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Students for Fair Admissions v. Harvard: Admissions Administrators Threaten the Future of Affirmative Action in the United States

Seth Johnson

According to the U.S Census Bureau's 2016 estimates, about 18,249,000, or 5.6%, of the 323,400,000 people living in the United States identify exclusively as Asian.¹ Another 1,797,000 Americans identify as having partial Asian ancestry.² In 2016, Asian-Americans comprised 16% of students enrolled at American four-year universities during the fall semester.³ At Harvard University, America's second-best undergraduate program,⁴ self-identified Asian students comprised 30% of the class of 2019.⁵ However, these numbers do not reveal anything about the individuals they represent. Who Asian-American students are, in contrast to how they are perceived by others, lies at the heart of the controversy in *Students for Fair Admissions v. President & Fellows of Harvard College*.⁶ In a case currently pending in the District Court for the District of Massachusetts, Students for Fair Admissions (hereafter "SFFA"), alleges that Harvard violated Title VI of the Civil Rights Act of 1964.⁷ Many observers expect the case to reach the Supreme Court on the issue of whether affirmative action will remain constitutional.⁸ Title VI prohibits federally funded institu-

¹ U.S. CENSUS BUREAU, THE ASIAN ALONE POPULATION IN THE UNITED STATES: 2016 (2019), <https://www.census.gov/data/tables/2016/demo/race/ppl-aa16.html>.

² U.S. CENSUS BUREAU, THE ASIAN ALONE OR IN COMBINATION POPULATION IN THE UNITED STATES: 2016 (2019), <https://www.census.gov/data/tables/2016/demo/race/ppl-ac16.html>.

³ JOEL MCFARLAND ET AL., NAT'L CTR. FOR EDUCATION STATISTICS, THE CONDITION OF EDUCATION 2018 174 (2018), available at <https://nces.ed.gov/pubs2018/2018144.pdf>.

⁴ *Harvard University*, U.S. NEWS, <https://www.usnews.com/best-colleges/harvard-university-2155> (last visited Mar. 3, 2019).

⁵ Mariel A. Klein & Elizabeth C. Keto, *Makeup of the Class*, THE HARVARD CRIMSON, <https://features.thecrimson.com/2015/freshman-survey/makeup-narrative/> (last visited Feb. 28, 2019).

⁶ See Expert report of Peter S. Arcidiacono at 38, *Students for Fair Admissions v. President and Fellows of Harvard Coll. Corp.* 346 F. Supp. 3d 174 (D. Mass. 2018) (No. 1:14-cv-14176-ADB) (noting Harvard's internal 2013 finding that Asian-American applicants were assigned much lower "personality" ratings than white applicants).

⁷ *Id.*

⁸ See Monica Levitan & LaMont Jones, *Scholars Believe Supreme Court Likely to End Affirmative Action with Kavanaugh*, DIVERSE: ISSUES IN HIGHER EDUCATION (Sept. 13, 2018), <https://diverseeducation.com/article/126121/> (article including multiple interviews with professors of law and other subjects discussing possibility Harvard case before new Supreme Court threatens

tions from engaging in racial discrimination.⁹ SFFA argues that Harvard engaged in racial discrimination by making the requirements of admission to the university far more difficult for Asian-American applicants than students of other racial backgrounds.¹⁰ Prior investigations and discovery for the trial revealed biased attitudes and procedures among admissions staff.¹¹ This insulted and hurt many Asian-Americans, including many generally supportive of affirmative action.¹² While Harvard insists that any appearance of discrimination is coincidental,¹³ growing awareness of the concept of implicit bias makes it difficult to take such claims at face value.¹⁴

A BRIEF HISTORY OF AFFIRMATIVE ACTION

Affirmative action policies were inspired by liberal twentieth century presidential administrations' commitments to improving society through public policy.¹⁵ The term "affirmative action" entered formally into legal discourse via the National Labor Relations Act of 1935.¹⁶ "Affirmative Action", in the labor context, meant that an employer had to make restitution after discriminating against a worker for her union participation.¹⁷ The phrase appeared

future of affirmative action); *See also* Paul Waldman, *The case that will destroy affirmative action in higher education*, WASH. POST, Oct. 18, 2018, https://www.washingtonpost.com/blogs/plumline/wp/2018/10/18/the-case-that-will-destroy-affirmative-action-in-higher-education/?utm_term=.d08d923b5b14 (discussing confluence of Harvard case, Trump administration directives, and changed Supreme Court make-up); Alia Wong, *Harvard's Impossible Personality Test*, THE ATLANTIC, July 19, 2018, <https://www.theatlantic.com/education/archive/2018/06/harvard-admissions-personality/563198/>.

