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AFFIRMATIVE ACTION IN COLLEGE ADMISSIONS: SUCCESSES AND FAILINGS

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Abstract: Although introduced in 1961, affirmative action policies continue to beget everyday conversations around and lawsuits against institutions of higher education. Students for Fair Admissions, a national advocacy organization that opposes the use of certain affirmative action policies in higher education, brought suit against Harvard University in 2017, arguing that the University discriminated against Asian-American applicants and therefore violated Title XI of the Civil Rights Act of 1964. This article discusses the arguments that both parties presented and provides an analysis thereof. The author's personal assessment is included, though it was written in advance of the District and Appellate Courts' recent verdicts. As *Students for Fair Admissions v. Harvard* is the latest in a series of high-profile cases against elite universities, this article seeks to provide a foundational understanding for how to approach similar cases that will undoubtedly arise in the future, some of which may even reach the Supreme Court.

Introduction

This article analyzes the key legal issues surrounding the 2017 litigation in *Students for Fair Admissions v. Harvard*, a Massachusetts District Court case concerning alleged admissions discrimination towards Asian Americans in violation of Title XI of the Civil Rights Act of 1964. In elucidating the contours of *Students for Fair Admissions,* this article evaluates previous college admissions cases that involve similar legal and ethical issues. Additionally, it provides an analysis of both the plaintiff's and defendant's positions.

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This litigation was initiated considering the fact that over the last two decades, Asian American applicants saw the lowest acceptance rate of any other racial group applying to Harvard (roughly 8.1%). The plaintiff, Students for Fair Admissions, presented the Court with three primary arguments with respect to Harvard's admissions practices: (1) the University engaged in intentional discrimination, (2) the University attempted to create racial-balancing, and (3) the University did not use race as a "plus factor" for the purpose of critical mass.[1] The defendant, Harvard University, defended its case by: (1) rationalizing its admissions policies, (2) connecting its admissions policies to the creation of a diverse student body, and (3) asserting that its admissions policy was aimed at allowing all students to have a safe and welcoming environment at Harvard.[2]

In addition to legal questions, many ethical issues arose in this litigation. As such, this case establishes certain principles dealing with admissions and diversity that will continue the legacy of affirmative action while also creating the potential for equitable reform. In this vein, *Students for Fair Admissions v. Harvard* will help set a precedent for the future of race-conscious admissions.

A Brief History of Affirmative Action

In 1961, President John F. Kennedy introduced the term "affirmative action" as a method to equalize discrimination that persisted in spite of civil rights laws and constitutional guarantees. Indeed, after the Supreme Court's decision in *Brown v. Board of Education* (1954) and the passage of the Civil Rights Act of 1964, discrimination in public accommodations was prohibited on the

[1] Students for Fair Admissions also presented "race-neutral alternatives" that Harvard could have employed. This will be discussed in the article's conclusion (Chiu).

[2] By comparison, African-American applicants enjoyed an average acceptance rate of 13.2%, white applicants enjoyed an average acceptance rate of 13.2%, and Hispanic-American applicants enjoyed an average acceptance rate of 10.6% (Avi-Yonah et al.)

basis on race, color, religion, sex, and national origin. Following these precedents, President Lyndon Johnson eventually developed and enforced affirmative action policies to advance civil rights and equality.

Beginning in the 1960s, colleges and universities adopted similar non-discriminatory admissions policies, prompting acceptance rates for minority students to increase. By 1978, however, flaws in affirmative action policies arose despite their good intentions: in *Regents of University of California v. Bakke* (1978), the Supreme Court ruled that the use of racial quotas was unconstitutional in the admissions process, though a school's use of affirmative action to focus on admitting more minority applicants was constitutional. The debate about affirmative action persisted through the 2000s with two landmark cases concerning college admissions: in 2003, the Supreme Court made rulings *Gratz v. Bollinger* and *Grutter v. Bollinger* that established that certain affirmative action policies promoted a "compelling state interest" in societal diversity. In 2013 and 2016, litigation arose in *Fisher v. University of Texas,* ultimately concluding in a ruling that established that states which use race as a consideration in the admissions process are not acting in violation of the Equal Protection Clause of the Fourteenth Amendment.[3] Now, the public eagerly awaits the results of likely appeals in *Students for Fair Admissions* because of the legal issues still outstanding.

