THE PERILS OF ASIAN-AMERICAN ERASURE[†]

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Affirmative action,[1] particularly its most well-known variant, race-conscious college[2] admissions practices,[3] has long occupied a precarious position in

[†] 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] Though a common definition now seems elusive, Executive Order 10925 first defined the modern concept of "affirmative action" as "ensur[ing] that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961). Professor George Lipsitz lamented the mid-1990s decline of affirmative action programs in federal contracting and California higher-education admissions, having lauded such programs for having "provide[d] one of the few effective mechanisms for offsetting the effects of continuing discrimination [against racially minoritized peoples] in the private and public sectors alike." GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS 229 (2006). The race-neutral language of the Executive Order seemingly belies a racist post-World War II labor market in which applicants and employees at risk of adverse race-based employment treatment were invariably non-white people of color. *See generally, e.g.*, Herbert Hill, *Race and Ethnicity in Organized Labor: The Historical Sources of Resistance to Affirmative Action*, 12 J. INTERGROUP RELS. 5 (1984) (exploring how organized labor institutionalized racist policies and practices thereby necessitating affirmative action interventions).

[2] Controversy over race-conscious admission practices is not unique to elite higher-education institutions. Selective public elementary and high schools have also used these practices, evoking similar scrutiny. *See, e.g.*, Vinay Harpalani, *Testing the Limits: Asian Americans and the Debate over Standardized Entrance Exams*, 73 S.C. L. REV. 759, 773-87 (2022) [hereinafter, Harpalani, *Testing the Limits*] (discussing selective high school admissions controversies in New York City and Fairfax County, Virginia); Note, Selena Dong, *"Too Many Asians": The Challenge of Fighting Discrimination against Asian-Americans and Preserving Affirmative Action*, 47 STAN. L. REV. 1027, 1031-34 (1995) (discussing racial-group caps for seats at San Francisco's highly selective Lowell High School); *cf.* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 737 (2007) (outlawing general assignment protocols that take race into account in "unitary" public school systems); Doe v. Kamehameha Schs./Bernice Pauahi Bishop Est., 470 F.3d 827, 849

constitutional jurisprudence of equal protection[4] and statutory antidiscrimination law.[5] As a policy matter, affirmative action practices are necessary[6] to reduce the impact of durable structural barriers to opportunity that have been imposed on members of identifiable racial groups because of their race.[7] Legally, they're on far less secure footing.

(9th Cir. 2006) (en banc) (holding pro-Native Hawaiian admissions policy in independent schools established by Hawaiian Royal Family trust did not violate 42 U.S.C. § 1981). *But see* Runyon v. McCrary, 427 U.S. 160, 179 (1976) (holding 42 U.S.C. § 1981 prohibits white segregationist academies from discriminating on the basis of race).

[3] *See generally* Fisher v. Univ. of Tex. (*Fisher II*), 579 U.S. 365 (2016); Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297 (2013); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); DeFunis v. Odegaard, 416 U.S. 312 (1974) (per curiam) (each reviewing constitutionality of post-de jure segregation considerations of race in higher-education admissions at public universities); *see also generally* Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631 (1948) (per curiam); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (each involving public, de jure segregated law school's denial of admission to Black applicant explicitly and solely because of their race).

[4] *See* Larry M. Lavinsky, DeFunis v. Odegaard*: The "Non-Decision" with a Message*, 75 COLUM. L. REV. 520, 522-25, 532 (1975) (identifying "constitutional cloud" of issues presented by race-conscious admissions programs (quoting Robert M. O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699, 767 (1971))).

[5] *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 491-92 (1980) (plurality opinion) (upholding congressional spending bill that required set-aside for minority-owned companies), *questioned by* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (applying strict scrutiny to invalidate state and local legislation requiring set-asides for minority-owned companies), *and* Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990) (applying intermediate scrutiny to uphold federal legislation that uses benign racial classification), *and overruled in part by* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (applying strict scrutiny to all governmental legislation that uses any racial classification).

