

**Metropolitan Transportation Commission and Association of Bay Area Governments
Joint MTC ABAG Legislation Committee**

September 11, 2020

Agenda Item 5a

Proposition 16: Statewide Ballot Initiative to Repeal California's Affirmative Action Ban

Subject: Proposed support for Proposition (Prop) 16, a constitutional amendment to repeal the state's ban on the use of affirmative action by public agencies.

Background: *History of California's Affirmative Action Ban*
California voters in 1996 approved Prop 209, a ballot initiative that banned the use of affirmative action in California. Specifically, Prop 209 amended the California Constitution to specify that the state cannot “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.” Repeal of Prop 209 would enable California's public universities, the state, local governments, and other public entities to develop programs and policies that directly aim to increase opportunities for people of color and women in admissions, hiring and awarding public contracts.

Leading up to Prop 209's passage by 55 percent of California voters, Ward Connerly—a member of the University California Board of Regents and the measure's key champion—contended that while affirmative action once helped to promote equal opportunity, it had outlived its usefulness. He testified before the United States Senate Judiciary Committee in April 1996 that “Affirmative action was meant to be temporary. It was meant to be a stronger dose of equal opportunity for individuals, and the prescription was intended to expire when the body politic had developed sufficient immunity to the virus of prejudice and discrimination.”ⁱ The official 1996 ballot argument in support argued that affirmative action was reverse discrimination that “perpetuate[d] the myth that “minorities” and women cannot compete without special preferences” and instead, the path to equality was to embrace a color-blind, race-blind, and gender-blind society.”ⁱⁱ Prop 209's passage in California spurred similar affirmative action bans in nearly a dozen other states.

Racial Disparities Persist

Our 2020 reality is that race-based disparities persist. An August 2019 Economic Policy Institute study found that Black workers are twice as likely to be unemployed as white workers, and a similar disparity exists between Black college-graduates and their white counterparts. In the Bay Area, Black households in each of the region's nine counties earn, on average, less than their white counterparts. For example, the 2014 median average income for white households in Alameda County was \$92,000, more than twice the median income for Black households (\$42,900). The racial wage gap is even more stark in San Francisco, where white households earned more than three times that of Black households. Black, Native American and Latino households are also disproportionately more likely to be rent-burdened.ⁱⁱⁱ

A comprehensive U.C. Berkeley study published in August 2020, *Affirmative Action, Mismatch, and Economic Mobility After California's Proposition 209* included findings from two decades of research indicating California's affirmative action ban has exacerbated inequalities. Researchers found that by multiple measures, the ban has been detrimental to Black and Hispanic students, decreasing their admissions into the University of California system, going to graduate school and—in particular for Hispanic students—earning a high salary.^{iv}

In June 2020, the U.C. Board of Regents unanimously voted in support of ACA 5 and the repeal of Prop 209 noting that “attempting to address racial inequality without actually considering race has proven to be challenging. Despite nearly two decades of effort and experimentation with race-neutral admissions at UC, the University’s enrollment of students from underrepresented groups and recruitment of faculty of color falls short of reflecting the rich diversity of California’s population.”

Impact on Public Contracting

In addition to prohibiting affirmative action in hiring and college admissions, Prop 209 also prohibited race and gender conscious procurement policies by the State of California and local agencies. It is difficult to quantify the precise impact this had on minority and women business enterprises (WMBEs) since the state and many local agencies stopped requiring collection of race and gender data after the law’s passage until subsequent legislation clarified that this was permissible. A 2015 study commissioned by the Equal Justice Institute estimates that WMBE’s lost over \$1 billion per year in business relative to the share they had been receiving prior to passage of Prop 209.^v It also points to Caltrans’ experience with its disadvantaged business enterprise (DBE) program—a requirement of federal funds—as an interesting case study of a race-neutral approach. In the four years prior to eliminating race as a factor in its contracting (a decision Caltrans made in response to an executive order in 1995 preceding Prop 209), Caltrans’ had an average DBE contracting rate of 22 percent. This fell to an average of 4.6 percent from FY 2007-2011 after it shifted to a completely race-neutral approach. Caltrans currently administers its race-neutral DBE program in compliance with federal law with a statewide goal of 12.5 percent for its federally-funded transportation contracts.

What Would Proposition 16 Do?

