSION

"[T]oday's meritocratic elite strikingly resemble the baseball pitcher...The meritocratic virtues...are artifacts of economic inequality in just the fashion in which the pitching virtues are artifacts of baseball."⁷⁶
—Daniel Markovits

If I am trying to draft a baseball team, I sure could use a left-handed relief pitcher before selecting my seventh first baseman. I find myself in the market for a left-handed reliever, not because I have a fetish for left-handed relief pitchers (if anything, I have already exhibited a fetish for first basemen), but because I know that I simply cannot go into the season without at least one left-handed reliever. Crucially, once he is selected, the

74. James Baldwin, *The White Problem*, in *THE CROSS OF REDEMPTION: UNCOLLECTED WRITINGS* 97 (Randall Kenan ed., 2010); see also, Raquel M. Robvais, "Birmingham is Really on Mars": *White Innocence and a Good Conscience*, in *THE ROUTLEDGE HANDBOOK OF RHETORIC AND POWER* (Nathan Crick ed., 2024).

75. See Spelman, *supra* note 20; Medina, *supra* note 21; CHARLES W. MILLS, *White Ignorance*, in *BLACK RIGHTS/WHITE WRONGS: THE CRITIQUE OF RACIAL LIBERALISM* (2017).

76. Markovits, *supra* note 13, at 264.

left-handed reliever knows just why he has been selected, as does the rest of the team. He might end up having the lowest number of innings pitched on the team, but his value is nevertheless obvious to everyone, and no one resents him for occupying a spot on the roster.

What do left-handed relievers and first basemen have to do with race-conscious admissions programs? Thomas expresses justifiable concern for the Black student who might think she was admitted *simply for being Black* and for her sense, correct or incorrect, that others (also) believe that she was admitted *simply for being Black*.⁷⁷ This can happen, and it surely has happened, but it would be a mistake to think that this is at all common or to confuse contingent features of *a* race-conscious admissions plan with inherent features of *all* race-conscious admissions plans. By and large, the *simply because* argument is a straw man, for no serious advocate of affirmative action purports to justify such programs on the basis on race, *qua* race (or sex, *qua* sex): “an utterly arbitrary preference for dark skin as opposed to light, or female anatomy over male anatomy.”⁷⁸ “That being [B]lack or white, male or female, does not in itself make anyone better or more deserving,” Thomas Hill insists correctly, “is acknowledged on all sides.”⁷⁹

It must be conceded, however, that Hill’s immolation of the *simply because* straw man does not eliminate Thomas’s concern. Hill, to his

77. Thomas, *supra* note 3, at 936.

78. Thomas E. Hill, Jr., *The Message of Affirmative Action*, 9 SOC. PHIL. & POL’Y 108, 113 (1991).

79. *Id.* at 113.

credit, realizes this. He would, in fact, be the first to acknowledge that the message conveyed by affirmative action policies and programs is both crucial and undertheorized. The advocates of affirmative action are guided by “quite general principles of justice or utility,” Hill observes, but those principles are sometimes articulated poorly or not at all.⁸⁰ What Thomas is after, and understandably so, is the identification and articulation of excellences sufficient to undermine any complaints that a student who does well by traditional criteria might care to raise.

Before the words can even leave Mr. Traditional’s mouth, his brain, Thomas hopes, reminds him that idiosyncratic excellences are valid and, by definition, rare. *Her scores are lower than mine, but she is [fill-in-the-blank], so I thank my lucky stars that we get to take this educational journey together.* Not only does this run through Mr. Traditional’s mind, but Ms. Idiosyncratic knows that it does. She is not released from double consciousness, but the hope is that she does escape (some) further stigmatization. She walked in through the front door with her head held high. No one is doing her any favors; her active and full participation on campus is a godsend. She brings with her tragic knowledge, creative tension, and the hope for a better day when American practices finally match American principles.⁸¹

That, believe it or not, is the easy part. Of course, there *are* idiosyncratic excellences, how could there not be? To effectively

80. *Id.*

81. See Ellison, *supra* note 27, at 586–87.

operationalize this concept, however, we need to know which idiosyncratic excellences are the most valuable when it comes to furthering legitimate institutional ends, and we must also consider both the burdens that those ends impose and the nature of their distribution throughout the relevant community. Thomas observes that racial and ethnic “minorities might very well be favored with regard to exhibiting” idiosyncratic excellences and he insists that “focusing upon idiosyncratic excellences, forged in the face of oppression, is a resounding way in which to affirm the richness of [a] group’s traditions and experiences.”⁸² This insight is at once apt, incomplete, *and* potentially quite dangerous. Are there idiosyncratic excellences that have been forged in the face of oppression? Without question. Can we affirm the richness of a group’s traditions and experiences by focusing on the idiosyncratic excellences of its members? Absolutely. However, we could still use some more clarity with respect to the nature of these excellences, and we also ought to think very carefully about how we might substantiate these excellences and about how we expect to instrumentalize them. In other words, even if we concede the value of idiosyncratic excellences, as I believe we should, we need to be able to distinguish between them, to rank their importance, and to put them to good and ethical use.

