

Should Texas Change the Top 10 Percent Law?

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Texas has struggled for decades with the issue of minority enrollment in its universities and has adopted a number of measures in efforts to increase diversity in its higher education system. After a federal court in 1996 struck down the use of race-based affirmative-action policies in higher education admissions, Texas lawmakers established new criteria for policies designed to increase diversity at state colleges and universities without directly basing admissions on the applicant's race or ethnicity. The "Top 10 Percent Law," enacted the following year by the 75th Legislature, guarantees admission to any public college or university in the state for Texas students who graduate in the top 10 percent of their high school classes.

Since the enactment of the Top 10 Percent Law, there has been much debate about whether this measure has been effective in promoting equalized access to Texas universities or whether it unfairly has deprived places at top state institutions to deserving students. In addition, a recent U.S. Supreme Court ruling now offers what many observers interpret as a legal justification for a return to some form of race-conscious affirmative-action admissions policies. This report examines the debate over changing the Top 10 Percent Law and what role, if any, race should play in the admissions process at state universities.

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A brief legal history of university admissions policies in Texas

State policies to encourage diversity in the higher education system derive ultimately from the 1950 *Sweatt v. Painter* decision, 339 U.S. 629 (1950).

This U.S. Supreme Court ruling, issued four years before *Brown v. Board of Education* required the integration of public schools, changed the way members of minority groups gained admission to Texas universities. The court ruled that the University of Texas (UT) School of Law had violated constitutional guarantees against discrimination by

setting up a separate law school for African Americans and other minorities and ordered the school to admit qualified black applicants.

In 1978, the U.S. Department of Health, Education and Welfare, through its Office of Civil Rights (OCR), threatened legal action against Texas, alleging that segregation of blacks and underrepresentation of Hispanics affected students, faculty, and staff at Texas higher education institutions. That same year, the U.S. Supreme Court ruled in *Regents of the University of California v. Bakke*, 438 U.S. 265 that the use of quotas or set-asides in affirmative action programs violated the equal protection clause of the Fourteenth Amendment. The court, however, affirmed diversity as a justifiable goal in university admissions programs.

In 1983, OCR accepted the “Texas Equal Educational Opportunity Plan for Public Higher Education” developed by the Texas Higher Education Coordinating Board (THECB). Known as the “Texas Plan,” it introduced minority enrollment goals for higher education, setting targets for freshman enrollment of 10 percent Mexican-American students and 5 percent African-American

students. The state adopted a Texas Plan II in 1989 without federal mandate.

In 1994, the U.S. Department of Education evaluated the state’s progress in eliminating vestiges of segregation, and later that year, THECB adopted “Access and Equity 2000,” a voluntary, six-year plan that set goals in Texas for increasing:

- graduation rates of African-American and Hispanic undergraduates to parity with the rate of Anglo students;
- numbers of African-American and Hispanic graduate and professional school students;
- the number and proportion of African-American and Hispanic faculty, administrators, and professional staff to parity with their proportional representation in the population, and;
- the number of minorities and women on the governing boards of public higher education institutions.

Broadening access to higher education

Courts long have held that the state has a compelling interest in expanding higher education opportunities to all its citizens. This is particularly urgent in Texas, which has rapidly growing minority populations, including Hispanics, that tend to have low rates of college participation. By 2006, according to THECB, Texas is expected to become a minority-majority state. There is broad agreement among policy experts that Texas must close the gaps in student participation and success in higher education to ensure the creation of a competitive workforce that is equipped for the jobs of the 21st century.

In response to these concerns, THECB in 2000 adopted the state’s higher education plan, *Closing the Gaps by 2015*. Since then, the Legislature has enacted a number of laws to support the plan, including requiring students entering the 9th grade in 2004 to take the Recommended High School Program, establishing the

College for Texans public awareness campaign, and establishing new financial aid programs for students.