[3] In *Fisher v. University of Texas* (2013) (alternatively called *Fisher I*), 570 U.S. ____ (2013), the Court ruled that strict scrutiny should be applied to determine the constitutionality of a race-sensitive admissions policy. *Fisher v. University of Texas (Fisher II)* is helpful in understanding *SFFA v. Harvard* since Harvard has involved itself in the Fisher case, filing an amicus brief in November 2015. Harvard's brief supported "UT Austin's use of race-conscious admissions policies to create a diverse student body, writing that a diverse student population is a compelling interest that justifies race-conscious admissions in higher education" (Ellis).

SFFA Arguments Against Harvard's Admission Policies

SFFA first contends that Harvard's admissions policy, also known as "The Harvard Plan," intentionally discriminates against Asian Americans. In its brief, SFFA points to Harvard President A. Lawrence Lowell's quota on Jewish enrollment in the 1920s and 1930s, one de-emphasized academic achievement and instead relied on legacy preferences.[4] Through this example, SFFA argues that Harvard employs an overly subjective analysis when considering Asian-American applicants. Furthermore, SFFA refers to Harvard's statistical data in demonstrating that the "racial demographics of Harvard's admissions and enrollment have remained stable over approximately the last decade, despite fluctuations in application rates."[5] SFFA also cites several studies that reveal disparities based on race indeed exist: for example, an Espenshade-Radford study concluded that Asian Americans are dramatically less likely to be admitted than otherwise similarly qualified Caucasian students.[6]

With this quantitative background, SFFA asserts that Harvard's personal rating of each applicant is significantly lower for Asian-American students than for other applicants, thus prompting many Asian-American students to be denied the equal opportunity to attend Harvard solely based on race. As a result of this system, SFFA concludes that Harvard University violated

[4] Chiu, Cynthia. "Justice or Just Us?: SFFA v. Harvard and Asian Americans in Affirmative Action - Note." Southern California Law Review, January 1, 2019. During the 1920s and 30s, Harvard established this quota by instituting a system that determined "character fitness and the promise of the greatest usefulness in the future as a result of a Harvard education" as a way to decrease the number of admitted Jewish students

[5] Chiu, Cynthia. "Justice or Just Us?: SFFA v. Harvard and Asian Americans in Affirmative Action - Note." Southern California Law Review, January 1, 2019. "[B]etween 2003 and 2012, the percentage of Asian Americans at Harvard wavered only slightly above and below approximately 17 percent. . . . [D]espite the fact that, by 2008, Asian Americans made up over 27 percent of Harvard's applicant pool, and approximately 46 percent of applicants with academic credentials in the range from which Harvard admits the overwhelming majority of students."

[6] Chiu, Cynthia. "Justice or Just Us?: SFFA v. Harvard and Asian Americans in Affirmative Action - Note." Southern California Law Review, January 1, 2019.

the *Gratz* precedent: that "overly mechanized" point systems violate the Equal Protection Clause of the Fourteenth Amendment.

In its second argument, SFFA claims that Harvard's admissions policy employs "racial balancing" to ensure a fixed quota of Asian Americans in its student body. SFFA deduced its claim by examining Harvard's statistical data which shows that even with fluctuations in application numbers, Harvard's admissions quotas have remained stable. Moreover, SFFA argues that the University's "one-pagers," which provide "statistics of the present representation of various racial groups as compared to the prior year," show Harvard's quota for Asian Americans.[7] This argument is important insofar as the *Bakke* decision established that using racial quotas in college admissions decisions violates the Equal Protection Clause. Although this landmark case eradicated racial quotas in higher education admissions, race is still considered as one of many factors during the admissions process under the auspices that it promotes the creation of a diverse student body.