First, if it is to do good work for us, the concept of idiosyncratic excellences cannot refer to just any old idiosyncrasies. Justice Powell’s

82. See Thomas, *supra* note 3, at 956, 932.

Idaho farm boy does “bring something to Harvard College that a Bostonian cannot offer,” but that “something” is not comparable to the “something” that “a [B]lack student usually...” brings “that a white person cannot offer.”⁸³ Racial diversity is *not* like geographical diversity⁸⁴, nor should it be “assessed alongside other kinds of diversity (of musicians, Texans, chess players, French speakers, and so on).”⁸⁵ Race-conscious admissions programs do not typically operate in this fashion, and for good reason.⁸⁶ We typically do not, and we should not, compare the diminishing marginal returns of each additional Black enrollee to “the first Alaskan resident, or Christian fundamentalist, or Vietnamese immigrant, or former soap opera star, etc.”⁸⁷

Careless or insidious language along these lines often leaves the uninitiated with the mistaken impression that admissions programs operate along two simple tracks. First, elite institutions “admit applicants who have the most reliable indicators of past performance from whom one can hope...that the ‘past is prologue.’” Second, “they apply looser, more subjective standards of ‘interestingness’ or nontraditional achievement to

83. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978).

84. Justice O’Connor is somewhat careless with this idea as well: “Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.” *Grutter v. Bollinger*, 539 U.S. 306, at 333.

85. Akhil Reed Amar & Neal Kumar Katyal, *Bakke’s Fate*, 43 UCLA L. REV. 1745, 1772 (1996).

86. Justice O’Connor, for instance, highlights Michigan Law’s “longstanding commitment to...’racial and ethnic diversity with special reference’” to URMs and its efforts to enroll a “critical mass” of such students “to ‘ensur[e] their ability to make unique contributions to the character of the Law School.’” *Grutter v. Bollinger*, 539 U.S. 306 316.

87. See Samuel Issacharoff, *Can Affirmative Action Be Defended*, 59 OHIO ST. L.J. 669, 679 (1998); Lionel K. McPherson, *Righting Historical Injustice in Higher Education*, in *THE AIMS OF HIGHER EDUCATION: PROBLEMS OF MORALITY AND JUSTICE* 124 (Harry Brighouse & Michael McPherson eds. 2015).

a range of applicants deemed desirable, but not indispensable.”⁸⁸ One problem with pre-*Grutter* articulations of Powell’s diversity rationale is that they fail to acknowledge, both normatively and descriptively, the essential “centrality of the institutional commitment to maintaining” URM enrollment at elite colleges and universities.⁸⁹

In other words, there are categories of applicants who may not exhibit the “*most* reliable indicators of past performance” that are, nevertheless, indispensable and irreplaceable. They do not add (mere) spice to an otherwise lily-white campus community, but rather bring knowledge, the absence of which renders American elites ignorant, incompetent, and a threat to freedom and equality both here and abroad. Being Black is *not* like being good (or great) at chess, and “Scandinavian farm boys who skate beautifully,”⁹⁰ entirely welcome as they ought to be, do not carry with them the moral lessons of oppressed peoples, nor is the knowledge they possess likely to pose any significant challenge to the unaccountable power of dominant groups.⁹¹

Thomas, I very much get the sense, knows all of this, even if he does not always make that clear to the reader. He imagines, for instance, a response to Barbara Grutter’s complaint of reverse discrimination along these lines: ““Oh, Ms. Grutter, you are talking about the [B]lack [student], whom we admitted over you, who wrote that amazing novel and did six

88. *Id.*

89. *Id.*

90. David B. Oppenheimer, *Archibald Cox and the Diversity Justification for Affirmative Action*, 25 VA. J. SOC. POL’Y & L. 158, 180 (2018) (quoting Harvard Dean Wilbur J. Bender).

