
CIVIL RIGHTS

CALIFORNIA'S SCA 5 AND RACIAL PREFERENCES IN EDUCATION

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Note from the Editor:

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- *California's SCA 5: Dealing with the Wide Democratic Tent*, DAILY KOS (March 18, 2014), available at <http://www.dailykos.com/story/2014/3/18/1285555/-California-s-SCA-5-Dealing-with-the-wide-Democratic-tent>.
 - Ben Christopher, *Finally, A Way to Diversify Cal Universities? Or "The Most Racist Bill" in State History?*, CALIFORNIA MAGAZINE (March 10, 2014), available at <http://alumni.berkeley.edu/california-magazine/just-in/2014-03-19/finally-way-diversify-cal-universities-or-most-racist-bill>.
 - Josie Huang, *Complicated relationship: Asian-Americans and affirmative action*, KPCC (March 13, 2014), available at <http://www.scpr.org/blogs/multiamerican/2014/03/13/16074/sca-5-asian-americans-affirmative-action/>.
 - Bernadette Lim, *Being Asian-American in the Affirmative Action Debate*, HUFFINGTON POST (May 19, 2015), available at http://www.huffingtonpost.com/bernadette-lim/being-asianamerican-in-th_b_7295246.html.
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On May 15, 2015, a coalition of 60 organizations filed a complaint with the United States Department of Education's Office of Civil Rights (OCR) alleging that Harvard and other Ivy League schools discriminated against Asian American applicants in the college admissions process.¹ According to the complaint, students that colleges identify as Asian American must score 140 points higher on the SAT than similarly qualified white applicants in order to win admission to these elite schools.² While Harvard and other similar schools proudly boast of their use of affirmative action to maintain a diverse student body,³ the OCR complaint alleges that there is a cap on Asian American students at these schools. The complaint alleges that the Ivy League schools are intent on limiting the population of Asian American students in the same manner that they limited the population of Jewish students nearly 100 years ago.⁴

California's flagship university was not named in the complaint. But how did UC Berkeley—the jewel in the crown of the California university system—avoid being named? Although the University of California earnestly wishes for the legal authority to use racial preferences in their admissions,⁵ the California Constitution as amended by Proposition 209 limits its authority to do so.

The constitutional amendment instituted by Proposition 209 has been in effect since 1997, but it recently barely survived an attempt to overturn its restrictions on racial preferences in state university admissions. Asian American groups, not oth-

erwise known for their political activism in California, used radio and social media to generate a firestorm of protest over the proposal to change Proposition 209. These groups succeeded in forcing the California legislature to drop a proposal to put a measure on the ballot for voters to determine whether to allow race-based admissions to resume in California.

I. CALIFORNIA PROPOSITION 209

Proposition 209, approved by California voters in 1996, added Article I, section 31 to the California Constitution. The measure implemented the broadest nondiscrimination principle into California law providing: "The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." The measure further defined "state" to include every public entity (state and local) and expressly included the University of California, the California State University, California community colleges, and all public schools in California.⁶

Proposition 209 did not have an immediate effect on the University of California system. The Regents of the University had already banned the consideration of race in admissions. Ward Connerly, an African-American businessman appointed to the Regents in 1993 by then-Governor Pete Wilson, spearheaded the effort to end race preferences in UC admissions. The 1995 decision to ban race in UC admissions made him "one of the most vilified and controversial figures in higher education," according to the San Francisco Chronicle.⁷ From that narrow victory with the UC Regents, Connerly decided to broaden this principle of nondiscrimination to nearly all governmental practices in California. Proposition 209 was the result of those efforts. Despite an active campaign opposing the measure, California voters approved Proposition 209 by a margin of 54 to 45 percent.⁸

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II. THE LEGAL CHALLENGES TO PROPOSITION 209

Proponents of race preferences immediately challenged the measure as a violation of the Equal Protection Clause of the Fourteenth Amendment. United States District Court Judge Thelton Henderson enjoined the measure, but the Ninth Circuit Court of Appeals vacated the judgement and upheld the state constitutional amendment.⁹ The court ruled that, “[a]s a matter of ‘conventional’ equal protection analysis, there is simply no doubt that Proposition 209 is constitutional.”¹⁰ The court also rejected the political structure argument—that by placing the ban on race preferences in the state constitution, the measure violates the political rights of minorities to seek preference laws in the future. The court noted that “[t]he alleged ‘equal protection’ burden that Proposition 209 imposes on those who would seek race and gender preferences is a burden that the Constitution itself imposes.”¹¹ The court concluded: “The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits.”¹²

