

Affirming Affirmative Action by Affirming White Privilege: *SFFA v. Harvard*

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INTRODUCTION

Harvard College’s race-based affirmative action measures for student admissions survived trial in a federal district court.¹ Harvard’s victory has since been characterized as “[t]hrilling,” yet “[p]yrrhic.”² Although the court’s reasoning should be lauded for its thorough assessment of Harvard’s race-based affirmative action, the roads *not* taken by the court should be assessed just as thoroughly. For instance, NYU School of Law Professor Melissa Murray commented that, much like the Supreme Court’s seminal decision in *Grutter v. Bollinger*³ (which involved the University of Michigan Law School), the district court’s decision in *Students for Fair Admissions v. Harvard*, by “focus[ing] on diversity as the sole grounds on which the use of race in admissions may be justified,” avoided “engag[ing] more deeply and directly with the question of whether affirmative action is now merely a tool to promote pluralism or remains an appropriate remedy for longtime systemic, state-sanctioned oppression.”⁴ This Essay, however, criticizes the district court’s assessment of Harvard’s use of race-based affirmative action *at all*, given that the lawsuit’s central claim had nothing to do with it. In a footnote, the court addresses the real claim at hand—discrimination against Asian-American applicants vis-à-vis white applicants resulting from race-neutral components of the admissions program.⁵ Had the analysis in this footnote served as the central basis of the court’s ruling, it could have both

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¹ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019), *appeal docketed*, 19-2005 (1st Cir. Oct. 11, 2019).

² Elie Mystal, *Harvard’s Thrilling—and Pyrrhic—Affirmative Action Victory*, NATION (Oct. 2, 2019), <https://www.thenation.com/article/harvard-affirmative-action/> [<https://perma.cc/DY9H-5FBH>].

³ 539 U.S. 306 (2003).

⁴ Melissa Murray, *That Affirmative Action Ruling Was Good. Its Rationale, Terrible.*, N.Y. TIMES (Oct. 2, 2019), <https://www.nytimes.com/2019/10/02/opinion/harvard-affirmative-action.html> [<https://perma.cc/L99Z-BG76>]; see also Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 955–56 (2001) (recounting that when *Grutter* “was first filed, many people encouraged the University to admit and carefully document its own historical and contemporary discrimination against African-Americans and other minority students” since “[t]his seemed the University’s safest and most straightforward strategy,” but “[t]he University rejected this suggestion, relying instead on the diversity defense alone”).

⁵ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 191 n.56.

demonstrated how elite schools privilege whiteness, and also thwarted the possibility of the Supreme Court ending race-based affirmative action in higher education once and for all.

In 2014, Students for Fair Admissions (SFFA), whose founder and president is the notorious anti-affirmative-action advocate Edward Blum, sued Harvard for anti-Asian-American discrimination in its admissions program. This Essay argues first that SFFA could have sought to remedy the portions of Harvard's admissions program that SFFA *itself* identified as potentially allowing anti-Asian-American bias to infect the selection process—namely, race-neutral components that effectively give preferences to white applicants. Instead, SFFA challenged the portion of the program that considers race in order to address the underrepresentation of Black and Latinx students at Harvard—commonly referred to as its affirmative action component. Nowhere in its arguments did SFFA draw a connection between the harm to Asian-American applicants and the race-based affirmative action component. Indeed, in its arguments to the court, SFFA presented its claim as arising out of discrimination against Asian-American applicants “vis-à-vis white applicants,” not Black and Latinx applicants.⁶ Nevertheless, following a trial, the district court conducted a thorough analysis of Harvard's use of race-based affirmative action, ultimately upholding it under *Grutter*'s strict scrutiny test.⁷

This Essay argues next that the district court could have instead isolated those race-neutral components of Harvard's admissions program that produced “disparate outcomes as between whites and Asian Americans” and found the race-based affirmative action component of the program irrelevant to the inquiry.⁸ In doing so, the court would have applied the test for facially neutral policies, assessing whether Asian-American applicants were disparately impacted by Harvard's race-neutral criteria and whether Harvard had the requisite discriminatory intent in maintaining such criteria. Breaking down Harvard's massive admissions program in this way would have been justified. Under a separate, yet related, doctrine—the state action doctrine derived from the Fourteenth Amendment's Equal Protection Clause—the Supreme Court has directed courts to focus on only *those specific facts* that give rise to the discrimination claim. Because the affirmative action component of the admissions program did not give rise to SFFA's claim, the court should not have assessed it.

