Minnesota Journal of Law & Inequality

Volume 44 | Issue 1 Article 2

February 2026

What Did the SFFA Court "Say to John"? White Innocents, Reciprocal Democratic Sacrifice, & the Message of Affirmative Action

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What Did the *SFFA* Court "Say to John"? White Innocents, Reciprocal Democratic Sacrifice, & the Message of Affirmative Action

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Abstract

This Article rejects claims (1) that there is a moral equivalence between the racial classifications associated with Jim Crow and the racial classifications associated with affirmative action and (2) that race-conscious admissions programs punish white Americans. First, it is possible to help those in urgent need and the political community at large without wronging others. Second, a failure to acknowledge the unavoidability of reciprocal democratic sacrifice enables members of the Supreme Court of the United States and others to pretend that any burden placed on "innocents" is undue. Third, this pretension conveys the highly dangerous message that Black gain necessarily depends upon corresponding substantial and unjustifiable white loss. Finally, the Article invites the articulation of alternative messages that attempt to recover the common-sense ordinariness of affirmative action. Alternative messages of this kind would arm nonbeneficiaries with the resources necessary to reconcile themselves to the unavoidability of reciprocal democratic sacrifice and enable them to pursue accomplishments and relationships free from avoidable complicity in American society's unexpiated crimes.

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> Imagine two college applicants from North Carolina, John and James. Both trace their family's [sic] North Carolina roots to the year of UNC's founding in 1789. Both love their State and want great things for its people. Both want to honor their family's [sic] legacy by attending the State's flagship educational institution. John, however, would be the seventh generation to graduate from UNC. He is White. James would be the first; he is Black. Does the race of these applicants properly play a role in UNC's holistic merits-based admissions process?[1]
>
> — Justice Jackson

> [W]hat would Justice J[ackson] say to John when deeming him not as worthy of admission: Some statistically significant number of white people had advantages in college admissions seven generations ago, and you have inherited their incurable sin?[2]
>
> — Justice Thomas

Introduction

A. Identities & Responsibilities

Each one of us is obligated to accept morally compromised identities that we have not chosen,[3] to foster just institutional arrangements,[4] to avoid reinforcing injustices or perpetuating their negative consequences,[5] and to resist unfair and unjust schemes.[6] We arrive on the scene already subject to a host of unselected obligations and conflicting demands for our loyalty and allegiance.[7] The liberal vision's picture of a self that stands beyond the reach of its experiences—the "unencumbered self"[8]—is a proceduralist fantasy and a dangerous one at that.

Does this mean that we come on to the scene already saddled with a host of forward-looking responsibilities arising from contingent social relations that we did not choose? It does.

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1. Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181, 385–86 (2023) (Jackson, J., dissenting).

2. *Id.* at 282 (Thomas, J., concurring).

3. Mark B. Brown, *James Baldwin and the Politics of White Identity*, 20 CONTEMP. POL. THEORY 1, 4 (2021).

4. TOMMIE SHELBY, DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM 54 (1st prtg. 2016).

5. *Id.*

6. Candice Delmas, *Political Resistance: A Matter of Fairness*, 33 LAW & PHIL. 465, 475 (2014).

7. *See* Judith N. Shklar, *Obligation, Loyalty, Exile*, 21 POL. THEORY 181, 184–85 (1993); Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81, 90 (1984) [hereinafter *Procedural Republic*]; MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 220–25 (Farrar, Straus and Giroux ed.,2009).

8. *Procedural Republic*, *supra* note 7, at 86.

First, robust and energetic resistance to oppression just is one of the ways in which we show respect for its victims and for ourselves.[9] Second, the discharge of these obligations is one way in which we respect ourselves and others as well-meaning moral agents.[10] And, third, oft-ignored, though nevertheless perpetually convergent, spiritual and democratic interests undermine the seemingly common sense conclusion that Black gains are indistinguishable from white losses.[11]

B. Slavery & Scalia's Dad

> [White Americans] are dimly, or vividly, aware that the history they have fed themselves is mainly a lie, but they do not know how to release themselves from it, and they suffer enormously from the resulting personal incoherence. This incoherence is heard nowhere more plainly than in those stammering, terrified dialogues which white Americans sometimes entertain with the black conscience, the black man in America. The nature of this stammering can be reduced to a plea. *Do not blame me. I was not there. I did not do it.*[12]
>
> — James Baldwin

However, what do we say to the white applicant who never owned or transported slaves and was born long after racial segregation's de jure implementation? *He* was not there. *He* did not do it. In a scathing critique of Justice Powell's controlling opinion in *Regents of the University of California v. Bakke*,[13] then-professor Antonin Scalia observes that his own father arrived in the United States as a teenager and had probably never seen a Black man let alone "profited from the sweat of any black man's brow."[14] Later in the same paragraph, however, Scalia acknowledges that white ethnics had, like all whites, benefitted from "discrimination against blacks" or themselves practiced it.[15] His point isn't that white ethnics don't practice discrimination against Blacks let alone benefit from it, but just that "to compare *their* racial debt . . . with that of those who plied the slave trade, and who maintained a formal caste system for many years thereafter, is to confuse a mountain with a molehill."[16]

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9. *See, e.g.*, Thomas E. Hill, Jr., *Moral Responsibilities of Bystanders*, 41 J. SOC. PHIL. 28, 30–31 (2010).

10. *Id.* at 37.

11. M. Broderick Johnson, *"Trying to Save the White Man's Soul": Perpetually Convergent Interests and Racial Subjugation*, 133 YALE L.J. 1335, 1352–60 (2024).

12. JAMES BALDWIN, *White Man's Guilt*, *in* THE PRICE OF THE TICKET 409, 410–11 (St. Martin's/Marek ed., 1985) (emphasis added).

13. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

14. Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race"*, 1979 WASH. U. L.Q. 147, 152 (1979).

15. *Id.*

16. *Id.* (emphasis added).

One response to this incessantly repeated "innocent white" objection[17] is to zero in on the unjust enrichment that even Scalia admits.[18] As accurate and powerful as this acknowledgement may be, I also find myself attracted to the position of those disinclined to press this potentially divisive argument.[19] Better perhaps is a response to the objection that simply focuses on the reality (1) that shared compensatory burdens are not at all unusual and (2) that innocent non-beneficiaries of unjust enrichment *already* suffer from non-reciprocal and unjust burdens.[20]

Even in the absence of compensatory motivations, the government regularly subjects segments of society to preferential treatment even though doing so necessarily burdens innocent nonbeneficiaries.[21] These programs are instances of affirmative action and how very odd, unfair, unjust, and bad it would be, if, as Jed Rubenfield observes, "the only kind of affirmative action made unconstitutional under the Civil War Amendments is the kind that would offer assistance to blacks."[22] A nation

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17. ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 139 (2010).

18. *See* James Boyd White, *What's Wrong with Our Talk About Race? On History, Particularity, and Affirmative Action*, 100 MICH. L. REV. 1927, 1941 n.24 (2002) ("Being a white person in America is like buying a house that was built by slaves before the Civil War."); *see also* RONALD J. FISCUS, THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION 46–47 (Stephen L. Wasby ed., 1992) ("Was Allan Bakke personally responsible for any of the racism that held back the minority applicants? Very possibly not, but that is the wrong question. That makes him 'innocent' only *up to the point at which he applies for one of the special admission seats*. But he becomes a guilty party the moment he seeks to receive a benefit he would not qualify for without the accumulated effects of racism. At that point he becomes an accomplice in, and a beneficiary of, society's racism. He becomes the recipient of stolen goods.").

19. *See, e.g.*, ANDERSON, *supra* note 17, at 139.

20. ANDERSON, *supra* note 17, at 139–40; *see also* Kwame Anthony Appiah, *"Group Rights" and Racial Affirmative Action*, 15 J. ETHICS 265, 273 (2011) ("If justice requires restitution to Japanese Americans for the wrongs they suffered in internment in World War II, I cannot complain, when my taxes are raised to pay this restitution, that I did not do the interring . . . . In a society with a history of racial inequality, whose consequences are evident in continuing unequal distributions of social goods, contributing to eradicating racial inequality is a perfectly reasonable aim."). *But see* Matthew Adams, *Nonideal Justice, Fairness, and Affirmative Action*, 20 J. ETHICS & SOC. PHIL. 310, 316–17 (2021) (noting that affirmative action programs are not analogous to raising taxes for state reparations for internment).

21. Jed Rubenfeld, *Affirmative Action*, 107 YALE L. J. 427, 464 (1997) (observing that "programs that offer special opportunities to the poor," "laws that require special accommodations for the handicapped," and "state action that grants preferences to veterans" are "[a]ll . . . instances of affirmative action" that inflict corresponding harm on "the unoffending rich, the innocently able-bodied, [and] the law-abiding civilian population," respectively).

22. *Id.*; *see also* Kermit Roosevelt III & Kellen McCoy, *Second Founding, Second Redemption*, 26 U. PA. J. CONST. L. 1369, 1418 (2024) ("The recent suit challenging FDA loan forgiveness for Black farmers is an illustration. If the FDA decided to help out potato farmers, or farmers in Wisconsin, or farmers over the age of fifty, any of those preferences

stratified on the basis of disability status surely is an unjust one, but this is no less true when it comes to race. Why, then, do so many in our society balk at *racial* affirmative action but not these other kinds?

Kermit Roosevelt, for one, prefers over what we might call "simple racism" an explanation grounded in his sense that whites "feel accused by" race-based affirmative action but not by other preferences.[23] This strikes me as both accurate and incomplete. White Americans do indeed seem to feel accused by affirmative action in a way that they don't feel accused by other preferences, but that reaction may also have something to do with the extent to which they can see themselves in those other preferences.[24] Whites are and can become poor, disabled, veterans, and legacies but they are not and will never become Black.[25] Losing to these others is losing to a part of oneself, while losing to Black Americans seems to function as a unique form of group-based threat in this society.[26] If

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would have been acceptable, without any demonstration of wrongdoing. But a preference for Black farmers requires a specific showing of unconstitutional discrimination, and the fact that ninety-seven percent of the Trump Administration's $9.2 billion farm bailout went to white farmers is irrelevant as long as it did not use explicit classifications."); John Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U. L. REV. 363, 365 (1966) ("Certainly we see no conflict between our ideals of equality and the granting of special treatment to the handicapped. And we not only tax the poor at a lower rate than the rich but we have a whole variety of social programs which, while they do not actually produce equality, nonetheless treat the needy in a sense more favorably than the wealthy."); Kent Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 585 (1975); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 406 (1978) (Blackmun, J., concurring in part and dissenting in part) ("[G]overnmental preference has not been a stranger to our legal life. We see it in veterans' preferences. We see it in the aid-to-the-handicapped programs. We see it in the progressive income tax . . . . And in the admissions field . . . educational institutions have always used geography, athletic ability, anticipated financial largess, alumni pressure, and other factors of that kind."); *Bakke*, 438 U.S. at 375 (Brennan, J., concurring in part and dissenting in part) ("Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go . . . there is a significant likelihood that they will be treated as second-class citizens because of their color."); Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CALIF. L. REV. 87, 111–12 (1979) ("[I]t is inconceivable that a slight dose of unintended stigma could by itself render an otherwise acceptable classification unconstitutional . . . . The conferral of benefits by legislation is not typically an attempt to stigmatize the beneficiaries; certainly that would be a strange explanation for veterans' preferences or benefits to the handicapped.") (citation omitted).

23. Kermit Roosevelt III, *The Ironies of Affirmative Action*, 17 U. PA. J. CONST. L. 729, 746 n.59 (2015).

24. *See* Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293, 350–51 (2018).

25. *See, e.g.*, Shklar, *supra* note 7, at 185.