⁹ Complaint at 93-94, *Students for Fair Admissions v. President and Fellows of Harvard Coll. Corp.*, 346 F. Supp. 3d 174 (D. Mass. 2018) (No.1:14-cv-14176-ADB) [*hereinafter* Complaint].

¹⁰ *Id.* at 44.

¹¹ Hua Hsu, *The Rise and Fall of Affirmative Action*, NEW YORKER, Oct. 15, 2018, <https://www.newyorker.com/magazine/2018/10/15/the-rise-and-fall-of-affirmative-action> (relating ivy league admissions officer's comments stereotyping an Asian-American applicant, revealed by Department of Education investigation); Michael Li, *I support affirmative action. But Harvard really is hurting Asian Americans.*, VOX (Oct. 18, 2018, 1:00 PM EDT), <https://www.vox.com/first-person/2018/10/18/17995270/asian-americans-affirmative-action-harvard-admissions-lawsuit>.

¹² Hsu *supra* note 11; Li *supra* note 11.

¹³ Wong, *supra* note 8.

¹⁴ *Id.*; Interview with Michael Li, Senior Counsel, The Brennan Ctr. for Justice at N.Y.U. Sch. of L. (Feb. 21, 2019).

¹⁵ Hsu, *supra* note 11.

¹⁶ Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L. J. 607, 611 (1998).

¹⁷ *Id.* at 612.

again in an executive order issued by President Kennedy in 1961.¹⁸ The order purported to prevent racial discrimination in hiring, but it went further in requiring the government to actively seek out diverse hires.¹⁹

The same language appeared in Title VII of the Civil Rights Act of 1964, which explicitly banned racial discrimination in private hiring for most companies.²⁰ Under the authority of that act, President Johnson created the Office of Federal Contract Compliance (“OFCC”) in 1965 to prevent racial employment discrimination.²¹ The OFCC’s administrative requirements of federal contractors came to define what affirmative action is.²² OFCC began requiring federal contractors to develop equal employment plans for hiring minorities and women, including how to better utilize diverse hires.²³ Due to the fact that universities are usually also federal contractors, employment affirmative action also applied to them under these policies.²⁴

In 1973, the Office of Civil Rights of then Department of Housing, Education, and Welfare took up regulations enforcing Title VI of the Civil Rights Act.²⁵ These regulations required public universities to implement measures aiming to “overcome the effects of conditions” resulting in fewer students of color enrolling.²⁶ Many universities implemented preferential admissions schemes to increase the number of enrolled students of color.²⁷ From the onset, affirmative action in education was driven by a desire to respond to the continuing impacts of slavery, and racism against African-Americans.²⁸ From that initial focus, affirmative action expanded to cover any member of a historically underrepresented group.²⁹

In the 1978 case *Regents of the University of California v. Bakke*, the Supreme Court held that the only constitutionally permissible reason for considering race in college admissions was the achievement of a diverse student

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 611.

²¹ *Id.* at 613.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 618.

²⁵ *Id.*

²⁶ *Id.* at 619.

²⁷ *Id.*

²⁸ *Id.* at 607-10 (centering author’s discussion on affirmative action on roots of slavery and discrimination, providing historical background for the emergence of affirmative action policies).

