
FINDING COMMON GROUND[†]

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Vinay Harpalani's piece, *Asian Americans, Racial Stereotypes, and Elite University Admissions*,¹ is a welcome addition to the long-suffering conversation about race-conscious admissions at elite colleges and universities.² It is a debate that we, as both a nation and the legal community, have been stubbornly locked in for over four decades.³ The impasse between the two sides measures itself most notably in the perennial 5-4 decisions of the Supreme Court.⁴ Rather than tread the well-worn paths of this debate, Harpalani offers a perspective that is refreshingly novel and all too often sorely lacking. Harpalani's central claim is simple yet potent—the Asian American community needs to be engaged, and their experiences and perspectives valued, in the debate over race-conscious admissions.⁵

Harpalani takes issue with how this debate, much like the debate over race more broadly in America, tends to follow a Black (and more nominally

[†] An invited response to Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. REV. 233 (2022).

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¹ Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. REV. 233 (2022).

² It is important to make clear that the vast majority of colleges and universities do not engage in race-conscious admissions. In fact, more than two-thirds say race has “no influence” at all and only 3.4% say that race has “considerable influence” on admissions decisions. See Stacy Hawkins, *Race-Conscious Admissions Plans: An Antidote to Educational Opportunity Hoarding?*, 43 J. Coll. & U.L. 151, 159 & n.56 (2018).

³ It was the Supreme Court's first decision on the matter in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that invited this debate when Justice Lewis F. Powell Jr. cast the deciding fifth vote both to strike down the racial set-aside program being challenged and to suggest that race-conscious admissions could be permitted under the right circumstances. *Id.* at 318-20.

⁴ *Bakke*, as well as *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), were all decided 5-4. *Fisher v. University of Texas*, 579 U.S. 365 (2016), was decided 4-3 due to the death of Justice Antonin Scalia and the recusal of Justice Elena Kagan.

⁵ Harpalani forcefully asserts, “[a]t a minimum, Asian American parents and children are stakeholders, and every effort should be made to include them in the conversation about admissions reforms. . . . [T]he voices of Asian American families affected should be heard and considered.” Harpalani, *supra* note 1, at 303-04.

Hispanics) versus White binary.⁶ It not only erases the interests and experiences of other minority communities, most notably Asian Americans,⁷ but also elides the vast and important differences that exist within each of these communities.⁸ Harpalani points out how even Students for Fair Admissions (“SFFA”) misses the mark in its case against Harvard, which though filed ostensibly on behalf of Asian Americans, principally seeks only to serve its own end to eliminate race-conscious admissions.⁹ He corrects for this error, and the broader cultural oversight, by forcing the reader to meaningfully engage with the experiences and perspectives of Asian Americans.¹⁰ These experiences, Harpalani asserts, are consonant neither with White nor with Black experiences and perspectives—they are at once singular (relative to other minority groups) and yet varied (within the group).¹¹ Harpalani urges readers (and this part seems particularly directed to those within the Asian American community) to reject the attempt by SFFA to use Asian Americans as a wedge against Blacks in the fight over race-conscious admissions.¹² At the same time, Harpalani tries to heal a long-standing rift between these two communities. Harpalani’s project is one of both bringing clarity and building coalition.

There are points on which Harpalani and I do not agree,¹³ but it feels more important to focus here on the points about which we might find common ground. It is worth noting that Harpalani himself is Asian American (South

⁶ *Id.* at 322 (acknowledging that Asian Americans have been missing from conversations about race in America).

⁷ Of course Native Americans/Indigenous Persons are also absent from many of these conversations on race in America.

⁸ There are significant differences as well among the experiences and perspectives of ethnic groups within the Hispanic community. *See generally* Scott B. Astrada & Marvin L. Astrada, *Being Latino in the 21st Century: Reexamining Politicized Identity & the Problem of Representation*, 20 U. PA. J.L. & SOC. CHANGE 245 (2017). The same is true for the Black community. *See generally* Cedric Gordon, *When Diversity for Diversity’s Sake Is Enough: Should Black Immigrants Receive the Benefit of Affirmative Action at the Detriment of Native Blacks?*, 1 IND. J.L. & SOC. EQUALITY 185 (2013).

⁹ Harpalani, *supra* note 1, at 323.

¹⁰ Harpalani spends quite a bit of time recounting the history of discrimination against Asian Americans as well as their contemporary experiences with discrimination. *See id.* at 245-46, 249-60. For many readers, this is no doubt an important history lesson.

¹¹ *Id.* at 322.

¹² Harpalani is clear that “Asian Americans should reject SFFA’s project and support affirmative action.” *Id.* at 308.

¹³ For instance, the data is clear that Asian American students are disproportionately overrepresented (grossly in some instances) among students at elite colleges, universities, and high schools. As I have argued previously, this belies any claim of discrimination against Asian Americans in admission to these schools. *See* Hawkins, *supra* note 2, at 160. While Harpalani does say the legal claims made by SFFA in the Harvard case are “weak,” he suggests elsewhere that the perceptions of Asian Americans suffering discrimination in admissions are legitimate. Harpalani, *supra* note 1, at 264, 307.

Asian to be exact), and I am Black. This attempt at finding common ground, therefore, is not merely an intellectual exercise between academics, it may also be emblematic of the ability of our two communities to similarly bridge their differences. Harpalani astutely observes that the source of tension between the Asian American and Black communities is not in fact race-conscious admissions, but instead the ideology of white supremacy.¹⁴ If we focus on our common enemy, instead of on each other, we might achieve Harpalani's vision of forging greater coalition between us. I would like to accept his invitation to try.