Prop 16 is a legislatively referred constitutional amendment placed on the ballot by Assembly Constitutional Amendment (ACA) 5 (Weber, 2020). If voters approve the measure, California public entities would be permitted—within the bounds of federal law—to implement affirmative action programs that explicitly use race and gender as factors in college admissions, government hiring and public contracting. Case law from the U.S. Supreme Court would guide what specific policies and programs would be permissible. The Supreme Court has ruled that strict racial quotas and point systems in higher education admissions are unconstitutional but individualized, holistic reviews that consider race, when tailored to serve a compelling public interest (such as educational diversity), are permissible. The Senate Floor bill analysis of ACA 5 summed it up as follows: “In short, the repeal of Prop 209 would permit the use of race and/or gender as a “plus” factor in college admissions, public employment, and public contracting. It would not permit the use of quotas or policies that [are] broadly tailored and do not consider the totality of the individual college applicant, job applicant, or contract bidder.”

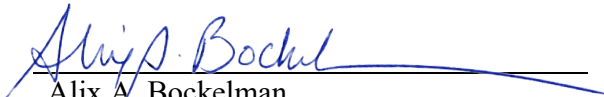
Discussion: In the Fall of 2019, MTC and ABAG received and supported the “Equity Platform” as a paradigm infusing equity through the portfolios of our regional agencies. While in advance of the social justice activism that gripped the nation in the wake of the violent death of George Floyd, the Platform underscored both the June 2020 joint statement issued by MTC Chair Scott Haggerty and ABAG President Jesse Arreguin and the Commission’s subsequent Resolution 4435, all reaffirming the agencies’ “commitment to meaningfully advance justice, equity, diversity and inclusion.” Plan Bay Area 2050 also embraces equity as a core goal and recognizes that additional strategies are needed to ensure that the region can deliver “a just and inclusive Bay Area where everyone can participate, prosper, and reach their full potential”—the Platform’s core vision.

Prop 16 is a unique opportunity for the Commission and Executive Board to support a statewide policy change that will provide state and public agencies across the Bay Area—including MTC and ABAG—a valuable tool to help create a more diverse workforce, contracting pool and student body, within the confines of federal law. Accordingly, staff recommends the committee refer a position of support to the Commission and the ABAG Executive Board.

Recommendation: Support

Positions: See Attachment A

Attachments: Attachment A: Proposition 16 Support and Opposition
Attachment B: UC Board of Regents Memo in Support of ACA 5/Repeal of Prop 209


Alix A. Bockelman

ⁱ [https://www.google.com/books/edition/California and Affirmative Action/p2df-VVq1ssC?hl=en&gbpv=1](https://www.google.com/books/edition/California%20and%20Affirmative%20Action/p2df-VVq1ssC?hl=en&gbpv=1)

ⁱⁱ <http://vigarchive.sos.ca.gov/1996/general/pamphlet/209.htm>

ⁱⁱⁱ <https://www.sfchronicle.com/bayarea/article/Incomes-rise-across-S-F-except-for-African-6548522.php>

^{iv} <https://cshe.berkeley.edu/publications/affirmative-action-mismatch-and-economic-mobility-after-california%E2%80%99s-proposition-209>

^v <https://equaljusticesociety.org/wp-content/uploads/2019/10/ejs-impact-prop-209-mwbes.pdf>