SFFA's third argument states that Harvard does not consider race for the purpose of achieving critical mass, but rather, that it considers race as more than just a "plus factor."[8] This assertion is premised on the precedent established in *Fisher II* that allows universities to determine their preferences on diversity if critical mass has already been achieved. Examining Harvard's diversity policy, SFFA contends that Harvard's policy fails to attain educational diversity since Harvard's policies are *not* focused on attaining critical mass, thus proving that race-conscious admissions "could be used in perpetuity even though there may be some point in time where the

[7] Chiu, Cynthia. "Justice or Just Us?: SFFA v. Harvard and Asian Americans in Affirmative Action - Note." Southern California Law Review, January 1, 2019.
[8] Chiu, Cynthia. "Justice or Just Us?: SFFA v. Harvard and Asian Americans in Affirmative Action - Note." Southern California Law Review, January 1, 2019. Critical mass is defined as "adequate representation of minority students so that the . . . educational benefits that can be derived from diversity can actually happen." See *Fisher v. University of Texas at Austin (Fisher II)*, 579 U.S. ___ (2016).

'use of racial preferences will no longer be necessary to further the interest in diversity."[9] Under this premise, SFFA asserts that race is more of a "plus factor" that can either help or hinder an applicant's admittance, thus violating the Fourteenth Amendment.

Harvard University's Counter-Arguments

Attempting to undermine the veracity of SFFA's claims, Harvard presents a compelling argument as to why its admissions policies give all applicants, especially Asian Americans, a fair chance in earning admittance. In response to SFFA's first argument, Harvard assert that it has "expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups," as stated in Justice Powell's *Bakke* concurrence.[10] In this way, Harvard presents itself as using admissions policies that threat all applicants as individuals.

Harvard further contends that SFFA's reference to the 1920s racial quota against Jewish Americans is not an indication of discriminatory intent against Asian Americans and does not suggest that Harvard is instituting these policies now. Moreover, Harvard cites Justice Powell's *Bakke* opinion that "colleges and universities have a right to academic freedom protected by the First Amendment, which includes a right to select their students."[11] Harvard then utilizes this notion in acknowledging its reaffirmance in the 2016 *Fisher II* case, ultimately arguing that it was simply exercising the right to determine admittance based on the University's definition of diversity.[12] As stated in Harvard's *Fisher II* amicus brief, "individualized admissions programs

[9] Chiu, Cynthia. "Justice or Just Us?: SFFA v. Harvard and Asian Americans in Affirmative Action - Note." Southern California Law Review, January 1, 2019.
[10] Oppenheimer, David B. 2018. "ARTICLE: ARCHIBALD COX AND THE DIVERSITY JUSTIFICATION FOR AFFIRMATIVE ACTION." *Virginia Journal of Social Policy & the Law,* 25, 158.
[11] Oppenheimer, David B. 2018. "ARTICLE: ARCHIBALD COX AND THE DIVERSITY JUSTIFICATION FOR AFFIRMATIVE ACTION." *Virginia Journal of Social Policy & the Law,* 25, 158.
[12] *Fisher v. University of Texas at Austin (Fisher II)*, 579 U.S. ___ (2016)

like Harvard's … considers each applicant as a whole person," preventing Asian Americans from "being grouped into one monolithic 'Asian category' that blurs the different realities that various ethnic subgroups face."[13] Based on the rulings from these cases, Harvard asserts that it has the right to choose the makeup of its student body through a fair admissions process.

Regarding SFFA's second argument of "racial balancing," Harvard argues that it maintains a diverse learning environment that admissions policy pioneers have diligently worked to achieve.[14] Although critical mass is an immeasurable number, the concept requires some ideal balance constituted through a number of factors. Because of the educational benefits of diversity, one of these factors is race. In having a proper balance of races within the university, not all qualified applicants can be accepted equitably, which is not a mirror of racial balancing but instead part of any admissions process. Most importantly, Harvard focuses on creating a diverse environment through a fair and competitive admissions process like any other elite university. SFFA's claims about Harvard's intentional "racial balancing" fails to consider the perspective of other minority groups as well as the need for a diverse learning environment that constitutes all backgrounds, races, and ethnicities. As upheld in *Smith v. University of Washington Law School* (9th Cir., 2004), admissions programs that recognize "different cultures, backgrounds, and languages" of applicants whose families or who themselves originated from the Philippines, Viet Nam, Cambodia, Taiwan, or the People's Republic of China would bring different contours to the educational environment. In applying *Smith*, Harvard argues that its admissions program fosters these values of diversity and inclusivity.