That was not the end of the legal challenges, however. In 2010, San Francisco urged the California state courts to void Proposition 209 using the same political structure argument rejected by the Ninth Circuit. The California Supreme Court ultimately rejected the argument.¹³ Affirmative action advocates made another attempt to overturn Proposition 209 in the Ninth Circuit, this time joined by the president of the University of California system. Again, however, the court rejected the challenge.¹⁴ The United States Supreme Court finally, after eighteen years of legal battles, rejected application of the political structure argument to laws outlawing preferences and discrimination.¹⁵

Opponents of Proposition 209 also sought to undo it legislatively. The state legislature attempted to override it with a statute asserting that the measure did not define “discrimination” and adopting the International Convention on the Elimination of All Forms of Racial Discrimination as the controlling definition. That international convention excepts preferences from the definition of “discrimination” if they are meant to ensure “adequate advancement of certain racial or ethnic groups or individuals requiring such protection.” A California appellate court rejected this definition as an attempt to amend the state constitution by statute.¹⁶

III. RACE PREFERENCES AT THE UNIVERSITY OF CALIFORNIA

Before Ward Connerly initiated his campaign to ban discrimination and preferences in UC admissions and before Proposition 209, the university system considered the race of applicants for admission.¹⁷ To preserve its elite status, the University of California adopted a plan in the late 1950s to admit only the top 12.5 percent of California high school graduates. The UC Berkeley campus sought to counter the impact of this restriction on minority groups by instituting an Education Opportunity Program in 1964. Under that program, Berkeley could select up to two percent of the incoming freshman class from a pool of candidates that did not otherwise meet the entrance qualifications. When the university began requiring all applicants to take the SAT in 1967, the negative impact on admission of black and Hispanic students grew. Conversely, the

number of Asian American students grew. Berkeley compensated for this negative impact on blacks and Hispanics by selecting up to four percent of the incoming class from applicants that did not meet the same qualifications as other students.¹⁸

In the 1980s, the percentage of Asian American students who met the academic qualifications for UC Berkeley grew, but the number admitted dropped sharply. However, after Proposition 209 was in effect for a decade, the percentage of Asian American students at UC Berkeley increased from 32 percent to more than 42 percent.¹⁹ Thus, when the California Senate proposed a ballot measure to amend Proposition 209 in order to allow race-based admissions to begin again in California, the Asian American community was understandably nervous.

IV. SCA 5—THE PROPOSAL TO AMEND PROPOSITION 209

State Constitutional Amendment 5 (SCA 5) was proposed to amend Article I, Section 31 of the California Constitution by removing “public education” from the list of areas where racial discrimination and preferences were prohibited and by removing state universities, colleges, and public schools from the definition of “state” actors who were prohibited from using race-based preferences. The measure would have removed all state law barriers to race-based admissions at the University of California, and other race-based programs in the California State University system and at all public primary and secondary schools.

SCA 5 was introduced in the California State Senate by Senator Ed Hernandez, with Senate co-authors Block, De Leon, Lara, Leno, and Steinberg.²⁰ The measure had Assemblyman Bradford as a principal co-author, and Assemblyman Garcia as a co-author—all Democrats at a time when Democrats held a super-majority in both chambers of California Legislature.²¹ With this backing, the measure easily passed the Senate. Although the authors believed they had an easy road to passage in the Assembly as well, they encountered an unexpected roadblock.

V. THE RISE OF THE ASIAN AMERICAN COMMUNITY AS A POLITICAL FORCE AGAINST RACE PREFERENCES

As noted above, when Asian American groups heard about the proposed change to Proposition 209, they were concerned, and for good reason. A recent study of admission practices by highly selective private universities established that “Asian applicants have 67% lower odds of admission than white applicants with comparable test scores.”²² While the concern of the Asian American community was not surprising, its input into the political process in California was—and it proved decisive. In California, the Asian American community “has traditionally leaned liberal Democratic.”²³ That is true at least as far as voting goes. According to Cathy and Alan Zhang who host “Engage America,” a radio show in the San Francisco Bay Area aimed at Chinese Americans in the area, “Chinese people care about education, but do not do politics.”²⁴ This interest in education overcame the reluctance to engage in politics, and the Chinese American community in particular suddenly learned how to organize.