Proposition 16 Support and Opposition

Support	Oppose
AAPI Women Lead	80-20 Educational Foundation, Inc. (80-20)
AAPIs for Civic Empowerment	80-20 DC Chapter
Abriendo Puertas/Opening Doors	Aborn Institute
Accountability Counsel	American Civil Rights Institute (ACRI)
Advancement Project California	American Coalition for Equality
AFSCME California	American Freedom Alliance (AFA)
AFSCME Local 3299	Asian American Coalition for Education (AACE)
Agricultural Institute of Marin	Asian Americans for Equal Rights (AAER)
Agriculture and Land-Based Training	Asian American Legal Foundation (AALF)
Alice B. Toklas LGBT Democratic Club	Asian Industry B2B (AIB2B)
Alliance for Boys and Men of Color	Asians not Brainwashed by Media (ANBM)
Alliance for Children’s Rights	Association for Education Fairness (AFEF)
Alliance of Californians for Community Empowerment	Bay Area Homeowners Network (BAHN)
Anderson Barker Architects	Better Milpitas (BM)
Anti-Defamation League	California Association of Scholars (CAS)
Anti-Recidivism Coalition	Central California Chinese Cultural Association (CCCCA)
API Equality of Los Angeles	Chinese American Alliance
API Equality of Northern California	Chinese American Civic Action Alliance (CACAAUS)
API Forward	Chinese American Citizens Alliance Greater New York (CACAGNY)
ARI Community Services	Chinese American Citizens Alliance Orange County (CACAOC)
AsAmNews	Chinese American Equalization Association (HQH)
Asian American Bar Association for the Greater Bay Area	Chinese Americans Shooting Sports Club (CASSC)
Asian American Psychological Association	Dallas Fort Worth Political Action Committee (DFW PAC)
Asian Americans Advancing Justice – Asian Law Caucus	Evergreen Chinese American Association (ECAA)
Asian Americans Advancing Justice – Los Angeles	Fair Chance for Asians
Asian American Architects and Engineers Association	Girls Club of Orting Washington
Asian Americans for Community Involvement (AACI)	MorningLight Education Group (MEG)
Asian Americans in Action	National Association of Scholars (NAS)
Asian Americans Rising	Northern California Chinese Culture-Athletic Federation (NCCCAF)
Asian Law Alliance	Panda Kung Fu Center
Asian Pacific American Bar Association of Los Angeles County	People Encouraging People (PEP)
Asian Pacific American Bar Association of Silicon Valley	Promoting Leadership in Aspiring Youth (PLAY Leadership)
Asian Pacific American Labor Alliance (AFL-CIO)	San Diego Asian Americans for Equality (SDAAFE)
Asian Pacific American Women Lawyers Alliance	Silicon Valley Chinese Association Foundation (SVCAF)
Asian Pacific Islander American Public Affairs Association	Silicon Valley Community United (SVCU)
Asian Pacific Policy and Planning Council	Silicon Valley Foundation for Better Environment (SVFBE)
Asian Pacific State Employees Association	
Asian Refugees United	