26. Raea Rasmussen and coauthors, for instance, find that "liberal, moderate, and conservative White Americans alike believe that racism is a zero-sum game with gains for Black people meaning losses for White people." Raea Rasmussen et. al., *White (but Not Black) Americans Continue to See Racism as a Zero-Sum Game; White Conservatives (but Not Moderates or Liberals) See Themselves as Losing*, 17 PERSPS. ON PSYCH. SCI. 1800, 1806 (2022). They further note, however, that liberal white Americans, moderate white Americans, and

unjust racialization itself functions as a qualification,[27] then white Americans are forever barred from outcompeting their Black counterparts along that dimension. My claim is not that all white Americans are equally enthralled by the prospect of this group-based threat. I do worry, however, that such sensitivity may already be a function of the extent to which they believe that racism itself is a zero-sum game that they are losing or at risk of losing.[28]

C. Guilt & Rebellion

> I think white males have a hard time because we are constantly blamed for being power-holding oppressors, yet we are not given many concrete ways to change. Then we just feel guilty or rebel.[29]
> — A student at the University of Michigan

Guilt—though perhaps sometimes and in some ways effective—is, a luxury for which we do not have the time. Rebellion, doubly so. Concrete ways to change are also often difficult to articulate and even more difficult to articulate persuasively. Our mutual interest in the fruits of race-conscious admissions at selective institutions of higher learning is, however, relatively easy to express. These institutions produce the American elite; a segregated elite is an incompetent elite; and an incompetent elite is a danger to this country and to the world.[30]

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conservative white Americans are, nevertheless, distinguishable from one another to the extent that "[l]iberal White Americans see racism as a zero-sum game they are winning by a lot, moderate White Americans see it as a game they are winning by only a little, and conservative White Americans see it as a game they are losing." *Id.* at 1806–07; *see also* Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSPS. ON PSYCH. SCI. 215, 217 (2011) (finding that many white Americans believe that advances in equality for Black Americans have led to anti-white discrimination that is more prevalent than anti-Black discrimination); *see also* Victoria C. Plaut, *Law and the Zero-Sum Game of Discrimination: Commentary on Norton and Sommers*, 6 PERSPS. ON PSYCH. SCI. 219, 219–21 (2011) (finding that the increasing belief in prevalent anti-white discrimination has "serious implications for antidiscrimination law.").

27. *See, e.g.*, ANDERSON, *supra* note 17, at 157–60.

28. *See* Rasmussen et al., *supra* note 26, at 1806–07.

29. Mark A. Chesler, Melissa Peet & Todd Sevig, *Blinded by Whiteness: The Development of White College Students' Racial Awareness*, *in* WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM 215, 225 (Ashley "Woody" Doane & Eduardo Bonilla-Silva eds., 2003).

30. *See, e.g.*, ANDERSON, *supra* note 17, at 98–99 (observing that whenever "advantaged groups are able to segregate themselves from the disadvantaged, they lose personal contact with the problems of the disadvantaged" and "become complacent and insular."); Elizabeth S. Anderson, *Fair Opportunity in Education: A Democratic Equality Perspective*, 117 ETHICS 595, 603 (2007) (observing that segregation "deprives multiply [sic] advantaged elites of the cultural capital that circulates in disadvantaged social circles" rendering them "less qualified to do their jobs."); Elizabeth Anderson, *The Social Epistemology of Morality: Learning from the Forgotten History of the Abolition of Slavery*, *in* THE EPISTEMIC LIFE OF GROUPS: ESSAYS IN THE EPISTEMOLOGY OF COLLECTIVES 75, 78 (Michael S. Brady & Miranda

Overwhelmingly white elite educational spaces yield an overwhelmingly white cadre of American leaders and an overwhelmingly white cadre of American leaders—especially one educated in segregated settings—will and does feature a view of human flourishing that is "stunted and often wrong."[31]

There's also no good reason, I think, for us to saddle our model of the average white applicant with a presumption of inordinate ignorance or close-mindedness. He may, for instance, be willing to acknowledge all that has been established to this point and yet still find it a kind of "cold comfort" for his experience of exclusion. As Khiara Bridges notes, the diversity rationale in support of race-conscious admissions "attempts to comfort white people who lose out on coveted spots in an incoming class by assuring them that *other white people*—the ones who secured a seat—are winners."[32] And it should surprise us not at all that white Americans, simply because they are human beings, find themselves incentivized to question and to oppose policies that "sometimes . . . operate to their detriment."[33] They may justifiably wonder: How can I benefit from an integrated setting that will not have me? The key, I think, is to better characterize the exclusion itself and the nature and extent of the incidental burden that one must bear because of it.

Fricker eds., 2016) (observing that "[s]ound moral inquiry is not only essentially social; it demands the participation of the affected parties, of those making claims on others' conduct, as well as those to whom such claims are addressed" and that "[w]e cannot hope to get our moral thinking straight unless we include the affected parties in our moral inquiry, and include them on terms of equality.").

31. Rachel A. Cohen, *I'm a White HLS Grad. Classroom Diversity Made Me a Better Lawyer.*, HARV. CRIMSON (Dec. 28, 2024), https://www.thecrimson.com/article/2024/12/28/cohen-harvard-law-diversity/ [https://perma.cc/R5KL-T2MD]; *see also* Barry Sullivan, *The Power of Imagination: Diversity and the Education of Lawyers and Judges*, 51 U.C. DAVIS L. REV. 1105 (2018) (noting the salience of racial and ethnic diversity in legal education); Justin Cole & Gregory Curfman, *Back to* Bakke*: The Compelling Need for Diversity in Medical School Admission*s, 22 YALE J. HEALTH POL'Y L. & ETHICS 60 (2023).

32. Khiara M. Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 138 (2022) (emphasis added).

33. *Id.*; *see also* CHARLES W. MILLS, BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE 146 (1st prtg. 1998) ("Whites do not have to be racist to want to keep their privileges (though racism, as a rationalization, may make it morally easier); they just have to be human.").

D. Moral Asymmetry

> [Black Law] is law that is inexplicable and probably wrong except in the context of the courts' desire to aid the black drive for social parity.[34]
>
> — Bob Comfort

We should care about group inequality precisely because its elimination or melioration is, as Glenn Loury insists, "a necessary element of what is needed to establish a just political community."[35] This, in turn, renders the notion of, and the aversion towards so-called "Black Law"—"law that is inexplicable and probably wrong except in the context of the courts' desire to aid the black drive for social parity"[36]—quite striking in the context of American history and culture. Imagine criticizing "Disability Law" for *its* moral asymmetry—for the sense (1) that it is "law that is inexplicable and probably wrong except in the context of the courts' desire to aid the [disabled community's] drive for social parity"[37] and (2) that, therefore, its core aims are to protect, include, and empower the disabled rather than to ensure equal treatment on the basis of disability/nondisability status.[38] Presumably a candid response to such an accusation of moral asymmetry is "guilty as charged."

Yes, it's true, we might calmly concede. "Disability Law" is indeed "inexplicable and probably wrong except in the context of" not simply the courts', but also society's "desire to aid the [disabled community's] drive for social parity."[39] Social parity—equal social status for all—is the very good for which we are striving, and its pursuit is obviously inextricable from the sometimes "differentiated"[40] burdens that we must necessarily bear to bring it into being. The achievement of equal status for Black

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34. Memorandum from Bob Comfort to Justice Powell 49 (Aug. 29, 1977), https://scholarlycommons.law.wlu.edu/casefiles/114/ (on file with Washington & Lee Univ. Sch. of Law); *but see* Claire Jean Kim, *Are Asians the New Blacks?*, 15 DU BOIS REV. 217, 221 (2018) ("[I]t is the law that has degraded Blackness, not the other way around.").

35. Glenn C. Loury, *Why Should We Care About Group Inequality?*, 5 SOC. PHIL. & POL'Y 249, 260 (1987).

36. Comfort, *supra* note 34, at 49.

37. *Id.*

38. Exemplifying an asymmetrical focus on what we might call suspect *classes* combined with a symmetrical and somewhat less weighty focus on what we might call suspect *classification. See* Lawrence Blum, *Racial and Other Asymmetries: A Problem for the Protected Categories Framework for Anti-Discrimination Thought*, *in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 182 (Deborah Hellman & Sophia Moreau eds., 2013); Sonu Bedi, *Collapsing Suspect Class with Suspect Classification: Why Strict Scrutiny Is Too Strict and Maybe Not Strict Enough*, 47 GA. L. REV. 301 (2013); Anthony Sangiuliano, *Justifying Antisubordination*, 3 AM. J.L. & EQUAL. 347, 349, 367–72 (2023).

39. Comfort, *supra* note 34, at 49.

40. Danielle Allen, *Integration, Freedom, and the Affirmation of Life*, *in* TO SHAPE A NEW WORLD 146, 159 (Tommie Shelby & Brandon M. Terry eds., 2018).

Americans and other underrepresented minorities (URMs) plausibly requires asymmetrical treatment of URMs vis-à-vis non-URMs because and to the extent that they are, like our disabled fellows, "differentially situated within the opportunity structure" of our society.[41]

E. Pushing Back

> If I have two children, and one is dying from a disease that is making the other uncomfortable, I do not show equal concern if I flip a coin to decide which should have the remaining dose of a drug . . . . [T]he right to treatment as an equal is fundamental, and the right to equal treatment, derivative. In some circumstances the right to treatment as an equal will entail a right to equal treatment, but not, by any means, in all circumstances.[42]
>
> — Ronald Dworkin

I submit that it is quite possible to help those in urgent need without wronging others even as and, sometimes, because we treat them differently. That we seem to recognize this ordinary truth with respect to our own families, and with respect to our disabled fellows among others, leads me to believe that we might already possess some of the necessary discursive resources to resist the zero-sum rhetorical framing that is so disturbingly popular with both the Court and white Americans.[43]

My goal in this Article is then to push back against what I've come to think of as Anti-Black Law by recovering some of the common-sense ordinariness of affirmative action, in general, and race-conscious admissions, in particular. As Danielle Allen reminds us, the open secret of democracy is that "some citizens are always giving things up for others."[44] Democracy, she observes, "puts its citizens under a strange form of psychological pressure by building them up as sovereigns and then

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41. Bradley A. Areheart, *The Symmetry Principle*, 58 B.C. L. REV. 1085, 1123–30 (2017); *see also*, Robert Westley, *White Normativity and the Racial Rhetoric of Equal Protection*, *in* EXISTENCE IN BLACK 97 (Lewis R. Gordon ed., 1997) ("'Race' is not oppressed in American society. Black people are oppressed. Native Americans are oppressed. Chicanos are oppressed. People of color are oppressed."); Nicholas deB. Katzenbach & Burke Marshall, *Not Color Blind: Just Blind*, *in* SEX, RACE, AND MERIT 54 (Faye J. Crosby & Cheryl VanDeVeer eds., 2000) ("Reading the Equal Protection Clause to protect whites as well as blacks from racial classification is to focus upon a situation that does not and never has existed in our society."); Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1767 (2001) ("Equal treatment . . . cannot be the sum total of equal protection because the application of that principle requires that the circumstances of the groups be similar. Race, however, embodies asymmetry–of resources, power, access, and social status.").

42. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 227 (Duckworth 1977).

43. *See* Rebecca Aviel, *Rights as a Zero-Sum Game*, 61 ARIZ. L. REV. 351, 368–71 (2019); Rasmussen et al., *supra* note 26, at 1806–07.

44. DANIELLE ALLEN, TALKING TO STRANGERS: CITIZENSHIP AFTER BROWN V. BOARD OF EDUCATION 29 (2004).

regularly undermining each citizen's experience of sovereignty."[45] What this also means is that democratic citizenship is inextricable from the experience of "democratic sacrifice": the experience of, and the cultivation of the skills and the disposition to support, "convert[ing] loss into . . . freely given gift[s] to be reciprocated."[46]

I take it that when poor people and people with disabilities and veterans enjoy preferential treatment, *as well as* symmetrical protection from unjust discrimination, they are in receipt of freely given gifts bestowed in part by the unoffending rich, the able-bodied, and civilians[47] as a simple function of communal loss-shifting.[48] Of course, there are those who do not look upon these as freely given gifts at all, but I propose to set those who take that position aside for the purposes of this Essay. I want instead to leverage our broadly, if not entirely, shared intuitions regarding the justifiability of seemingly preferential treatment in other morally asymmetrical contexts to counter the Court's false, inflammatory, and pernicious contentions, (1) that there is a moral equivalence between the racial classifications associated with Jim Crow and the racial classifications associated with affirmative action; and (2) that race-conscious admissions programs necessarily punish white Americans.

F. Reconsidering the Message of Affirmative Action

My approach will be to reconsider the validity and impact of the messages that the Court is conveying to American high school students. This concern also extends to the messages that the Court is likewise conveying to all of us in and out of academia who find ourselves deeply invested in seeing American youth flourish individually and collectively as they also contribute mightily to the betterment of society. It is more than a little concerning that a number of the Court's members have been operating simultaneously as "exemplars" of public reason[49] *and*,

45. *Id*. at 27.

46. *Id*. at 36.