[6] *See generally* Dominique J. Baker & Michael N. Bastedo, *What If We Leave It Up to Chance? Admissions Lotteries and Equitable Access at Selective Colleges*, 51 EDUC. RESEARCHER 134 (2022) (noting robust simulation methods reveal that lotteries substantially reduce student-of-color admissions); Daniel Fershtman & Alessandro Pavan, *"Soft" Affirmative Action and Minority Recruitment*, 3 AM. ECON. REV. 1 (2021) (contending policies that simply encourage greater percentages of people of color in hiring pools might not be enough to yield hiring of candidates of color due to differences in candidates' evaluation based on race, and that "harder" affirmative action that incorporates direct consideration of candidate race, such as quotas, might be necessary to yield hiring outcomes).

[7] *Cf.* Ben Backes, *Do Affirmative Action Bans Lower Minority College Enrollment and Attainment?: Evidence from Statewide Bans*, 47 J. HUM. RES. 435, 443-50 (2012) (reporting statewide affirmative action bans led to lower Black and Latinx enrollment in selective public colleges and universities); Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities*, 94 REV. ECON. & STAT. 712, 717-19 (2012) ("[A]ffirmative action bans decrease underrepresented minority enrollment at selective colleges."); Mark C. Long & Nicole A.

As a constitutional matter, these measures have been summarily divorced from any reparative purpose since the "diversity rationale" emerged from *Regents of the University of California v. Bakke*[8] as the only compelling interest a public college or university may have in race-consciousness enrollment management.[9] Without "a [predicate] judicial determination of constitutional violation," a public college or university simply cannot appeal to remedy to justify its use of race classifications.[10] The question currently before the Court in *Students for Fair Admissions, Inc. v. University of North Carolina*[11] is whether the diversity rationale alone is constitutionally sufficient.[12] In the companion case, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*,[13] the question is whether a federal-funds-receiving educational institution's consideration of race can be compatible with the Title VI statutory requirement[14] that such institutions not discriminate on racial grounds.[15] Unlike in the *University of North Carolina* case, the certified question

Bateman, *Long-Run Changes in Underrepresentation After Affirmative Action Bans in Public Universities*, 42 EDUC. EVALUATION & POL'Y ANALYSIS 188, 196-99 (2020) (highlighting how decades of affirmative action bans have led to persistent declines in Black and Latinx representation in public flagship university undergraduate student bodies). *But cf.* prabhdeep singh kehal, Daniel Hirschman & Ellen Berrey, *When Affirmative Action Disappears: Unexpected Patterns in Student Enrollments at Selective U.S. Institutions, 1990-2016*, 7 SOCIO. RACE & ETHNICITY 543, 552-56 (2021) (articulating that affirmative action policies are associated with higher Black and Latinx student enrollment in higher-status, highly selective colleges and universities, but lower enrollments in less selective institutions); Mark C. Long, *Is There a "Workable" Race-Neutral Alternative to Affirmative Action in College Admissions?*, 34 J. POL'Y ANALYSIS & MGMT. 162, 175-80 (2015) (showing that replacing race-conscious affirmative action methods with proxy methods yields less academically prepared student-of-color cohort).

[8] 438 U.S. 265 (1978).

[9] *Id.* at 314-15 ("As the interest in diversity is compelling in the context of a university's admissions program, the question remains whether the program's racial classification is necessary to promote this interest."); *see also id.* at 300-02 (finding analogy to school desegregation remedies inapposite to race-conscious admissions in the absence of a history of legally mandated segregation at the ten-year-old medical school).

[10] *Id.* at 300-02.

[11] 567 F. Supp. 3d 580 (M.D.N.C. 2021), *cert. granted*, 142 S. Ct. 896 (2022) (mem.).