<p>Asians4BlackLives Association of Asian American Attorney and CPA Firms Association of California State Employees with Disabilities Axiom Corporation AYPAL: Building API Community Power Bayanihan Equity Center Bend the Arc: Jewish Action Black Community Clergy & Labor Alliance Black Parallel School Board, Sacramento Black to the Future Action Fund Black Women Organized for Political Action Bulosan Center for Filipino Studies CAFE de California – Chicano Latino State Employees Association California Asian Pacific American Bar Association California Association for Bilingual Education California Black Chamber of Commerce California ChangeLawyers California Civil Rights Coalition California Climate Change & Agriculture Network California Community Colleges Consultation Council California Democratic African American Party California Democratic Party Asian Pacific Islander Caucus California Employment Lawyers Association California Farmlink California Federation of Teachers California Hispanic Chamber California Immigrant Policy Center California Labor Federation California LULAC California National Organization for Women California Nurses Association California Pan-Ethnic Health Network California Reinvestment Coalition California State Firefighters Association California State PTA California Teachers Association California Young Democrats– AAPI Caucus California Young Democrats– Womxn Caucus California Young Democrats Asian Pacific Islander Caucus California/Hawaii State Conference NAACP Californians for Justice Californians for Pesticide Reform Californians for Safety and Justice Californians Together</p>	<p>Southlands Christian School (SCS) Students For Fair Admissions (SFFA) TOC Foundation (TOCF) Tri-Valley Asian Association (TVAA) University of California Chinese Alumni Association (UCCAA) Uttar Pradesh Mandal of America (UPMA) WA Asians for Equality (ACE) Xi’an Jiaotong University Alumni Association of Northern California Zeidman Consulting</p>
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<p>Campaign for College Opportunity Canal Alliance Career Ladders Project Ceres Community Project Cesar Chavez Foundation Child Care Law Center Children's Defense Fund-CA Chinese American Progressive Action Chinese for Affirmative Action CHIRLA Church State Council Civic Design Group Coalition for Asian American Children and Families Coalition of Asian American Leaders Commission on Status of Women and Girls Communities United for Restorative Youth Justice (CURYJ) Community Alliance with Family Farmers Community Coalition Community Legal Services in East Palo Alto Congregation B'nai Israel Congregations Organized for Prophetic Engagement (COPE) San Bernardino Consumer Attorney of California Consumers for Auto Reliability and Safety Cooper-Woodson College Enhancement Program Sacramento State University Council on American-Islamic Relations, California Chapter (CAIR-CA) Council on American-Islamic Relations, San Francisco Bay Area Office (CAIR-SFBA) Courage Campaign CSUN AAS Department CYD LGBTQ Caucus Del Sol Group Democratic Schools and Wellstone Democratic Club Education Committee Desertsong Group, The Disability Rights Education & Defense Fund Dolores Huerta Foundation Drug Policy Alliance East Bay Asian Youth Center East Bay La Raza Lawyers Association East Coast Asian American Student Union (ECAASU) Ecology Center Educators for Democratic Schools Wellstone Democratic Club Education Committee El Camino Community College District</p>	
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<p>Empowering Pacific Islander Communities (EPIC) Environmental Defense Fund Incorporated Equal Justice Society Equal Rights Advocates Equality California Fathers and Families of San Joaquin Fibershed Filipino Advocates for Justice Filipino Bar Association of Northern California Filipino Community Center Food for People Friends Committee on Legislation of California Future Leaders of America GAPIMNY—Empowering Queer & Trans Asian Pacific Islanders Getting Played: Symposium on Equity in the Entertainment Industry and Awards GO Public Schools Greater Los Angeles African American Chamber of Commerce Greater Sacramento Urban League HAWK Institute Hispanic Association of Colleges and Universities Hmong Cultural Center of Butte County Hmong Innovating Politics (HIP) Homeless Action Center Human Impact Partners InnerCity Struggle Innovate Public Schools International Action Network for Gender Equity and Law Jakara Movement Japanese American Citizens League Jewish Community Relations Council of the Sacramento Region Justice in Aging Khmer Girls in Action Kid City Hope Place Korean American Center Korean Resource Center Koreatown Immigrant Workers Alliance (KIWA) La Comadre LA Community College District Lao Advocacy Organization of San Diego (LAOSD) Lao American National Alliance Lao Collective Latino and Latina Roundtable of the San Gabriel and Pomona Valley Latino Coalition for a Healthy California</p>	
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<p>Latino Equality Alliance LAW Project of Los Angeles Lawyers' Committee for Civil Rights of the SF Bay Area LEAD Filipino League of Women Voters California Legal Aid at Work Let My People Go Little Manila Rising Los Angeles Alliance for a New Economy (LAANE) Los Angeles Chamber of Commerce Los Angeles Community College District (LACCD) Los Angeles County Democratic Party Los Angeles Food Policy Council LSC Consulting Lutheran Office of Public Policy – CA MALDEF Martin Food Policy Council Maternal and Child Health Access MBA Association, Hass Business School Mental Health Association for Chinese Communities Miller Advocacy Group National Association of Minority Contractors, Southern California National Association of Women Business Owners (NAWBO) California National Center for Youth Law National Council of Jewish Women – CA National Council of Negro Women, Sacramento Valley Section National Japanese American Citizens League National Korean American Service & Education Consortium (NAKASEC) National Lawyers Guild-Los Angeles National Queer Asian Pacific Islander Alliance (NQAPIA) Natural Resources Defense Council Network on Religion and Justice for API LGBTQ People (NRJ) New America Alliance New Beginnings Consulting & Training, LLC New Life Christian Church NextGen California Nikkei for Civil Rights & Redress Nikkei Progressives North Orange Community College District Oakland Food Policy Council</p>	
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<p>Oakland Vietnamese Chamber of Commerce OCA-Greater Los Angeles OCA Sacramento Chapter – Asian Pacific American Advocates Occidental Arts and Ecology Center Officers for Justice Peace Officers Association Ollin Strategies OneJustice Orange County Asian and Pacific Islander Community Alliance (OCAPICA) Organize Win Legislate Sacramento Parent Organization Network Peralta Community College District Planned Parenthood Affiliates of California Public Advocates Inc. Public Interest Law Project Queen’s Bench Bar Association Reappropriate Redemption Ministries Reinvent Stockton Foundation Resilience Orange County Roots of Change Rural County Representatives of California Sacramento Food Policy Council Sacramento National Action Network Cal State National Action Network San Fernando Valley NAACP San Francisco African American Chamber of Commerce SEIU California SF Coalition for Economic Equity Sierra Harvest Sigma Pi Phi Fraternity SIREN (Services, Immigrant Rights & Education Network) Social Change Social Justice Collaborative</p> <p>South Asian Bar Association of Northern California (SABA-NC) Southeast Asian Community Alliance Southeast Asian Community Center Southern California College Access Network Speak UP Stonewall Democratic Club Sustainable Agriculture Education and United Food and Commercial Workers Sycuan Band of the Kumeyaay Nation Teach For America Bay Area Teach For America California</p>	
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Teach For America California Capital Valley Teach For America Los Angeles Teach For America San Diego Teach Plus – California The American Civil Liberties Union of California The Bar Association of San Francisco The Cambodian Family Community Center The Center for Asian Pacific American Women The Education Trust – West The Fannie Lou Hamer Institute The Fresno Center The Praxis Project The Princeton Review Foundation The San Francisco Chronicle Editorial Board The Village Nation Truth Healing Evolution Counseling Services UAW Local 2865 UC Berkeley Law UC Chicanx Latinx Alumni Association UCLA Center for the Study of Women Ujima Child and Family Services Underground Scholars Initiative – UC Berkeley United Cambodian Community United Farm Workers (UFW) University Council-American Federation of Teachers University of California Student Association University of California Board of Regents USC Race and Equity Center USCA Racial Justice Now Western Center on Law and Poverty Western States Council Women Lead Worksafe	
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Office of the President