47. Rubenfeld, *supra* note 21, at 464.

48. Christopher Edley Jr., *Affirmative Action and the Rights Rhetoric Trap*, 3 HARV. BLACKLETTER J. 9, 14 (1986).

49. JOHN RAWLS, POLITICAL LIBERALISM 216, 233, n.18 (1993) ("A supreme court . . . protect[s] the higher law [of the people]. By applying public reason, the court is to prevent that law from being eroded by the legislation of transient majorities, or more likely, by organized and well-situated narrow interests skilled at getting their way . . . . *It must be said that historically the court has often failed badly in this role*.") (emphasis added to indicate footnote language); *see also* Jeremy Waldron, *Public Reason and "Justification" in the Courtroom*, 1 J.L. PHIL. & CULTURE 107, 129, 131 (2007) ("What courts [interpreting the United States Constitution] call 'giving reasons' is an attempt to connect the decision they are facing with some piece of abstract and ill-thought-through eighteenth-century prose. Or it is an attempt to construct desperate analogies between the present decision they face and

contrastingly, what we might call cognitive "laziness masters" in their capacity as "socially designated authorities for expert ignorance."[50] They carry on the pretense (1) that inclusion is morally indistinguishable from exclusion; (2) that reciprocal democratic sacrifice is somehow avoidable; and (3) that *any* burden placed on "innocents"—no matter how insignificant, nonarbitrary, justified, and proportionate—is undue.[51] The implicit goal of this rhetoric is to convince the American public that, no matter whether we think that racial equality is just around the corner or an unattainable goal, the cure is worse than the disease or even that the cure *is* the disease.[52]

"Two wrongs don't make a right," "you can't fight fire with fire," and "[t]he way to stop discrimination on the basis of race is to stop

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other decisions that happen to have come before them (in which they were engaged in similar contortions). There is laborious discussion of precedent, even though it is acknowledged at the highest levels of adjudication that precedent does not settle the matter . . . . And all the time, the real issues at stake in the good-faith disagreement about rights get pushed to the margins. They usually take up only a paragraph or two of the twenty-pages or more devoted to an opinion, and, even then the issues are seldom addressed directly.").

50. JOSÉ MEDINA, THE EPISTEMOLOGY OF RESISTANCE 145–46 (2013) ("Laziness masters" or "expert ignoramuses" play a key role in a "social division of cognitive laziness, a social orchestration of epistemic attitudes that gives some subjects or subcommittees a special role and responsibility in engineering and instilling the epistemic deficiencies and atrophies that support active ignorance, such as the inability to challenge certain things or to ask certain questions."); *see also James B. Beam Distilling Company v. Georgia*, 501 U.S. 529, 549 (1991) ("I am not so naïve (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it as judges make it, which is to say as though they were 'finding' it—discerning what law is, rather than decreeing what it is today changed to, or what it will tomorrow be.") (Scalia, J., concurring) (emphasis omitted); Richard Posner, *Comment on Professor Gluck's "Imperfect Statutes, Imperfect Courts"*, 129 HARV. L. REV. 11, 13 (2015) ("'[T]he law made me do it' might be a judicial motto. Most judges would be profoundly uncomfortable having to explain that they had 'interpreted' a statute in a particular way because an issue had arisen that the legislators had not envisaged when they enacted the statute and so the judges resolved it in what they thought was a sensible way at least roughly congruent with what the statute seemed to be concerned with. In short, judges prefer for reasons of self-protection to be thought of as agents rather than as principals."); Bill Watson, *Did the Court in* SFFA *Overrule* Grutter*?*, 99 NOTRE DAME L. REV. REFLECTION 113, 135–36 (2023) ("The Court's failure to explain its overruling of *Grutter* [in *SFFA*] calls into question the Justices' sincerity and good faith. It also injects needless confusion into the law, making it harder to comply with the Court's holdings and contributing to further litigation. And it undermines the impersonality of the Justices' decisionmaking and thereby risks further eroding the Court's perceived legitimacy.").

51. Joel K. Goldstein, *The Supreme Court's Assault on History in* SFFA, 54 SETON HALL L. REV. 1353, 1379 (2024) ("While purporting to follow *Grutter* . . . the *SFFA* majority silently dropped the adverb 'undue,' a consequential excision that covertly converted a balancing test to minimize disadvantage to nonminorities into an absolute prohibition against using race."); Vinay Harpalani, *Secret Admissions*, 48 J.C. & U.L. 325, 327 (2023) (observing that the Students for Fair Admissions Court "essentially transformed no 'undue burden' into no burden at all.").

52. *See* Scalia, *supra* note 14.

discriminating on the basis of race."[53] Some may continue to suffer through no fault of their own, the Court admits, and "societal discrimination" may be permanent, but under conditions of scarcity any effort to include one group excludes, injures, and punishes another irrespective of intent, social positioning, and ultimate effect.[54] Inapt as these pithy sound bites are, the Court is surely right to conclude that turnabout is *not* fair play. Our acknowledgement of the wrongness of past discrimination certainly "commits us to the view that it would also be wrong for racial discrimination to favor black people over white people *in the same sorts of circumstances*."[55] But the circumstances are not at all the same and, though it surely is true that one can't always "fight fire with fire," surgery can be to knife wounds as race-conscious means are to the eradication of race-based advantages and disadvantages.[56]

The remainder of this Article proceeds as follows. Part I introduces Justice Jackson's "John" by way of a brief story from everyday life. John, a nondisabled adult, in my hypothetical reconstruction, confronts the frustration of an empty disabled-designated parking spot in front of his favorite restaurant. The initial function of this story is simply to illustrate the salutary ubiquity of what we might call "non-pejorative" or "non-moralized" discrimination. Part II then flashes back to John at seventeen, enjoying his last days of high school and applying to colleges. Here John faces the salutary ubiquity of "non-moralized" discrimination in the form of race-conscious admissions. As with the disabled parking dispensation, the race-conscious admissions dispensation does not over-burden John

53. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (contending that "[t]he way to stop discriminating on the basis of race is to stop discriminating on the basis of race."); Clarence Thomas, *Toward a Plain Reading of the Constitution–The Declaration of Independence in Constitutional Interpretation*, 30 HOWARD L.J. 983, 992 n.37 (1987) (claiming that a color-blind Constitution "is very much a political matter, and a necessary condition for a color-blind society."); Lee C. Bollinger, *What Once Was Lost Must Now Be Found: Rediscovering an Affirmative Action Jurisprudence Informed by the Reality of Race in America*, 129 HARV. L. REV. F. 281, 282 (2016) ("[F]or many years now, Supreme Court jurisprudence has conspired to turn our attention away from our history—and erode our shared understanding—with decisions that assume the existence of the very colorblind society that we have yet to achieve.").

54. Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 732–33 (2007).

55. DAVID BOONIN, SHOULD RACE MATTER? 193 (2011) (emphasis added); *see also* Bollinger, *supra* note 53, at 284 ("The symmetry championed by the Chief Justice has a legalistic resonance, but the consistency demanded by the Court is otherwise asked to bear too heavy a weight. Why is the genius of our Constitution inadequate for recognizing the difference between Topeka and Seattle? And why must we look for that answer through an ahistorical lens?").

56. Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1270 (2002) ("There is no contradiction . . . in using race-conscious means to eradicate the causes of race-based disadvantages. Surgery is often needed to repair knife wounds."); *see also* GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 140 (Harvard Univ. Press ed., 2021) ("Moral irrelevance does not imply instrumental irrelevance.").

nor does it punish, stigmatize, insult, demean, or subordinate him in any way. The final substantive section of the Article, Part III, is dedicated to a consideration of the *Students for Fair Admissions v. President & Fellows of Harvard College* (*SFFA*)[57] Court's competing messages with respect to race-conscious admissions. The Court's majority, and Justice Thomas in particular, mischaracterizes the goal, function, and normative implications of race-conscious admissions as well as their depiction in the context of Justice Jackson's blistering dissent. I consider what message these mischaracterizations send to John, to American teenagers, and to the American public at large. Additionally, this Article advances the conversation towards the development of alternative messages that embrace and reflect a wholesome narrative that emphasizes relationship, community, the cultivation of a disposition to make good use of one's political power, and what we might call the "perpetually convergent" spiritual and democratic interests that we always and already share.

I. A Portrait of the Artist as an Adult—Finding a Place to Park

> [T]here is only one way to persuade our fellow citizens: not by engaging in policy analysis, not by talking about three-part tests, and not by propounding clever ways to balance fifteen different factors. If we are to persuade, we need to tell a good story.[58]
>
> — L. H. LaRue

Consider John. He finishes work early, beats the rush hour traffic, and pulls onto the already busy street that leads to his favorite restaurant. He's anxious. Tonight is special. His significant other is waiting for him, things haven't been going well lately, and they always seem to count his admittedly too-frequent tardiness as an indication that he doesn't truly value his partner or the relationship.

At first it seems that *every* nearby spot is taken, but this isn't quite true. One nearby spot is open—the best one in fact. But it's a disabled-designated spot and John isn't disabled. "Dammit!", John exclaims. He doesn't really mean it, or he both means it and doesn't. John—arithmetically competent as he is—knows that the designation's elimination would have almost no impact on nondisabled drivers like himself.[59] And, far more importantly, he looks upon the designation as a

57. Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

58. L. H. LaRue, *Telling Stories about Constitutional Law*, 26 TEX. TECH L. REV. 1275, 1286 (1995).

59. Thomas J. Kane, *The Long Road to Race-Blindness*, 302 SCIENCE 571, 573 (2003) ("Suppose there were one parking space reserved for disabled drivers in front of a popular restaurant. Eliminating the reserved space would have a minuscule effect on the parking

kind of "freely given gift" to our disabled fellows—a societal "gift" and a "legitimate sacrifice . . . made voluntarily and knowingly"[60] that he might likewise individually benefit from one day even as he and we already collectively and individually benefit from the protection, inclusion, and empowerment of the disabled.[61]

This dispensation says nothing at all contemptuous about John, specifically, or about the nondisabled, more generally. It is good, this dispensation. It strikes John as good through and through. And even though it's surely possible to allocate too many disabled-designated spots, the one in front of his favorite restaurant certainly seems warranted and, try as he might, he can't think of a single disabled-designated spot that he's ever encountered that didn't seem likewise warranted. John also recognizes, though it feels a bit wrong to think in these terms, that most of those responsible for the current dispensation are, like him, likely to be nondisabled themselves.[62] This feels like it might be somewhat important because it strikes him as unlikely that the nondisabled would discriminate against themselves in favor of the disabled.[63] Finally, John (1) finds that he suspects that if anything there may be too *few* disabled-designated spots; (2) takes a couple of deep breaths to settle his nerves; (3) locates a more-distant spot; and (4) hoofs it double-time to the restaurant, his partner, and—one hopes—a relationship-salvaging evening.

Most of this seems to track, but John is wrong to conclude that discrimination is absent from the scenario. The extant dispensation is indeed indicative of discrimination. Our community has opted for a somewhat asymmetrical approach to the problem. It has chosen—*we* have chosen—to discriminate against the nondisabled in favor the disabled: the disabled can legally park in disabled-designated and not-disabled-designated spots while the nondisabled can only legally avail themselves of the latter. Discrimination is ubiquitous and it isn't necessarily bad, unfair, unjust, or wrong.[64] John intuitively understands

options for nondisabled drivers. But the sight of the open space may frustrate many passing nondisabled motorists looking for someplace to park.").

60. ALLEN, *supra* note 43, at 110.

61. *See* Paul-Emile, *supra* note 24, at 350–51.

62. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 170 (1980) ("Whites are not going to discriminate against all whites for reasons of prejudice, and neither will they be tempted generally to underestimate the needs and deserts of whites relative to those, say, of blacks or to overestimate the costs of devising a more finely tuned classification system that would extend to certain whites the advantages they are extending to blacks.").

63. *See* Bedi, *supra* note 38, at 315.

64. All-too-often the opponent of affirmative action "trades on an ambiguity" in the term "discrimination." THOMAS E. HILL, *The Message of Affirmative Action*, *in* AUTONOMY AND SELF-RESPECT 193 (1991). She starts with the "evaluatively neutral [or non-moralized]

this even if he's never given it much thought. And when he does give it some brief thought during the hustle to the restaurant, he comes to recognize that it's perhaps only when the discrimination evidences a lack of due and equal consideration for all impacted that the otherwise common and shoulder-shrug experience of discrimination is properly described as wrongful. The disabled parking dispensation, though it does treat him both differentially and, in a sense, unequally vis-à-vis his disabled fellows, doesn't fail to treat him *as* an equal.[65] It needn't necessarily differentiate between the disabled and the nondisabled "in a manner that ranks some"—whether that "some" refers to the disabled or to the nondisabled—"as less morally worthy than others."[66]

II. A Portrait of the Artist as a Teenager—Applying to College

I find flashbacks as annoying as the next person, but let's do it anyway. John is now seventeen years old, occasionally searching for parking spots in his parents' oldish minivan and applying to colleges. He's also famous-adjacent because he finds himself featured in Justice Jackson's dissent from the majority opinion in *SFFA v. Harvard*.[67] In her dissent, Justice Jackson invites the reader, the American public, to consider the following hypothetical about John and a new character named James:

> Imagine two college applicants from North Carolina, John and James. Both trace their family's [sic] North Carolina roots to the year of UNC's founding in 1789. Both love their State and want great things for its people. Both want to honor their family's [sic] legacy by attending the State's flagship educational institution. John, however, would be the seventh generation to graduate from UNC. He is White. James would be the first; he is Black. Does the race of these applicants properly play a role in UNC's holistic merits-based admissions process?[68]

The Opinion of the Court does not address Justice Jackson's hypothetical directly but does conclude (1) that "[e]liminating racial

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sense" in which to "'discriminate' means to 'make a distinction,' to pay attention to a difference" and "then shifts to the pejorative [or moralized] sense when [she] asserts that discrimination is always wrong." *Id.* at 193–94. It is by no means impossible that race-conscious admissions plans discriminate in both the non-moralized and the moralized sense, but such a conclusion demands actual argumentation and not merely the casual, and surely sometimes overtly disingenuous, exploitation of an ambiguity with respect to the word "discrimination." *See id.* at 187, 193–94.