²⁹ *Id.* at 614 (discussing Kennedy executive order as the model for what affirmative action has become defined as).

body.³⁰ The Court reaffirmed that view in the 2003 case *Guttinger v. Bollinger*, holding again that the use of race as one of the many factors in determining admissions was a compelling government interest for Fourteenth Amendment purposes.³¹ Most recently, the Court described the value of affirmative action policies as “promoting cross-racial understanding, [helping to] break down racial stereotypes, and [enabling] students to better understand persons of different races.”³² The Court also found that an “equally important” benefit of affirmative action is that it “promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.”³³ If this vision is to survive *SFFA v. Harvard*, it will require college administrators to recognize how they may contribute unwittingly to the very problem they are dedicated to solving.³⁴

A BRIEF HISTORY OF RACIAL BIAS AGAINST ASIANS IN AMERICA

The first people of East Asian ancestry to arrive in lands eventually comprising the United States arrived between the Eighteenth and Nineteenth centuries.³⁵ These people primarily came to work in agriculture as indentured servants.³⁶ By the 1850s, significant communities of mostly Chinese laborers lived most notably in western states.³⁷ Many of these Chinese immigrants came to work in the construction of railroads, agriculture, the service sector, and mining.³⁸ Many white Americans adopted blatantly racist attitudes to-

³⁰ Nancy L. Zisk, *Embracing Race-Conscious College Admissions Programs: How Fisher v. University of Texas at Austin Redefines “Affirmative Action” as a Holistic Approach to Admissions that Ensures Equal, Not Preferential, Treatment*, 100 MARQ. L. REV. 835, 838 (2017).

³¹ *Id.* at 842.

³² *Id.*

³³ *Id.* at 842-43.

³⁴ Li Interview, *supra* note 14.

³⁵ Karan Mahajan, *The Two Asian Americas*, NEW YORKER, Oct. 21, 2015, <https://www.newyorker.com/books/page-turner/the-two-asian-americas>.

³⁶ *Id.*

³⁷ United States Dept. of State Office of the Historian, *Chinese Immigration and the Chinese Exclusion Acts*, <https://history.state.gov/milestones/1866-1898/chinese-immigration> (last visited Mar. 3, 2019) [*hereinafter* State Dept.].

³⁸ *Id.* (stating mid-19th century Chinese immigrants worked in gold mines and agricultural jobs); See Mahajan, *supra* note 35 (discussing how mid- 19th century Chinese immigrants began working as launderers during the California gold rush); Rhoda J. Yen, *Racial Stereotyping of Asians and Asian Americans and Its Effect on Criminal Justice: A Reflection on the Wayne Lo Case*, 7 ASIAN AM. L. J. 1, 7 (2000) (discussing sharp increase of Chinese immigrants in California during the 1870s to work on railroads and in agricultural sector).

wards Chinese immigrants immediately after they arrived.³⁹ Chinese immigrants attempted to integrate into broader American society, but they were met by the business community with incendiary hatred and even violence.⁴⁰

At the same time, California passed exclusionary laws that required special licenses for Chinese businesses and prevented naturalization of Chinese immigrants.⁴¹ Similar laws also affected South Asian immigrants.⁴² In the 1923 Supreme Court case of *U.S. v. Bhagat Singh Thind*, the Court stripped a man of Indian descent of his citizenship.⁴³ The Court found that the Immigration Act of 1917's prohibition on the naturalization of Asian persons applied retroactively to Asians that entered the country prior to its passage.⁴⁴

Losing citizenship as an Asian in early twentieth century California often led to dire consequences.⁴⁵ Under the California Alien Land Act of 1913, non-citizen Asians could not legally own agricultural property in the state.⁴⁶ In 1882, Congress passed the Chinese Exclusion Act.⁴⁷ The act prevented any further immigration from China for what was supposed to be ten years.⁴⁸ However, iterations of the act were successively renewed until 1943.⁴⁹ The weight of these policies and societal attitudes demonstrates that white America viewed being Asian as essentially incompatible with being American.⁵⁰

³⁹ See Yen, *supra* note 38 at 6-7 (discussing multiple historians' relating research documenting wide variety of offensive stereotypes held by 19th century white Americans against Chinese immigrants).

⁴⁰ *Id.* at 7 (Discussing worsening of attitudes and racist attacks against Chinese immigrants after they entered into competition with white-owned businesses).

⁴¹ State Dept., *supra* note 37.