TO THE REGENTS OF THE UNIVERSITY OF CALIFORNIA:

ACTION ITEM

For Meeting of June 15, 2020

**ENDORSEMENT OF ASSEMBLY CONSTITUTIONAL AMENDMENT 5 AND THE
REPEAL OF PROPOSITION 209 (NOVEMBER 2020 BALLOT)**

EXECUTIVE SUMMARY

The Chair of the Board of Regents and the President of the University recommend that the Regents endorse Assembly Constitutional Amendment (ACA) 5 and the repeal of the provisions of Proposition 209. Proposition 209, the 1996 voter initiative codified as Article I, Section 31 of the California Constitution, prohibits the University from discriminating against or “granting preferential treatment” to any individual or group on the basis of race, sex, color, ethnicity, or national origin. Despite years of effort with race-neutral admissions at UC, UC enrollment of students from underrepresented groups and recruitment of faculty of color falls short of reflecting the diversity of California’s population.

RECOMMENDATION

The Chair of the Board of Regents and the President of the University recommend that the Regents endorse Assembly Constitutional Amendment (ACA) 5 and the repeal of the provisions of Proposition 209 (1996), which prohibits use of race or gender as a factor in UC admissions decisions.

BACKGROUND

Assembly Constitutional Amendment 5 (ACA 5) by Assembly Member Shirley Weber aims to repeal Proposition 209 by placing a measure on the November 2020 ballot. ACA 5 requires a two-thirds vote in each house of the Legislature by June 25, the last day for an initiative measure to qualify for the general election ballot. If ACA 5 qualifies for the ballot and a majority of voters approve the measure in November, the provisions of Proposition 209 in the State constitution would be repealed and UC would be allowed to act in a manner consistent with federal and other applicable law related to public employment, education, and contracting.

ACA 5 passed the State Assembly by a vote of 60 to 14. The bill is currently in the State Senate awaiting referral to committee. ACA 5 is expected to be referred soon to both a policy and a fiscal committee and, if approved by majority votes, proceed to the Senate floor for action prior

to the June 25 deadline. If the Senate approves ACA 5 by a two-thirds margin, a measure would be placed on the ballot for November 2020.

The text of ACA 5 can be viewed [here](#).

Proposition 209, the 1996 voter initiative codified as Article I, Section 31 of the California Constitution, prohibits the University from discriminating against or “granting preferential treatment” to any individual or group on the basis of race, sex, color, ethnicity, or national origin. Proposition 209 was precipitated by Regents’ Special Policy 1 (SP-1) and Special Policy 2 (SP-2) in July 1995. SP-1 ended the use of race, ethnicity, and gender as criteria for admissions to UC or to any program of study. SP-2 prohibited the consideration of the same attributes in the University’s employment and contracting practices. In May 2001, the Regents passed a new resolution (Regents Policy 4401, Policy on Future Admissions, Employment, and Contracting (Resolution Rescinding SP-1 and SP-2)) to rescind SP-1 and SP-2 and to reaffirm the University’s commitment to a diverse student policy. This policy was mostly symbolic in nature as Proposition 209 had been codified in the California Constitution.

Regents Policy 4400, Policy on University of California Diversity Statement, last amended in 2010, renewed the University’s commitment to “the full realization of its historic promise to recognize and nurture merit, talent, and achievement by supporting diversity and equal opportunity in its education, services, and administration, as well as research and creative activity. The University particularly acknowledges the acute need to remove barriers to the recruitment, retention, and advancement of talented students, faculty, and staff from historically excluded populations who are currently underrepresented.”