According to THECB, total enrollment in higher education stands at 1.15 million students. *Closing the Gaps* calls for enrolling an additional 500,000 students in higher education and increasing by 50 percent the number of bachelor’s degrees, associate’s degrees and certificates by 2015. (The board since has increased this estimate by 90,000 students to account for rapid population growth, particularly in the Hispanic population.) THECB says that approximately 200,000 of those students are expected to enroll even without additional efforts to prepare and enroll more students. Enrolling the remaining students needed to reach *Closing the Gaps* goals will require increasing participation from every population group, but especially Hispanics and African Americans. According to THECB, higher education participation and success rates for all Texans must rise more rapidly in order to avoid a general decline in educational levels.

Ken Ashworth, THECB commissioner at that time, said these various plans did result in the enrollment of additional Hispanic and African-American students in Texas universities but that despite gains, as of 1995, minorities still were underrepresented in Texas higher education.

Hopwood v. Texas. In 1991, the UT School of Law developed an admissions policy that set different standards for minority versus Anglo students in an effort to increase minority enrollment. Guided by the goals for minority admissions established under the Texas Plan, a separate admissions subcommittee reviewed minority applications and recommended to the full committee a sufficient number of candidates to meet the enrollment targets.

This affirmative-action program was challenged successfully by the plaintiffs in the 1996 federal court ruling, *Hopwood v. Texas*, 78 F.3d 932. The case eventually reached the Fifth U.S. Circuit Court of Appeals, which struck down the admissions program on the grounds that it amounted to illegal reverse discrimination. Although the law school's separate admissions policy no longer was in effect by the time of the decision, the court's ruling broadly challenged the use of any affirmative-action policy, other than one narrowly tailored to remedy a clear case of discrimination, and established the legal basis for seeking monetary damages against the state.

Also in 1996, the U.S. Supreme Court declined to grant Texas' petition to review the Fifth Circuit's *Hopwood* decision. In 1997, Texas Attorney General Dan Morales issued an opinion (L097-001) that applied the *Hopwood* standards to all state universities, not just in the area of admissions but also to financial aid, scholarships, and student and faculty recruitment and retention. He reasoned that these standards also applied to private universities that accepted federal research dollars or student loan funds.

Recent Supreme Court rulings. In June 2003, the United States Supreme Court ruled in two cases involving race as a criterion in university admissions. In *Gratz v. Bollinger*, 539 U.S. 244 (2003), the court struck down the University of Michigan's affirmative action undergraduate admission policy, holding that the program violated the Fourteenth Amendment because it was not narrowly tailored. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), however, the court upheld the university's law school admission policy. In both cases, the court affirmed that the pursuit of broad intellectual diversity in higher education

serves many compelling state interests, including the training of future leaders.

According to the court, race-conscious admissions programs are constitutional under certain conditions. Such a program must be "narrowly tailored" and cannot use a point system or specify a certain percentage or number of minority students that must gain admission. Instead, race and ethnicity may receive individualized consideration among a range of workable alternatives to achieve diversity. A race-conscious program must be reviewed periodically and have reasonable duration limits, which can be met with sunset provisions. The court suggests a time frame of 25 years, after which it expects a policy of race-conscious admissions no longer would be necessary to guarantee equal opportunity to higher education.

The Top 10 Percent Law

In response to the *Hopwood* ruling (and prior to the *Gratz* and *Grutter* decisions) the 75th Legislature in 1997 enacted the Top 10 Percent Law, HB 588 by Rangel, guaranteeing admission to any public college or university in the state for Texas students who graduate in the top 10 percent of their high school classes. The law was designed to broaden access to public higher education institutions by promoting greater geographic, socioeconomic, and racial/ethnic representation without using race as an admissions criterion. It uses class rank as the single measure of merit and applies to all public and certain private high schools.

The Top 10 Percent Law has had the greatest impact on UT-Austin and Texas A&M University at College Station, selective Tier 1 schools that limit admissions. Data collected since the enactment of HB 588 indicate that the law has increased minority representation at those universities.

