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From Proposition 209 to *SFFA v. Harvard*: Affirmative Action in Higher Education

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*Affirmative action is an active effort through policies aiming to provide opportunities for populations who have been historically underrepresented by allowing them to gain access to education, employment, and business contracting by using race as a factor. In California, the passage of Proposition 209 during the 1996 California ballot initiative created the end to affirmative action programs within the state. With the end of affirmative action programs in California, this Note explores the impact Proposition 209 left for underrepresented racial groups within higher education, specifically in the University of California (U.C.) system. Moreover, this Note addresses misconceptions created by opponents of affirmative action, such as the “mismatch theory” and harm towards the Asian American population. In 2023, the United States Supreme Court held in *Students for Fair Admissions v. Harvard* that race-based affirmative action programs would be unconstitutional.¹ With the national end of affirmative action programs, this Note also explores some alternative solutions, such as universities considering socioeconomic status instead of race.*

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1. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

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I. HISTORY OF AFFIRMATIVE ACTION AND PROPOSITION 209

Affirmative action is viewed as one form of reparations for minority groups who have been historically underrepresented in the United States.² The term “affirmative action” first appeared in President John Kennedy’s Executive Order 10925 in 1961, which established the Committee on Equal Employment Opportunity and mandated government contractors to hire and treat employees “without regard to their race, creed, color, or national origin.”³ This executive order was intended to display the government’s commitment to equal opportunity.⁴ In 1965, President Lyndon Johnson strengthened Kennedy’s executive order through Executive Order 11246, by including sex on the list of attributes and establishing the Office of Federal Contract Compliance Programs (OFCCP) to ensure compliance.⁵ These orders generated a substantial increase in African Americans in public employment, at a rate double that of Caucasian employees in the 1970s.⁶ However, these affirmative action policies were divisive when introduced. For instance, opponents of affirmative action argued that these policies violated the Equal Protection Clause of the Constitution, while supporters said affirmative action was necessary to bridge the gaps in employment and education.⁷

The constitutionality of affirmative action programs was eventually challenged by the United States Supreme Court in *Regents of the University of California v. Bakke*.⁸

2. Curtis Stokes, Bill E. Lawson & Geneva Smitherman, *The Language of Affirmative Action: History, Public Policy and Liberalism*, 33 BLACK SCHOLAR 14, 15 (2003).

3. *Id.* at 15.

4. *Id.*

5. Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965), as amended; Juliet R. Aiken, Elizabeth D. Salmon & Paul J. Hanges, *The Origins and Legacy of the Civil Rights Act of 1964*, 28 J. BUS. & PSYCH. 383, 388 (2013).

6. Aiken, Salmon & Hanges, *supra* note 5, at 390.

7. *Id.*

8. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

In this case, Allan Bakke was a White male applicant who was denied acceptance to University of California (U.C.), Davis School of Medicine while racial minorities with lower scores were admitted due to racial quotas reserving minority students a spot at the school.⁹ The Court held that affirmative action would be permitted if used as a factor considered for college admissions, but that racial quotas would remain unconstitutional.¹⁰ This legal precedent was upheld for forty-five years, in cases like *Grutter v. Bollinger* and *Fisher v. University of Texas*, until the Court's decision in *Students for Fair Admissions v. Harvard College* in 2023 ended affirmative action.¹¹

Before the passage of Proposition 209, the U.C. Board of Regents voted to abolish affirmative action within the U.C. campuses in 1995.¹² This meeting was twelve hours long, and fourteen out of twenty-four regents were persuaded by then-Governor Wilson's argument that "affirmative action 'preferences' are not only unfair and divisive but also create racial tensions in this country."¹³ In opposition to this idea, many students testified that a lack of diversity was a major problem in U.C. campuses.¹⁴ With a majority vote of fourteen regents opposing affirmative action, this vote became the precursor to California's Proposition 209. In 1996, Proposition 209 passed the ballot with 55 percent of Californian voters in support, ending preferential treatment of racial minority groups by state government institutions.¹⁵

II. THE IMPACT OF PROPOSITION 209 ON THE UNIVERSITY OF CALIFORNIA SYSTEM

The passage of Proposition 209 changed the landscape of the U.C. system, decreasing the number of underrepresented minority groups.¹⁶ This Section explores the impact Proposition 209 had in the U.C. system, highlighting the decline of underrepresented minority groups in undergraduate programs, faculty hiring, and medical and law school enrollment across U.C. campuses.

A. Undergraduate Impact

Although Proposition 209 passed in 1996, its race-neutral admissions policies did not take effect until 1998 at the U.C. campuses.¹⁷ From 1997 to 1998, the admissions rate of underrepresented students fell from 79.1 percent to 71.2 percent

9. *Id.* at 276.

10. *Id.* at 319.

11. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Texas at Austin*, 579 U.S. 365 (2016); *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

12. Ula Taylor, *Proposition 209 and the Affirmative Action Debate on the University of California Campuses*, 25 FEMINIST STUD. 95, 95 (1999).