Ultimately, the court did not find that Harvard intentionally discriminated against Asian-American applicants. But, as shown below,

⁶ Plaintiff's Proposed Findings of Fact and Conclusions of Law at 10, *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d 126 (No. 14-cv-14176).

⁷ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at

⁸ *Id.* at 190 n.56.

that point was under-prosecuted by SFFA. If this claim had been more thoroughly addressed in the litigation and succeeded, its remedy would not have impacted Harvard's race-based affirmative action.

I. HARVARD'S ADMISSIONS PROGRAM

SFFA chose to target Harvard's use of race-based affirmative action because of the special place it holds in Supreme Court jurisprudence. Justice Powell's plurality opinion in the Court's first assessment of the use of race in higher education admissions, *Regents of the University of California v. Bakke*, discussed Harvard's use of race approvingly.⁹ Based on Powell's praise, the Court later used Harvard's admissions program as a standard against which to judge the University of Michigan's use of race-based affirmative action in *Grutter*.¹⁰ Thus, according to SFFA's logic, if Harvard's use of race is illegitimate, "any use of race" in admissions would be illegitimate.¹¹

Given the model status of Harvard's race-based affirmative action program in Supreme Court jurisprudence, predictably, the district court concluded that Harvard's use of race in its admissions process met the Supreme Court's standards. The court concluded that Harvard's admissions program is "a time-consuming, whole-person review process where every applicant is evaluated as a unique individual."¹² And, as part of this process, "[r]ace is only intentionally considered as a positive attribute."¹³

The court specifically found that race is used as "a tip or plus factor" for "African American and Hispanic applicants, while white and Asian American applicants are unlikely to receive a meaningful race-based tip."¹⁴ Notably, outside of the context of race, the only other category to meaningfully receive such "tips" are "recruited athletes, legacies, applicants on the dean's or director's interest lists, and children of faculty or staff" ("ALDCs").¹⁵ The court found that ALDCs are "disproportionately white,"¹⁶ and the "lower admission rate for staff-interviewed Asian Americans is driven primarily by the fact that Asian

⁹ 438 U.S. 265, 316–17 (1978) (plurality opinion).

¹⁰ 539 U.S. at 335–37.

¹¹ Complaint at 3, 116–19, *Students for Fair Admissions Inc.*, 397 F. Supp. 3d 126 (No. 14-cv-14176) (emphasis added).

¹² *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 136.

¹³ *Id.* at 146. "ALDCs" stands for the following advantaged groups: athletes, legacies, dean's list, and children of faculty and staff.

¹⁴ *Id.* at 146, 190 n.56.

¹⁵ *Id.* at 138 n.15.

¹⁶ *Id.* at 138 n.16.

American applicants are . . . far less likely than white applicants[] to be recruited” as ALDCs.¹⁷

II. EVIDENCE OF ANTI-ASIAN-AMERICAN DISCRIMINATION

It is apparent to racial justice advocates that “[t]he conservative movement against affirmative action that Blum advances does not care about Asian Americans.”¹⁸ Yet, the anti-affirmative-action movement’s desire to maintain white privilege should not undercut any legitimate grievances that Asian-Americans have regarding student admissions.