According to an analysis performed by UT-Austin, the freshman class of 2003 was the most diverse in the university's history, and minority students make up an even greater percentage of the incoming class for the fall of 2004. Hispanic enrollment increased to 16.9 percent (up from 16.3 percent in 2003), African-American enrollment rose from 4.1 percent to 4.5 percent, and Asian-American enrollment rose from 17.6 percent to 17.9 percent. The percentage of Anglo students in the freshman class fell below 60 percent in 2003 for the first time in the school's history and stands today at approximately 58 percent.

In an effort to ensure the enrollment of highly ranked graduates from low-income schools, the university has developed outreach and scholarship programs targeted at top 10 percent seniors at certain resource-poor schools.

The Top 10 Percent Law has not had such a dramatic impact on increasing diversity at Texas A&M, according to the university's admissions office. However, minority enrollment did rise last fall, which Texas A&M University President Robert Gates says is the result of intensive outreach, recruiting, and retention efforts. Admissions are merit-based and focus on each applicant. Texas A&M directed \$8 million for needs-based scholarships designated for first-generation, low-income students. In addition, the university used \$4 million to establish regional prospective student centers in Corpus Christi, Dallas, Houston, San Antonio, and Weslaco. The student centers are staffed with admissions and financial aid counselors who travel to area high schools and speak to potential students. Also in January 2004, Texas A&M announced that it would no longer award bonus points to "legacy" applicants – those who had a relative who attended A&M.

According to President Gates, African Americans make up 3 percent of the 2004 freshman class, an increase of 35 percent from the previous fall. Hispanic enrollment over the same period has increased 26 percent, and Hispanic students make up 12 percent of the 2004 freshman class. The share of students admitted automatically to Texas A&M is around 50 percent.

Debate and proposals

Debate about the Top 10 Percent Law centers generally around three issues:

- whether it unfairly denies access to the state's leading universities to highly qualified "second-decile graduates" – students who graduate just outside the top 10 percent of their classes;
- whether it saturates universities with students admitted automatically under the law, leaving these institutions little discretion about whom to admit; and
- whether it encourages "brain drain" – forcing top students to attend university outside Texas because they were denied admission to the flagship universities

(universities recognized nationally for such qualities as first-rate graduate and research programs, faculty, and enrollment standards).

Fairness. Many of those who would like to change or repeal the Top 10 Percent Law argue that it unfairly disadvantages students who attend high schools with rigorous academic standards, many of whom otherwise would be qualified to attend a flagship university but graduate outside the top 10 percent of their classes. They say the plan is forcing some students to take lighter course loads or move to less demanding schools. In addition, they argue, some students who graduate at the top of their classes at less demanding high schools may not be qualified to attend the state's best public universities.

In the 2001 school year, for example, 12.4 percent of students who qualified for admission under the Top 10 Percent Law took the minimum level of curriculum. This is unfair, critics say, to other students who follow more demanding curricula and do not qualify for top 10 percent admission as a result. In addition, SAT scores have fallen among incoming freshmen at UT-Austin who graduated in the top 10 percent of their classes. According to UT admissions data, the average SAT score among top-10-percent students has dropped from 1253 in 1996, before the enactment of the law, to 1223 in 2003. Over this same period, the average SAT score among non-top-10-percent freshmen has risen from 1197 to 1257, further evidence, critics say, that the law unfairly disadvantages talented second-decile graduates. Flagship universities should consider the academic standards at the high schools from which applicants graduate, critics say, to ensure that the students they admit are qualified.

Supporters of the Top 10 Percent Law argue that it should not be modified because it is doing what it was designed to do – provide a race-neutral method of admitting a diverse class of highly qualified students. The law is fair, they say, because basing admissions on class rank levels the playing field for students across the state and compares students to their peers based on how well they have taken advantage of available resources. For example, recent data from UT-Austin's admissions office indicate that since 1996, among all racial and ethnic groups, top 10 percent students have outperformed students who scored significantly higher on standardized college entrance exams. In addition, supporters argue that class rank appears to be a good predictor of student performance. In the mid-

range of SAT scores, which is where most students fall, top 10 percent students performed as well as students in the second decile or below who scored 200 to 300 points higher on the SAT exam.

