

## ***SFFA v Harvard*: Rebuilding a Wall in Higher Education**

Likhitha Kancherla

**Audience Analysis (101 words):** Although *SFFA v Harvard* is an “Affirmative Action” lawsuit specific to Harvard, its potential implications are widespread. Therefore, individuals, especially minorities, who are affected by post secondary institutions, would want to be informed about not only this case but the legal status of Affirmative Action as a whole. Considering post secondary education has become the norm, the majority of young adults would be impacted by the decisions made from this case. Accordingly, the demographic that this paper concerns is quite widespread. Some commonly held values that this population (educated Americans) would be expected to believe in are equal opportunity and education.

Affirmative Action: A term many individuals are familiar with, yet, the underlying details surrounding the topic remain a distant concept. When it was first introduced in 1961, it was meant to provide opportunities to historically excluded groups in not only the institution of education as we have commonly referred to it as, but also employment and housing. Aiding children of alumni and athletes are also among the many objectives of Affirmative Action. This important structure, however, has been under scrutiny since its conception because in addition to legacy and athletics, it also addresses the sensitive and uncomfortable topic of race. One common speculation against the race conscious aspect of Affirmative Action is that racism is no

longer relevant. However, this misconception of race no longer being relevant exists because racism has evolved to fit the norms of today. Systemic barriers are still prevalent and relevant, but they are more discreet. Thereby, time and time again, though the Supreme Court may have added restrictions, it has ultimately upheld the entity of Affirmative Action. The upcoming case *SFFA v Harvard*, however, has the potential to change this precedent because of Kavanaugh's recent appointment to the Supreme Court panel. His addition has resulted in a majority right wing court and thus "The Harvard litigation appears destined for a Supreme Court with five Justices hostile to Affirmative Action" (Feingold 709). Furthermore, this case is distinct from others due to the overwhelming support from the Trump Administration as well as a more sympathetic argument from previous lawsuits since the plaintiffs are Asian Americans, a minority, instead of White college applicants. Ed Blum, the conservative activist responsible for not only this lawsuit, but previous lawsuits questioning Affirmative Action, has strategically used the 'model minority' this time around to invalidate the legitimacy of race conscious admissions and to preserve the effects of White privilege. Though the specifics of this case may not seem relevant to most people, it has the potential to not only affect Harvard, but every publicly funded university and any future legislation related to benevolent discrimination (the distinguishment of race as a means of providing equal opportunity). In order to sustain and promote the progress made in dismantling systemic barriers, it is imperative to preserve Affirmative Action and further enforce 'benevolent discrimination' because it encourages equal opportunity- a concept that America is founded upon.

In the history of Affirmative Action, quota systems have been ruled against by the supreme court, meaning... colleges are not allowed to have a certain number of seats allocated

for a specific minority group. Specifically, in the *SFFA v Harvard case*, Ed Blum has claimed that while the population of Asian Americans has increased, the percent of Asian Americans admitted into Harvard has remained the same. Jeff Sessions, the attorney general, in a similar manner, also asserted that “Harvard admissions officers monitor and manipulate the racial makeup of incoming classes.” (Binkley, 2018). These claims, however, lack much needed supporting evidence. First of all, Asians are actually overrepresented in Harvard’s student population. Despite comprising only 5.8% of the US population, Asian Americans made up 22.2% of Harvard’s admitted class of 2021. Secondly, Asian Americans who have been admitted to Harvard have increased from 16.1 percent in the class of 2004 to 22.2 percent in the class of 2021 (Patriot Act, 2018). According to Feingold, a law professor, “ For the class of 2019, Harvard received over 37,000 undergraduate applications, 26,000 of which came from domestic applicants. Of those, 8,000 domestic applicants had perfect converted GPAs and over 5,000 had a perfect math or verbal SAT score. In total, Harvard offered admission to 2,003 students (roughly 5.4% of all applicants),”(720). Accordingly, it can be inferred that Harvard relies on more than just numerical measures in their immensely selective admissions process. Thereby, irrespective of one’s academic excellence, getting into Harvard is no easy feat. Correspondingly, in a previous Affirmative Action case, *Fisher v University of Texas* (also brought forward by Ed Blum), this notion of “race conscious policies discriminating the majority” had also been prominently referred to. The case involved a White applicant, Abigail Fisher, who claimed that due to her race she didn’t receive admission into University of Texas. Her claims were disproven, considering out of the applicants chosen over her with lower scores, only five were Black or Latino while 42 were White. On the other hand 168 Black and Hispanic students with scores as