Indications of potential discrimination against Asian-American students as compared to white students permeates this story. For instance, in deciding to sue Harvard for wait-listing him from admission, Asian-American applicant Michael Wang was, in part, influenced by college prep programs that have been known to advise students of Asian descent to try to conceal their ethnic identity and “appear less Asian” in their applications.¹⁹ An investigator with the Department of Education’s Office for Civil Rights “confirmed that many Ivy League admissions officers had, in the past, talked stereotypically when evaluating Asian-American applicants.”²⁰

Indications of potential anti-Asian-American discrimination also surfaced throughout litigation. As Harvard Law Professor Jeannie Suk Gersen has noted, documents produced in discovery showed:

In 2013, Harvard’s Office of Institutional Research conducted an internal investigation of race bias in its admissions process and produced reports suggesting that it was biased against Asians. Among the most striking findings was that Asians were admitted at lower rates than whites, even though Asian applicants were

¹⁷ *Id.* at 138.

¹⁸ See Mystal, *supra* note 1. See also THE HARVARD SYLLABUS: A GUIDE TO THE AFFIRMATIVE ACTION DEBATE AT HARVARD, STUDENTS OF SOCIOLOGY OF ASIAN AMERICA/NS at 9 (2019), <https://sociology.fas.harvard.edu/files/sociology/files/harvardsyllabus.pdf> (describing Edward Blum’s efforts to dismantle racial justice initiatives, as well as the *Harvard* lawsuit’s role in perpetuating the “model minority myth”—which has used the arrival of privileged immigrants resulting from “selective immigration policies” in the 1960s “to attack the civil rights movement”); Julie J. Park & Amy Liu, *Interest Convergence or Divergence?: A Critical Race Analysis of Asian Americans, Meritocracy, and Critical Mass in the Affirmative Action Debate*, 85 J. HIGHER ED. 36, 46 (2014) (“[The] failure [of the anti-affirmative-action movement] to recognize and challenge . . . the White advantage in holistic admissions testifies to how anti-affirmative action advocates are less likely to support Asian Americans when interest divergence occurs . . .”).

¹⁹ Hua Hsu, *The Rise and Fall of Affirmative Action*, THE NEW YORKER (Oct. 8, 2018), <https://www.newyorker.com/magazine/2018/10/15/the-rise-and-fall-of-affirmative-action> [<https://perma.cc/4PAD-QTSS>].

²⁰ *Id.*

rated higher than white applicants in most of the categories used in the admissions process, including academics, extracurriculars, and test scores. One exception was the “personal rating.”²¹

In response to these findings, at trial, Harvard’s dean of admissions “speculated that [Asian applicants’] lower personal ratings reflected the fact that high-school teachers and guidance counsellors’ support in recommendations is stronger for whites than for Asians.”²² Or, as Professor Suk Gersen translated, “if there was indeed bias against Asians, it originated outside of Harvard,” but Harvard’s “holistic review process, which is designed to take account of various disadvantages in a student’s minority background, would not attempt to correct for it.”²³

Looking at the evidence in another way, as journalist Elie Mystal has highlighted, “if Harvard looked only at ‘academic’ factors, Asian American students would make up 43 percent of its class, not the 20 percent representation they enjoy now.”²⁴ Given that a class composed of students who only scored well in academic factors may not be a worthy goal, this disparity is only significant when compared with “a different study [that] found that 43 percent of white students at Harvard were actually legacies, athletes, or kids from families who donated money to the school.”²⁵ In short, the numbers suggest a form of discrimination against Asian-American students to ensure room for a sufficient number of white students.

The struggle against anti-Asian-American discrimination in student admissions is not new. Affirmative action originated as a remedy for the ongoing oppression of Black communities through structural racism built by centuries of slavery and decades of white terrorism and Jim Crow apartheid.²⁶ But, as reflected in the role that Asian-American advocates for

²¹ Jeannie Suk Gersen, *Anti-Asian Bias, Not Affirmative Action, is on Trial in the Harvard Case*, NEW YORKER (Oct. 11, 2018) [hereinafter Suk Gersen, *Anti-Asian Bias*], <https://www.newyorker.com/news/our-columnists/anti-asian-bias-not-affirmative-action-is-on-trial-in-the-harvard-case> [<https://perma.cc/3RA7-C9BY>].