91. Anderson, *supra* note 37, at 93–94.

years of social service in South America, but who had only a 2.50 GPA.”⁹² This, it would seem, is what Thomas means by idiosyncratic excellences, and this is just where he starts to lose me and the plot. Idiosyncratic excellences, I would have thought, must be genuinely idiosyncratic and not the mere trappings of wealth and affluence. The demographic category of Black novelist-missionary applicants with 2.50 GPAs and low SAT scores, it is worth keeping in mind, may very well be an empty set. If this is what we mean by idiosyncratic excellences, then all we have done is to compound the meritocratic advantage of the wealthy and ensure the racial and socioeconomic resegregation of selective colleges and universities.

The other side of this coin is, however, likewise problematic. Imagine that the critique above is correct and damning. How might a Thomas ally respond? She might highlight the part that money cannot buy. She might focus more intently on the pain out of which the idiosyncratic excellences were forged than on the excellences themselves. The Black novelist-missionary applicant is not indispensable because she is a novelist-missionary, but because she is a *Black* novelist-missionary. She took her pain, subjected it to her will to survive, and fashioned out of it, art and service, the service of art, and the art of service. This is undeniably impressive. However, recall both that this, combined with a 2.50 GPA and low test scores, may refer to an empty set, and that, even if not technically an empty set, the numbers are surely quite low. I am happy to concede that

92. Thomas, *supra* note 3, at 939.

Thomas has identified a clear example of idiosyncratic excellence, but his characterization of that concept seems heavy on the excellence and light on the idiosyncrasy.

More important, I think, is to identify and to admit those applicants whose idiosyncratic excellences remain more inchoate (think, again, of “Unknown Knowns”). What might we unlock in a young person ready, willing, and able to pursue self-transformation? What might her self-transformation unlock in others? Though it certainly is important not to romanticize the elite college experience, it is also important not to downplay the role that these institutions play in helping to cultivate capable citizens and set the nation’s agenda.⁹³ The students who attend these institutions will be disproportionately represented in leadership positions, and they may never again find themselves part of such a racially integrated cooperative endeavor. The examples are legion, and the evidence from the social sciences is overwhelming.⁹⁴ Cross-racial interaction changes young people, mostly in a positive manner. It is extremely important, however, to carefully curate these interactions if they are to yield the kind of results that we are hoping for, and one aspect of that careful curation has to do with who is involved, at what numbers, and under what circumstances.

IV. INTEREST-CONVERGENCE, INSTRUMENTALIZATION, & SUBJECTIFICATION

93. See Jennifer M. Morton, *The Miseducation of the Elite*, 29 J. POL. PHIL. 3, 21 (2021).

94. See generally, Uma M. Jayakumar, *Expert Report of Dr. Uma Jayakumar*, 4 N.C. C. R. L. REV. 108, 123 (2023).

Second, it is tempting, wrong, and dangerous to assume that everyone benefits equally from cross-racial interactions at PWIs. That everyone benefits may indeed be true, but we surely must also concern ourselves with the distribution of the burdens that yield those benefits. It does not simply go without saying that URMs and non-URMs get the same (or equivalent) benefits out of such interactions, nor does it go without saying that there are no steep prices to pay for identifying and instrumentalizing a group's idiosyncratic excellences.

We are, it must be acknowledged, operating within the uncomfortable and unstable realm of interest convergence and racial fortuity.⁹⁵ The interests of URMs and non-URMs converge when it comes to benefiting from integrated educational experiences at elite colleges and universities, not only because we all share material interests in the fruits of those experiences, but also because we share perpetually convergent spiritual and democratic interests in the development and maintenance of a competent and robustly responsive democratic elite.⁹⁶ It is also terribly important, I think, to take what Richard Ford calls a “beady-eyed” approach to these matters even as we acknowledge with him that “[e]litism can’t be democratized.”⁹⁷

95. See Derrick Bell, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 69, 138–59 (2004).

96. See Johnson, *supra* note 65.

97. Richard T. Ford, *Capitalize on Race and Invest in Justice*, 126 HARV. L. REV. F. 252, 253 (2013) [hereinafter *Capitalize on Race*]; Richard T. Ford, *Elitism Can't Be Democratized*, BOSTON REV. (Oct. 1, 2019), <https://www.bostonreview.net/articles/democratizing-elitism/>.