65. DWORKIN, *supra* note 42, at 227; SHELBY, *supra* note 4, at 32.

66. DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 172 (2008).

67. Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181, 385–86 (2023) (Jackson, J., dissenting).

68. *Id.* at 385–86 (Jackson, J., dissenting).

discrimination means eliminating *all* of it"[69] and (2) that the Harvard and the University of North Carolina (UNC) race-conscious admissions policies violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.[70] The Court notes, however, that "nothing in [the Court's] opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[71]

Justice Thomas, in his *SFFA* concurrence, does, however, directly address Justice Jackson's hypothetical. He first notes that "[t]oday's 17-year olds . . . do not shoulder the moral debts of their ancestors" and then concludes that "[o]ur Nation should not punish today's youth for the sins of the past."[72]

More specifically, Justice Thomas wonders "what would Justice Jackson say to John when deeming him not as worthy of admission."[73] Would she claim that because "[s]ome statistically significant number of white people had advantages in college admissions seven generations ago" that John has, thereby, "inherited their incurable sin?"[74]

Before assessing the validity of Justice Thomas's queries and what they themselves "say to John," let's further enrich our hypothetical understanding of John by borrowing the backstory of the not-at-all-hypothetical Cole Clemmons. Cole, also seventeen-years-old, attends a high school that is 83% white in Franklin, Tennessee, "with its highly rated school system, its median income of $102,000 and its picturesque downtown packed with pricey boutiques."[75] He was no party to the *SFFA* litigation but learned of the Court's decision when he received a *New York Times* alert on his phone while attending a Summer International Studies program at the University of Memphis.[76] He immediately showed the alert to his Korean-American roommate, who responded by saying, "This

69. *Id.* at 206 (emphasis added). Chief Justice Roberts, it must be noted, explicitly excludes from consideration the colossal and continuing effects of so-called "societal discrimination." *Id.* at 209.

70. *Id.* at 206.

71. *Id.* at 230.

72. *Students for Fair Admissions*, 600 U.S. at 274 (Thomas, J., concurring).

73. *Id.* at 282.

74. *Id.*

75. Hannah Natanson, *After Affirmative Action, a White Teen's Ivy Hopes Rose. A Black Teen's Sank*, WASH. POST (Nov. 18, 2023), https://www.washingtonpost.com/education/interactive/2023/affirmative-action-race-teen-college-applications/ [https://perma.cc/DH97-DXN8]; Post Reports, *Applying for College After the End of Affirmative Action*, WASH. POST, at 27:00 (Dec. 27, 2023), https://www.washingtonpost.com/podcasts/post-reports/applying-for-college-after-the-end-of-affirmative-action/ [https://perma.cc/CQ43-MFWY].

76. Natanson, *supra* note 75.

is going to help me."[77] Cole recalls "feeling shocked," but then also thought to himself, "Wait. This might help me too, because I'm white."[78] Black loss equals white gain—and, presumably, *Black gain equals white loss*—says the Court to our teenagers and to everyone else for that matter.[79]

Not long after receiving the news of the Court's decision Cole began to consider expanding "his list of Ivies" in light of the Court's decision and on "Aug. 1, the day the Common Application opened, [he] clicked into a separate Google search tab" on his laptop's browser and "typed 'prettiest Ivy league campus'" before proceeding to scroll "through images of illuminated stone archways, white-edged brick buildings and leafy quads aglow with fall colors."[80]

James's family, Justice Jackson tells us, was at least "six generations behind" John's and that this is "because of their race."[81] John doesn't—or he needn't—know James personally, but they are in relationship all the same. They are socially-connected[82]—caught in Dr. King's "inescapable network of mutuality"[83]—in part because some of John's advantages are "nonaccidentally correlated"[84] mirror-images of James's disadvantages. Take away race-conscious admissions and James loses a counterbalancing advantage while John gains yet another.[85] In this *very* narrow sense then, James's loss is indeed John's gain and Black loss does indeed yield white gain.

The two young men are differentially situated at the start of the "admissions relay" even if that does not "fully determine whether either eventually crosses the finish line."[86] John, again borrowing from Cole's

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77. *Id.*

78. *Applying for College After the End of Affirmative Action*, *supra* note 75.

79. Randall Kennedy, *The Truth Is, Many Americans Just Don't Want Black People to Get Ahead*, N.Y. TIMES (June 7, 2023), https://www.nytimes.com/2023/06/07/opinion/resistance-black-advancement-affirmative-action.html [https://perma.cc/L2W6-R838].

80. Natanson, *supra* note 75.

81. *Students for Fair Admissions*, 600 U.S. at 397 (2023) (Jackson, J., dissenting).

82. *See generally,* IRIS MARION YOUNG, RESPONSIBILITY FOR JUSTICE (2011).

83. MARTIN LUTHER KING, JR., *The Ethical Demands for Integration*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 117, 122 (James Melvin Washington ed., HarperCollins 1991) (1986).

84. SALLY HASLANGER, RESISTING REALITY: SOCIAL CONSTRUCTION AND SOCIAL CRITIQUE 328 (2012).

85. Julian Jonker, *Affirmative Action for Non-Racialists*, 33 PUB. AFFS. Q. 195, 201 (2019); *see also* Robin West, *Constitutional Fictions and Meritocratic Success Stories*, 53 WASH. & LEE L. REV. 995, 1016 (1996) ("If we wish to maintain our commitment to meritocracy and to maintain our belief that meritocracy is the normal, as well as desirable, route to success, then we are forced, in effect, to deny the degree to which history shows otherwise. We are forced to distort our history . . . . We are forced to deny the extent to which the advantage, successes, and potentiality of every white person is a product of racial advantage rather than of individual merit standing alone.").

86. *Students for Fair Admissions*, 600 U.S. at 403 (Jackson, J., dissenting).

backstory, thoughtful young man that he is, is at least somewhat aware of the extent to which he and James are both differentially situated *and* socially connected:

> I definitely have privilege. For example, for the ACT, right? I was able to go and get private tutoring for that and bring up my score. Like, I brought up my math score six points because of that, I feel like, and not everyone has that ability, but just knowing other people can't and they're also applying to those same schools as me and I know they've probably worked really hard to do it their own way, I feel almost bad in a way. Those people have worked so hard, and I've just been able to use the privileges I have to get to the same spot as them.[87]

He identifies and acknowledges a laundry list of advantages from which he continues to benefit and then further admits that he feels "almost . . . bad in a way."[88] John, now completely fused with Cole, says that he almost feels bad precisely because applicants like James worked so hard and because, though he too has worked hard, he's been able to use the privileges he has to get to the same spot as James.

John's, perhaps nascent but already praiseworthy, sense of justice appears to lead him to something very much like the oft-rehearsed "parable of the foot race:"

> When the race begins, one runner falls behind, and the officials notice that he has weights attached to both ankles. They stop the race, order the runners to hold their places, and remove the weights. Now, is it fair to resume the race from the positions where the runners were stopped? Obviously not. Some correction is required.[89]

He has already considered at least some of the import of this parable. John recognizes that, irrespective of where and how he and James started the relay, James has pretty much made it to the "same spot" despite both the disadvantages and the lack of advantages that necessarily correspond with his racialized status on top of any other disadvantages, class-based or otherwise, with which he may be saddled.

If we imagine the selves that young John and young James have fashioned in response to the world's impingements[90] as sculptures[91] and their college applications as wildly insufficient though perhaps nevertheless useful facsimiles of those sculptures,[92] then we can and we

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87. *Applying for College After the End of Affirmative Action*, *supra* note 75.

88. *Id.*

89. JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL: A BIOGRAPHY 457 (Fordham Univ. Press 2022).

90. Daniel C. Dennett, *The Self as a Center of Narrative Gravity*, *in* SELF AND CONSCIOUSNESS: MULTIPLE PERSPECTIVES 103, 110 (Frank S. Kessel, Pamela M. Cole & Dale L. Johnson eds., Routledge 2016) (1992).

91. Benjamin Eidelson, *Treating People as Individuals*, *in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 203, 214 (Deborah Hellman & Sophia Moreau eds., 2013).

92. *See generally,* Andrew Koppelman & Donald Rebstock, *On Affirmative Action and Truly Individualized Consideration*, 101 NW. U. L. REV. 1469 (2007).

should calibrate our understandings of their fitness for admission in such a way that we account for the effects of *both* the successive deliberative choices that led to the overall product *and* the quality of the raw materials with which each had to work. Our selection process could include, among other things, the desire to identify the applicants with the strongest potential for contributing positively to society in general and to the specific university community in particular. We recognize that to accurately identify that potential we should, in addition to many other factors, give extra weight to those aspects of an applicant's past achievement—perhaps the individual's exercise of deliberative choice[93]—that don't result from situational advantage.[94] To the extent that the previous dispensation was consistent with such (re)calibration it does not seem to unjustly discriminate against John—for it neither denigrates him nor otherwise fails to treat him as an equal—even if there may be any number of alternative and convincing arguments against it.[95]

III. The Competing Messages of the *SFFA* Court

The Roberts majority opinion, and the Thomas concurrence, communicate, among a great many other things, (1) that moral responsibility is coextensive with the obligation to repay "moral debts;" and (2) that we do not, or should not, inherit the "moral debts" of our "ancestors."[96] Justice Thomas also seems to suggest that even though the enrollment of "racially diverse classes by race-*neutral* means" confirms "the efficacy of a colorblind rule," the practice of race-*conscious* admissions is, by contrast, necessarily zero-sum, dangerous, and both Constitutionally and morally impermissible.[97] In other words, a university's efforts to enroll a racially diverse class by race-neutral means, though it might also result in John's rejection, would yield "the same benefits of racial harmony and equality without any of the burdens

93. Eidelson, *supra* note 91, at 214.

94. Thomas E. Weisskopf, *Rethinking Affirmative Action in Admissions to Higher Educational Institutions*, *in* EQUALIZING ACCESS 55 (Zoya Hasan & Martha Nussbaum eds., 2012).

95. Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 17 (2000) ("Affirmative action expresses inclusion, not exclusion. While individual white applicants who would be admitted under a race-blind system are in fact excluded (in other words, they do suffer concrete harm), the best understanding of the practice in our culture today is not that white students are not welcome or worthy of admission . . . . This conclusion does not imply that affirmative action is necessarily wise policy; it may well have harmful consequences that must be weighed against its beneficial effects. But it does mean that affirmative action does not raise an Equal Protection problem.").

96. *See* Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181, 209 (2023); *id.* at 274 (Thomas, J., concurring).

97. *Id.* at 272, 274, 277, 284.

and strife generated by affirmative action policies."[98] The validity of this position depends on it actually being the case (1) that the same benefits can be achieved through race-neutral means,[99] and, perhaps even more importantly; (2) that race-conscious admissions plans necessarily impose additional and unfair burdens over and above race-neutral ones; and (3) that such plans cause a kind of strife that isn't simply the upshot of John's unwillingness to distinguish "I want" from "I ought to have"[100] and a craven attempt to take refuge in victimhood.[101]

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98. *Id.* at 284.