²² Jeannie Suk Gersen, *At Trial, Harvard’s Asian Problem and a Preference for White Students from “Sparse Country,”* NEW YORKER (Oct. 23, 2018) [hereinafter Suk Gersen, *At Trial*], <https://www.newyorker.com/news/our-columnists/at-trial-harvards-asian-problem-and-a-preference-for-white-students-from-sparse-country> [<https://perma.cc/3A2Q-8U84>].

²³ *Id.*

²⁴ Mystal, *supra* note 2.

²⁵ *Id.*; see also Derek Thompson, *The Cult of Rich-Kid Sports*, ATLANTIC (Oct. 2, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/harvard-university-and-scandal-sports-recruitment/599248/> [<https://perma.cc/896X-ZPZA>] (noting the existence of “stark evidence that Harvard . . . give[s] preferential treatment to affluent white applicants through legacy preferences and sports recruitment”).

²⁶ See, e.g., Lawrence, *supra* note 4, at 951–52.

racial justice have played in defending Harvard in this litigation,²⁷ the struggle against anti-Asian discrimination has long been a part of the multiracial struggle for affirmative action.²⁸ It is both ironic and evidence of this country's racial caste system that Asian-Americans have been made the face of the movement to *dismantle* affirmative action.

III. THE COURT'S EQUAL PROTECTION ANALYSIS OF HARVARD'S ADMISSIONS PROGRAM

Contrary to popular narratives surrounding the lawsuit, SFFA did not argue that favorable treatment of the race of Black and Latinx applicants harmed the chances of admission for Asian-American applicants.²⁹ But, as Professor Suk Gersen explains, “[i]t has served Harvard’s interest for people to think that, unless it wins this case, affirmative action will be eliminated, and that Harvard’s treatment of Asian-American applicants was necessary to attain an acceptable level of diversity among its undergraduates.”³⁰ Notably, “[t]he many amicus briefs that have been filed in support of Harvard generally make those assumptions.”³¹

Nevertheless, Harvard responded to SFFA’s claims using a framework that would have allowed the court to appropriately consider the claim of discrimination against Asian-American applicants as compared to white applicants, rather than assess the legitimacy of Harvard’s use of race-based affirmative action. Harvard argued that the test for facially race-neutral policy should apply, rather than strict scrutiny, which applies to policies making express, race-based classifications, such as race-based affirmative action measures.³² This was because, as the court recognized, “admissions officers provide [race-based] tips to African American and Hispanic applicants, while white and Asian American applicants are unlikely to receive a meaningful race-based tip,” and thus, race could not be a factor in disparate treatment between white applicants and Asian-American applicants.³³

Yet, the court decided that the admissions program could not be segmented into components where race is used as an express classification

²⁷ See *Harvard Lawsuit*, ASIAN AM. ADVANCING JUST., <https://www.advancingjustice-la.org/what-we-do/policy-and-research/educational-opportunity-and-empowerment/affirmative-action/harvard> [<https://perma.cc/KBR5-FW2Y>] (last visited Feb. 13, 2020).

²⁸ See, e.g., Hsu, *supra* note 20; Park & Liu, *supra* note 19, at 39.

²⁹ Plaintiff’s Proposed Findings of Fact and Conclusions of Law, *supra* note 6, at 10.

³⁰ Suk Gersen, *Anti-Asian Bias*, *supra* note 22.

³¹ *Id.*

³² *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 189, 190 n.56 (D. Mass. 2019), *appeal docketed*, 19-2005 (1st Cir. Oct. 11, 2019).

³³ *Id.* at 190 n.56.

and where it is not—instead, the program must be considered “in its entirety.”³⁴ And because race is expressly used as a factor at some point in the admissions program, the court closely scrutinized this *express* use of race. In doing so, the court implicitly legitimized an admissions program that effectively offers a preference for white applicants to the detriment of applicants of color through the use of race-neutral criteria.