13. *Id.*

14. *Id.*

15. R. Michael Alvarez & Lisa García Bedolla, *The Revolution Against Affirmative Action in California: Racism, Economics, and Proposition 209*, 4 STATE POL. & POL'Y Q. 1, 3 (2004).

16. UNIV. OF CAL. OFF. OF THE PRESIDENT, UNDERGRADUATE ACCESS TO THE UNIVERSITY OF CALIFORNIA AFTER THE ELIMINATION OF RACE-CONSCIOUS POLICIES 1, 18 (2003), https://www.ucop.edu/enrollment-services/data-and-reporting/undergraduate-admissions/aa_final_2.pdf [perma.cc/WP5B-2TEM].

17. *Id.* at 2.

systemwide across all U.C. campuses.¹⁸ At U.C. Riverside and U.C. Santa Cruz, the rate fell from about 79 percent to 73 percent.¹⁹ Additionally, this impact was greater at more selective campuses. At U.C. Berkeley, U.C. Davis, and U.C. San Diego, the rate fell by more than 20 percent.²⁰ It fell by more than 15 percent at U.C. Los Angeles (UCLA) and U.C. Santa Barbara, and by 8.3 percent at U.C. Irvine.²¹ This decline became more transparent at U.C. Berkeley and UCLA between 1995 and 1999. The admissions rate of underrepresented students at U.C. Berkeley declined sharply from 26.1 percent to 11.2 percent and from 26.7 percent to 12.7 percent at UCLA.²² The reduced chances of admission into a University of California affected all underrepresented minorities, regardless of their academic backgrounds.²³ As a result, the number of underrepresented minority applicants sending their Scholastic Aptitude Test (SAT) scores to U.C. Berkeley and UCLA also dropped due to the end of affirmative action, further contributing to a decline in admissions to these campuses, but application numbers increased at less selective U.C. schools.²⁴ Even with this redirection of application numbers, there was still a decline in enrollment rates at each U.C. campus. Generally, Proposition 209 did create changes in the U.C. system's undergraduate admittance rate of underrepresented students, with more discernible changes at U.C. Berkeley and UCLA, which experienced more than a 50 percent decline by 1999.

Students' discernment of the campus climate with no affirmative action policies also created tension among minority students. A survey using data gathered from 9,750 African American and Latino students shows that they felt that peers of the same racial background received less respect on campuses with no affirmative action programs compared to those campuses with those policies.²⁵ Scholars have already expressed the importance of having a diverse student body for a better campus climate.²⁶ A 2008–2010 report using data from eight U.C. campuses revealed that only 62.2 percent of African American students felt that their race was respected, in comparison to 92.6 percent of Whites.²⁷ For Latino students in the U.C. system, 77.2 percent felt their ethnicity was respected on their campuses.²⁸ By stark comparison, the students' views on the campus climate for these same groups were much different at the University of Texas (UT) at Austin, where affirmative action programs were still upheld by the 2003 Supreme Court decision in *Grutter v. Bollinger*.²⁹ At UT Austin, 89.9 percent of Latino and 72.3 percent of African

18. *Id.* at 18.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. Kate Antonovics & Ben Backes, *Were Minority Students Discouraged from Applying to University of California Campuses After the Affirmative Action Ban?*, 8 EDUC. FIN. AND POL'Y 208 (2013) [perma.cc/7GTS-P8HL].

24. *Id.* at 248.

25. William Kidder, *Missshaping the River: Proposition 209 and Lessons for the Fisher Case*, 39 J. COLL. & UNIV. L. 53, 55 (2013).

26. Sylvia Hurtado, Kimberly Griffin, Lucy Arellano, & Marcela Cuellar, *Assessing the Value of Climate Assessments: Progress and Future Directions*, 1 J. DIVERSITY HIGHER EDUC. 204, 204 (2008), <https://doi.apa.org/doi/10.1037/a0014009> [perma.cc/6P5D-DUWT].

27. Kidder, *supra* note 25, at 61.

28. *Id.* at 62.

29. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

American students felt respected.³⁰ The difference of ten percentage points in views of respect between African American and Latino students at the U.C. campuses and UT Austin displays a notable difference between schools with affirmative action and those without.

B. Women Faculty Hirings

Furthermore, Proposition 209 heavily impacted faculty hiring of women in the U.C. system. For example, U.C. Davis experienced a 22 percent decline in the percentage of women new faculty hires following the Proposition's approval.³¹ From 1997 to 1998, women constituted 35 percent of the new faculty hires but comprised only 13 percent between 1998 to 1999, when Proposition 209 took effect.³² This pattern occurred across all U.C. campuses.