99. Justice Thomas's speculation that race-neutral measures could yield the "same benefits" as race-conscious admissions program is unconvincing both because he fails to engage with most of the empirical research on the issue and because his operative notion of sameness is marked by an indifference to the distribution of students throughout our nation's institutions of higher learning. *Students for Fair Admissions*, 600 U.S. at 284 (Thomas, J., concurring). In other words, his claim that race-neutral measures could yield the "same benefits" depends upon a lack of concern regarding the clustering of URM students. The upshot of Thomas's view is that a race-neutral dispensation that yielded zero URM students at selective institutions could be no less integrated than a race-conscious one simply because URM students might cascade down to less and less selective institutions. *See* Randall Kennedy, *The Race-Neutral Delusion*, LONDON REVIEW OF BOOKS (Aug. 10, 2023), https://www.lrb.co.uk/the-paper/v45/n16/randall-kennedy/the-race-neutral-delusion [https://perma.cc/DHM3-LNYF] ("[A] selection scheme focused wholly on class, leaving race out of consideration, will diminish the number of Black and Latino students attaining admission to elite institutions [because] [p]oor whites constitute a large reservoir of competitors who will often be better prepared and have better credentials than their Black peers, including Blacks on higher rungs of the socioeconomic ladder."); Kevin Woodson, *Entrenched Racial Hierarchy: Educational Inequality from the Cradle to the LSAT*, 105 MINN. L. REV. 481, 503 (2021) (observing that "racial sorting of black college students into less well-resourced and academically rigorous institutions . . . limits their law school prospects."); Joni Hersch, *Affirmative Action and the Leadership Pipeline*, 96 TUL. L. REV. 1, 37 (2021) ("Students without elite undergraduate degrees do not catch up monetarily with those with elite degrees, even by earning an advanced degree from an elite institution."); Michael K. Brown & David Wellman, *Embedding the Color Line: The Accumulation of Racial Advantage and the Disaccumulation of Opportunity in Post-Civil Rights America*, 2 DU BOIS REV. 187, 194–95 (2005) ("When critics of affirmative action tell Black students who have been denied admission to . . . Berkeley that 'there is nothing wrong with attending UC Riverside,' they ignore the fact that *who you meet* at Harvard, Yale, or Princeton—or at Berkeley, Ann Arbor, or Madison—is integral to the accumulation of economic and social advantage."); JULIE PARK, RACE ON CAMPUS: DEBUNKING MYTHS WITH DATA, 68 (2018) ("[S]ocioeconomic diversity on its own neither subsumes nor replaces the positive effects linked with having racial diversity in the student body when it comes to triggering the educational benefits of diversity. Racial diversity in a student body is irreplaceable, and race-conscious policies are needed to help make that happen.").

100. JOHN C. LIVINGSTON, FAIR GAME? 24–25 (1979) (observing that "[a] case for affirmative action programs . . . can be made to any white male who is still capable of distinguishing 'I want' from 'I ought to have'" and contending that "[i]f our children have lost the ability to make that distinction, we have deprived them of their democratic birthright.").

101. *See* Clarence Thomas, *Addresses: Victims and Heroes in the Benevolent State*, 19 HARV. J.L. & PUB. POL'Y 671, 680–81 (1996). Here, Justice Thomas admits that he is troubled by "the backlash against affirmative action by "angry white males." *Id.* He agrees with them that the "intended beneficiaries of the civil rights regime [must] break away from the ideology of victimhood" by "cherish[ing] freedom," "accept[ing] responsibility," and

A. Justice Jackson's Message: Race Matters

On the one hand, John hears Justice Jackson acknowledge that "[i]t is hardly [his] fault that he is the seventh generation to graduate from UNC" and that "UNC should permit him to honor that legacy."[102]

He then hears her note that it also wasn't "James's (or his family's) fault that he would be the first."[103] Justice Jackson's claim does not depend upon an assignment of fault or blame[104] nor does it depend upon any claim that James is a victim seeking a handout or that UNC is justified in denying one to John. Instead, her claim is just that "UNC ought to be able to consider why" it is that "James's family was six generations behind because of their race, making John's six generations ahead."[105] Race matters today, Justice Jackson says to John and to all of us, (1) because "racial disparities may have mattered for where some applicants find themselves today;" (2) because "[n]o one benefits from ignorance;" and (3) because "ensuring a diverse student body in higher education helps *everyone*, not just those who, due to their race, have directly inherited distinct disadvantages with respect to their health, wealth, and wellbeing."[106] Properly understood, there is nothing in Justice Jackson's claims suggesting that John is being punished or that he is expected to settle the debts of another.

One key to thinking clearly about race-conscious admissions plans is, as I've already stressed, to rob them of their seeming abnormality. Like it or not, democracy does this kind of thing to people. Sacrifice is democracy's preeminent ritual, Allen reminds us, and no exemption exists for children let alone young adults.[107] Indeed, John is simply experiencing the discomfort of initiation—the discomfort, following Dworkin's metaphor, of missing a dose of medicine given *our* urgent need to administer it to James in his stead.[108] He is merely learning what it means to be a democratic citizen and he isn't necessarily being wronged, let alone punished.[109] It needn't be the case—indeed it is very unlikely to

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"demonstrat[ing] fortitude in the face of unfairness." *Id.* Thomas insists, however, that these "angry white males" "remember that if we are to play the victim game, the very people they decry have the better claim to victim status." *Id.* at 681.

102. *Students for Fair Admissions*, 600 U.S. at 396–97 (Jackson, J., dissenting).

103. *Id.* at 397.

104. *See* Sangiuliano, *supra* note 38, at 350 ("Subordination is a state of affairs that, when it is objectionable, is so regardless of whether its existence is historically attributable to the conduct of any agent(s).").

105. *Students for Fair Admissions*, 600 U.S. at 397 (Jackson, J., dissenting).

106. *Id.* at 397, 407, 405.

107. ALLEN, *supra* note 44, at 28.

108. *See* DWORKIN, *supra* note 42, at 227.

109. BERNARD R. BOXILL, BLACKS & SOCIAL JUSTICE 167 (rev. ed. 1992) (observing that

be the case—that UNC or Justice Jackson and the other *SFFA* dissenters have an interest in punishing John, and the differential treatment that he'd experience would not denigrate him as a white person.[110] The dispensation that they endorse is safely and justifiably asymmetrical in part because John and James are, again, "differently situated within the relevant opportunity structure" of our society[111] and in part because its operation does not subject John to stigmatization, subordination, or denigration.[112]

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affirmative action "does not require young white males to pay, at additional cost to themselves, the price of their advantages. It proposes instead to compensate the injured with goods no one has yet established a right to and therefore in a way that imposes no unfair losses on anyone" and that if a white applicant "is concerned with fairness, and if preferential [treatment] makes the competition fairer, he should have no objections to it."); MICHEL ROSENFELD, AFFIRMATIVE ACTION & JUSTICE 307–08 (1991) ("Although affirmative action treats innocent white males unequally, it need not deprive them of any genuine equal opportunity rights. Provided an affirmative action plan is precisely tailored to redress the losses in prospects of success attributable to racism or sexism, it only deprives innocent white males of the corresponding undeserved increases in their prospects of success . . . . [A]ffirmative action does not take away from innocent white males anything that they have rightfully earned or that they should be entitled to keep."); Adams, *supra* note 20, at 332 (claiming that "affirmative-action policies reflect a fair distribution of the burdens that are required to transition to a more just society," that an "explanation for why they are fair can be presented using [a] nonideal contractualist framework," and that "it would be rational for parties who do not know what social position they will occupy to assent to a principle that condones affirmative action.").

110. We've known for more than a generation that disappointed white applicants typically are "not denied admission because [they are] white, *simpliciter*." Erwin N. Griswold, *Some Observations on the* DeFunis *Case*, 75 COLUM. L. REV. 512, 519 (1975); *see also* Regents of University of California v. Bakke, 438 U.S. 265, 375 (1977) (Brennan, J., concurring in part and dissenting in part) ("Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second-class citizens because of their color. This distinction does not mean that the exclusion of a white resulting from the preferential use of race is not sufficiently serious to require justification; but it does mean that the injury inflicted by such a policy is not distinguishable from disadvantages caused by a wide range of government actions, none of which has ever been thought impermissible for that reason alone."); Ronald Dworkin, Bakke*'s Case: Are Quotas Unfair?*, *in* THE AFFIRMATIVE ACTION DEBATE 103, 111 (Steven M. Cahn ed., 2002) ("[Bakke] says that he was kept out of medical school because of his race. Does he mean that he was kept out because his race is the object of prejudice or contempt? That suggestion is absurd . . . . Race is not, in *his* case, a different matter from . . . other factors equally beyond his control. It is not a different matter because in his case race is not distinguished by the special character of public insult. On the contrary, the program presupposes that his race is still widely if wrongly thought to be superior to others.").

111. Areheart, *supra* note 41, at 1135.

112. Blum, *supra* note 38; *see also*, LAWRENCE BLUM, "I'M NOT A RACIST, BUT . . . ": THE MORAL QUANDARY OF RACE 89 (2002) (observing that not "every group-based discriminatory policy has the effect of stigmatizing the group in question," that "[t]he group must be vulnerable to being stigmatized," and that "able-bodied people, or white people, are not comparably vulnerable, and policies that discriminated against them would not have the effect of stigmatizing them as groups.").

It is easy enough for John to later comprehend the disabled parking spot arithmetic. He quickly scolds himself both because he understands the social value of the spot's designation and, less importantly, because he recognizes that his narrow self-interest is not only narrow but also just barely implicated. Were it not for the designation he'd still be driving around in a huff because someone—nondisabled or otherwise—who was unwilling to miss a single second of happy hour had already snatched up the much sought-after spot. And, likewise, were it not for UNC or Harvard's limited race-conscious admissions policies, young John would still face the likely prospect of rejection, precisely because that's what the practice of selectivity entails[113] and because considering what would have happened to John had he been James is *not* equivalent to considering what would have happened to John had the admissions process been race-neutral.[114]

The *SFFA* majority, and Justice Thomas in particular, teaches John (1) to misperceive basic social facts and, as importantly; (2) to assume a moral symmetry with respect to discrimination "on the basis of race;"[115] and (3) to think that moral responsibility only extends to the remediation of bad states of affairs that we have ourselves intentionally brought into being.[116] The *SFFA* majority acts as cognitive "laziness masters"[117] in

113. Elisa Holmes, *Anti-Discrimination Rights Without Equality*, 68 MOD. L. REV. 175, 188 (2005) ("[S]urely we do not mean that all applicants should really have an equal chance of getting a place—obviously some applicants will have a better chance than others at meeting the selection criteria. That is the whole point of selection criteria.").

114. Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1080 (2002) ("To consider what would have happened to a white applicant had he been black is not equivalent to considering what would have happened to that applicant had the admissions process been race-neutral."); *see also* Goodwin Liu, *Race, Class, Diversity, Complexity*, 80 NOTRE DAME L. REV. 289, 299 (2004) ("The main competition faced by middle- and low-income whites in selective admissions is, and always has been, not the few minority applicants in the pool, but rather the large sea of privileged whites and now Asians—most of whom are denied admission and would surely be among the first in line for any additional spaces freed up by eliminating affirmative action."); *see also* Jerry Kang, *Asians Used, Asians Lose: Strict Scrutiny from Internment to* SFFA, 113 CALIF. L. REV. 979, 993 (2025) ("[T]here are relatively few underrepresented minorities in elite institutions and so many more White and Asian applicants. Even if affirmative action ended, those few slots would likely be taken by some *other* White or Asian.").

115. The *SFFA* majority collapses suspect *class* with suspect *classification*. Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181, 256 (2023) (Thomas, J., concurring). *See generally* Bedi, *supra* note 38. *See also* Jed Rubenfeld, *The Purpose of Purpose Analysis*, 107 YALE L.J. 2685, 2685 n.3 (1998) ("[T]he Court has in effect made *whites* a suspect class, without ever acknowledging that this result contradicts everything the Court used to say about the criteria of suspect class status.").

116. Roosevelt & McCoy, *supra* note 22, at 1420 ("[The Court] tells whites that if they have done nothing wrong as individuals—if they have not committed acts of racism—they are entitled to enjoy the benefits of the status quo free and clear, without worrying about where the status quo came from.").

117. MEDINA, *supra* note 50, at 158.

order to (1) mask and maintain structural injustice; (2) mislead us with respect to the costs and benefits of compensating for structural injustice;[118] and (3) teach yet another generation of Americans both that discrimination against whites in *this* society is the moral equivalent of discrimination against Blacks and that Black gain necessarily entails substantial and unjustifiable white loss.[119] Ultimately, the Court further activates white, and now to some extent also Asian American, identity in a counterproductive way by making it seem that there is no moral distinction between inclusion and exclusion and that indications of Black success portend calamity and justify white grievance as well as protectionist social, legal, and political mobilization.[120]

B. The SFFA Majority's Message: URM Gains Equal Non-URM Losses

> [I]t is not even theoretically possible to 'help' a certain racial group without causing harm to members of other racial groups. 'It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others.'[121]
>
> — Justice Thomas

The Court cultivates the mistaken impression that simply because a particular policy yields substantial immediate and clearly discernible benefits for one segment the population—URMs in this case—that that same policy also and necessarily depends upon some kind of substantial and unjustifiable sacrifice on the part of at least one other segment of the population. Race-conscious admissions programs straightforwardly benefit URMs in a great many ways even as their operation "has an almost imperceptible impact on any other applicant's chance of admission."[122]

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118. Allen Buchanan, *When Knowing What Is Just and Being Committed to Achieving it Is Not Enough*, 38 J. APPLIED PHIL. 725, 726 (2021).