Supporters also credit the law with helping Texas' flagship universities fulfill their mission to serve students across Texas by granting broader opportunities to the very best students from every high school. Not only has it helped create more diverse freshman classes – racially, economically, and geographically – at UT-Austin and at Texas A&M, but supporters say it has done so in a way that benefits all regions of the state, especially poorer rural and urban areas. There are approximately 1,500 public high schools in Texas, but before the enactment of the Top 10 Percent Law, half of UT-Austin's entering classes came from just 64 schools – mostly upper-middle-class suburban schools. The rest of an average freshman class came from 800 schools, leaving more than 600 schools sending no students.

In response to concerns about the academic qualifications of many students who gain automatic admission under the law, supporters point to data from a study published by Princeton University that was presented to the Senate Subcommittee on Higher Education in June 2004. Although graduates in the second decile of their high school classes lacked the admission guarantee, these data show that 75 percent of those graduates whose first college choice was a flagship institution went on to enroll at one. Meanwhile, 71 percent of second-decile seniors whose top choice was another four-year institution in Texas also were successful enrolling at one. The study also revealed that, contrary to anecdotal claims, second-decile students from “feeder schools” – schools with long histories of sending graduates to the flagship campuses – still have a substantial advantage in their access to these leading universities. Virtually all feeder-school graduates who graduated in the top 20 percent and who identified UT-Austin or Texas A&M as their top college choice succeeded in enrolling there.

Finally, data from the Princeton study reveal that top-ranked students from resource-poor schools are enrolling out of state in some of the most competitive private institutions as well as leading public institutions. If these students truly were unprepared for the rigors of higher

education, argue supporters of the current law, they would not be gaining admission to these schools.

HB 750 by Woolley and SB 320 by Wentworth, filed this session, would repeal the Top 10 Percent Law. SB 333 by West would require students to complete the recommended or advanced high school curriculum to gain eligibility for automatic admission under the Top 10 Percent Law. The bill would make exceptions for students who could not comply for reasons beyond their control and would apply to admissions for the 2008-09 academic year. HB 656 by Goolsby would reduce automatic admissions to the top 5 percent starting in the 2009-10 academic year, and also require the completion of the recommended or advanced curriculum. HB 1113 by Goolsby would apply the top 5 percent change starting with the 2005-06 academic year.

Discretion in admissions. Some critics of the current law, including UT-Austin President Larry Faulkner, say that admitting students based on one criterion – graduation rank – limits an institution's flexibility and creates an unhealthy academic environment. They say that Texas' flagship universities are losing control of enrollment through the number of slots they must dedicate to top 10 percent graduates. In addition, such a rigid admissions policy can choke the flow of talented students into such fields as the arts and music, among others. With such a high percentage of a freshman class being automatically admitted, critics say, admission departments have little incentive to aggressively recruit students best suited for their campuses.

In October 2002, UT President Faulkner established a task force to study and recommend strategies for managing student enrollment. Among other things, the task force recommended in January 2004 that the University reduce the total student population to 48,000 over the next five years, increase the size of the faculty, encourage more students to graduate in four years, and pursue legislative changes to the Top 10 Percent Law to limit the automatic admissions to no more than 60 percent of a freshman class.