good as or better than Fisher were also rejected (Patriot Act, 2018). This misconception that Affirmative Action favors Black or Hispanic applicants with lower scores over more qualified White (and now Asian) applicants has been alluded to far too many times- especially considering holistic review refers to the consideration of a myriad of factors, with only one of them being race. Henceforth, Affirmative Action (race conscious admissions in particular), contradicting the commonly perpetuated myth of a reverse racial bias, actually has a limited impact on the acceptance of applications.

However, *SFFA v Harvard* is more convincing than prior cases, since as priorly mentioned, Asian Americans are being victimized instead of White applicants. This was a strategic and purposeful choice as Feingold elaborates, “With White applicants extracted from the perceived Affirmative Action equation, we become more prone to overlook the myriad ways in which Harvard’s admissions regime confers racial benefits on White applicants” (719). To shift the focus from what was previously a “Black and White debate”, Blum/SFFA has resorted using the “model minority” to push its agenda. Historically Asians have been used as a “model” for other minorities to follow and their achievements are used to silence the struggles of other minorities while appeasing White guilt. This model minority myth is relevant since it “allowed White Americans to refute one of the central arguments of civil rights activists: that legalized discrimination had made it exceedingly difficult for people of color to thrive in America”(Lee and Outten 3) and continues to be used to suppress current efforts of addressing the effects of legalized discrimination. Michele Moses, a professor who specializes in disagreements in race policies and equality of educational opportunity, explains how this relates back to the Affirmative Action debate when she says, “From a CRT (critical race theory) perspective, we

understand that this politics of resentment has the ultimate aim of preserving White privilege in selective higher education. As such, we conclude that Affirmative Action is not the culprit in the controversy over Asian Americans and negative action; White supremacy is.” (19-20).

Accordingly, though the arguments made by SFFA may appear more sympathetic, the implications, intentional or not, are ultimately to sustain racist structures because equality (in this case via Affirmative Action) feels like discrimination when one is accustomed to privilege.

Though it is important to recognize the manipulation of the model minority in promoting anti-Affirmative Action rhetoric, that is not to say that there is no anti-Asian bias in Harvard’s admission’s process. While Ed Blum and SFFA were wrong in that Harvard’s enforcement of Affirmative Action negatively impacts Asian Americans, their evidence to support that Harvard may have an anti-Asian bias was legitimate. Race is supposed to be one factor among many that is considered in Harvard’s holistic admissions process when assessing a student’s overall rating. SFFA brought forth evidence indicating “‘There’s a statistically significant ‘Asian-American penalty’ at Harvard, where admissions officers rate each applicant’s personal qualities (as well as their academic achievement, extracurricular activities, and athletic ability). Asian-American students, on average, got lower personal scores than White applicants did” (Hoover, 2018).

Though the majority stereotypes of Asians are positive (to sustain the model minority propaganda), there are still negative implications to their stereotypes. As contended by Historian Ellen Wu, “a key element of the model minority discourse was to position Asian Americans as ‘not-Black’—that is, as overachievers in contrast to Black underachievement, as hard workers in contrast to Black indolence, and as people who play by the rules rather than demanding right” (Moses 12). While such stereotyping obviously negatively portrays the Black population, its