⁴² See Mahajan, *supra* note 35 (relating the tragic story of an Indian immigrant to California who encountered discriminatory laws aimed at his ethnicity in the early twentieth century).

⁴³ *U.S. v. Bhagat Singh Thind*, 261 U.S. 204, 207-15 (1923).

⁴⁴ *Id.*

⁴⁵ Mahajan, *supra* note 35.

⁴⁶ Daniel B. Lumbang & Kaibigan, *The Alien Land Act of 1913*, THE NEW CASTLE, May 31, 2015, <http://www.thenewcastle.org/blog/2015/5/31/the-alien-land-act-of-1913>.

⁴⁷ Rhoda J. Yen, *Racial Stereotyping of Asians and Asian Americans and Its Effect on Criminal Justice: A Reflection on the Wayne Lo Case*, 7 ASIAN AMERICAN LAW JOURNAL 1, 7 (2000).

⁴⁸ Yen, *supra* note 38 at 7.

⁴⁹ *Id.*

⁵⁰ State Dept., *supra* note 37 (discussing racist rumors spread about Chinese immigrants using prostitutes, smoking opium, gambling, thereby lowering "cultural and moral standards of American society."); Mahajan, *supra* note 34 (quoting author Erika Lee: ". . . [Asian Americans are perceived as] perpetual foreigners at worst, or probationary Americans at best."); Yen, *supra* note 38 (describing the views of white Americans towards 19th century Chinese immigrants: ". . . white Americans viewed the Chinese as strange and exotic beings.").

Perhaps no legal precedent demonstrates this view better than the recently abrogated holding in the 1944 Supreme Court case of *Toyosaburo Korematsu v. U.S.*⁵¹ In the now infamous case, the Court upheld a criminal sentence for an American citizen of Japanese ancestry who refused to leave his own home after an executive order declared that no one of Japanese ancestry could remain in so-called “military areas.”⁵² In doing so, the Court agreed with Congress and the president that it was simply too difficult to segregate loyal Japanese-Americans from disloyal Japanese-Americans.⁵³ A total exclusion was justified in the name of wartime security.⁵⁴

This decision was only recently abrogated in *Trump v. Hawaii*.⁵⁵ In *Trump v. Hawaii*, the Court nevertheless upheld the president’s broad authority to prevent people from foreign countries from entering the United States.⁵⁶ Specifically, the Court held that the President did not unlawfully discriminate based on national origin when he issued an order barring entry to the United States for all persons in six countries in Africa and the Middle East.⁵⁷ The Court did not find *Korematsu* applicable to the facts in the case, and only addressed it because the plaintiffs attempted a comparison.⁵⁸

Quotas based on race officially ended with the 1965 Immigration and Nationality Act.⁵⁹ This act was passed four years after the Kennedy administration first used the term “affirmative action” in adopting an executive order requiring government contractors to adopt a positive non-discrimination principle.⁶⁰ The end of officially sanctioned discriminatory policies did not end stereotypes about Asians being strange or intrinsically different from “normal”

⁵¹ *Toyosaburo Korematsu v. U.S.*, 65 S. Ct. 193, 195 (1944).

⁵² *Id.* at 194.

⁵³ *Id.* at 195.

⁵⁴ *Id.*

⁵⁵ Eric L. Muller, *The Supreme Court was right to overturn Korematsu. Now it needs to overrule Hirabayashi*, L.A. TIMES, Jul. 3, 2018, available at <https://www.latimes.com/opinion/op-ed/la-oe-muller-korematsu-hirabayashi-20180703-story.html>.

⁵⁶ Amy Howe, *Opinion analysis: Divided court upholds Trump travel ban (Updated)*, SCOTUS BLOG (Jun. 26, 2018), <https://www.scotusblog.com/2018/06/opinion-analysis-divided-court-upholds-trump-travel-ban/>.

⁵⁷ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2415 (2018).

⁵⁸ *Id.* at 2423.

⁵⁹ Mahajan, *supra* note 35.

⁶⁰ Hua Hsu, *THE RISE AND FALL OF AFFIRMATIVE ACTION*, NEW YORKER, Oct. 15, 2018, <https://www.newyorker.com/magazine/2018/10/15/the-rise-and-fall-of-affirmative-action>.