[12] Petition for a Writ of Certiorari Before Judgment at i, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. Nov. 11, 2021) (presenting questions of whether *Grutter v. Bollinger*, 539 U.S. 306 (2003), should be overruled and whether university could reject race-neutral alternatives to race-conscious admissions without first proving that said alternatives would substantially reduce academic quality or educational benefits of diversity).

[13] 397 F. Supp. 3d 126 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) (mem.).

[14] 42 U.S.C. § 2000d.

[15] Petition for Writ of Certiorari at i, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 20-1199 (U.S. Feb. 25, 2021) ("Title VI of the Civil Rights Act bans race-based admissions that, if done by a public university, would violate the Equal

in the *President & Fellows of Harvard College* case specifically asks if institutional consideration of race "penalize[es] Asian-American applicants."[16]

This is the first time that the Court has explicitly asked for consideration of the effects race-conscious admissions policies might have on Asian Americans. Though this motivating premise is left unstated, in Professor Vinay Harpalani's article, *Asian Americans, Racial Stereotypes, and Elite Admissions*,[17] it's long overdue.

Politically, and doctrinally, this conversation is usually structured as a contest between privileged whites and a makeshift confederation of *certain* peoples of color, usually Blacks and Latinx, who are positionally invested with structural disadvantage. Asian Americans occupy a precarious place—and rarely one of their own choosing—within this conversation. This dyadic framing is always problematic because there is no place for Asian Americans to occupy within it. Alternately enlisted as "honorary whites," tepidly embraced as second-tier members of the community of color, or erased altogether from consideration, until the Students for Fair Admissions, Inc. ("SFFA") cases, Asian Americans have rarely held meaningful agency in how they participate in the affirmative action conversation. This reality, long festering under the surface, has gone underappreciated in both mainstream and critical sociolegal discourses.

His article might well have been entitled, *The Perils of Asian American Erasure*, for that is the dilemma that Professor Harpalani, rightly predicting the true controversy at the heart of the SFFA cases, draws our attention to. But unlike *Fisher I, Fisher II*, *Grutter*, *Gratz*, or even *Bakke*, which presented variations on the same legal arguments,[18] the SFFA cases have Asian American protagonists. This is intentional, it will be successful, and both realities are unsettling. Try as we might to believe otherwise, it is conceptually difficult to accept non-white agents of white supremacy as acting fully in its pursuit. It is even more difficult when we suspect, as one does, as Professor Harpalani does, that these non-white agents have been co-opted out of perverse projections of common interests that do not truly converge.[19]

Protection Clause. *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003). Is Harvard violating Title VI by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives?").

[16] *Id.*

[17] *See generally* Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. REV. 233 (2022) [hereinafter Harpalani, *Asian Americans, Stereotypes, and Admissions*].

[18] *See supra* note 3.

[19] Harpalani, *Asian Americans, Stereotypes, and Admissions*, *supra* note 17, at 309-10 (citing Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC'Y 105, 106-07 (1999) (identifying affirmative action as manufactured theater of conflict between Blacks and Asian Americans)); *cf.* Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 528-33 (1980) (introducing thesis that courts apply law to endorse social change desired by Blacks only when it suits interests of white sociopolitical structures); Lani Guinier, *From Racial Liberalism to*

But it is also sobering in a different way. While progressive affirmative action advocates might lament the current exploitation of certain Asian-American positionalities by conservatives, we have ourselves to blame for decades of negligence towards conversations within and with the community that, had we engaged them openly, might have developed differently.