119. *See generally* Blum, *supra* note 38; JULIET HOOKER, BLACK GRIEF/WHITE GRIEVANCE (2023); CLAIRE JEAN KIM, ASIAN AMERICANS IN AN ANTI-BLACK WORLD (2023).

120. *See, e.g.*, Thomas M. Keck, *From* Bakke *to* Grutter, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT (Ronald Kahn & Ken Kersch eds., 2006).

121. Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181, 271 (2023) (Thomas, J., concurring).

122. Brief for the United States as Amicus Curiae Supporting Respondent at 32–33 n.4, *Students for Fair Admissions*, 600 U.S. 181 (2023) (No. 20-1199) [hereinafter Brief for the United States]; *see also* Sherick Hughes, Dana N. Thompson Dorsey & Juan F. Carrillo, *Causation Fallacy 2.0: Revisiting the Myth and Math of Affirmative Action*, 30 EDUC. POL'Y 63, 82–83 (2016) (observing that "[a]dmissions rates for remaining applicants [at Harvard College] would change from 5.84% to 6.84% (a difference of 1%) if Black and Hispanic students were removed from the admissions pool," and "[a]dmissions rates for remaining applicants [at UNC] would change from 27.59% to 31.68% (a difference of 4.91%) if Black and Hispanic students were removed from the admissions pool."); Goodwin Liu, *The Myth*

None of this, of course, changes the fact that, even though the impact is "almost imperceptible," John's chances are indeed potentially lower with than without race-conscious admissions.[123] It has yet to be shown, however, that he benefits less from the previous dispensation or that, if he does in some sense benefit less from the previous dispensation, that such losses are otherwise uncompensated for or unjustified.[124] Justice Thomas's concurrence claims but does not show (1) that the old dispensation would "punish" John for "the moral debts of [his] ancestors;"[125] (2) that John benefits less from the old dispensation; or (3) that John benefitting less in one sense is necessarily a bad thing. These implications are not only unargued for, but they simply do not follow.

Race-conscious admissions programs do not, or they need not, necessarily punish John for "the moral debts of [his] ancestors."[126] Such programs aren't necessarily punishment for anything, let alone punishment for debts incurred by another. We can tell that John is not being punished precisely because him not getting something that he wants is not the goal of race-conscious admissions programs, but merely an incidental effect of their operation. It is entirely rational to pursue a plan that aims to capture James's civic as well as academic potential[127] without also and at the same time pursuing a plan the purpose of which

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and Math of Affirmative Action, WASH. POST (Apr. 14, 2002), https://www.washingtonpost.com/archive/opinions/2002/04/14/the-myth-and-math-of-affirmative-action/60096413-672b-4a4f-8dd1-8d38a7f282e9/ [https://perma.cc/87WS-6MEQ]; Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297, 320 (2015) ("Th[e] . . . innocence paradigm . . . rests on the premise that whites are 'innocent' of continuing racial inequality and that they are, thereby, 'injured' by state considerations of race that seek to redress it. As a result, the use of race to identify persons for the purpose of distributing government benefits is itself regarded as harmful, even if white plaintiffs have not been specifically denied a government benefit as a result of the contested policy itself.").

123. Brief for the United States, *supra* note 122, at 32–33 n.4.

124. *See, e.g.*, Roosevelt, *supra* note 23, at 733 ("Any white applicant has a much larger chance of being admitted to the same schools she would have in the absence of affirmative action, and at each of those schools, the education offered will be of higher quality because of the diversity.").

125. *Students for Fair Admissions*, 600 U.S at 274 (Thomas, J., concurring).

126. *Id.*

127. Weisskopf, *supra* note 94, at 60; *see also*, ANDERSON, *supra* note 17; Koppelman & Rebstock, *supra* note 92, at 1479 ("With law school admissions, . . . the real objects of concern are not the attorneys we train, but the public who will be their clients, and who will live in a society where they wield the power associated with their profession. We consider individuals, but we do so not for their sake but for the sake of the public they are going to serve. We individualize in the same way as the bricklayer fashioning a piece to go into an odd corner. He doesn't do it for the sake of the bricks. Admissions is inevitably social engineering."); Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U. S.F. L. REV. 757, 775 (1997) ("Once we acknowledge the continuing existence of racism and commit ourselves to its disestablishment, the applicant who has been identified and treated by the society as a subordinated racial minority will bring to that freedom fighting enterprise a life experience that makes her peculiarly qualified for the task.").

is to exclude John.[128] Not everything that reduces one's chances of admission counts as a form of punishment or wrongful discrimination. Harvard's all-too-often romanticized decision to prefer "Scandinavian farm boys who skate beautifully" over "some snobs," for instance, was not a decision to exclude Boston Brahmins even though it could and did sometimes have that effect.[129] Finally, it surely strains, or perhaps entirely obliterates, credulity to think that institutions like Harvard and UNC are motivated by animus towards white Americans[130] or that affirmative action itself—as distinct from a host of other unrelated features of their admissions plans—is indicative of animus towards Asian Americans.[131]

In fact, were the goal to exclude John, race-conscious admissions—especially as it was hemmed in by the so-called diversity rationale—is a decidedly inefficacious way of going about it. Whites, it is crucial to note, abound even under race-conscious admissions: "In 2020, white students made up 52 percent of the high school graduating class but 57 percent of entrants to selective colleges, thus maintaining their centuries-long overrepresentation on selective college campuses."[132] The best way, the only truly effective way, to "punish" John—outside of explicitly excluding him as was the case with James's family and other Black families—would be to eliminate or to deemphasize those criteria of merit that selective institutions most fervently insist upon, and which also just so happen to

128. This remains true even if the plan may have that incidental though predictable effect. *See* Deborah Hellman, *Diversity by Facially Neutral Means*, 110 VA. L. REV. 1901, 1946 (2024) (observing that the mere fact that an "actor cannot logically envision achieving her aim without the occurrence of [a] foreseen consequence" does not preclude that same official from being "motivated to increase the representation of some racial groups without being motivated to decrease the representation of others.").

129. David B. Oppenheimer, *Archibald Cox and the Diversity Justification for Affirmative Action*, 25 VA. J. SOC. POL'Y & L. 158, 179 (2018) (quoting former Harvard Dean Wilbur J. Bender); *see also* BOONIN, *supra* note 55, at 140–46.

130. Kimberly West-Faulcon, *The* SFFA v. Harvard *Trojan Horse Admissions Lawsuit*, 47 SEATTLE U. L. REV. 1355, 1418 (2024).

131. *See, e.g.*, Jerry Kang, *Ending Affirmative Action Does Not End Discrimination Against Asian Americans*, 28 UCLA ASIAN PAC. AM. L.J. 91 (2024); Vinay Harpalani, *"Bait-and-Switch": How Asian Americans Were Weaponized to Dismantle Affirmative Action,* 71 DRAKE L. REV. 323 (2024); Kang, *supra* note 114.

132. Anthony P. Carnevale, Zachary Mabel & Kathryn Peltier Campbell, *Race-Conscious Affirmative Action*, CTR. ON EDUC. AND THE WORKFORCE 7 n.21 (2023), https://cew.georgetown.edu/wp-content/uploads/cew-race_conscious_affirmative_action-fr-spread.pdf [https://perma.cc/N7J5-TP8E]; *see also id.* at 10 fig.2 (showing that "[w]hite and Asian/Pacific Islander students have become more overrepresented at selective colleges since 2002 [from a 9 percentage-point gap to a 15 percentage-point gap], while Black/African American, Hispanic/Latino, and American Indian/Alaskan Native students have become more underrepresented [from a 14 percentage-point gap to a 20 percentage-point gap]."); *see generally* ELLEN BERREY, THE ENIGMA OF DIVERSITY 64 (2015); DAVID F. LABAREE, A PERFECT MESS 97 (2017).

contribute mightily to white overrepresentation, *with the intention and not simply the incidental effect of harming and injuring whites*.

Notice also that Justice Thomas in effect concedes, as he must, that not all selection criteria that happen to lower an applicant's chances count as punishment.[133] Like Justice Kennedy before him, Justice Thomas seems to think both that racially integrated schools can contribute to the "benefits of racial harmony and equality" and that such benefits can be practically and perhaps also justifiably/legally achieved through race-neutral means.[134]

But if racial integration is a legitimate goal and racial integration depends upon the actual presence of some number of URMs, then John still might "lose his spot."[135] And this, in turn, would seem to suggest that punishment is distinguishable from the incidental lowering of an applicant's chances even when those chances are lowered in the service of a race-conscious end like *racial* integration, so long as that integrative goal is achieved without reliance upon the far more candid and efficient method of explicitly using racial classifications.[136]

What makes this so? I can only imagine that lowered chances don't always amount to punishment because sometimes the lowering of an applicant's chances is not the object of a policy—is not, in other words, the result of some bare desire to harm a particular individual or group—but merely an incidental effect.[137] In using race-neutral means to achieve

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133. *See* Deborah Hellman, *The Zero-Sum Argument, Legacy Preferences, and the Erosion of the Distinction Between Disparate Treatment and Disparate Impact*, 109 VA. L. REV. ONLINE 185, 188, 192 (2023).

134. Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181, 284 (2023) (Thomas, J., concurring); *see also* Michael C. Dorf, *Race-Neutrality, Baselines, and Ideological Jujitsu After* Students for Fair Admissions, 103 TEX. L. REV. 269, 292 (2024) ("It is certainly notable that Justice Thomas—who is arguably the most pro-colorblind Justice ever to sit on the Supreme Court—thought (and apparently still thinks) that at least one facially race-neutral policy remains race-neutral even when used to increase or maintain racial diversity."); Jack M. Balkin & Reva B. Siegel, *Remembering How to Do Equality*, in THE CONSTITUTION IN 2020, at 101 (Jack M. Balkin & Reva B. Siegel eds. 2009) ("Even the most determined advocates of color blindness are usually willing to accept benign race-conscious motivations for facially race-neutral methods like Texas's '10 percent plan' . . . or class-based affirmative action. That would make little sense if they thought that there were [sic] really no difference between benign and invidious motivation.").

135. LOURY, *supra* note 56, at 132 ("As a matter of simple logic, a college with limited places to fill can achieve more racial diversity only if some black applicants are admitted who would otherwise have been rejected, while some nonblack applicants are rejected who would otherwise have been admitted. Selective institutions will naturally try to reject the least qualified of the otherwise admissible nonblack applicants while admitting the most qualified of those black applicants who would otherwise have been rejected.").

136. *See* Gratz v. Bollinger, 539 U.S. 244, 295–98 (2003) (Souter, J., dissenting); *see generally* Cristina M. Rodriguez, *Against Individualized Consideration*, 83 IND. L.J. 1405 (2008).

137. Cécile Laborde, *Structural Inequality and the Protectorate of Discrimination Law*,

race-conscious objectives we are not necessarily aiming to exclude/punish/victimize John even if we are, perhaps among other things, aiming to include those, like James, who continue to suffer from seemingly everlasting "societal discrimination" and its long-lingering effects.[138] But if we don't necessarily punish or injure John when we incidentally diminish his chances in the service of a race-conscious end through the operation of race-neutral means, then how can it be claimed that we necessarily punish/injure, and not merely fail to satisfy the narrow interests of, John when we incidentally diminish his chances in the service of a race-conscious end through the operation of race-conscious means? The moral difference between punishment and non-punishment doesn't seem to depend upon a distinction between the means, but upon an alternative distinction between (1) diminished chances that are the point of a policy; and (2) diminished chances that are merely an incidental and perhaps often also unavoidable byproduct of an otherwise justifiable goal.[139]

POL., PHIL. & ECON., Oct. 22, 2024, at 1, 13 ("No relevant harm is done when a practice has a merely statistically disparate impact on members of a group without either communicating biased attitudes or perpetuating the broader pattern of inequality that discrimination law is designed to combat.").

138. *See* Loury, *supra* note 35, at 254; *see also* Glenn C. Loury, *The Superficial Morality of Color Blindness: Why "Equal Opportunity" May Not Be Enough?*, 39 EAST. ECON. J. 425, 426–27 (2013); Kim Forde-Mazrui, *Alternative Action after* SFFA, 76 STAN. L. REV. ONLINE 149, 152 (2024); Chika O. Okafor, *Un-Erasing Race: Introducing Social Network Discrimination to the Law*, 102 N.C. L. REV. 1517, 1518–25 (2024).