For example, preferences, or “tips,” for ALDC applicants give privileges to white applicants at significantly higher rates than to any other racial group.³⁵ ALDC admissions make up more than forty percent of admitted white students, three quarters of whom “would have been rejected if they had been treated as white non-ALDCs.”³⁶ The court found that “removing tips for these applicants would improve socioeconomic diversity at Harvard and increase the number of Asian American students,” but rejected the argument that Harvard should be *forced* to do so.³⁷ The court, however, only assessed the elimination of ALDC tips as a race-neutral alternative to the race-based affirmative action component.³⁸ For the purposes of increasing the number of Black and Latinx students accepted to Harvard, eliminating ALDC tips is insufficient. The court did not assess the use of ALDC preferences to privilege whiteness and thereby discriminate against Asian-Americans, and any applicants of color.

Similarly, the court under-examined the way in which geographic diversity is achieved. The court found that “for the class of 2018, Harvard lowered the SAT score required to make the search list to 1310 for students from ‘sparse country’ who identified their race as white, other, or unidentified while not simultaneously lowering the required score for Asian American students from the same states to the same level.”³⁹ Effectively, for Asian-American applicants, race played a larger role than the geographic views they would represent as compared to white applicants.⁴⁰ But the court did not reach any conclusions on whether or how this may have evidenced Harvard’s discrimination against Asian-Americans. The court found inconclusive the question of “whether these variations were accidental or intentional,” because the variations did not affect the court’s analysis of the legality of Harvard’s use of affirmative action for Black and Latinx applicants.⁴¹

³⁴ *Id.*

³⁵ *Id.* at 179.

³⁶ Peter Arcidiacono, Josh Kinsler, & Tyler Ransom, *Legacy and Athlete Preferences at Harvard* (Nat’l Bureau of Econ. Research, Working Paper No. w26316, 2019), <http://public.econ.duke.edu/~psarcidi/legacyathlete.pdf>.

³⁷ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 179.

³⁸ *Id.* at 179–80.

³⁹ *Id.* at 154.

⁴⁰ See Suk Gersen, *At Trial*, *supra* note 23.

⁴¹ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 154.

If the court had instead applied the test for facially neutral policies, evidence of any disparate impact of the race-neutral components of the admissions program on Asian-American applicants as compared to white applicants, such as the ALDC tips or the “sparse country” policy, and of Harvard’s decision to maintain any such components, could have revealed bias against Asian-Americans in the admissions program, and in favor of maintaining white privilege.

To be fair, the court offers such an analysis in a footnote, concluding that it “would easily find in favor of Harvard on SFFA’s claim of intentional discrimination as there has been no showing of discriminatory intent or purpose.”⁴² At the same time, however, the court commented that Harvard’s admissions process “would likely benefit from conducting implicit bias trainings for admissions officers.”⁴³ The inability of the court to identify intentional discrimination, yet apparently still smell something fishy in the admissions program, makes sense. Despite the evidence of potential anti-Asian-American bias described above, *amici* pointed out that although “SFFA’s primary argument . . . appears to be that Harvard is acting with an unconscious bias against Asian American students,” SFFA “did not bring forth any witness to explain what an unconscious bias is, how it operates, or how the evidence here demonstrates that Harvard is acting with an unconscious bias that favors white applicants to the detriment of Asian American applicants.”⁴⁴ SFFA’s goal of dismantling race-based affirmative action rendered the introduction of such evidence unnecessary.

Nevertheless, as offered above, had the court applied the test for facially neutral policies, evaluations of Harvard’s race-neutral components that presented “disparate outcomes as between whites and Asian Americans” would have been more closely analyzed in the opinion, and the court’s ruling against SFFA would have been based on that ground, rather than on any evaluation of the affirmative action component of the admissions program.⁴⁵

IV. HOW THE COURT COULD HAVE ISOLATED ALLEGED CAUSES OF ANTI-ASIAN-AMERICAN DISCRIMINATION

Rather than view the admissions program in its entirety, the court could have isolated only those components of the admissions program that gave rise to SFFA’s specific claim of discrimination against Asian-

⁴² *Id.* at 191 n.56.

⁴³ *Id.* at 204.

⁴⁴ *Amici Curiae Students Proposed Findings of Fact and Conclusions of Law* at 49, *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d 126 (No. 14-cv-14176).