An interview with Martha S. West, a retired employment law professor at U.C. Davis, revealed that faculty hiring decisions were made by faculty members, and campus administrators held little weight on diverse hiring decisions as they only had veto abilities to propose hiring.³³ However, these hiring decisions should not have been influenced by the U.C. Board of Regents' 1995 resolution to end affirmative action programs nor the adoption of Proposition 209 because the federal Executive Order 11246 still imposed binding affirmative action policies.³⁴ Under this order, any organization with at least fifty employees and fifty thousand dollars or more in federal funding must follow federal affirmative action policies on hiring employees.³⁵ Under the state-wide ban on affirmative action policies, faculty hirings were supposed to remain unaffected since each U.C. campus received more than fifty thousand dollars in federal funds to comply with Executive Order 11246. Yet, right before the implementation of Proposition 209 from 1995 to 1996, 36 percent of new U.C.-wide faculty hires were women, dropping to 26 percent the following year and to 25 percent from 1999 to 2000.³⁶ In contrast, the number of women faculty in college hiring nationwide increased to 48 percent in 1999, making the rates of U.C. women faculty hiring significantly lower than the national percentage.³⁷

C. Black Students and Black Faculty Hirings

Proposition 209 reduced the rates of Black student enrollment and Black faculty hiring at the University of California. Proposition 209 took effect on the undergraduate programs in 1998, causing a 59 percent decline in Black student enrollment at U.C. Berkeley.³⁸ U.C. Berkeley had 273 entering black students, which was just 7.6 percent of the total freshman class, and the following year, U.C.

30. Kidder, *supra* note 25, at 61–62.

31. Martha S. West, *Unprecedented Urgency: Gender Discrimination in Faculty Hiring at the University of California*, 19 NWSA J. 199, 199 (2007).

32. *Id.* at 199.

33. Interview with Martha S. West, Professor of L. Emerita, U.C. Davis Sch. of L., “Post-Proposition 209 Influence on Women Faculty Hiring at the U.C. System” (Apr. 6, 2024) (interview notes on file with the author).

34. *Id.*

35. West, *supra* note 31, at 201.

36. *Id.*

37. *Id.*

38. *Proposition 209's Damage to Black Faculty Hirings at the University of California*, J. BLACKS HIGHER EDUC. 17 (2006).

Berkeley had 113 entering Black students, consisting of only 2.9 percent of the freshman class in 1998.³⁹ Even in 2005, Black students comprised 3.1 percent of the freshman class, showing little improvement since the passing of Proposition 209.⁴⁰ At U.C. Berkeley, this resulted in the number of African Americans enrolled being well below the state's average.⁴¹

Furthermore, Black faculty hiring also experienced a drop in numbers. Nine years before the passage of Proposition 209, 3.4 percent of faculty appointments in the U.C. system were Black, and nine years after Proposition 209, only 2.9 percent of faculty appointments were Black.⁴² These numbers have been more significant at the U.C. Berkeley and UCLA campuses. At U.C. Berkeley, between 1987 and 1996, African Americans were 4.6 percent of the new faculty appointments.⁴³ However, nine years after affirmative action, there have been only eighteen new Black faculty appointments, who made up 3 percent of the new faculty hires at U.C. Berkeley.⁴⁴ At UCLA, thirty-one Black faculty were hired between 1987 and 1996, making up 4 percent of the new appointments.⁴⁵ Yet, ten years after affirmative action ended, there were only eighteen new Black faculty appointments, who made up 2.9 percent of the new hires.⁴⁶ The data presented shows the significant harm Proposition 209 has caused to not just students but the diversity of faculty members as well, with a greater impact once again at the U.C. Berkeley and UCLA campuses.

D. University of California Medical Schools

Proposition 209 also had an impact on the percentage of underrepresented students who were admitted to U.C. medical schools. Twenty years before Proposition 209, 6.2 percent of students awarded a medical degree within the U.C. system were African Americans, which was higher than the national average of 5.7 percent.⁴⁷ Between 2002 and 2019, this number fell to 5 percent at the U.C. level while the national average rose to 6.4 percent.⁴⁸ Decades after the end of affirmative action, the number of African American students receiving medical degrees at U.C. schools has not returned to levels before Proposition 209.⁴⁹

In turn, this affected the number of medical professionals who come from underrepresented backgrounds, as research shows that African American and Hispanic physicians are more likely to serve underserved communities.⁵⁰ This is important because California has a significant shortfall of Latino resident

39. *Id.*

40. *Id.*

41. Richard Frankel, *A New Civil Rights Revolution?*, 18 YALE L. & POL'Y REV. 431, 434 (2000).

42. *Proposition 209's Damage to Black Faculty Hirings at the University of California*, *supra* note 38, at 18.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. WILLIAM C. KIDDER, PROPOSITION 16 AND A BRIGHTER FUTURE FOR ALL CALIFORNIANS: A SYNTHESIS OF RESEARCH ON AFFIRMATIVE ACTION, ENROLLMENT, EDUCATIONAL ATTAINMENT AND CAREERS AT THE UNIVERSITY OF CALIFORNIA 5 (2020).

