

Hypo: Texas ten-percent plan

In 1997, the Texas legislature adopted the "Ten Percent Plan." The Ten Percent Plan works by giving any Texas high school student who is in the top 10% in his or her high school class automatic admission to any Texas state university, regardless of standardized test scores, the content of the classes he or she took, the academic reputation of his or her high school, extracurricular activities, and other considerations. Most students admitted to the University of Texas under the Ten Percent Plan have chosen to attend its flagship institution, the University of Texas-Austin ("UT-Austin").

The stated goal of the law is to not only "ensure a highly qualified pool of students each year in the state's higher educational system" but also to promote diversity among the applicant pool in order to "ensure that a large, well qualified pool of minority students [is] admitted to Texas universities." To this end, the Ten Percent Plan has been successful. Of the freshmen at UT-Austin, 18.7 percent are Hispanic and 5.2 percent are black, roughly the same proportions as before a 1996 federal court ruling abolished UT's racial quota system. But the Ten Percent Plan has also had unintended consequences. Seventy-one percent of the 6,864 Texans in the freshman class are "top 10 percenters," compared with 41 percent in the first year the formula was used. Some UT college officials have commented that they now have less flexibility to admit high school class presidents, high SAT scorers, science fair winners, immigrant strivers, artists and the like.

Rachel Michalewicz is a senior at a public high school in Buda, TX. She has a 3.867 GPA on a 4.0 scale (placing her in the top 10.1% of her graduating class) and an SAT score of 1290 (placing her in the middle quantile of incoming UT freshmen). Rachel has participated in a number of extra-curricular activities including Marching Band, Jazz Band, Math Club and Junior ROTC. She is a dedicated volunteer with a local food shelter and also works 20 hours per week at a local grocery store.

Rachel (who is white) has just applied to, and been rejected from, UT-Austin. She and her parents have filed suit in federal district court against the University of Texas system challenging the constitutionality of the Texas Ten Percent Plan. You represent either Rachel or the Chancellor of the University of Texas. Based on the caselaw we have read, what are your best arguments and why?

Hypo: UC Law School Admissions

The University of California system is experimenting with two different affirmative action programs in the hopes of attracting a critical mass of Hispanic students at its law schools.

The first program, in effect at the newly-opened UC Irvine Law School, is closely modeled on the University of Michigan Law School's program, creating a preference for Hispanic applicants while being careful to use ethnicity as one factor among many, to assess each applicant individually, etc.

The second program, in effect at the UC Hastings College of the Law, is similar. The key difference is that instead of putting a thumb on the scale in favor of Hispanic applicants, it puts a thumb on the scale against Asian applicants, treating Asian ethnicity as one disadvantageous factor among the many that go into assessing each candidate individually.

It turns out that both programs have precisely the same effect: as compared to a color-blind admissions process, a dozen more Hispanic and a dozen fewer Asian applicants to the programs are admitted to the respective programs.

Asian applicants denied admission under both plans have filed a lawsuit in federal court against the University of California system. The case is now being heard by the U.S. Court of Appeals for the 9th Circuit, where you are a law clerk. What are your recommendations to your judge and why?