139. Kristina Meshelski, *Affirmative Action is Not Morally Wrong*, *in* ETHICS, LEFT AND RIGHT 555, 560 (Bob Fischer ed., 2020) ("Those who benefit from affirmative action are obviously not harmed, and those who do not benefit are merely experiencing what must be experienced by someone. The sense in which the losers of this process are harmed is that the resources they want are not offered to everyone. This . . . is a harm, but if someone was going to be denied access, then with or without affirmative action that harm would take place."); Edley, *supra* note 48, at 14 ("Is the disadvantaged, faultless white a victim of black aspirations, or is he simply finding himself on the expensive side of a proposition about redistribution because both the disadvantaged black and the innocent white are dealing with a problem bigger than all of us?"); *see also* SONU BEDI, REJECTING RIGHTS 176 (2009); Hellman, *supra* note 128, at 1946.

C. The Cultivation of White Ignorance

> Imagine an ignorance that resists . . . . [A]n ignorance that fights back[,] . . . an ignorance militant, aggressive, not to be intimidated, an ignorance that is active, dynamic, that refuses to go quietly—not at all confined to the illiterate and uneducated but propagated at the highest levels of the land, indeed presenting itself unblushingly as knowledge.[140]
>
> — Charles W. Mills

John could easily be forgiven for being confused about when he is or isn't being punished for the sins of his or someone else's great-great-great-grandparents. And this is because he is and we are caught in a reality-distortion field of which members of the Court are not the sole creators or operators, but well-situated amongst its devoted and high-profile/high-impact stewards. The Court's messaging and not simply its actions contributes mightily to the "prison of misbelief"[141] within which John finds himself.[142] He is in a very important sense unfree[143] to the extent that he is with good reason under the very much mistaken impression that "there is a 'moral [and] constitutional equivalence' between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality."[144] The "laws designed to subjugate" Black Americans were laws *designed* to subjugate Black Americans, that was their purpose—they were based on a bare desire to harm[145] and, therefore, depended upon what is both a morally and "a constitutionally inadmissible rationale."[146] Admissions policies that serve, in part, to counterbalance John's "six generations" worth of accumulated advantages are asymmetrical *and*, like the practice of allocating disabled parking spots, not the least bit

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140. CHARLES W. MILLS, BLACK RIGHTS/WHITE WRONGS 49 (2017).

141. Allen Buchanan, *Prisoners of Misbelief*, *in* THE OXFORD HANDBOOK OF FREEDOM 508, 520 (David Schmidtz & Carmen E. Pavel eds., 2018).

142. Aviel, *supra* note 43, at 375.

143. Buchanan, *supra* note 141, at 508, 516–17.

144. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) (citation omitted); *see* RANDALL KENNEDY, FOR DISCRIMINATION 165 (2013) ("[Justice] Thomas's equating of racial distinctions intended to impose white supremacy with racial distinctions intended to undo white supremacy is one of the silliest, albeit influential, formulations in all of American law."); TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW 221 (2015) ("The implied moral equivalence between affirmative action and malicious or intentional direct discrimination is dangerous sophistry."); *see also* MILLS, *supra* note 140, at 57 (observing that "the 'white' in 'white ignorance' does not mean that it has to be confined *to* white people.").

145. SONU BEDI, BEYOND RACE, SEX, AND SEXUAL ORIENTATION 17, 143 (2013); Stanley Fish, *The Nifty Nine Arguments Against Affirmative Action in Higher Education*, J. BLACKS HIGHER EDUC. 79, 80 (2000).

146. BEDI, *supra* note 139, at 113.

designed to "stick it"[147] to anyone let alone an effort to demean, stigmatize, or subordinate nonbeneficiaries. Race-conscious admissions policies, though thoroughly insufficient to solve a great many social problems and quite flawed in a great many respects, nevertheless merely—but also crucially—serve, among other things, the noble purpose of enabling a woefully small subset of URMs to compete and to cooperate with their white and Asian American peers as "co-creators in the kingdom of culture."[148]

Benign purpose notwithstanding, Justice Thomas is surely correct that race-conscious admissions policies are morally impermissible if, and when, they do indeed unduly harm innocents. Reciprocal sacrifice is one thing and non-reciprocal sacrifice another.[149] Both Chief Justice Roberts and Justice Thomas contend that selective college admissions is a zero-sum game and that, therefore, benefits to John and to James are mutually exclusive.[150] But why must this be so? Surely it is not the case that John is injured by a dispensation that includes the designation of disabled parking spots. Surely, he isn't the subject of unequal consideration[151] and, therefore, harmed and injured simply because he does not get something of value that he happens to want. He wants, for instance, that spot right in front of his favorite restaurant just as much as you or I do, but is it correct to say that he is necessarily harmed and injured, even if he is not punished, when it is reserved for another? It certainly *could be* that John is harmed and injured by that dispensation, but surely that isn't *necessarily* the case.

If the spot is reserved for his disabled fellows, then not getting what he wants is—in an exceedingly important sense—precisely what John wants. What he really wants both for himself and for his fellows is equal respect and consideration rather than protection from social loss and from the ritual of reciprocal democratic sacrifice that lies at the heart of liberal democracy. This could, of course, be accomplished in other ways. Were there no disabled parking spots, he could still leave the spot in front of the restaurant open every time he makes the trip, but I suspect that typically there would be no spot to leave open because someone would have already taken it. Instead, the community takes care of the collective action problem—we settle on "the salient coordination point"[152]—and,

147. BEDI, *supra* note 139, at 147; BOONIN, *supra* note 55, at 193.

148. Allen, *supra* note 40, at 148; *see also* LOURY, *supra* note 56, at 153.

149. ALLEN, *supra* note 44, at 110–11; ROSENFELD, *supra* note 109, at 304–12, 322–28; BOONIN, *supra* note 55, at 190–94.

150. Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181, 218 (2023); *id.* at 272 (Thomas, J., concurring).

151. DWORKIN, *supra* note 42, at 227.

152. Jonker, *supra* note 85, at 203.

grumble silently though he might on a particular evening when running late, John is, nevertheless, grateful because not getting what he wants *is* what he wants.[153] Social policy is in this instance wholly in line with his sense of justice and with what we might call his and our "perpetually convergent interests"[154] even if/as it frustrates his narrow self-interest. The dispensation is, if John insists on patting himself on the back, little more than an instance of loss converted into "a freely given gift to be reciprocated"[155] and nothing at all like the compelled donation of "in-kind benefits"[156] that the Court sets out to depict in the context of its affirmative action jurisprudence.

Where then is the outrage over disabled parking spots? Why don't we think of their provision as an example of the non-disabled wrongfully discriminating against themselves in favor of the disabled? Maybe we don't call this wrongful discrimination simply because—in addition to its capacity to satisfy a particularly urgent social need—we recognize that it in no way demeans, stigmatizes, or subordinates the nondisabled. Because we are convinced that making eager and joyful, or even begrudging, provision for our disabled fellows is neither dastardly nor supererogatory, but a simple "freely given gift" and a kind of "enabling constraint"[157] that follows ineluctably from our shared sense of justice. *If* this is burden and *if* this is harm, then it is not at all wrongful. It is good. It is nonarbitrary differential treatment that in no way signals a failure of equal respect and concern vis-à-vis the rights of nonbeneficiaries.

John didn't create these problems—the "moral asymmetry" that obtains with the respect to *both* the discrimination against and stigmatization of the disabled vis-à-vis the nondisabled and the discrimination against and stigmatization of Black Americans vis-à-vis white Americans[158]—but now, whether he likes it or not he is the tip of the spear leveled by others. The Court, by invoking his rights and satisfying his narrow self-interest, is denying him the satisfaction of his broader interests, both spiritual and democratic.[159] What John really

153. Buchanan, *supra* note 141, at 517.

154. Johnson, *supra* note 11, at 1352 (highlighting two "perpetually convergent interests:" (1) "a spiritual interest, which concerns the moral, emotional, and psychological effects of White supremacy on White people" and (2) "a democratic interest, which concerns racial subjugation's harm to democracy.").

155. ALLEN, *supra* note 44, at 36.

156. Kevin D. Brown, *The Road Not Taken in* Brown*: Recognizing the Dual Harm of Segregation*, 90 VA. L. REV. 1579, 1584 (2004).

157. Bernard Yack, *Toward a Free Marketplace of Social Institutions: Roberto Unger's Super-Liberal Theory of Emancipation*, 101 HARV. L. REV. 1961, 1967–70 (1988); *see* JEFF SPINNER-HALEV, SURVIVING DIVERSITY 61 (2000); DONALD HERZOG, POISONING THE MINDS OF THE LOWER ORDERS 165 (1998).

158. Blum, *supra* note 38, at 183–84; Paul-Emile, *supra* note 24, at 331–32.

159. Johnson, *supra* note 11, at 1352.

wants, if we imagine him like any decent citizen of a well-functioning democracy, is for the basic structure of his society to be designed and maintained in such a way that, with his active and abiding support, it can effectively address those disadvantages—like being "six generations behind"—that citizens suffer through no fault of their own.[160] Rather than cultivate his civic virtue by allowing him to join us in freely giving to James as we freely give to our disabled fellows, he learns a very different lesson from the Court: Black loss is white gain *and* Black gain is white loss. John may wish that this wasn't so, but the damage is already done to the extent that he comes to embrace, reluctantly or otherwise, the rhetoric surrounding the Court's zero-sum argument.[161]

Young John has, or is just now beginning to have, a sense of justice.[162] If we let, *if we insist that*, him win yet another rigged race[163] then he's going to need to deal with that psychologically.[164] And perhaps John does that, as Cole plans to do it, by giving back in the form of taking full advantage of his opportunities.[165] But surely his sense of justice is somewhat more demanding than that as it may be for Cole as well. John, it is quite true, was "not there" for slavery or for Jim Crow, but he is here now for the winning of rigged races.[166]

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160. HILL, *supra* note 64, at 208 ("[I]mplicit in our democratic ideals is the idea that our public institutions should be so arranged that they afford to individuals, over time, more or less equal opportunities to develop and make use of their natural talents and to participate and contribute to those institutions.").

161. José Medina, *Color-Blindness, Meta-Ignorance, and the Racial Imagination*, 1 CRITICAL PHIL. RACE (SPECIAL ISSUE) 38, 47 (2013) ("In color blindness, the evasion of responsibility goes very deep: . . . it results in a numbness or insensitivity to racial matters that limits the agent's capacity to respond to wrongs and to improve ethically or politically, since the subject is unable to recognize such limitation."); Buchanan, *supra* note 118, at 733 (observing "that *both* underestimations and overestimations regarding the prospect for progress in justice can have the same effect, not contrary effects, namely, to encourage acquiescence in an unjust status quo.").

162. Bernard R. Boxill, *How Injustice Pays*, 9 PHIL. & PUB. AFFS. 359, 362 (1980).

163. *See, e.g.*, Kwame Anthony Appiah, *The Diversity of Diversity*, *in* OUR COMPELLING INTERESTS 161, 165–66 (Earl Lewis & Nancy Cantor eds., 2016) ("If we are trying to find out how good someone is at math, a test that displays her in a poor light when she's thinking of herself in one way and a good light when she thinks of herself in another doesn't do the job . . . . Phenomena like stereotype threat and implicit bias mean that many of the devices that we use to assign social rewards systematically fail to do what we claim for them. An SAT is meant to measure scholastic aptitude, not discover losses in self-confidence caused by negative stereotypes or gains due to positive ones.").

164. Brown, *supra* note 156, at 1597–98; Lisa B. Spanierman & D. Anthony Clark, *Psychological Science: Taking White Racial Emotions Seriously—Revisiting the Costs of Racism to White Americans*, *in* IMPACTS OF RACISM ON WHITE AMERICANS IN THE AGE OF TRUMP 115 (Duke W. Austin & Benjamin P. Bowser eds., 2021).

165. *Applying for college after the end of affirmative action*, *supra* note 75.

166. Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 301 (1990) ("[T]he rhetoric of innocence obscures this question: What white person is 'innocent,' if innocence is defined as the absence of advantage at the expense of others?"); MARTIN LUTHER

Perhaps he arrives on campus at UNC, however, and finds himself sighing with relief because it's as diverse as he ever hoped it could be—maybe there's a Black student named James in his very dorm!—even if, technically speaking, it's less integrated than it was before. John might, as do many white students attending selective institutions after graduating from overwhelmingly white high schools, come to think that there are "already enough black and Latino students to make for a rich educational experience."[167] For many white students, the selective institutions that they attend for college, although they often do not come close to proportional representation, may very well be the most diverse institutions that have touched their lives with any degree of regularity. How can we then fault them for not noticing how *few* URMs there are when they still can't get over how *many* there are?[168]

D. Expediency versus Justice

I do think, however, that Justice Thomas is justifiably unsatisfied with the messages that the Court has been sending to John over the years and for demanding an alternative. The now non-existent middle-right of the Court all-too-often spoke the language of mere expediency.[169] And I do think that it might be fair to conclude, as does Laurence Thomas, that Justice O'Connor, in opting for expedience "at the cost of justice strictly understood," "simply . . . h[eld in *Grutter v. Bollinger*][170] that admitting an occasional minority with very low scores is worth it if that will hasten the day when the standing of minorities in society is such that [they] are no longer haunted by the stigma of racism."[171] I agree with Justice Thomas,

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KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY*?* 91 (Beacon Press 1968) (1967) ("To ignore evil is to become an accomplice to it.").