48. *Id.*

49. *Id.*

50. Miriam Komaromy, Kevin Grumbach, Michael Drake, Karen Vranizan, Nicole Lurie, Dennis Keane & Andrew B. Bindman, *The Role of Black and Hispanic Physicians in Providing Health Care for Underserved Populations*, 334 NEJM 1305, 1305 (1996).

physicians, and a ban on affirmative action only negatively affects this. According to the Public Policy Institute in California, Latinos made up about 40 percent of the California population in 2022.⁵¹ Although Latinos are the single largest minority, Latinos have the lowest rate of physicians per population.⁵² The UCLA Latino Policy and Politics Initiative found that in 2011, California had 5.4 medical residents and fellows per one hundred thousand Latino state residents, which was about 85 percent lower than the national average of 36.6 medical residents.⁵³ From 2001 to 2017, there was no significant change in these numbers.⁵⁴ The ban on affirmative action by Proposition 209 contributed to this condition within the medical profession, notably at the U.C. level.

E. University of California Law Schools

Law school is another field in which a ban on affirmative action has contributed to the decline in underrepresented groups being awarded a professional degree. Amongst students from the top U.S. law schools, studies show that underrepresented minority students have the highest pro bono contributions yet experience disproportionately low leadership contributions, such as being a law firm partner or joining positions in the federal judiciary.⁵⁵

Within U.C. law schools, a ban on affirmative action created a significant drop in the number of African American applicants. Between 1970 and 1996 at U.C. Berkeley School of Law, the average number of African American students enrolled each academic year was 25.7.⁵⁶ By the time Proposition 209 took effect on schools, this average dropped to 12.5 African American students per year between 1997 and 2011, although there was an increase in the number and quality of African American students applying to law schools.⁵⁷ Similarly, between 1970 and 1996, an average of thirty African American law students were enrolled each year at UCLA School of Law.⁵⁸ However, Proposition 209 lowered this average to just eleven African American students at law schools per year between 1997 and 2011.⁵⁹ U.C. Davis School of Law and U.C. Law San Francisco (formerly U.C. Hastings) also experienced a drop in African American applicants, although less so than at U.C. Berkeley and UCLA.⁶⁰

51. HANS JOHNSON, MARISOL MEJIA & ERIC MCGHEE, CALIFORNIA'S POPULATION (2024), <https://www.ppic.org/publication/californias-population/> [web.archive.org/web/20251011120405/https://www.ppic.org/publication/californias-population/].

52. *Id.*

53. LAURA E. MARTINEZ, GABRIELA SOLIS, VIANNEY GOMEZ, JULIO MENDEZ-VARGAS, SONJA F. M. DIAZ & DAVID E. HAYES-BAUTISTA, THE CURRENT STATE OF THE LATINO PHYSICIAN WORKFORCE 2 (2019), https://latino.ucla.edu/wp-content/uploads/2021/08/LPPI_Current_State_of_the_Latino_Physician_Workforce_2019-compressed.pdf [perma.cc/M844-7P4T].

54. *See generally id.* (showing in Figure 1 that California's Latino resident physician rate remained relatively unchanged, increasing only slightly from approximately 5.8 per 100,000 in 2011 to about 6.4 per 100,000 in 2017).

55. Kidder, *supra* note 25, at 120.

56. *Id.* at 122.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 86.

III. POST-AFFIRMATIVE ACTION BAN STEPS IN THE UNIVERSITY OF CALIFORNIA SYSTEM

Following the negative effects of Proposition 209 within the University of California, the institution introduced the Eligibility in the Local Context (ELC) policy program in 2001, and it guaranteed admissions to the top 4 percent of students graduating from California high schools each year.⁶¹ The purpose of the program was to improve access to the U.C. system for minority students.⁶² The ELC program would allow students from these under-resourced high schools to be eligible for U.C. admissions, even with lower-than-average SAT scores. In 2025, the U.C. system has the “Statewide Index,” which guarantees students in the top 9 percent of their high school graduating class admission to one U.C. campuses.⁶³ The California State University system also proposed a program similar to the University of California’s ELC policy to increase the outreach of minority students onto these campuses after Proposition 209.⁶⁴

Through the statewide guarantee program, the U.C. system allowed students from underrepresented backgrounds to achieve educational attainment opportunities in the absence of affirmative action programs. Although this effort does not directly recruit students from underrepresented backgrounds or communities, it served as an alternative solution to Proposition 209’s ban on affirmative action.

IV. OPPOSITIONS TO AFFIRMATIVE ACTION

A. The Academic Mismatch Theory and Graduation Rates

A widely known critique of affirmative action programs is the academic “mismatch theory.”⁶⁵ This theory postulates that due to affirmative action programs, minority students who attend more selective universities are not properly equipped to attend those schools compared to students who enroll in schools where their academic performance would have been better matched.⁶⁶

Richard Sanders, a professor at UCLA School of Law, contended in his 2004 Stanford Law Review article that affirmative action in law school admissions makes African American students who were admitted to top law schools more likely to drop out without passing the bar, leading to fewer African American lawyers.⁶⁷ The mismatch theory emphasizes that if law students admitted to top law schools through affirmative action were to attend lower-ranking schools, they could have excelled academically and eventually passed the bar exam to become lawyers.⁶⁸

61. Grant H. Blume & Mark C. Long, *Changes in Levels of Affirmative Action in College Admissions in Response to Statewide Bans and Judicial Rulings*, 36 EDUC. EVALUATION & POL’Y ANALYSIS 228, 231 (2014).