By centering the debate on the ideology of white supremacy, rather than on race-conscious admissions, Harpalani and I can agree that eliminating the consideration of race in admissions harms all minority applicants.¹⁵ The demand for "colorblindness" implicit in the opposition to race-conscious admissions has always been a mechanism for reinforcing white supremacy by discounting, papering over, and otherwise denying the experiences of racial and ethnic minorities.¹⁶ Those experiences might be different for Asian Americans than they are for Blacks but, as Harpalani rightly points out, they are no less racialized.¹⁷ All racial and ethnic minority applicants suffer when they are forced to flatten their identities and obscure their lived experiences in order to avoid running afoul of mandates for ostensibly race-neutral admissions. The only students who benefit from ignoring their race are those White students who are seen, and see themselves, as unracialized.¹⁸

By centering the ideology of white supremacy rather than race-conscious admissions, perhaps too Harpalani and I can find agreement about the pernicious effects of standardized tests to exclude capable students, disproportionately Black and Hispanic, from accessing elite schools.¹⁹ Harpalani acknowledges this

¹⁴ Harpalani, *supra* note 1, at 239.

¹⁵ See *id.* at 321-26. Notably, even if White applicants benefit from the elimination of race in admissions, they undoubtedly will still suffer as students because everyone benefits from having a more diverse student body. See Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How Brown v. Board of Education Helped To Further White Supremacy*, 105 VA. L. REV. 343, 351 (2019).

¹⁶ See generally, e.g., Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

¹⁷ Harpalani, *supra* note 1, at 323.

¹⁸ Many White students do not realize they are "racialized" before college. See generally KARYN D. MCKINNEY, *BEING WHITE: STORIES OF RACE AND RACISM* (2005).

¹⁹ Asian Americans disproportionately benefit from the reliance on standardized testing in admissions. For instance, Asian Americans represent only about six percent of high school graduates but comprise upwards of twenty percent of the student bodies at elite colleges like Harvard, Princeton, Columbia, and the University of Pennsylvania. Harpalani, *supra* note 1, at 239 n.14. Similarly, Asian Americans comprise seventy percent of students at Stuyvesant High School in New York City where the student population is seventy percent Black and Hispanic. *Id.* at 288; see also Hawkins, *supra* note 2, at 160.

disparity but is equivocal in his objection to standardized tests.²⁰ He argues that Asian American students and their families have bought into the idea that these tests are the necessary and appropriate means of gaining access to elite schools, which in turn will fuel their social and economic mobility.²¹ The problem is that whatever their original purpose,²² standardized tests have become a mechanism for the maintenance of white supremacy cloaked in the veil of meritocracy.²³ The experiences of Asian American students demonstrate this myth of meritocracy.²⁴ In playing (and losing) the testing game, Asian Americans should realize that the game was never theirs to win. All minorities lose (eventually) in a system whose purpose and design is to maintain white supremacy, and we all stand to gain in dismantling that system.

Finally, centering white supremacy, rather than race-conscious admissions, highlights the fact that the stereotyping and implicit bias that Asian American applicants experience could just as easily be, if it has not already been, used to disadvantage other racial and ethnic minorities as well. Despite the District Court in the Harvard case acknowledging that the legal claims associated with this type of stereotyping and implicit bias are not actionable,²⁵ it is no less problematic as a matter of educational policy or practice. Black students in fact face some of the most damaging negative stereotypes in the educational domain.²⁶ We all have an interest in challenging the use of these stereotypes in deciding which students are capable of succeeding, which have overcome hardships and discrimination, or which are likely to enhance student body diversity. No racial group is monolithic. All students deserve to be judged on their own individual merits, not diminished to a caricature of society's worst impressions of their racial or ethnic group.

Harpalani reveals to us that SFFA does not speak for, or represent, all Asian Americans. They could not if they tried because Asian Americans are varied in their perspectives and experiences. This revelation is also a reminder that there is often common ground to be found, when we search for it. Rather than

²⁰ Harpalani, *supra* note 1, at 299-307.

²¹ *Id.* at 307.

²² For a discussion of the history of standardized testing, see generally NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* (1999).

²³ For a discussion challenging the "merit" of standardized admissions tests, see Hawkins, *supra* note 2, at 155-62.

²⁴ The object of standardized tests is not to allow schools to identify and admit only the most capable students. Even the most elite colleges and universities have always considered countless factors beyond academic credentials to admit students. See Stacy L. Hawkins, *Mismatched or Counted Out? What's Missing from Mismatch Theory and Why It Matters*, 17 J. CONST. L. 855, 864, 865 & n.30 (2015).

²⁵ This is not entirely true, as some courts have recognized this claim, and it is certainly possible for other courts to do so as well. See, e.g., *State v. Bagby*, 522 P.3d 982, 985 (Wash. 2023) (en banc); *State v. Sum*, 511 P.3d 92, 101 (2022) (en banc).

²⁶ The most notable is the stereotype of Black intellectual inferiority. See Hawkins, *supra* note 24, at 877 n.74, 898-99.

choosing to allow the debate about race-conscious admissions to be co-opted by its opponents, who are using both Asian American and Black students as a means of perpetuating white supremacy, we ought to instead use that common ground to forge coalition in the fight, not against race-conscious admissions, but against our true common enemy—the ideology of white supremacy.