There were Asian American interest groups involved in the fight against SCA 5. These included the Joint Chinese University Alumni Association, Chinese Alliance for Equality, and the

Vietnamese Cambodia and Laos Association of America.²⁵ The 80-20 National Asian American PAC also actively campaigned against the measure.²⁶ A change.org petition generated more than 112,000 signatures opposing SCA 5. In a telephone interview I conducted, Cathy and Alan Zhang explained that their radio show also helped spur the Chinese American community to action. They explained that immigrants from mainland China avoided political participation in the past. Their experience in China made them believe that such participation was dangerous. This issue, however, struck a nerve with a community concerned with the education of their children. An example of that intense interest in education are the after school programs targeted at Chinese American students in particular, with students spending as much as 15 hours per week in these extra classes.²⁷ The Zhangs interviewed Senator Leland Yee about the proposed constitutional amendment and organized a forum to discuss the measure. The San Jose Mercury News covered the forum and other reporters started asking questions about how the amendment might impact college admissions of Asian Americans at the University of California.²⁸

The most successful organizing efforts seem to have happened on social media. SCA 5 became a topic of conversation on various Facebook pages. People in the community began learning about the measure when mitbbs.com, a Chinese Language BBS forum, discussed the proposed amendment. WeChat, a phone-based group-messaging platform was one tool that advocates used to spread the word about SCA 5. Weibo, a Chinese language social network similar to Twitter was also instrumental in organizing the community.²⁹ As the Los Angeles Times reported, “the coalition that shot down SCA 5 was not a traditional political movement... Some were simply mothers with children preparing for college.”³⁰

VI. CONCLUSION

As the push to pass SCA 5 fell apart, Senate leader Darrell Steinberg called for a discussion of affirmative action, arguing that “affirmative action is not quotas.”³¹ However, admission to a selective university, like the University of California (and especially UC Berkeley), is a zero-sum game. Admission of one student requires exclusion of another. The Asian American communities that came together in opposition to SCA 5 understood that concept, and they understood that they would be the likely losers if the University of California were to use racial preferences for university admissions. There are still allegations that the University of California continues to use race preferences in some of its admissions decisions. UCLA Professor Tim Groseclose argues that race is a factor in the second round of admissions, with African American students more than twice as likely as Asian American students to advance from the “maybe” pile of applications to admission.³² Still, there is a difference between the hidden use of race and the explicit use of race that imposes a ceiling on the number of Asian American students permitted to attend the most selective schools.

The legal action filed against elite universities argues that these selective universities use race in their admissions decisions to disadvantage Asian American students. Comments by the Harvard General Counsel, who stated, “We will vigorously defend the right of Harvard... to continue to seek the educa-

tional benefits that come from a class that is diverse on multiple dimensions,”³³ appear to support that argument. To the students applying for admission with near perfect test scores and superlative grade point averages, that can sound like the universities are using race in admissions decisions to ensure that there are not “too many” of some groups on campus. That fear motivated the Asian American community in California to come to the defense of Proposition 209. “Mothers with children preparing for college” can be a force in California politics.

Endnotes

1 Complaint Against Harvard University and the President and Fellows of Harvard College for Discriminating Against Asian-American Applicants in the College Admissions Process, Submitted to the Office for Civil Rights, U.S. Department of Education and the Civil Rights Division, U.S. Department of Justice, May 15, 2015 (Complaint). The Department of Justice quickly dismissed the complaint, purportedly because of ongoing litigation raising the same issues. Brief for the California Association of Scholars as Amicus Curiae, p. 29-30 *Fisher v. University of Texas at Austin*, Supreme Court No. 14-981.

2 Complaint at 13; see also Priceonomics, *Do Elite Colleges Discriminate Against Asians*, August 24, 2013, available at <http://priceonomics.com/post/48794283011/do-elite-colleges-discriminate-against-asians>.

3 See California Association of Scholars Brief at 27, n.19.

4 *Id.* at 27.

5 See footnote 14, *infra*.

6 Cal. Const. Art. I, § 31(f).

7 Tanya Schevitz, *Connerly Retiring as UC Regent—Leaves Controversial Legacy*, SAN FRANCISCO CHRONICLE, Jan. 19, 2005, available at <http://www.sfgate.com/education/article/Connerly-retiring-as-UC-regent-leaves-2704643.php>.