62. See *id.* at 231.

63. *Statewide Guarantee*, UNIV. CAL. ADMISSIONS, <https://admission.universityofcalifornia.edu/admission-requirements/freshman-requirements/california-residents/statewide-guarantee> [perma.cc/6HA4-AAN7] (last visited Mar. 3, 2025).

64. Blume & Long, *supra* note 61, at 231.

65. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 450 (2004).

66. *Id.* at 429.

67. *Id.* at 372.

68. *Id.* at 371–72.

However, empirical evidence and recent research indicates that the mismatch theory is untrue at varying levels of educational degree programs, such as undergraduate programs.

Data from the 2020 U.S. News & World Report of the top twelve public universities shows that Black students with a six-year graduation rate are higher at public schools that did have affirmative action programs such as the University of North Carolina Chapel Hill, the University of Virginia, and the College of William & Mary (with the University of Virginia having the highest percentage at 90 percent and the University of North Carolina Chapel Hills with the lowest percentage at 85 percent).⁶⁹ In comparison, the top twelve public universities that no longer had affirmative action programs held lower rates of Black student six-year graduation rates (with U.C. San Diego having the highest at 83 percent and U.C. Santa Barbara tied with U.C. Davis for the lowest percentage at 75 percent).⁷⁰ Overall, the average graduation rate of these top public universities in 2020 with affirmative action programs was 87.3 percent and the average of those without affirmative action programs was 78 percent.⁷¹ With the recent ban of affirmative action across all public universities by the U.S. Supreme Court's decision in *Students for Fair Admissions v. Harvard*,⁷² it will be interesting to see how these statistics on the top twelve public universities will change. I predict that the graduation rate of schools that had affirmative action programs banned by the Court's recent decision would experience a similar decline in enrollment and graduation rates of underrepresented groups as in the U.C. system post-Proposition 209.

Furthermore, an additional study disproves the mismatch theory, showing that minority students excel at more selective schools. Using national empirical data between 1982 and 1992 from selective and nonselective schools, the study found that graduation rates of Black and Hispanic students increased.⁷³ In 1982, the Black student graduation rate at nonselective schools was 26 percent and it rose to 48 percent by 1992.⁷⁴ At selective schools, the graduation rates of Black students also increased from 52 percent in 1982 to 72 percent by 1992.⁷⁵ For Hispanic students, the graduation rates during this time frame also increased from 26 percent to 40 percent at nonselective schools and an increase of 7 percent at selective institutions.⁷⁶ This data on the graduation rates of minority students, including those admitted through affirmative action programs at both selective and nonselective schools, shows that graduation rates were improving, even with affirmative action programs.

A specific case study of graduation rates between African American and White students at Duke University further challenges the mismatch theory proposed by Sanders. Data from the Journal for Blacks in Higher Education shows that Black students from high-ranking schools have high graduation rates and are mostly close

69. KIDDER, *supra* note 47, at 3.

70. *Id.*

71. *Id.*

72. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 218, 218 (2023).

73. Sigal Alon & Marta Tienda, *Assessing the "Mismatch" Hypothesis: Differences in College Graduation Rates by Institutional Selectivity*, 78 SOCIO. EDUC. 294, 303 (2005).

74. *Id.* at 302.

75. *Id.*

76. *Id.*

to or equal to those of their White peers in the top schools.⁷⁷ Data provided by the Duke University administration reveals that African American students enrolled at Duke had a mean SAT score of 1281 and White students had a mean score of 1417.⁷⁸ In terms of income, about 71 percent of White students had a family income of over \$100,000 whereas only 37 percent of African American students did.⁷⁹ Even with these differences, the graduation rates between African American and White students were relatively similar.⁸⁰ For example, data from undergraduate students revealed that the average GPA for first-year White students was 3.33, and a 2.90 GPA average for Black students.⁸¹ Regardless, the graduation rate was 90 percent for White students and 88 percent for Black students.⁸²

B. Asian Americans and Affirmative Action

Another prominent critique against affirmative action programs is that Asian American students are harmed by affirmative action programs, and it is a zero-sum game against African American and Latino students. However, data shows that the Asian American and Pacific Islander (AAPI) population at the U.C. system has a lot to gain from affirmative action initiatives. For example, the Hmong population within the U.C. system has had lower graduation rates since 2010 than African American and other underrepresented students.⁸³ It is possible that without the restrictions of Proposition 209, affirmative action efforts could address challenges in education where race-neutral programs are not working.