Perhaps it goes without saying, but there is no elite education without the presence of elites. Elite colleges and universities are elite because elites attend them and send their children to them, and non-elites cannot rub shoulders with elites who have been excluded from campus. This is no *fait accompli*, and elitism does indeed “clash[] with the idea of the university as a classless meritocracy, but it is,” Ford also acknowledges, “indispensable to the status of the elite school and hence to the social mobility [that] it offers.”⁹⁸

Elite universities, it is crucial to note, offer the promise of social mobility to non-elites and the assurance of social *immobility* to elites. Elite American higher education is, Michael Sandel observes, “like an elevator that most people enter on the top floor.”⁹⁹ “In practice,” Sandel continues, “most colleges and universities do less to expand opportunity than to consolidate privilege.”¹⁰⁰ If you do not like the sound of all of that, then your problem is less with elite college admissions than it is with the fact that, as Ford puts it, “[w]e live in a country—indeed a planet—dominated by markets...”¹⁰¹ All of that said, even Ford admits that the “complaint of commodification has some bite when applied to university admissions, where perhaps we are entitled to expect loftier motives to predominate.”¹⁰² That, I submit, is the narrow band within which this discussion operates. My argument, like Ford’s, is straightforwardly meliorist and beady-eyed.

98. *Id.*

99. Sandel, *supra* note 13, at 159.

100. *Id.*

101. *Capitalize on Race*, *supra* note 97, at 254.

102. *Id.* at 253.

The neoliberal university is, to be clear, an abomination, but it is also not going anywhere anytime soon.

How then to operate within the real world, a world in which the best we can presently hope to do is to “capitalize on race and invest in justice”? As I see it, the rubber meets the road precisely where we negotiate the line between subjectification and instrumentalization. Whites want Blacks to teach them how to navigate spaces that are not as lily-white as the spaces they have known, and Black would-be elites need to learn how to survive and thrive in overwhelmingly white spaces.¹⁰³ What many white students on elite campuses tend to miss, but admissions officers may not, is GPB’s function as not only an *alienated familiar*, but also as the potential builder of bridges.¹⁰⁴ Between GPW and the Blacks of Detroit (the *simply alien other*) sits GPB (the *alienated familiar other*). Finally, his fraught experiences in white spaces can pay dividends both for himself and for others. GPB is the lefty reliever who can sometimes handle Shohei Ohtani. He gets you out of jams and keeps the line moving.¹⁰⁵

103. See generally, Kyneshawau Hurd & Victoria C. Plaut, *Diversity Entitlement: Does Diversity-Benefits Ideology Undermine Inclusion*, 112 NW. U. L. REV. 1605 (2018); Natasha K. Warikoo, THE DIVERSITY BARGAIN 43–61 (2016); Aries, *supra* note 19, at 37–55.

104. Elizabeth Aries, for instance, notes that white social learning at Amherst “was most likely to occur if [white students’] Black friends were of equal or higher socioeconomic status” and Julie Park and her coauthors find that “middle and upper-middle class Black students...have notably higher rates of cross-racial interaction” and function as bridge-builders, “play[ing] a unique role in supporting a positive campus racial climate.” See Aries, *supra* note 19, at 35; Julie Park, Nicholas Bowman, Nida Denson, & Kevin Eagan, *Race and Class beyond Enrollment: The Link between Socioeconomic Diversity and Cross-Racial Interaction*, 90 J. HIGHER EDUC. 665, 683–84 (2019); Julie Park, RACE ON CAMPUS: DEBUNKING MYTHS WITH DATA 68 (2018); Park, *supra* note 49, at 155 (“With the SCOTUS ruling in *SFFA*, some selective institutions will become like donuts, with growing social distance (i.e., the hole of the donut) between groups with more privilege and students from lower socioeconomic backgrounds, especially low-income URM students.”).

105. “Increasingly,” Julie Park observes, “name-brand institutions are mostly made up of full-pay, affluent students (mostly White and, to some extent, Asian American) and to a lesser extent, low-income students who receive need-based financial aid, with less representation from groups in between: the missing middle.” Park also worries that “the gap between these two groups may widen”

CONCLUSION

“ETERNALLY AT PEACE AND PERPETUALLY AT WAR”

“[S]ometimes I get awfully tired of trying to save the white man’s soul.”¹⁰⁶
—Justice Marshall

This is a lot to ask of a young person who already has enough on their plate as a learner, long before we start to factor in their role as a teacher. Also, just because someone like GPB has a lot to teach does not mean that anyone is particularly keen to listen and to learn. Black students at PWIs, Asad Rahim observes, often (1) “feel compelled to silence those perspectives that bring attention to their outsider status,” (2) “feel reluctant to introduce perspectives that originate from their personal experiences,” and (3) find themselves “inclined to avoid sharing their views on race” because they anticipate “negative reactions from their white peers and perhaps even professors...”¹⁰⁷ Even though “Black students commonly report[] both a desire to talk about race and a belief that discussing race and racism is essential to discussions,” they often find themselves “reluctant to bring up either topic in class discussions,” citing “a widespread view that talking about race diminishes their intellectual standing.”¹⁰⁸

post-*SFFA* such that “we see drops in in-between groups like middle-class Black students, who have traditionally helped bridge racial *and* economic divides on campus.” Park, *supra* note 49, at 155 (emphasis in the original).