8 California Secretary of State, *Statement of the Vote*, November 5, 1996, at p. 36, available at <http://elections.cdn.sos.ca.gov/sov/1996-general/sov-complete.pdf>.

9 *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 710 (9th Cir. 1997).

10 *Id.* at 701.

11 *Id.* at 709.

12 *Id.* at 708.

13 *Coral Construction, Inc. v. City and County of San Francisco*, 50 Cal. 4th 315, 332 (2010).

14 *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1132 (9th Cir. 2012). UC President Mark Yudof was named by the plaintiffs as a defendant in the action. Both he and Governor Brown argued that Proposition 209’s ban on race preferences in university admissions violated the Equal Protection Clause. Governor Brown’s Answering Brief, 2011 WL 2822871.

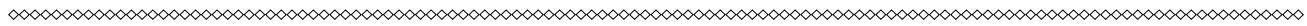
15 *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1638 (2014) (plurality).

16 *C&C Construction v. Sacramento Municipal Utilities Dist.*, 122 Cal. App. 4th 284, 302 (2004).

17 See *Regents of the University of California v. Bakke*, 438 U.S. 265, 269 (1978).

18 PBS Frontline, *History of Admissions at UC Berkeley*, available at <http://www.pbs.org/wgbh/pages/frontline/shows/sats/etc/ucb.html>.

19 Laurel Rosenhall, *California Lawmakers Shelve Effort to Bring Back Af-*



firmative Action, SACRAMENTO BEE, March 17, 2014, available at <http://www.sacbee.com/2014/03/17/6245623/california-lawmakers-shelve-effort.html#storylink=cpy>.

20 Senate Constitutional Amendment No. 5, 2013-14 Regular Session.

21 Sharokina Shams, *Democrats lose supermajority control in CA Legislature*, KCCRA.COM, November 5, 2014, available at <http://www.kcra.com/politics/democrats-lost-supermajority-control-in-ca-legislature/29570378>.

22 Priceconomics, *Do Elite Colleges Discriminate Against Asians*, *supra* note 2.

23 Frank Shyong, *Affirmative action amendment divides state's Asian Americans*, LOS ANGELES TIMES, May 18, 2014, available at <http://www.latimes.com/local/la-me-asian-divisions-20140519-story.html>.

24 Interview with Cathy and Alan Zhang, September 30, 2014.

25 Zen Vuong, *'Affirmative action' amendment SCA 5 withdrawn for revision*, PASADENA STAR NEWS, October 9, 2014, available at <http://www.pasadenastarnews.com/social-affairs/20140317/affirmative-action-amendment-sca-5-withdrawn-for-revision>.

26 Laurel Rosenhall, California lawmakers shelve effort to bring back affirmative action, Sacramento Bee, March 17, 2014, available at <http://www.sacbee.com/2014/03/17/6245623/california-lawmakers-shelve-effort.html#storylink=cpy>.

27 Zen Vuong, *'Affirmative action' amendment SCA 5 withdrawn for revision*, Pasadena Star News, October 9, 2014 (<http://www.pasadenastarnews.com/social-affairs/20140317/affirmative-action-amendment-sca-5-withdrawn-for-revision>).

28 Interview, *supra* note 24.

29 Shyong, *Affirmative action amendment divides state's Asian Americans*, *supra* note 23.

30 *Id.*

31 Laurel Rosenhall, *California Lawmakers Shelve Effort to Bring Back Affirmative Action*, SACRAMENTO BEE, March 17, 2014, available at <http://www.sacbee.com/2014/03/17/6245623/california-lawmakers-shelve-effort.html#storylink=cpy>.

32 Maxim Lott, *UCLA prof says stats prove school's admissions illegally favor blacks*, FOX NEWS, May 13, 2014, available at <http://www.foxnews.com/us/2014/05/13/ucla-prof-says-stats-prove-school-admissions-illegally-favor-blacks/>.

33 *Asian groups file federal complaint against Harvard over admission practices*, FOX NEWS, May 17, 2015, available at <http://www.foxnews.com/us/2015/05/17/asian-groups-filed-federal-complaint-against-harvard-over-admission-practices/>.