In the law school setting, for instance, statistics from enrollment rates of five different law schools (UCLA, U.C. Berkeley, U.C. Davis, University of Washington, and University of Texas) between 1993 and 2005 do not indicate a negative practice against Asian American students.⁸⁴ Between 1993 and 1996, when affirmative action programs were still active at these campuses, the average enrollment of Asian American students were as follows: 19.4 percent at UCLA, 15.5 percent at U.C. Berkeley, 17.1 percent at U.C. Davis, 17.8 percent at University of Washington, and 5.7 percent at University of Texas.⁸⁵ Whereas, after the end of affirmative action between 1997 and 2005, the averages experienced slight changes: 18.1 percent at UCLA, 17.9 percent at U.C. Berkeley, 20.6 percent at U.C. Davis, 15.2 percent at the University of Washington, and 6.3% at the University of Texas.⁸⁶ Overall, the average Asian American student enrollment between these schools with affirmative action programs was 12.9 percent, and 14.3 percent without affirmative action.⁸⁷

Some public officials, such as Justice Alito in his *Fisher* dissent, have over-focused on the representations of Asian-Americans to argue against affirmative

77. *Affirmative Action in College Admissions: More Evidence That the Mismatch Theory Is Hogwash*, J. BLACKS HIGHER EDUC. 26, 27 (2009).

78. *Id.* at 27.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. KIDDER, *supra* note 47, at 3–4.

84. William Kidder, *Negative Action Versus Affirmative Action: Asian Pacific Americans Are Still Caught in the Crossfire*, 11 MICH. J. RACE & L. 606, 618 (2006).

85. *Id.*

86. *Id.*

87. *Id.*

action and “pit[ted] [them] against other communities of color.”⁸⁸ However, Asian Americans generally support affirmative action, even though the support has varied across time and different subgroups of Asian American communities.⁸⁹ Between 2012 and 2016, Asian American registered voters were asked questions about affirmative action, such as “[t]hinking about colleges and universities, do you favor, oppose, or neither favor nor oppose giving blacks, women, and other minorities better access to higher education?”⁹⁰ In 2012, 75 percent of Asian Americans supported affirmative action within the education setting, but by 2016, this support dropped to 65 percent.⁹¹ Within those four years, support for affirmative action programs significantly declined among Chinese Americans, and since they are the largest Asian ethnic group, a decline in their support also created an indirect decline in support for other Asian American groups.⁹²

With the widespread news about *Students for Fair Admissions v. Harvard*, SFFA targeted Asian Americans as affirmative action plaintiffs because their usual clients have not produced successful verdicts in federal court.⁹³ Edward Jay Blum, a litigant and activist for *Students for Fair Admissions* who recruited Asian Americans who were denied admission into Harvard, then argued that affirmative action policies hurt Asian Americans because they boosted the acceptance rates of African Americans and Latinos.⁹⁴ Nonetheless, Asian Americans were overrepresented at top schools like Harvard, comprising 6.6 percent of the U.S. population but 24.4 percent of Harvard’s freshman class in 2021.⁹⁵

As shown, the statistics provided show that Asian American students in the law school setting did not experience significant changes after the ban on affirmative action programs. Moreover, Asian Americans are not extreme opponents of affirmative action policies. The widespread media coverage of *Students for Fair Admissions v. Harvard* could have contributed to the misconception that affirmative action programs are a zero-sum game between Asian Americans and other underrepresented racial groups.

V. ALTERNATIVE SOLUTIONS TO AFFIRMATIVE ACTION PROGRAMS

The ban on affirmative action in California by Proposition 209 left notable effects on the U.C. system, but an alternative solution is to implement the use of socioeconomic status as a factor for these programs instead of race. The Supreme

88. Harvey Gee, *Redux: Arguing About Asian Americans and Affirmative Action at Harvard After Fisher*, 26 ASIAN AM. L.J. 20, 21 (2019).

89. Neil G. Ruiz, Ziyao Tian & Jens Manuel Krogstad, *Asian Americans Hold Mixed Views Around Affirmative Action*, PEW RSCH. CTR. (June 8, 2023), <https://www.pewresearch.org/race-and-ethnicity/2023/06/08/asian-americans-hold-mixed-views-around-affirmative-action/> [perma.cc/4S4Z-H7MC].

90. Jennifer Lee, *Asian Americans, Affirmative Action & the Rise in Anti-Asian Hate*, 150 DAEDALUS 180, 190 (2021).

91. *Id.*

92. Karthick Ramakrishnan & Janelle Wong, *Survey Roundup: Asian American Attitudes on Affirmative Action*, AAPI DATA (June 18, 2018), <http://aapidata.com/blog/asianam-affirmative-action-surveys> [perma.cc/Y7SV-ZMGD].

93. Kathryn L. Cantu, *The Eyes of Texas Are Upon You: Will Affirmative Action in Texas Survive Its Endless Constitutional and Legislative Attacks?*, 25 ST. MARY’S L. REV. & SOC. JUST. 11, 38 (2023).