106. GILBERT KING, *DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA* 4 (2012) (quoting Thurgood Marshall).

107. Asad Rahim, *Race as Unintellectual*, 68 *UCLA L. REV.* 632, 637 (2021).

108. *Id.* at 638.

White students at PWIs, it must be noted, do not share these concerns. They “perceive no reputational costs for discussing race and generally feel that racial analysis is encouraged within their departments, no matter who offers that analysis.”¹⁰⁹ White students might come across as both analytical and broad-minded when discussing race and racism at PWIs, while Black students find themselves navigating a perceived “link between discussing race and diminished intellectual capacity...”¹¹⁰ (Black HBCU students, it is worth noting, report a very “different relationship between talking about race and being perceived as intelligent.”¹¹¹)

Upon his retirement, the nation’s first Black justice of the United States Supreme Court was the subject of a moving tribute by the nation’s first female justice. Justice O’Connor, writing in the *Stanford Law Review*, acknowledges that Justice Marshall’s perspective was special in a way that others were not. She begins, quite movingly, by highlighting the ways in which he interfaced with the world:

His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established

109. *Id.* at 659.

110. *Id.* at 662.

111. *Id.* at 663.

safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice.¹¹²

O'Connor insists that Marshall brought to his role on the Court not only "legal acumen, but also his life experiences, constantly pushing and prodding" his brothers and sister "to respond not only to the persuasiveness of legal argument but also to the power of moral truth."¹¹³ She confesses that she was "most personally affected by Justice Marshall as a raconteur," including his capacity and his willingness to provide her with "a peephole...into the character of a man who is at once eternally at peace and perpetually at war."¹¹⁴

This is, I think, a version of what Ellison calls "tricky magic."¹¹⁵ Black as other *and* Black as the conscience of the Nation. *Eternally at peace and perpetually at war*. I do not think that I have it in me to criticize Justice O'Connor's heartfelt and exceedingly powerful tribute to Justice Marshall. It is a credit to her and, I suspect, a credit to her own unique perspective as a woman *in this society* that she was able to pick up so much of what he was putting down. However, I *am* bold enough to claim that his air of "eternal peace" was a front.

112. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992).

113. *Id.*

114. *Id.* at 1217, 1219.

115. Ellison, *supra* note 27, at 587.

Justice Marshall, like GPB and all other Black Americans navigating white spaces, experienced, among other things, epistemic exploitation and ontic burnout.¹¹⁶ When other minds were at rest or turned to trivial matters, he was still teaching anyone who would listen. Justice O'Connor asks Marshall "how he managed to avoid becoming despondent from the injustices he saw."¹¹⁷ The Justice responds with yet another parable (*Now I must teach you not only about the horror but also how to survive it?!?*). This time Marshall finishes a harrowing story about an innocent Black man sentenced to life in prison by an all-white jury with a seemingly rhetorical question. "But what are you going to do?" he asks before answering his own question with an even more profound one. "There are only two choices in life," Marshall insists, "stop and go on." "You tell me," he puts the question to O'Connor (who surely knows more than a little about that eternal quandary), "what would you pick?"¹¹⁸

The man was idiosyncratically and every other kind of excellent, *and* he was also exhausted. The same goes, I submit, for the URMs on the campuses of elite colleges and universities. Ford's beady-eyed approach is no doubt the only sane and healthy response

116. See generally Nora Berenstain, *Epistemic Exploitation*, 3 ERGO 569 (2016); Gerry Dunne & Alkis Kotsonis, *Epistemic Exploitation in Education*, 55 EDUC. PHIL. & THEORY 343 (2023).

117. O'Connor, *supra* note 112, at 1219.

118. *Id.* at 1220.

to centuries of American recalcitrance. Exhausting and exploitative as it all is, Black people “must have something for whites to listen to when one day they acquire the power and whites become willing to listen to them.”¹¹⁹ Justice Marshall knew this, and so too do the brave *and* astonishingly excellent underrepresented minorities who find themselves under siege and nevertheless committed to fighting the good fight on the campuses of this country’s elite colleges and universities. The imperative is clear: let us see to it that we embrace their alienated familiarity and their democratic irreplaceability so that they might help us ensure that all flourish in this land of plenty. *Don’t stop. Go on.*

119. Bernard R. Boxill, *Power and Persuasion*, 32 J. SOC. PHIL. 382, 385 (2001).