description of Asian Americans as “overachievers” and “obedient” has resulted in schools like Harvard, and American society as a whole to rate Asian Americans as not personable. Although Harvard claims they have not done so, there is evidence that shows otherwise. These anti-Asian bias allegations were confirmed when Harvard, undoubtedly in response to SFFA’s questioning, renewed their policies to the following- “‘The consideration of race or ethnicity may be considered only as one factor among many.’ The word ‘only’ is boldfaced and underlined. The new guidelines also stated that admissions officers should not consider an applicant’s race or ethnicity when assigning the personal ratings” (Hoover, 2018). This suggests that Harvard themselves recognized there was bias in the personal ratings. Because of the threat to their reputation, however, Harvard allowed for SFFA to conveniently conflate anti-Asian bias with Affirmative Action as Feingold mentions in his article, “There is logic to such an approach. By acquiescing to an Affirmative Action narrative, Harvard can present itself as the valiant defender of race conscious admissions and, by extension, racial equality more broadly” (712). Basically, anti-Asian bias is being used to discredit Affirmative Action by SFFA, and Affirmative Action is being used by Harvard to overshadow their bias and to uphold their reputation. Accordingly, the intentions of both parties are misplaced, and Affirmative Action is wrongly under fire for it as Moses insightfully phrases, “Whether there was or was not negative action by Harvard admission officials, the lawsuit misplaces the blame for the alleged discrimination on Affirmative Action policy” (5). Thus in *SFFA v Harvard*, though the premise for SFFA’s argument (anti-Asian bias) is valid, their overall argument (premise plus the conclusion that Affirmative Action is to blame) is not logically sound.

Even if SFFA were to change the premise for their argument, the conclusion of Affirmative Action being unfair is inaccurate because their rationale stems from the notion that race is no longer an issue and that any recognition of race in legislation is discriminatory (even if it is benevolent). However, even when looking at the institution of education alone, statistics show that race plays a role in accessibility and opportunities. While some may argue that socioeconomic status alone may be a better indicator of one's access to opportunities, a report on race conscious policies suggests differently, "Black students enroll in less selective colleges than White students of the same family income. Black students also have lower completion rates and higher student loan default rates.... 'Socioeconomic disparities or characteristics are only rough approximations of the unique lived experiences of Black and Brown students,'" (Elfman 9). In addition to socio-economic conditions, Black and Brown students are met with more social resistance in education (via negative social sanctions, socially perpetuated labels, etc) However, even when looking solely at numbers, White and Black families from the same economic class are not equivalent as stated in the Washington Post, " Thomas Shapiro estimated the relative wealth by race for middle-class families.... He found that black middle-class wealth was only 22 percent of whites'. This gap has undoubtedly widened since 2007 because the housing collapse harmed blacks — who were targeted disproportionately for exploitative subprime loans and exposed to foreclosure — more than whites" (Strauss, 2017). The disparities presented in the evidence prove that race *does* need to be addressed in post secondary education. Post secondary education in particular should be required to address race in admissions because of the "Institutions' historically racist admission policies which have led to the underrepresentation of Black and Latinx students" (Elfman 8). Ultimately, while race conscious policies are necessary

and important to promote equal opportunity, the present impact of race conscious policies in admissions is actually limited. Debates against such policies are blown out of proportion, as race is just one small factor of many that are considered by admissions, and considering race in admissions does not directly and negatively impact more privileged groups.

Still, concerns about 'reverse-discrimination' have still been voiced, as Chief Justice John G. Roberts Jr once famously said, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." This sentiment is shared by many, but it is important to recognize that such 'discrimination' or recognition is necessary because of systemic barriers. In a more politically aware manner, Justice Sotomayor countered, "The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination". Furthermore, addressing race consciousness as a form of discrimination, even as benevolent discrimination, is unfitting and perpetuates a negative connotation. This ill-suited terminology, and the controversy it has caused, has resulted in the limited enforcement of race conscious policies. However, because systemic barriers are still so prominent, the current limited enforcement of race conscious policies is not enough to ensure equal access to opportunities. Henceforth, race conscious policies should actually be implemented on a larger scale because the effects of historical inequities are still extensive. The most effective and powerful platform to enforce such policies is post secondary education because, "By design, race-conscious policies will increase higher education access and provide much-needed support to students of color" (Elfman 8). Higher education, now more than ever, plays an important role in access to better job opportunities, economic success, social networking, and overall a better quality of life.



Consequently, increasing access to higher education for minorities would provide a means to a better socioeconomic status and access to opportunities.