167. NATASHA K. WARIKOO, THE DIVERSITY BARGAIN 99 (2016).

168. *Id.* at 48, 52, 99; Daniel Kees, *Defanging Diversity:* SFFA v. Harvard *and Its Implications for the Diversity Rationale in Higher Education Admissions*, 14 COLUM. J. RACE & L. 1023, 1055–56 (2024) ("Students today are less likely to have grown up in socioeconomically or racially diverse neighborhoods, so many middle- and upper-class freshmen have their first substantive interactions with low-income and non-white persons on a college campus.").

169. *See, e.g.*, Sandra Day O'Connor & Stewart J. Schwab, *Affirmative Action in Higher Education Over the Next Twenty-Five Years*, *in* THE NEXT TWENTY-FIVE YEARS 61 (David Lee Featherman, Marvin Krislov & Martin Hall eds., 2010) (arguing that "educational institutions should be permitted to consider race because prohibiting them from doing so might intensify the nation's problems, rather than eliminate them").

170. Grutter v. Bollinger, 539 U.S. 306, 341 (2003) (upholding the University of Michigan Law School's race-conscious admissions plan but also conceding "that 'there are serious problems of justice connected with the idea of preference itself'" (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978)).

171. Laurence Thomas, *Equality and the Mantra of Diversity*, 72 U. CIN. L. REV. 931, 941 (2004).

and with Laurence Thomas, that this is *not* the message that the high Court ought to be sending to John or to James for that matter.

Justice O'Connor tells John that, at least for the time being, he is being singled out for sacrifice and she implies—in a complete retreat from reality—that that experience of sacrifice is non-reciprocal and would be entirely avoided were he a member of an underrepresented minority group.[172] She hastens to assure him that this dispensation won't last forever, but Justice Thomas is surely correct to note that *wrongful* discrimination is no less wrongful today than it will be tomorrow or "in 300 months."[173] Of course, to agree with Justice Thomas that the *Grutter* Court said the wrong thing to John is not necessarily to agree with him that the *SFFA* Court has now said the right thing to him. We can, and I do, share—at least as a matter of principle—in both Thomas's rejection of Justice O'Connor's seemingly-moderate pragmatism without at the same time conceding that white "innocents" are being (1) unduly burdened or (2) injured in any way.

We must and we can sidestep the implication that John is a being treated solely as a means to an end that he does not share.[174] We needn't, as the Court has for decades now, simply dismiss him while simultaneously implying that the sacrifice of his concerns is the expedient move to make.[175] To John, Justice O'Connor, in effect, says something like the following:

> Dear [John],
>
> > We regret to inform you that your application for admission has been rejected. Please understand that we intend no offense by our decision. We do not hold you in contempt. In fact, we don't even regard you as less deserving than those who were admitted.
> >
> > It is not your fault that when you came along society happened to not need the qualities you had to offer. Those admitted instead of you are not deserving of a place, nor worthy of praise for the factors that led to their admission. We are only using them—and you—as instruments of a wider social purpose.
> >
> > We realize you will find this news disappointing. But your disappointment should not be exaggerated by the thought that this rejection reflects in any way your intrinsic moral worth. You have our sympathy in the sense that it is too bad you did

172. Brown, *supra* note 156, at 1596; *See generally* Angela Onwuachi-Willig, *"I Wish I Were Black" and Other Tales of Privilege*, THE CHRON. OF HIGHER EDUC. (Oct. 28, 2013), https://www.chronicle.com/article/i-wish-i-were-black-and-other-tales-of-privilege/ [https://perma.cc/K2CN-N26P].

173. *Grutter*, 539 U.S. at 351 (Thomas, J., concurring in part and dissenting in part).

174. *See* HILL, *supra* note 64, at 200.

175. *See id.* at 198.

> not happen to have the traits society happened to want when you applied. Better luck next time.
>
> Sincerely yours . . . .[176]

Justice Thomas is wrong, however, to think that this horrific pro-affirmative action message, or something like it, is the only one on offer. Better, I think, to craft and to convey messages that embrace and reflect a wholesome narrative that emphasizes relationship,[177] community,[178] the cultivation of a disposition to make good use of one's political power,[179] and those "perpetually convergent" spiritual and democratic interests that we always and already share.[180]

John needs us in this moment[181] as does James. Both young men suffer from the "distinct racial damages" that follow necessarily from the American white-over-Black racial hierarchy.[182] And both ought to find themselves operating within a set of social institutions reflective of the collective desire to see to it that the American story—their distinct/shared narratives combined with ours—is conspicuously marked first and foremost by social solidarity and the essential and salutary practice of reciprocal democratic sacrifice. John needs to be able to look James in the eye throughout his life and not have to "feel bad in a way" or to feel the need to continually remind us that he is, as Baldwin puts it, "not responsible for the textile mills of Manchester, or the cotton fields of Mississippi."[183] He needs access to life paths that perpetuate neither shame nor any dependency upon a false sense of superiority continually reinforced by our insistence that he win rigged race after

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176. SANDEL, *supra* note 7, at 180.

177. *See, e.g.*, HILL, *supra* note 64, at 206.

178. *See, e.g.*, ALASDAIR MACINTYRE, AFTER VIRTUE 220 (2007); SANDEL, *supra* note 7, at 234; James B. White, *A Response to "The Rhetoric of Powell's* Bakke*,"* 38 WASH. & LEE L. REV. 73, 74–75 (1981).

179. *See, e.g.*, JUDITH SHKLAR, THE FACES OF INJUSTICE 43 (1990); Bernard Yack, *Injustice and the Victim's Voice*, 89 MICH. L. REV. 1334, 1348 (1991).

180. Johnson, *supra* note 11, at 1352–60.

181. Medina, *supra* note 161, at 57 ("[D]eveloping a positive sense of identity while taking responsibility for racial oppression is not easy for white subjects, for the recognition of responsibility can be shattering."); José Medina, *Ignorance of Racial Insensitivity*, *in* THE EPISTEMIC DIMENSIONS OF IGNORANCE 195–96 (Rik Peels & Martijn Blaauw eds., 2016) ("[B]ecoming epistemically sensitive is not only or primarily an individual responsibility – it is not even something that the individual can always accomplish fully by herself, in isolation. Rather, it is a shared responsibility that can only be discharged cooperatively and collectively.") (emphasis omitted).

182. Rogers M. Smith, *Black and White after* Brown*: Constructions of Race in Modern Supreme Court Decisions*, 5 U. PA. J. CONST. L. 709, 723 (2003).

183. BALDWIN, *supra* note 12, at 411; *see also* JAMES BALDWIN, *Words of a Native Son*, *in* THE PRICE OF THE TICKET 401, 406 (Beacon Press eds., 2021) ("I know you didn't do it, and I didn't do it either, but I am responsible for it because I am a man and a citizen of this country and you are responsible for it, too, for the very same reason . . . .").

rigged race after rigged race.[184] If we are to show John the respect that he deserves as an individual and as a citizen, we simply cannot taint his future accomplishments and relationships with *our*—not his—unexpiated crimes.[185] John "was not there," but *we* were. And the assumption that whiteness itself offers sufficient protection from the cancer of white supremacy and its long-lingering effects is, as it always has been, not at all justified.

Conclusion

Because I don't believe in unencumbered selves, I don't believe that John is—or has—one. Like the rest of us he is a "story-telling animal"[186] and his self a "center of narrative gravity"[187] that arrives on the scene already subject to a host of unselected obligations and conflicting demands for his loyalty and allegiance. Though John may not inherit moral debts—I'm somewhat uncomfortable with the language of accounting in this context[188]—he is both morally and politically responsible, as we all are, for morally compromised identities that he has not chosen[189] and for the extent to which he both benefits from and contributes to the continued existence of unjust states of affairs.

Young John is also, let's remember, just seventeen years old. And, though his sense of justice may in fact be as well developed as anyone else's, he quite literally—and somewhat tragically—cannot stop contributing to and benefiting from injustice on his own.[190] From his

184. White, *supra* note 18, at 1940–41; Chesler, Peet & Sevig, *supra* note 29, at 223.

185. Susan Stark, *Taking Responsibility for Oppression: Affirmative Action and Racial Injustice*, 18 PUB. AFFS. Q. 205, 215 (2004) ("Morality . . . requires that whites take responsibility for racial injustice, not because any [white person] has individually caused racial injustice. But because good relationships with others and the well-being of our fellows is the responsibility of each one of us.").

186. MACINTYRE, *supra* note 178, at 216.

187. Dennett, *supra* note 90, at 103.

188. Iris Marion Young, *Asymmetrical Reciprocity*, *in* INTERSECTING VOICES 54–56 (1997); HILL, *supra* note 64, at 198–201; HOWARD MCGARY, RACISM AND SOCIAL JUSTICE 141 (1999).

189. Brown, *supra* note 3, at 4; Hill, *supra* note 9, at 29–30; *see also* MACINTYRE, *supra* note 178, at 216 ("I can only answer the question 'What am I to do?' if I can answer the prior question 'Of what story or stories do I find myself a part?' We enter human society, that is, with one or more imputed characters—roles into which we have been drafted—and we have to learn what they are in order to be able to understand how others respond to us and how our responses to them are apt to be construed.").

190. *See* Robert S. Taylor, *Racial Responsibility Revisited*, 35 PUB. AFFS. Q. 161, 170 (2021) ("[W]hites are continually receiving benefits that could be refused but that, for all they know, may be tainted by racist motivations: How can whites be sure that when they are given a job offer, nice treatment in a shop or at the DMV, a warm reception to a romantic overture, and so on, they are not being benefitted (in whole or in part) for illicit racial reasons? Asymmetric information insulates white beneficiaries from will implication in such cases, but does it really insulate them from special moral responsibility . . . ?"); Delmas, *supra* note 6, at 478; Brown, *supra* note 3, at 11, 16.

perspective, if not from ours, applying to college should be more like finding a parking spot. Disappointment is understandable and we aren't always our best selves, but the social institutions of John's society should be structured in such a way that he can both comprehend and reconcile himself to reciprocal democratic sacrifice, in general, and to the reciprocal democratic sacrifice of race-conscious admissions, in particular.

John may find that his partner is furious or even gone by the time he reaches the restaurant, but wouldn't it be nice if he can simply pivot to grabbing a beer with James instead? An injury that affirmative action is meant to address is the continued denial of what Bernard Boxill aptly dubs "the benefits of fair interaction" and we mustn't ever forget, important differences with respect to moral urgency notwithstanding, that these benefits are also denied to John whenever they are denied to James.[191] Our estrangement from one another,[192] and the misunderstanding, misrepresentation, and resentment that it all-too-often breeds, is a problem for which race-conscious admissions is but a small part of the potential solution.[193] Finally, because the Court continues to powerfully abet and facilitate this estrangement, as well as the unshared reality[194] that both produces and results from it, it is no part of the solution and quite a large part of the problem.

191. Bernard Boxill, *Affirmative Action in Higher Education*, *in* A COMPANION TO THE PHILOSOPHY OF EDUCATION 598–99 (Randall Curren ed., 2003); *see also* Robert A. Garda Jr., Students for Fair Admissions *through the Lens of Interest-Convergence Theory: Reality, Perception, and Fear*, 77 SMU L. REV. 93, 103 (2024) ("Because Whites are the most socially isolated racial group, the socializing benefit of diverse educational environments inures primarily to White students.").

192. KING, *supra* note 83, at 74 ("Racism is total estrangement. It separates not only bodies, but minds and spirits.").

193. Medina, *supra* note 161, at 64 ("The expansion of one's social sensibilities—and with it also the pluralization of one's racial consciousness—is an ongoing task that does not have an end. And it is a task that individuals cannot fully carry out all by themselves. Such a task requires sustained interactions with significantly different individuals and groups (interactions that provide disruptions and diverse forms of epistemic friction); it requires the continued critical interrogation of the collective imagination from multiple perspectives; and it also requires the cultivation of intra- and inter-group solidarities and the collaborative efforts of overlapping social movements that can create the conditions for cognitive and affective melioration.").

194. Elizabeth Anderson, *Epistemic Justice as a Virtue of Social Institutions*, 26 SOC. EPISTEMOLOGY 163, 170–72 (2012).