⁴⁵ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 190 n.56.

Americans as compared to whites, and assessed them for that purpose. The state-action doctrine offers an analogous precedent for such an approach.

Though SFFA's claim against Harvard, a private university, was brought under Title VI of the Civil Rights Act of 1964, the court subjected the Title VI claim to the same analysis as race-based claims against public universities under the Fourteenth Amendment's Equal Protection Clause.⁴⁶ A related doctrine under the Equal Protection Clause, the state action doctrine, applies when a constitutional claim arises out of the conduct of a private actor.

Under the state action doctrine, courts are required to assess the state's involvement in only those facts that specifically give rise to the potential claim, rather than assess the larger relationship between the state and private actor. For instance, in *Blum v. Yaretsky*, the Supreme Court found that even though private nursing homes in New York were extensively regulated and heavily subsidized by the state, and the state played a significant—and arguably coercive—role in the process of transferring or discharging Medicare patients from these facilities, the Court would only assess whether the *specific decision* to transfer or discharge Medicare patients could be attributed to the state for the purposes of assessing an Equal Protection violation.⁴⁷ The Court explained that “constitutional standards are invoked only when it can be said that the State is *responsible* for the *specific conduct of which the plaintiff complains*.”⁴⁸ Similarly, in *Moose Lodge No. 107 v. Irvis*, the Supreme Court found insufficient state action for an Equal Protection claim arising out of a private club's refusal to serve Black patrons.⁴⁹ The Court's analysis rendered irrelevant the private club's dependence on a state-granted and -regulated liquor license that the state itself made scarce, although it essentially “put . . . the weight of [the state's] liquor license . . . behind racial discrimination.”⁵⁰ At the same time, however, the Court found that the state liquor-licensing regulations' *specific requirement* that the private club comply with its own bylaws directing the discrimination against Black patrons was the only conduct subject to a constitutional claim.⁵¹

Applying this segmented approach found in the state action doctrine to an anti-discrimination assessment of the relevant components of Harvard's admissions program would have both allowed the court to focus on the

⁴⁶ *Id.* at 189 (citing *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) (“We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.”)).

⁴⁷ 457 U.S. 991 (1982).

⁴⁸ *Id.* at 1004 (second emphasis added).

⁴⁹ 407 U.S. 163, 171–79 (1972).

⁵⁰ *Id.* at 183 (Douglas, J., dissenting).

⁵¹ *Id.* at 179.

problem identified by the plaintiffs—discrimination against Asian-Americans in favor of white applicants—and avoided a ruling against Harvard’s use of race-based affirmative action, limiting the opportunity for affirmative action to be considered by a hostile Supreme Court.

CONCLUSION

Writer Hua Hsu draws a connection between, on the one hand, the rise of persons of Asian descent attending elite schools and resulting characterizations by the general public that the “schools weren’t as good as they once were,” and, on the other, the route the challenge against Harvard’s admissions program has taken.⁵² The idea that Harvard would not be “Harvard” if its student body was less white is, perhaps, what has pitted communities of color against one another. The district court’s focus on Harvard’s race-based affirmative action program serving to increase its enrollment of Black and Latinx students, instead of Harvard’s effective preferences for white students—the real potential cause of any harm to Asian-American applicants and other applicants of color—once again echoes this sentiment.⁵³ The court’s ruling thus effectively affirmed, yet again, the inherent value of whiteness⁵⁴ in the racial caste system of the United States.

⁵² Hsu, *supra* note 20.

⁵³ See Park & Liu, *supra* note 19 at 39–40 (describing “the idea that Asian Americans face disadvantages in the admissions process not because of affirmative action but due to a phenomena known as negative action,” which “explain[s] how Asian Americans are often displaced by Whites, and not other ethnic minorities”); see also Lawrence, *supra* note 4 at 953 (explaining how the “diversity” rationale for affirmative action programs “makes no effort to inquire into the ways that current facially neutral practices may have a foreseeable and unjustifiable discriminatory impact or to account for unconscious bias”).

⁵⁴ See generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).