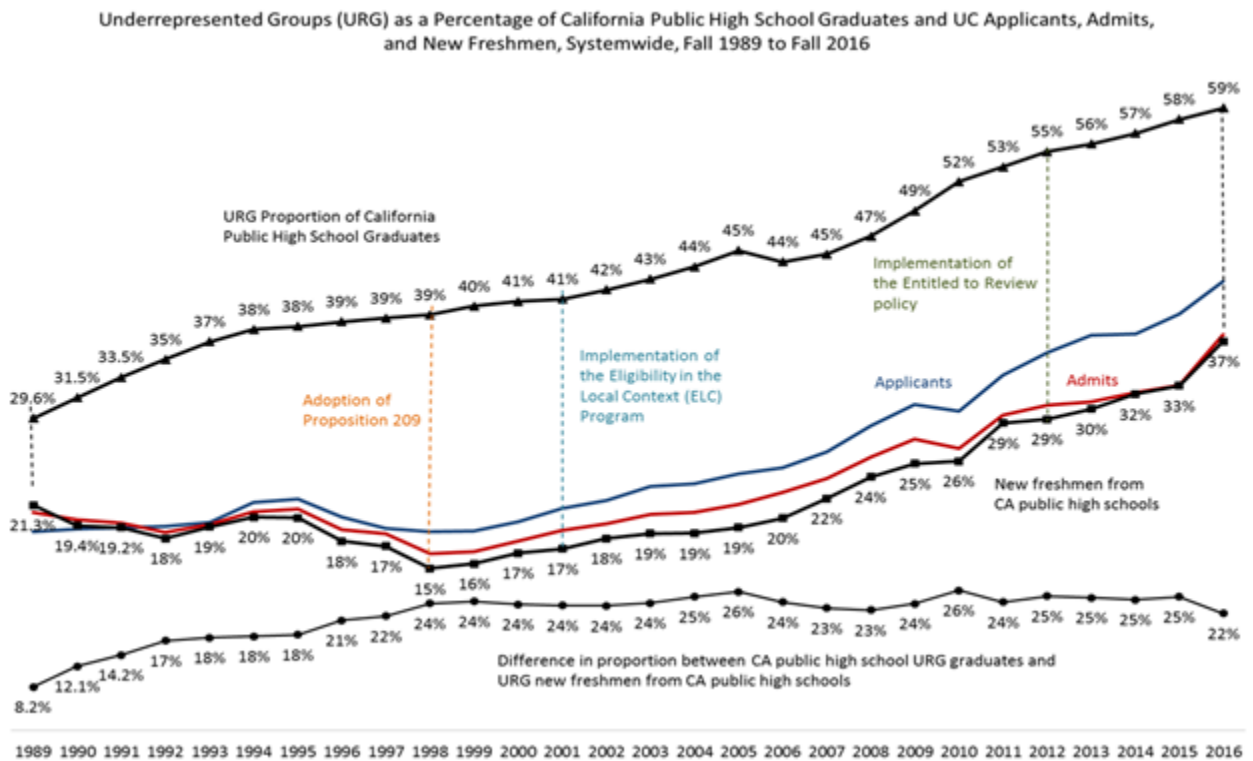
After the passage of SP-1, UC saw a dramatic drop in the number and proportion of freshman from underrepresented groups admitted to and enrolling in UC’s most selective campuses, UC Berkeley and UCLA. These declines drew widespread attention and led to a number of policies and programs to mitigate the effects of Proposition 209. These efforts included the following:

- Expansion of UC outreach programs (1997), including a 100 percent increase in State funding for Student Academic Preparation and Educational Partnerships (SAPEP) programs, followed by a 50 percent cut just four years later.
- Eligibility in the Local Context (2001) which offers guaranteed admission to qualified students in the top nine percent of each participating high school.
- Comprehensive review in undergraduate admission (issued in 2001 and last updated in 2012), the process by which students applying to UC campuses are “evaluated for admission using multiple measures of achievement and promise while considering the context in which each student has demonstrated academic accomplishment.” In implementing comprehensive review, most UC campuses also adopted the holistic review of applicants by trained evaluators.