94. Lee, *supra* note 90, at 192.

95. *Id.*

Court in *Students for Fair Admissions v. Harvard* held that affirmative action programs based on race are unconstitutional, violating the Fourteenth Amendment's Equal Protection Clause.⁹⁶ Rather than the use of race as a determinant for affirmative action programs, the use of socioeconomic status may be held constitutional because it requires a lower level of constitutional review.⁹⁷ The standard of review of race-based admissions is strict scrutiny, but courts must determine the constitutionality of evaluating applicants based on socioeconomic status using the rational basis standard of review instead, which is lower than strict scrutiny.⁹⁸ Under rational basis, socioeconomic status could be held constitutional under the Fourteenth Amendment's Equal Protection Clause.

A. The Use of Socioeconomic Status Instead of Race-Based Affirmative Action Programs

Under the Equal Protection Clause of the Fourteenth Amendment, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁹⁹ However, when a regulation uses race, ethnicity, or national origin as a factor for a burden or benefit, then the court will use the strict scrutiny test.¹⁰⁰ This test requires that there be a sufficient "compelling state interest" to decide whether a regulation violates the Equal Protection Clause of the Fourteenth Amendment.¹⁰¹

In *Students for Fair Admissions*, the admissions systems at Harvard College and the University of North Carolina (UNC) used an applicant's race as a factor for college admissions.¹⁰² The plaintiffs filed a lawsuit against Harvard and UNC, arguing that "their race-based admissions programs violate . . . Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment."¹⁰³

Since the affirmative action programs at Harvard and UNC involved race-based factors, the programs needed to pass the strict scrutiny test used by the court and show that the means are "narrowly tailored" to a "compelling government interest."¹⁰⁴ The compelling governmental interest presented by Harvard was that it would train future leaders, prepare its students for a diverse society, educate its students through diversity, and produce new knowledge from these diverse outlooks.¹⁰⁵ UNC provided similar reasons for its compelling state interest. However, the Court held that these reasons were not sufficiently coherent as a compelling state interest for purposes of strict scrutiny because the Court could not adequately measure any of these goals proposed by the school.¹⁰⁶

96. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023).

97. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

98. *Id.*

99. U.S. CONST. amend. XIV, § 1.

100. *Students for Fair Admissions*, 600 U.S. at 308.

101. Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 355 (2006).

102. *Students for Fair Admissions*, 600 U.S. at 195.

103. *Id.* at 197–98.

104. Cynthia Chiu, *Justice Or Just Us: SFFA v. Harvard and Asian Americans in Affirmative Actions*, 92 S. CAL. L. REV. 442, 446 (2019).

105. *Id.*

106. *Students for Fair Admissions*, 600 U.S. at 214–15.

With race-based affirmative action programs considered unconstitutional on the federal level as well, an alternative solution to this dilemma is using affirmative action programs that are based on applicants' socioeconomic status. Since race could no longer be considered for admissions, the Court would employ a lower level of review to determine whether it comports with the Fourteenth Amendment's Due Process Clause.¹⁰⁷ In this case, a rational basis standard of review would be used, the lowest standard applied by the courts.¹⁰⁸ Under rational basis review, the state needs only prove a "legitimate state purpose."¹⁰⁹ Here, affirmative action programs based on socioeconomic status can arguably have a legitimate state purpose to promote diversity, address historical inequalities of low-income populations, and indirectly support underrepresented minorities who consist of these low-income populations. Since this approach uses a lower standard of review, it would be more likely to pass the Court's review.

Research shows a correlation between family socioeconomic status and college enrollment, with findings showing that children from families of higher socioeconomic status have greater college attendance rates and have more successful educational experiences with better college expectations, academic abilities, and resume building.¹¹⁰ Although race-based affirmative action programs can no longer be used to support the enrollment of underrepresented minorities in higher education, socioeconomic status still influences college enrollment. Data shows that, in 2022, Black individuals comprise 13.5 percent of the total U.S. population yet make up 20.1 percent of the U.S. population in poverty.¹¹¹ Similarly, Hispanics comprise 19.3 percent of the total population, and 28.4 percent of the impoverished population, while White individuals comprise 58.5 percent of the total population, and account for 44 percent of the impoverished population.¹¹² These numbers showcase an overrepresentation of Black and Hispanic populations in poverty statistics, while White individuals are underrepresented in poverty statistics. Affirmative action programs based on socioeconomic status, however, could still indirectly support underrepresented populations who are below the poverty line and admit students in a "holistic" manner.¹¹³ However, the poverty rate for White families is the highest, and programs based on socioeconomic status could benefit more White families than their intended target of racial minorities.¹¹⁴

107. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).

108. See *id.*

109. Raphael Holoszy-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2071, 2074 (2015).

110. James Tompsett & Chris Knoester, *Family Socioeconomic Status and College Attendance: A Consideration of Individual-Level and School-Level Pathways*, 18 PLOS ONE 1, 14–16 (2023).

111. Em Shrider, *Poverty Rate for the Black Population Fell Below Pre-Pandemic Levels*, U.S. CENSUS BUREAU (Sep. 12, 2023), <https://www.census.gov/library/stories/2023/09/black-poverty-rate.html> [perma.cc/7ZJ4-XJRE].