Americans.⁶¹ While overwhelmingly negative and crass stereotypes have somewhat subsided, other stereotypes linked to the same old notion of Asians as “other” continue to hold sway, particularly in the stereotype of the “model minority.”⁶²

The emergence of the model minority stereotype can be traced to developments in the wake of the 1965 Immigration Act.⁶³ The Act allowed large-scale Asian immigration for the first time since the 1880s.⁶⁴ However, unlike the unskilled laborers of that era, the Act restricted entry to mostly skilled, already educated applicants.⁶⁵ At the same time, the descendants of the earlier waves of Asian immigrants began to move out of neighborhoods their families had either chosen to remain in or had been compelled to remain in due to discrimination and violence.⁶⁶ Both these second-generation immigrants and the highly skilled and educated post-1965 immigrants moved to middle and upper class neighborhoods⁶⁷. This move resulted in more white people than ever before interacting with Asians socially and in the workplace.⁶⁸ The model-minority stereotype, is objectionable for narrowly construing a diverse group of people, and it also fails to consider the more complicated reality for many Asian-Americans.⁶⁹

Notably for the current Harvard case, the stereotype has often been used to justify discriminatory attitudes against other minority groups such as African-Americans.⁷⁰ Proponents argue that Asian-Americans demonstrate that anti-racism policies are unnecessary to help improve the lives of other minority

⁶¹ Mahajan, *supra* note 35 (discussing Donald Trump portraying Japanese businessmen as uninterested in friendly small talk, singly focused on economic considerations); Li Interview, *supra* note 14 (Mr. Li related how Harvard administrators might perceive Asian-American applicants as “less interesting” due to not understanding, valuing, and accepting culture motivating them to focus on academics and developing excellent work ethic).

⁶² Yen, *supra* note 38 (Discussing the trope of the model minority as underlaid by a racist belief that Asians are naturally endowed with greater intelligence than other racial groups).

⁶³ *Id.*

⁶⁴ *Id.* at 7.

⁶⁵ *Id.* at 2-3.

⁶⁶ *Id.* at 3, 7 (discussing internal migration of second generation Asian-Americans; discussing racist attacks against Chinese immigrants in 19th century); Daniel B. Lumbang & Kaibigan, *supra* note 44.

⁶⁷ Yen, *supra* note 38 at 7.

⁶⁸ *Id.* at 3.

⁶⁹ Li Interview, *supra* note 14 (discussing Harvard’s failure to consider Asian Americans from a working-class background); Yen, *supra* note 38 at 4 (discussing how many South-Asians, the elderly, and others have higher rates of poverty and have working-class realities).

⁷⁰ Li Interview, *supra* note 14.

groups.⁷¹ Some characterize Ed Blum, the conservative activist who founded Students for Fair Admissions, of suggesting as much in attempting to end affirmative action through the case.⁷² Prior to the Harvard case, Blum also unsuccessfully backed the plaintiff in *Fisher v. University of Texas at Austin*.⁷³ In that case, the Supreme Court upheld the University of Texas' race-conscious admissions program as an acceptable means to pursue its legitimate interest in education.⁷⁴

Perhaps the most directly harmful effect of the model minority stereotype is that it de-personifies a given Asian-American individual, and deprives him or her of self-definition.⁷⁵ This is seen in the words of a college admissions officer's words spoken to a Department of Education investigator while discussing an applicant to Harvard, ". . . typical Asian student. Wants to become a doctor. Nothing special here."⁷⁶

THE HARVARD CASE RESULT AND THE FUTURE OF AFFIRMATIVE ACTION WILL DEPEND ON HOW COURTS AND THE PUBLIC TREAT RACIAL BIAS

The plaintiff in *SFFA v. Harvard* is proceeding on the theory that Harvard's admission procedures violated Title VI of the Civil Rights Act of 1964.⁷⁷ In order to succeed in a suit for a private remedy on account of a Title VI violation, current law requires that SFFA prove that Harvard *intentionally* discriminated against Asian-Americans through its admissions policies.⁷⁸ Though no one can know for certain how the judge will view the case, it seems likely that whether intentional discrimination can be shown hinges on the widely-discussed phenomenon of Asian-American applicants receiving lower

⁷¹ Yen, *supra* note 38 at 4

⁷² Li Interview, *supra* note 14 (noting Ed Blum may have less than pure motives for pursuing the law suit).