Guiding the reader to the perils of Asian American erasure is the first contribution Professor Harpalani's article makes to extant and soon-to-be post-SFFA scholarship on race and Asian America. Crafting a place for Asian America within this conversation is the second. Through his largely descriptive engagement with problematic tropes like the "model minority,"[20] "perpetual foreigner,"[21] and "passive nerd"[22] stereotypes, Professor Harpalani revisits the previous generation's pioneering Asian American sociolegal scholarship[23] to explain how white supremacist logics created the Asian-American other to suppress Asian American access to select educational opportunity[24] while leveraging it to dismantle race-conscious efforts that threaten the permanence of white supremacy.[25] The sum of these tensions remains iterative, but deceptively subconscious according to Professor Harpalani.[26] This, he identifies, is the root source of the unique vulnerability Asian American communities have to the political appeals of anti-affirmative action advocates.[27]

Racial Literacy: Brown v. Board of Education *and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92, 100-09 (2004) (identifying "interest divergence" as byproduct of racial hierarchy that converses with ideologies of white supremacy to maintain status quo); Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 164-88 (2011) (challenging "received knowledge" of theory and warning that prescriptive adherence to thesis arrests development of more potentially fruitful strategies for achieving racial equity).

[20] *See generally* ELLEN D. WU, THE COLOR OF SUCCESS: ASIAN AMERICANS AND THE ORIGINS OF THE MODEL MINORITY (2013) (describing how myth of "model minority" emerged as part of U.S. conceptualization of race in post-Civil War era).

[21] *See* Frank H. Wu, *Where Are You Really From? Asian Americans and the Perpetual Foreigner Syndrome*, C.R. J., Winter 2002, at 14, 14 (introducing "perpetual foreigner syndrome" to describe how Asian Americans are understood in United States as always foreign and never truly American).

[22] *See* Harpalani, *Asian Americans*, *Stereotypes, and Admissions*, *supra* note 17, at 245 ("[T]he passive nerd image[is] the idea that Asian Americans excel academically but are one-dimensional 'geeks' and 'nerds' who lack social and leadership skills.").

[23] *See, e.g.*, sources cited *supra* notes 19-21 and *infra* notes 24, 28.

[24] Harpalani, *Asian Americans*, *Stereotypes, and Admissions*, *supra* note 17, at 240 (citing Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 3 (1996) (introducing "negative action" to describe affirmatively adverse treatment of Asian Americans)).

[25] Harpalani, *Asian Americans*, *Stereotypes, and Admissions*, *supra* note 17, at 240-41 & n.21 (citing *inter alia* Jonathan P. Feingold, SFFA v. Harvard*: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707, 709-10 (2019) (applying negative action to understand how Harvard's Asian penalty benefits white applicants)).

[26] *Id.* at 307-08.

[27] *Id.*

The restorative, meta-intervention of citing Asian American scholars as experts-in-chief in this discussion is Professor Harpalani's third and, perhaps, most impactful contribution. In as much as we outside of Asian American communities have ignored the unique dilemmas that emerge from occupying this liminal space, we have also ignored the scholarship of Asian Americans that offered a pathway forward had we more purposefully embraced it. But where Asian American forebearers wrote from the multiracial coalition's perspective to Asian America to encourage its solidarity, if not support of the beleaguered practice,[28] Professor Harpalani expands his target audience to include those of us who have continued to ignore, silence, and misunderstand the real and imagined dilemmas facing Asian America on issues related to affirmative action. He writes on the verge of substantively indicting us all to live up to the fullness of the coalition we too often tout as transformative for antiracism.

He doesn't do it forcefully enough. Professor Harpalani opens Part IV of the article with the charge: "Progressive Asian Americans and other racial equity advocates cannot let SFFA capture the narrative on negative action."[29] But he doesn't provide instruction on how to evade such capture. Having well identified how the schism that first caught national attention in the 1990s has widened and deepened, his prescriptions are that Asian American communities raise their race consciousness and support affirmative action, and that racial equity advocates better understand the unique challenges discrete racial groups face in combatting structural racism.[30] He doesn't offer much to the former in return for their putative investment other than possible "slight decrease in the number of Asian Americans at elite universities."[31] Professors Gabriel Chin, Sumi Cho, Jerry Kang, and Frank Wu made little headway with their plea for Asian Americans to act "beyond self interest"[32] in the immediate aftermath of California Proposition 209's enactment, which disallowed affirmative action practices in that state in 1996.[33] One is hard-pressed to imagine more hardened contemporary Asian American communities choosing differently. Why pick solidarity even