112. *Id.* at Figure 3.

113. Thomas Scott-Railton, *Shifting the Scope: How Taking School Demographics Into Account in College Admissions Could Reduce K-12 Segregation Nationwide*, 36 YALE L. & POL'Y REV. 219, 279 (2017).

114. Alice Xiang & Donald B. Rubin, *Assessing the Potential Impact of a Nationwide Class-Based Affirmative Action System*, 30 STAT. SCI. 297, 308 (2015).

B. Socioeconomic Status Combined with Race-Based Recruitment Efforts

Although affirmative action programs based on socioeconomic status alone would not be enough to racially diversify universities, a study shows that they can when combined with other efforts. An academic paper, “Can Socioeconomic Status Substitute for Race in Affirmative Action College Admissions Policies? Evidence from a Simulation Model” by Sean Reardon, produced a simulation system by using socioeconomic status as an alternative to race-based affirmative action programs.¹¹⁵ Under this simulation, results show that using socioeconomic-based affirmative action programs alone would not be sufficient to create the same diverse environment as race-based affirmative action programs.¹¹⁶ However, when socioeconomic-based affirmative action programs are paired with race-based recruitment efforts, they may yield a significant impact.¹¹⁷

Furthermore, affirmative action programs based solely on socioeconomic status would place a financial burden on the law school’s financial aid system. Since UCLA School of Law has had a grant-based aid system since 1994, it was predicted that a fivefold increase in the number of students who had parental incomes below thirty thousand dollars per year meant higher grants for these students.¹¹⁸ This increase in students from lower socioeconomic status would increase UCLA’s grant distribution by about 30 percent, which is about \$340,000.¹¹⁹ Although UCLA School of Law would be able to remain diverse, it would place a great financial burden on the university. The same dilemma could apply at other public schools considering this approach.

CONCLUSION

The discussion encompassing the ban on affirmative action by Proposition 209 has a long history in California that has greatly influenced its public education system in various ways. By analyzing how race, sex, or ethnicity could no longer be considered for college admissions at the U.C. system, it becomes evident how access to higher education for underrepresented students became a bigger hurdle. As previously discussed, the decline of underrepresented groups in student enrollment and faculty hiring occurred at all U.C. campuses, with U.C. Berkeley and UCLA experiencing the biggest declines. Notwithstanding the restrictions imposed by Proposition 209, there have been alternative efforts to encourage diversity efforts in higher education, like the University of California’s ELC program, which guarantees the top 9 percent of California high school students’ admission into a U.C. campus.

While critics of affirmative action programs point to the academic mismatch theory, low graduation rates, and reducing the admissions rates of Asian Americans, empirical data shows otherwise. Looking at the academic records of undergraduate

115. Sean F. Reardon, Rachel Baker, Matt Kasman, Daniel Klasik, & Joseph Townsend, *Can Socioeconomic Status Substitute for Race in Affirmative Action College Admissions Policies? Evidence from a Simulation Model* (Stan. Ctr. for Educ. Pol’y Analysis, CEPA Working Paper No. 15-04, 2017), <http://eric.ed.gov/?id=ED580828> [perma.cc/Q8GT-K39A].

116. *Id.* at 68 Figure C3, 69 Figure C4.

117. *Id.* at 33.

118. Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 499 (1997).

119. *Id.*

students at top public schools with affirmative action programs and those without affirmative action policies, it is evident that underrepresented students enrolled at selective schools with affirmative action policies perform just as well and graduate at similar rates to White students. Another prevalent critique of affirmative action programs is that they give African American and Hispanic students preference over Asian Americans, as seen in *Students for Fair Admissions v. Harvard*. However, data on U.C. enrollment indicates that Asian American admissions rates were not negatively impacted by affirmative action programs and some Asian American communities, like Hmong students, who face low graduation rates, benefitted from the programs.¹²⁰ Now that other top universities across the country cannot use affirmative action policies to diversify their campuses, future research would require looking into how the changes in enrollment for underrepresented minority groups also impact these other schools once the Court's decision takes effect.

With a current federal ban on race-based affirmative action programs, alternative solutions to diversify campuses should be considered. One possible solution is to use socioeconomic status as a factor for admissions rather than race because it would remain constitutional under the Supreme Court's decision. However, even this proposed solution brings challenges to public universities. First, White families comprise a larger portion of the U.S. population and occupy the largest share of the population living in poverty, potentially leading to higher enrollment of whites in higher education than minorities if socioeconomic status were the sole factor. Second, there would be a significant strain on public schools to increase their financial aid if certain schools adopt the grant-based system, because more grants would need to be allocated to students with a lower socioeconomic status. Although it may seem difficult to implement affirmative action programs based on socioeconomic status, it is not impossible, and more research would need to be done to determine how schools could implement socioeconomic factors that target racial minority groups without burdening the schools' grant system.

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120. KIDDER, *supra* note 47, at 3.

