

Blend It, Don't End It:

**Affirmative Action and the Texas Ten
Percent Plan After *Grutter* and *Gratz***

**Mexican American Legal Defense
and Educational Fund (MALDEF)**

**Americans for a Fair Chance,
a project of the Leadership Conference
on Civil Rights Education Fund**

Equal Justice Society

Society of American Law Teachers

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EXECUTIVE SUMMARY

The Fifth Circuit's *Hopwood v. Texas* ruling, repudiating the diversity rationale as a compelling interest for race-conscious admissions, dramatically restricted higher education opportunities for students of color in Texas. The recent Supreme Court decision in *Grutter v. Bollinger* overrules *Hopwood* and reaffirms that student body diversity is a compelling governmental interest that warrants the use of affirmative action at colleges and universities. Also, the Supreme Court ruling provides guidance about what is required to narrowly tailor affirmative action, so that race is one factor among many and so that all applicants are given the benefit of individualized review. In “Blend It, Don’t End It,” Mexican American Legal Defense and Educational Fund (MALDEF), Americans for a Fair Chance (a project of the Leadership Conference on Civil Rights Education Fund), the Equal Justice Society, and the Society of American Law Teachers, assess racial and ethnic diversity in Texas higher education at the flagship undergraduate campuses, law schools, and medical schools.

This report primarily focuses on opportunities for African Americans, Latinos, and American Indians. Asian Pacific Americans are also discussed in some sections, but the data are not as complete, which reflects the fact that admission figures are generally unavailable for the diverse ethnic/national subgroups within this umbrella category. Likewise, this report does not focus on the barriers women continue to face in higher education, especially as they relate to access to opportunities in underrepresented fields including the sciences, mathematics, engineering, and business.

“Blend It, Don’t End It” recommends that the benefits and lessons of the Texas Ten Percent Plan currently in place be woven together with the constitutionally permissible consideration of race in admissions. While the Ten Percent Plan has important benefits, our comprehensive review of the evidence confirms that the Ten Percent Plan and other race-neutral measures cannot wholly replace the affirmative action policies and programs needed to achieve racial diversity at the University of Texas at Austin, and particularly at Texas A&M University.

“Blend It, Don’t End It” also documents that the Ten Percent Plan contributed significantly to socioeconomic, geographic, and racial/ethnic diversity, particularly at UT-Austin. We therefore strongly oppose legislative proposals to repeal or cap the Ten Percent Plan, which would likely undermine the college aspirations of rural as well as low-income students from all racial and

ethnic backgrounds. Others urge modifying the Ten Percent Plan so that it no longer guarantees admission to flagship campuses, but we conclude that such a proposal is ill-conceived because it would eliminate the key feature of the Ten Percent Plan and would diminish the flagship institutions' accountability to all Texans.

"Blend It, Don't End It" showcases seven ways that universities can affirm their support for student body diversity by implementing and/or maintaining legally permissible affirmative action, including: 1) looking beyond the numbers to holistically evaluate each applicant; 2) developing a diversity policy statement; 3) documenting the educational benefits of diversity and, if applicable, the institution's prior record of discrimination; 4) developing broad diversity goals and maintaining sound criteria; 5) reviewing legacy policies and evaluating the potential disparate impact on students of color; 6) periodically reviewing whether there are workable race-neutral alternatives to affirmative action; and 7) eliminating other artificial barriers to inclusion.

Among the significant educational findings at the Texas flagship undergraduate universities, law schools, and medical schools are the following:

Undergraduate Education:

- At Texas A&M University at College Station, African Americans and Latinos were 18.8% of freshmen enrollments at A&M in 1995, shortly before *Hopwood*. This dropped to an average of 12.1% in the first six years of the Texas Ten Percent Plan (1998-2003). Moreover, the situation at Texas A&M has not improved since 2000. In 2003, the proportion of African Americans and Latinos (12.6%) was still one-third lower than in 1995 despite the fact the percentage of Texas high school graduates who are Black and Latino increased significantly over the same period. We conclude that Texas A&M was seriously mistaken when it recently concluded that it can significantly improve diversity without affirmative action, and we urge the institution to revisit this decision.
- The situation at the University of Texas at Austin under the Ten Percent Plan is best characterized as "good but not good enough." The proportion of African Americans and Latinos in 1995 (17.5%) increased slightly to an average of 17.8% under the Ten Percent Plan in 1998-2003. The trend, though somewhat uneven, is also in a positive direction. However, during the first five years of the Ten Percent Plan, there was a widening

“opportunity gap” between the percentage of Black and Latino Texas high school graduates, and the percentage of Black and Latino freshmen at UT-Austin. Even in 2003, when Black/Latino enrollments rose to 20.6%, up significantly from the prior year, the opportunity gap nonetheless remained wider than it had been in 1995 with affirmative action.

Legal Education:

- Prior to *Hopwood*, the University of Texas Law School (UTLS) graduated more Mexican American and African American attorneys than just about any other non-minority law school in the country. African American enrollments at UTLS dropped from an average of 7.0% in 1990-95 to an average of 2.97% since *Hopwood* (1997-2003), nearly a three-fifths decline. For Mexican Americans, the corresponding figures declined from 10.9% to 7.8%. *Hopwood* initially precipitated stunning resegregation in 1997 (0.9% African Americans, 5.6% Mexican Americans), but enrollments gradually improved annually so that the 2002 entering class included 4% African Americans and 8% Mexican Americans. In 2003, enrollments for African American (6%) and Mexican Americans (13.9%) increased substantially from the previous year, but for reasons explained in this report, the 2003 yield rates for Mexican Americans and Blacks were historically high, so the 2003 figures do not suggest that UTLS can sustain a workable race-neutral program.
- Overall, the law schools in Texas have low levels of diversity after *Hopwood*, though legislation such as Education Code § 51.842, to reduce the misuse of standardized testing in graduate and professional school admissions, has had a positive impact at public institutions. African Americans are well represented at Texas Southern University’s Thurgood Marshall School of Law, a historically Black institution, but at the other eight Texas law schools, African Americans were a combined 3.7% of enrollments in 2002, well below the national average. This includes only 1.5% of enrollments at the University of Houston, 1.6% at Texas Tech, 2.5% at St. Mary’s, and 0.6% at Baylor. Across the nine Texas law schools, Latinos were about 11.8% of total enrollments in 2002, and only 8.9% when excluding St. Mary’s and Thurgood Marshall. Asian Pacific Americans were 5.0% of enrolled students in 2002 at the nine law schools in Texas, and American Indians were only 0.6%.

Medical Education:

Only 3.3% of Texas medical degrees went to African Americans in 2001, less than half of the national average. Latinos received 11.5% of Texas medical degrees. African Americans, Latinos, and American Indians were 21.4% of first-year Texas medical school enrollments in 1995, which declined after *Hopwood* to an average of 17.2% in 1997-2002. Yet, research shows that African American and Latino physicians care for a grossly disproportionate share of the Black and Latino communities, which have urgent needs for improved health care.