[13] Brief for United States District Court District of Massachusetts as Amicus Curiae Brief...In Opposition To Plaintiff's Motion For Summary Judgment, Students for Fair Admissions v. Harvard 1:14-cv-14176-DJC (D. Mass). pg. 8.
[14] Chiu, Cynthia. "Justice or Just Us?: SFFA v. Harvard and Asian Americans in Affirmative Action - Note." Southern California Law Review, January 1, 2019.

Lastly, Harvard replies to SFFA's arguments that it fails to consider race for the goal of achieving critical mass. In *Fisher II*, the Supreme Court mandated that a university must reevaluate its critical mass status every five years, leading Harvard to create the "Smith Committee" which focuses on affirmative action policies. Consequently, Harvard claims that its holistic admissions process allows all students to be given a fair chance, thus demonstrating that race is not put on a pedestal for any applicant but instead merely serves as another contributing factor. Harvard maintains that it does not discriminate or base its rigorous admissions process on an applicant's background and even promotes "the belief that diversity adds an essential ingredient to the educational process."[15] Harvard's convictions, the University argues, are affirmed with the *Grutter* decision which states that "student body diversity promotes learning outcomes," and "better prepares students for an increasingly diverse workforce and society …" Harvard also claims that "there is substantial diversity within the Asian American community" since the term is all encompassing of a geographically-disparate population.[16] Harvard correctly acknowledges that it faces the difficult task of making admission decisions since diversity is a broad term with many complexities.

Personal Assessment

In considering the evidence presented to the District Court, it is clear that Harvard's admissions policies do provide all applicants a fair chance no matter their race, background, or socioeconomic status. With respect to SFFA's claims, Harvard enjoys First Amendment rights to freely choose who has the privilege of joining its incoming student body. As one of the oldest and

[15] Oppenheimer, David B. 2018. "ARTICLE: ARCHIBALD COX AND THE DIVERSITY JUSTIFICATION FOR AFFIRMATIVE ACTION." *Virginia Journal of Social Policy & the Law,* 25, 158.
[16] Brief for United States District Court District of Massachusetts as Amicus Curiae Brief...In Opposition To Plaintiff's Motion For Summary Judgment, Students for Fair Admissions v. Harvard 1:14-cv-14176-DJC (D. Mass). pg. 5.

most elite universities in the world, Harvard is intentional and decisive in its admissions decisions, but in a non-discriminatory way. SFFA raises valid concerns in its lawsuit but fails to consider the importance of Harvard's interest in student applicants from different backgrounds, especially *within* the Asian-American community.

Conclusion

Since the 1987 *Bakke* litigation brought the topic of diversity in higher education to the Supreme Court, various competing interests have attempted to alter the scope of affirmative action programs. Despite the fact that the majority of universities today do not openly employ race considerations in admissions as open-enrollment institutions, *SFFA v. Harvard* makes a valuable contribution to the history of debates over affirmative action in higher education.

Although Harvard was victorious in the District and Appellate Courts' review, there are "workable race-neutral alternatives" that can be employed to reduce the possibility of discrimination. For example, universities can incentivize applicants requiring more financial aid to apply to increase applications from historically-underserved minority groups. As a recent article in the *University of Michigan Journal of Law Reform* has argued, with "more inclusive applicant pools, social mobility in America will improve and reduce the size of preferences universities use."[17] With this in mind, the potential for *all* colleges to achieve meaningful diversity and fulfill their educational missions may seem improbable, but the remains a need for increasingly race-neutral alternatives to ensure there is minimal possibility for discrimination.

[17] Sander, Richard, and Danielson, Aaron. 2014. "Thinking Hard About "Race-Neutral" Admissions." *University of Michigan Journal of Law Reform* 47 (4): 967.

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*Smith v. University of Washington Law Schoo*l, 392 F.3d 367 (9th Cir. 2004)

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, et seq.

U.S. Constitution. Amend. XIIII, Sec. 1.