Some observers favor limiting the number of students admitted automatically to the UT System. Dr. Marta Tienda, one of the authors of the Princeton study, calls for allowing no more than 50 percent of Texas freshmen who

Supporters of the Top 10 Percent Law argue that it provides a fair, race-neutral method of admitting a diverse class of highly qualified students.

graduate in the top 10 percent of their class to be admitted automatically. During the 2003 regular session, SB 86 by Wentworth, which in its final form would have capped the number of automatic admits at 60 percent and required the completion of the recommended or advanced curriculum, passed the House but died on the Senate floor during the last hours of the session due to a filibuster. HB 1046 by Branch, filed this session, would limit automatic admissions to 50 percent of an institution's enrollment capacity.

According to UT-Austin, fall 2004 enrollment has dropped 2 percent compared to fall 2003, and the percentage of graduates from Texas high schools admitted under the automatic admission plan is 66 percent, down from the previous year's figure of 70.5 percent.

Opponents of capping the number of students admitted automatically say such a policy would undermine the college aspirations of students from all racial, ethnic, geographic, and economic backgrounds. In addition, they say, public policy should not be crafted based on the desires of one institution. Other opponents say that any proposal to cap admissions should be coupled with a method of granting priority to students who traditionally are underrepresented in the university system.

"Brain drain." Critics of the Top 10 Percent Law, including Gov. Rick Perry, who in 2004 called for its review, say it has led to an admissions squeeze that only will worsen with time. As a result, they say, many top students graduating from excellent schools are leaving Texas to attend college.

According to supporters of the current law, the Princeton study indicates there are not large numbers of high-achieving students being crowded out of the most selective public institutions in Texas. Moreover, it appears that most students who enroll out of state do so by choice, not because they were denied admission to a Texas institution.

Leave institutional assignment to university system. According to Dr. Tienda and others, the number of automatic admits should be rationed to schools in a way that is responsive to the carrying capacity of the higher education system, which means that the institutional assignment should be decided by the system administrators

rather than students. Under such a plan, a top 10 percent student who gained automatic admission to a state university system could express a preference for a particular university but would not be guaranteed admission to that institution. HB 37 by Eissler, filed this session, would implement such a plan.

Supporters say such a policy would give universities the flexibility they need to maintain some discretion over admissions while still guaranteeing each top 10 percent student a place within a university system. Critics say that eliminating guaranteed admission to flagship campuses would diminish the duty and accountability of these institutions to all Texans.

Opponents of the Top 10 Percent Law argue that it unfairly disadvantages excellent students who graduate in the second decile of their classes at demanding high schools.

Create more flagship universities.

Some observers argue that the best way to grant access to more talented students, including minority students, is to create more flagship institutions, preferably through the designation of an existing university. The problem, they say, is not that Texas has too many students entering higher education under automatic admissions, but that there are not enough flagship institutions to accommodate the number of qualified students who want to attend. Some supporters of this idea say that, based on the state's population, Texas should have around seven top tier institutions. Critics, however, warn that new flagship universities might be established at the expense of UT-Austin and Texas A&M, which they say are not adequately funded even today.

In 2001, the 77th Legislature enacted HB 1839 by Junell, creating the Texas Excellence Fund (TEF) and the University Research Fund (URF) to support "excellence" and research at general academic institutions and thereby help increase the number of flagship institutions in Texas. In fiscal 2002-03, each of the funds received \$33.8 million. HB 1, the general appropriations bill, appropriated \$22.5 million to each fund for fiscal 2004-05, but Gov. Perry used a line-item veto to eliminate the funding. However, \$11.6 million for each fund later was restored for fiscal 2005 by budget execution authority.

Return to race-conscious affirmative action.

Nationally, only about one-third of colleges and universities use race as a factor in their undergraduate admission decisions. According to a report by the National Association

for College Admissions Counseling, that figure includes some of the nation's most selective institutions, both public and private. Among those who consider race and ethnicity as a factor in admissions, 82 percent credited the policy with increasing the number of minority students represented in the student body.