Overall, though *SFFA v Harvard* may seem like an irrelevant, ambiguous lawsuit about the reputation of a prestigious post secondary institution, it is a case that could overrule major precedent and prevent any further efforts to rectify the racist foundations of America. With the current Supreme Court panel of justices, and the widespread grievances on Affirmative Action, an important litigious entity for equal opportunity is under threat. Not only would this impact post secondary education, but would prevent the government in correcting the wrongdoings of American history. Accordingly, it is imperative to recognize the conflation of terminology (such as Affirmative Action and an Anti-Asian bias) in promoting regressive agenda, especially in litigations that have the potential to establish a new present. By doing so, rather than the form of discrimination evolving to fit the current norms, real progress can be achieved.

#### Works Cited

“Affirmative Action.” *Patriot Act*, Netflix, 28 Oct. 2018.

Binkley, Collin, et al. “Trump Administration Backs Asian Americans in Harvard Case.” *PBS News Hour*, 30 Aug. 2018.

Elfman, Lois. “Report: Universities Must Cultivate Race-Conscious Policies to Address Historical Inequities.” *Diverse: Issues in Higher Education*, vol. 36, no. 25, 2020, pp. 8-9.

Feingold, Jonathan. "SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus." *California Law Review*, vol. 107, no. 2, Fall 2019, pp. 707-36.

Hoover, Eric. "Both Sides at Harvard Trial Agree on One Thing: The 'Wolf of Racial Bias' Is at the Door." *Chronicle of Higher Education*, Fall 2018

Lee, Timothy, and Robert Outten. "The Effect of Model Minority Myth Salience on White Americans' Perceptions of Black Americans and Their Support for Affirmative Action." *Psi Chi Journal of Psychological Research*, vol. 25, no. 1, Spring 2020, pp. 2-13.

Moses, Michele, et al. "Racial Politics, Resentment, and Affirmative Action: Asian Americans as 'Model' College Applicants." *The Journal of Higher Education*, vol. 90, no. 1, 2019, pp. 1-26.

Strauss, Valerie. "Actually, we still need Affirmative Action for African Americans in college admissions. Here's why." *Washington Post*, 2 Aug. 2017.

<https://www.washingtonpost.com/news/answer-sheet/wp/2017/08/02/actually-we-still-need-affirmative-action-for-african-americans-in-college-admissions-heres-why/>

### Bibliography

"Affirmative Action." *Patriot Act*, Netflix, 28 Oct. 2018.

Binkley, Collin, et al. "Trump Administration Backs Asian Americans in Harvard Case." *PBS News Hour*, 30 Aug. 2018.

Elfman, Lois. "Report: Universities Must Cultivate Race-Conscious Policies to Address Historical Inequities." *Diverse: Issues in Higher Education*, vol. 36, no. 25, 2020, pp. 8-9.

Feingold, Jonathan. "SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus." *California Law Review*, vol. 107, no. 2, Fall 2019, pp. 707-36.

Hoover, Eric. "Both Sides at Harvard Trial Agree on One Thing: The 'Wolf of Racial Bias' Is at the Door." *Chronicle of Higher Education*, Fall 2018

Lee, Timothy, and Robert Outten. "The Effect of Model Minority Myth Salience on White Americans' Perceptions of Black Americans and Their Support for Affirmative Action." *Psi Chi Journal of Psychological Research*, vol. 25, no. 1, Spring 2020, pp. 2-13.

Moses, Michele, et al. "Racial Politics, Resentment, and Affirmative Action: Asian Americans as 'Model' College Applicants." *The Journal of Higher Education*, vol. 90, no. 1, 2019, pp. 1-26.

Paguyo, Christina, and Michele Moses. "Debating Affirmative Action: Politics, Media, and Equal Opportunity in a 'Postracial' America." *Peabody Journal of Education*, vol. 86, no. 5, 2011, pp. 553-579.

Strauss, Valerie. "Actually, we still need Affirmative Action for African Americans in college admissions. Here's why." *Washington Post*, 2 Aug. 2017.

<https://www.washingtonpost.com/news/answer-sheet/wp/2017/08/02/actually-we-still-need-affirmative-action-for-african-americans-in-college-admissions-heres-why/>

Wright, Dwayne, and Liliana Garces. “ Understanding the Controversy Around Race-Based Affirmative Action in American Higher Education.” *Controversies on Campus*, 2018, pp. 3-21