⁷³ Sarah Hinger, *Meet Edward Blum, the Man Who Wants to Kill Affirmative Action in Higher Education*, ACLU, Oct. 18, 2018, <https://www.aclu.org/blog/racial-justice/affirmative-action/meet-edward-blum-man-who-wants-kill-affirmative-action-higher>.

⁷⁴ See *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198, 2214-2215 (2016).

⁷⁵ Yen, *supra* note 37 at 6 (noting psychological consequences of depriving a person of the ability to define themselves).

⁷⁶ Hua Hsu, *supra* note 54.

⁷⁷ Complaint at 93-94, *supra* note 9.

⁷⁸ *Alexander v. Sandoval*, 121 S. Ct. 1511, 1516 (2001) (emphasis added on "intentionally").

“personal” scores than applicants of any other races.⁷⁹ The statistical report prepared by the plaintiff’s expert witness shows that for all racial groups other than Asians, a higher academic score is associated with a higher personal score.⁸⁰

Further, the report shows that alumni interview rankings of Asian-American applicants on the personal score were lower than what Harvard administrators ranked the Asian-American applicants.⁸¹ The lower personal score ratings stand in stark contrast to the fact that Asian-American applicants have the highest academic rating of any other racial group applying to Harvard.⁸² For many, this cannot help but conjure up the specter of the model minority stereotype.⁸³

Affirmative action intends to improve educational institutions and society at large by broadening the definition of who is included and expanding the definition of what is valuable.⁸⁴ While this is no easy task, many Asian-Americans who firmly believe in the importance of affirmative action know and insist that it is possible without yielding ground to stereotypes about Asian-Americans.⁸⁵ While current case law requires a showing of intentional discrimination, it remains a question as to whether the fairly new concept of implicit bias might be enough to prove it.⁸⁶ One theory is that the proof of bias in the personal rating discrepancy may come not so much in the lower personal rating itself, but rather from Harvard’s institutional awareness of the issue and lack of response.⁸⁷ Harvard’s failure to confront the issue raises a painful, yet

⁷⁹ See Stuart Taylor Jr., *Racial Preference on Trial as Harvard Goes to Court*, WEEKLY STANDARD (Oct. 12, 2018 at 12:21 PM), <https://www.weeklystandard.com/stuart-taylor-jr/sffa-v-havard-racial-preference-trial-could-end-up-at-supreme-court> (discussing the personal rating discrepancy throughout, citing it as biggest factor in outcome of the case).

⁸⁰ Expert report of Peter S. Arcidiacono at 49, *Students for Fair Admissions v. President and Fellows of Harvard Coll. Corp.*, 346 F. Supp. 3d 174 (D. Mass 2018) (No.1:14-cv-14176-ADB).

⁸¹ *Id.* at 50.

⁸² *Id.* at 52.

⁸³ Li Interview, *supra* note 14 (discussing how hard work and academic excellence among Asian Americans is undervalued by larger society preferring subjective measures of “coolness”).

⁸⁴ See Zisk, *supra* note 29.

⁸⁵ Li Interview, *supra* note 14.

⁸⁶ *Alexander v. Sandoval*, 121 S. Ct. 1511, 1516 (2001); Li Interview, *supra* note 14 (discussing potential for implicit bias, noting that Harvard administrators probably do not intend to be biased, but that it may be time to face that prospect).

⁸⁷ Stuart Taylor Jr., *Racial Preference on Trial as Harvard Goes to Court*, WEEKLY STANDARD (Oct. 12, 2018 at 12:21 PM), <https://www.weeklystandard.com/stuart-taylor-jr/sffa-v-havard-racial-preference-trial-could-end-up-at-supreme-court>.

legitimate thought in the minds of many Asian-Americans: “Are we seen for who we are?”⁸⁸

⁸⁸ Li Interview, *supra* note 14.