A report issued in 2004 by the Commission of 125, an advisory group of prominent citizens from within and beyond Texas, contains recommendations on how UT-Austin can best serve Texas and society at large over the next 25 years. Regarding recruiting and admissions, the commission recommended that financial aid programs be expanded, that UT-Austin exercise primary control over admissions and efforts to ensure diversity, and that no single factor should be used for admissions. Instead, a holistic approach that uses factors including SAT scores, class rank and race should be used for undergraduate applicants, which would make such an affirmative-action plan distinct from those in place pre-*Hopwood*.

Beginning with the 2005-06 academic year, UT-Austin will add race and ethnicity to the criteria considered for student admission, scholarships, and fellowships in cases when individualized and full-file review is conducted, i.e., when admission is discretionary rather than automatic. Texas A&M does not contemplate a similar change in admissions policy, according to university officials.

In the 55 years since the *Sweatt* ruling, some observers feel that Texas higher education institutions have made considerable progress in eradicating lingering effects of discrimination, particularly through the reforms made possible by the Top 10 Percent Law. Affirmative-action programs are inherently unfair, they say, because they give an advantage to one applicant based on race at the expense of other students who may have better academic qualifications. In any case, such methods are no longer needed because Texas has learned to promote diversity without using racial criteria to make admissions decisions. The Bush Administration brief filed on behalf of the *Grutter* and *Gratz* plaintiffs praised admissions plans based on graduation rank, rather than racial criteria.

Others say that affirmative action programs are just as necessary today as they were 50 years ago in order to address socioeconomic and educational inequities that still exist. They say that American society needs affirmative action to correct systemic biases in university

admissions that perpetuate a disadvantage for qualified minority applicants. Race-neutral admissions, they argue, work against minorities because they rely heavily on standardized test scores that are more of a reflection of where the students attended high school and what resources were available to them than a reliable predictor of college performance. Another rationale for affirmative action is that it benefits society by helping to create a class of minority professionals who can serve as role models for members of underprivileged groups. Finally, supporters argue, affirmative action is necessary to maintain intellectual diversity in schools. Some legal scholars, however, say a return to preferences in admissions would be an invitation for more lawsuits, despite Supreme Court rulings in the *Grutter* and *Gratz* cases.

Some supporters of affirmative-action plans say that the Top Ten Percent law has not done enough to encourage diversity and should be replaced by race-conscious admissions policies. These critics claim that even though the proportional representation of minorities has risen, the actual numbers have not significantly increased. According to UT admissions data, for example, African-American enrollment in freshman classes at that university has increased by only 43 students between 1996, when African-American students made up 4 percent of the class, and 2004, when 5 percent of enrolled freshmen were African American.

While agreeing that educational opportunities are not equal for all students, other observers support maintaining the current law, at least until the adoption of a statewide affirmative-action policy. In the meantime, they favor blending the Top Ten Percent law with the constitutionally permissible consideration of race in admissions. They claim that even though the current law has important benefits, it and other race-neutral measures cannot wholly replace the affirmative-action policies and programs needed to achieve racial diversity in Texas institutions.

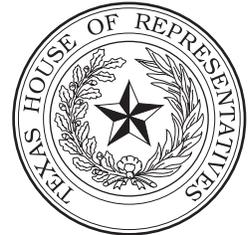
Expand educational opportunities. Some observers say that debates about changing or repealing the Top 10 Percent Law miss the point. The focus instead should be on the more fundamental issues of higher education equity and access. Policymakers should focus on equalizing the funding and improving the quality of public schools and how best to achieve the goals necessary to ensure an educated workforce for Texas. It would be a wise investment for the state to strengthen underperforming

high schools instead of penalizing students who succeed in spite of the resources available to them by repealing the Top 10 Percent Law or capping the number of automatically admitted freshmen, they say.

The Princeton study showed that college access even for top 10 percent students from resource-poor schools remains low. Large numbers of college-eligible graduates from resource-poor schools targeted for scholarships do not enroll anywhere. Texas universities should continue to pursue the goal of expanding opportunities to high schools with low rates of participation in higher education, say advocates for expanded educational opportunities.

– by *Rita Barr*

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