- Guidelines for Addressing Race and Gender Equity in Academic Programs (2015), a resource for University administrators considering measures that UC can legally implement to support its commitment to diversity.
- A number of systemwide and campus programs to diversify the professoriate and health professions including the President’s and Chancellor’s Postdoctoral Fellowship Programs; Advancing Faculty Diversity initiative, UC Programs in Medical Education (UC PRIME), and the UC-HBCU initiative, among many others.

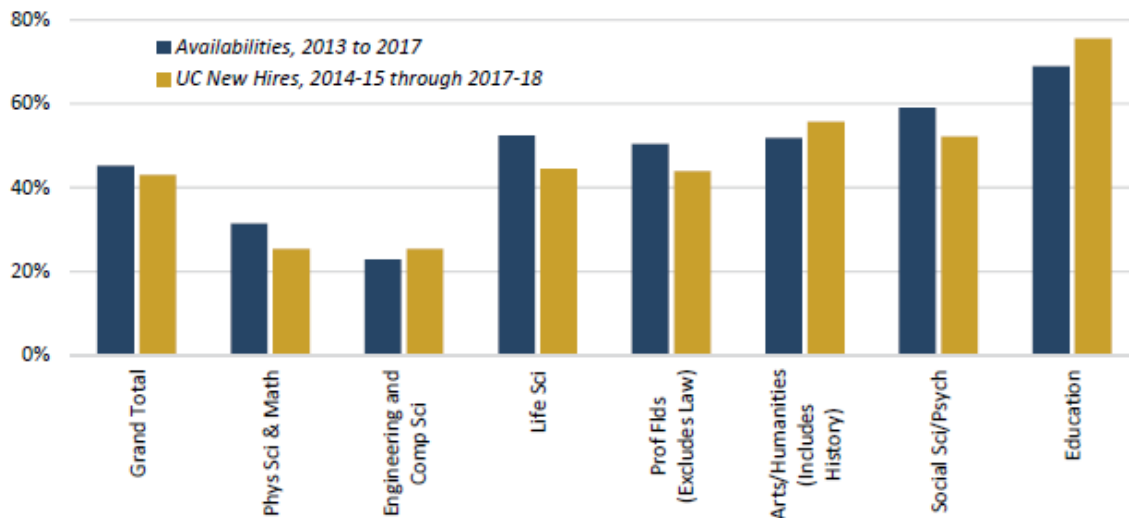
Despite these policy changes and programmatic efforts, UC has not kept pace with the diversity of students in California K-12 schools or with the overall California population. As shown in Figure 1 below, prior to Proposition 209, the proportion of freshmen from underrepresented groups (URG) averaged 19 to 20 percent, then dropped to 15 percent in 1998 then slowly increased over the next 20 years, reaching a peak at 37 percent in 2016—an increase that can be attributed to the increase in enrollment across all UC undergraduate campuses. Meanwhile, the percentage of URG students graduating from high school has nearly doubled to over 56 percent in 2016.

Figure 1: URGs as Percentage of California Public High School Graduates and as Percentage of UC Systemwide Freshman Applicants, Admits, and Enrollees, Fall 1989 to Fall 2016



Among faculty ranks, UC has generally kept pace with the availability of URG doctorate recipients in most fields. However, UC has not kept pace with the availability of women PhDs in several fields, including STEM fields such as life sciences, physical sciences, and mathematics (Figure 2).

Figure 2 Female new assistant professors compared with national availability by discipline group, University-wide, 2013–14 to 2017-18



Source: UC Academic Personnel and Program Administration and Survey of Earned Doctorates

Despite UC’s policy and programmatic changes, attempting to address racial inequality without actually considering race has proven to be challenging. Despite nearly two decades of effort and experimentation with race-neutral admissions at UC, the University’s enrollment of students from underrepresented groups and recruitment of faculty of color falls short of reflecting the rich diversity of California’s population.

An amicus brief submitted in 2016 by the University in *Fisher v. University of Texas* summarized the impact of Proposition 209 in short: “UC’s many years of effort and experimentation with a wide variety of race-neutral approaches demonstrates that, at least under current circumstances in California, highly competitive public universities cannot maintain historic levels of diversity within their student bodies—much less reflect in their student bodies a growing state population of underrepresented minorities—using only race-neutral methods.”

President Napolitano, the ten Chancellors, the systemwide Academic Council, the UC Student Association, and the UC Graduate and Professional Council have all publicly expressed their support for ACA 5 and the repeal of Proposition 209.