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New Twists Mark the Debate Over Texas' Top 10-Percent Plan

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Born out of one legal battle over affirmative action, the Texas college-admissions policy known as the "top 10 percent plan" is now at the center of another.

The University of Texas at Austin is being challenged in U.S. District Court over its 2004 decision to return to using race-conscious admissions criteria after years without them. The outcome of the case may hinge on this question: Did Texas lawmakers come up with a workable alternative to such policies when they adopted a measure that required public colleges there to admit any young state resident in the top 10th of his or her high-school class?

The court's ruling could have implications for the University of California and for Florida's public university system, which followed Texas' lead in adopting class-rank-based admissions guarantees, and may further complicate colleges' efforts to promote diversity.

In briefs submitted to the court, lawyers for two white students rejected by the university are arguing that the 10-percent law has proven so effective in diversifying campuses that the institution has no need — and thus no legal justification — for using race-conscious admissions. Should the court accept their argument, it could set a precedent whereby the development of effective alternatives to race-conscious admissions policies undercuts the defense of such policies in the courts. Those colleges that have had to make do without race-conscious admissions policies as a result of ballot measures, court decisions, or some act of government may find it harder to go back to using them.

The lawyers for the University of Texas, for their part, dispute the assertion that having the 10-percent plan precludes their consideration of race and argue that the policy is deeply flawed because it leaves their institution having to fill too many freshman seats based solely on applicants' high-school class rank.

The questions raised by the lawsuit are hardly the only ones that surround the 10-percent plan, which was adopted in response to a 1996 federal appeals-court ruling, in the case *Hopwood v. Texas*, interpreted as barring the state's colleges from considering applicants'

race or ethnicity. The admissions guarantee has been the focus of intense debate throughout the decade it has been in effect and came under attack in each of the Legislature's last two sessions, largely because many parents complain that it unfairly hurts the prospects of students in competitive high schools.

For education researchers, however, the 10-percent plan has been a boon, a Texas-size educational experiment providing fodder for dozens of studies on student achievement, college admissions, and the ways families and high schools deal with the admissions process.

Their findings — at least some of which appear likely to inform the litigation under way in the federal courthouse in Austin — suggest that the plan has affected colleges and their students in profound ways, many of which were unexpected or belie common assumptions. While the plan has not been the great equalizer of selective-college access that many of its proponents hoped it would be, it also has not fulfilled critics' fears that it would force the state's two flagship institutions — the University of Texas at Austin and Texas A&M University — to admit large numbers of unprepared students while turning away a host of better-qualified applicants.

"It has made people in Texas very aware of college access," says Marta Tienda, a professor of sociology, demographic studies, and public affairs at Princeton University who has studied the 10-percent plan extensively. At the same time, she says, the policy "is being blamed for all kinds of things that it is not responsible for," like the growing number of high-quality applicants who are getting rejection letters from the University of Texas at Austin simply as a result of the rapid growth of the state's college-age population.

"The college squeeze is very intense in Texas," Ms. Tienda says, "and it is very easy to blame the 10-percent law."

Texas 2-Step

The pending lawsuit hangs its challenge to Austin's race-conscious admissions policy on guidance given to colleges in the U.S. Supreme Court's 2003 *Grutter v. Bollinger* decision. In that case, a five-member majority of justices upheld the use of race-conscious admissions by the University of Michigan's law school — superseding the *Hopwood* ruling — but advised that colleges should engage in "serious, good-faith consideration of workable race-neutral alternatives" before resorting to affirmative-action preferences.

The new complaint in Texas, mounted by the Washington-based Project on Fair Representation, a program of the American Enterprise Institute, argues that the 10-percent plan is exactly the sort of "workable race-neutral alternative" the Supreme Court advised colleges to seek and that its effectiveness in bringing diversity to the University of Texas legally precluded the institution from going back to considering applicants' ethnicity or race.

The university's lawyers say the plan has not brought their institution enough racial and ethnic diversity, especially given the rapid growth of the state's Hispanic population. They also argue that the 10-percent plan is not workable because it hinders the university's ability to consider applicants as individuals and assemble classes with students who have a diverse array of interests and talents. With about 80 percent of the in-state students in this fall's entering class having been admitted automatically, William C. Powers Jr., the university's president, has told the court he worries about turning away "students who were not in the top 10 percent but who nevertheless were virtuoso violinists, brilliant mathematicians, gifted poets, computer-science wizards, or who performed other roles that enrich a great university community."

In a strange twist, each side in the dispute is offering arguments that its opponents made just a few years ago. For example, the university had characterized the 10-percent plan as race-neutral, while Edward J. Blum, director of the Project on Fair Representation, denounced such plans in a 2003 *Chronicle* editorial as "another brick in the wall of massive resistance to the principle of nondiscrimination." Now, however, Mr. Blum is calling the plan race-neutral, while the university's lawyers are arguing in a legal brief that the policy "was plainly designed" with the intent of increasing minority enrollments for the sake of bringing about a specific racial balance.

Michael A. Olivas, a professor of law at the University of Houston who played a key role in the 10-percent plan's development, says he believes the new lawsuit is "a backdoor means of assailing" the policy, regardless of what the attorneys who filed it are saying. "All it does is cause consternation among university officials who are not great fans of the plan anyway," he says.

Adjusting the Bar

How the court decides the question of whether the 10-percent plan has brought the university enough diversity may come down to its definition of "enough."

The university acknowledges that the 10-percent plan caused its black and Hispanic enrollments to rebound and rise above where they were in 1996, before the *Hopwood* ruling. But the institution argues that it needs to take in many more minority students now than it did then, especially given the rapid growth of the state's Hispanic population over the past decade. Hispanic students now account for about 36 percent of the state's high-school graduates and about 16 percent of the Austin campus's student body. Black students account for just over 4 percent of the university's enrollment and about 14 percent of the state's high-school graduates.

The lawyers for the plaintiffs argue that the university thought its minority enrollments back in 1996 were large enough to reap the educational benefits of diversity, and therefore it has no legal justification for using race-conscious admissions policies to try to drive its minority enrollments substantially higher.

Regardless of how the court rules in the case, the 10-percent plan is almost certain to remain under assault in the Legislature, especially given its unpopularity among many upper-middle-class families whose children attend good schools where it is tough for even bright students to finish in the top 10th of their class.

The University of Texas wants to see the share of students it must admit through the plan capped. Considering how top-10-percenters have already come to dominate the Austin campus, it is not hard to imagine a day when they will fill every seat.

The university may even get more such applications than it has seats available. If that day comes, the admissions guarantee might turn out to be no guarantee at all. And the university might end up using exactly the sort of holistic, individualized selection process it desires — this time around, to select among top-10-percent applicants.

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