[28] *See generally, e.g.*, ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA (2000) (encouraging "interracial justice" commitments across racial groups toward antisubordination); Gabriel J. Chin, Sumi Cho, Jerry Kang & Frank Wu, *Beyond Self-Interest: Asian Pacific Americans toward a Community of Justice, a Policy Analysis of Affirmative Action*, 4 UCLA ASIAN PAC. AM. L. J. 129 (1996) (encouraging Asian Pacific Islander Americans against co-optation by "model minority" and "meritocracy" logics used to confuse discrimination with antimeritocracy); Mari Matsuda, *We Will Not Be Used*, 1 UCLA ASIAN PAC. AM. L.J. 79 (1993) (calling for Asian Americans to resist becoming "racial bourgeoisie" and instead to persist in coalition with peoples of color in opposition to white supremacist goals).

[29] Harpalani, *Asian Americans*, *Stereotypes, and Admissions*, *supra* note 17, at 308.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 308 (quoting Chin et al., *supra* note 28, at 129).

[33] Proposition 209, 1996 Cal. Stat. A-294 (codified as CAL. CONST. art. I, § 31 (1996)).

over exploitation if solidarity comes with apparent positional and achievement disadvantage?

"Unmasking challenges"[34] only provides part of a necessary intervention to the latter group of racial equity advocates. It is sadly revelatory in 2023 that large populations of our pluralist society are unaware of the massive diversity—educational, cultural, linguistic, socioeconomic, and yes, racial—among the Americans who trace their ancestry to the world's geographically largest continent. But there seems to be more operating within the feedback loop—"model minority" in pursuit of ostensible merit to combat "perpetual foreigner" and "passive nerd" stereotypes that allow negative action against said "model minority"—than a charge toward either greater racial consciousness among Asian Americans or coalition building by us all is poised to address.

I can't speak for all non-Asian Americans whose work pursues equity and justice, and I won't. But, as a constitutional scholar of race and the law whose personal experiences will always remain naïve to the day-to-day nuances of living in the United States as an Asian American, I wanted (needed) more—deeper, more sweeping, ethnographic, almost phenomenological inquiry into the sociology, the economics, and the politics of Asian American communities that confront the race-consciousness and affirmative action debacle. On a surface level, one can observe how enforcement of a Black-white narrative of U.S. racism makes Asian America vulnerable to spillover harms by omission and situational exploitation by commission. But, while it is helpful to understand these challenges descriptively, it would be transformative to learn how to identify both opportunities to intervene and interventions that could be meaningful for both communities.

If we are truly to understand and embrace Asian America within the racism eradication project, then we will need to understand how Asian American people and communities have been situated—and have situated themselves—within the sociolegal phenomenon of race and racism. Professor Harpalani's article does good work in moving this part of the effort forward. Separately, we will need to understand better the values many have in descriptively meritorious systems of allocating access to elite educational opportunities long before we propose any alternatives lest we risk fostering divergence[35] instead of mutually beneficial strategy.[36]

Perhaps this is a book project that emerges from Professor Harpalani's recent scholarship.[37] I would look forward to reading it.

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[34] *See* Harpalani, *Asian Americans*, *Stereotypes, and Admissions*, *supra* note 17, at 312 (titling Section IV.B "Unmasking Challenges Faced by Asian Americans").

[35] *Cf.* Guinier, *supra* note 19, at 100-09.

[36] *Cf.* Driver, *supra* note 19, at 164-88.

[37] *See generally* Harpalani, *Asian Americans*, *Stereotypes, and Admissions*, *supra* note 17; Harpalani, *Testing the Limits*, *supra* note 2.