Affirmative Action Revived: What is the Future for Law Schools?

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An interesting thing happened early in the summer of 2003. After watching the whittling away of affirmative action programs across the country for almost a decade, the United States Supreme Court approved the continued use of race as a factor in higher education. In *Grutter v. Bollinger*, the Court ruled 5-4 that the pursuit of diversity is a compelling state interest that justifies Michigan Law School's affirmative action program.\(^1\) Prior to the decision, it had seemed that bit-by-bit affirmative action was meeting its end. Lawsuits across the country claimed that whites were illegally disfavored by race-conscious programs, and laws passed in several states prohibited any advantage to members of a racial or ethnic group. All of these small attacks seemed part of a larger movement to end the practice altogether, but the *Grutter* decision has revived affirmative action programs in higher education, at least for now.

Despite the pro-affirmative action ruling, however, there remain several jurisdictions where anti-affirmative action laws are still in force, pending a direct court challenge based on *Grutter*. Since *Grutter* is not self-enforcing, such state law-based programs barring affirmative action need to be challenged and found unconstitutional in separate court actions before the states can be compelled to stop using them. California's Proposition 209 (1995), for example, declared that “[t]he state shall not 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.”\(^2\) Meanwhile, schools patterning their admissions policies after the Law School's race-conscious program can be assured of passing constitutional scrutiny—at least so long as *Grutter* remains law.

Critics of affirmative action ask why we need it, given that fifty years have passed since the Supreme Court ruled segregated schools unconstitutional in *Brown v. Board of Education*.\(^3\) Reading *Brown* to establish formal equality of opportunity, anti-affirmative action commentators have claimed that open access to opportunity has eliminated the need for the government to remain involved in promoting racial equality; society, they argue, would equalize itself, and race-conscious government policies are positively harmful. Statistics belie these claims: in the legal profession, the demographics of the bar do not at all mirror the demographics of the American population. For instance, about 32% of the Texas population is Hispanic, while the State Bar of Texas is only 6.4% Hispanic.\(^4\) At oral

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argument, counsel for Barbara Grutter was hard-pressed to answer the statement by the amici curiae military officers that they found it unavoidably necessary to employ race-conscious selection processes in the military officer corps. The ongoing need to maintain a diverse and representative officer corps appeared persuasive to some members of the Court as they considered the reasons for continued use of race-conscious practices.

We also argue that in a service profession like law, a consumer of legal services may be more comfortable, and better served, if he can find a professional with a similar background to his or someone who looks like him. Furthermore, in a learning environment like that of a law school, students who have had different experiences can participate in certain discussions (e.g., on racial profiling or employment discrimination) in a unique way, thus contributing to the overall learning of their classmates. Law professors and students can attest to the pedagogical value of diverse classroom perspectives on encounters with the law. In short, both demographic and anecdotal evidence leave little doubt that race-conscious programs like Michigan’s are very much needed at present.

The next question, of course, is how long this need will continue. Justice O’Connor anticipated that question in Grutter’s majority opinion, and provided an answer: “[W]e expect[] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” This statement is a rather clear indication of the Court’s timetable, but whether our society will be ready by then is another matter entirely. Barring a miraculous equalization of educational opportunities for K-12 students in the United States, institutions of higher education will continue to face the challenge of designing admissions and recruitment programs that ensure the diversity of the classroom and the educated work force for a long time to come. Thus, if we consider 2028 to be the termination year for affirmative-action plans, and we assume that K-12 will not be restructured by that year to create equal opportunities for students throughout the country, then law schools and all institutions of higher education must prepare race-neutral programs to ensure diversity.

When the Court handed down Grutter last year, several law schools had already experimented with race-neutral programs for eight or nine years. Some state laws required such policies, and The University of Texas School of Law and other schools located in the Fifth Circuit had been required to follow the anti-affirmative action orders since Hopwood v. Texas. As a result, many creative alternatives have been tested. There are three categories into which the alternative programs can be grouped: application evaluation, recruitment methods, and long-term building of the applicant pool.

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5. Transcript of oral argument at 4-5, Grutter.
Law schools have taken a variety of measures in order to structure application review in a race-neutral way. Some have edited their policies to reflect less emphasis on Law School Admissions Test (LSAT) scores, thereby allowing other factors to have more significance in the review. Although law schools certainly do not want an entering class that is any less intelligent than previous classes, they found it necessary to make decisions based on additional student data. Some have tried to place more emphasis on socioeconomic factors, but they have learned that such factors are a poor substitute for race. Law schools have also reconsidered who reviews the applicant files. Student reviewers have proven very helpful, as they tend to place more emphasis on personal background or community involvement. Administrative review is another alternative, in which admissions professionals are responsible for reading all files and making the bulk of the decisions, with the committee adding their votes in marginal cases. Such review allows for a clearer perspective on each applicant, and on the class as a whole. With committee review, in contrast, files are distributed among committee members, and no one person is familiar with the entire applicant pool.

It is important to note that admissions officers must balance the institutional goals of reporting high median GPA and LSAT scores on the one hand, and enrolling a diverse class on the other. In order to achieve both of these goals while employing race-neutral restrictions, admissions officers must solicit more information from applicants. Naturally, reviewing more information takes more time, but it is necessary. In the extreme situation where only LSAT, GPA and race/ethnicity are collected (beyond the standard contact information), it is clear that a decision to admit someone with lower scores is a decision based significantly on race/ethnicity. Thus, the more information collected, the more data points that can become factors in any individual decision. Most admissions professionals would recommend making personal statements a mandatory part of the application. Extensive résumés can also be requested; some law schools allow as many as three pages for the résumé.

It is important to be specific in the instructions to applicants about what should be included in a student's application. Applicants must show more than strong writing skills or an interest in an academic topic in their personal statements. Decision-makers are aided more in defending their decisions if the applicants are encouraged or required to write about their personal background and experiences. In fact, some schools faced with attacks on their affirmative action programs have created the option of additional statements, inviting information about overcoming obstacles and/or about personal experiences with discrimination. The University of Texas School of Law, as it was trying to address the elimination of race as a factor in its admission process, initiated an interview process. Only a few U.S. law schools conduct interviews as part of the evaluation process, and such processes are admittedly not efficient. Interviewing applicants requires staff time to communicate with candidates and schedule interviews, recruitment and training of interviewers,
establishment of interview criteria and forms, coordination of efforts between interviewers and reviewers, and delays as review and decision must be placed on hold until the applicant can be interviewed. Consequently, law-school admissions offices will be forced to address the problem of limited resources in order to accommodate the increase in information being solicited and considered.

Once all attempts have been made to ensure that the review of applications is designed to achieve a racially/ethnically diverse group of admitted students, the focus must be on recruitment efforts. At present, many law schools offer scholarships to students of color in an effort to enroll a racially diverse class. Certainly, scholarships are an important part of any recruiting effort. However, when race-neutral restrictions are in place, creative solutions must be sought. Several schools facing such restrictions have adopted race-neutral matching programs first designed by Professor Doug Laycock at The University of Texas School of Law. The concept of the matching program was a brilliant one in an environment where some schools are under restrictions with regard to the use of race and some are not. Matching is especially useful for a public law school. In a matching program, the law school first develops a list of competitor law schools, and then advertises to all admitted students that they may apply for a matching award if they receive an award from any law school on that list. The dollar amount of the scholarship is not matched, but the cost of attending the competitor school is matched or bettered. In other words, the amount of money that the student must borrow or pay out of pocket is calculated, and a scholarship to the school is offered that will result in the same or lower borrowed and out-of-pocket costs than at the matching school. The cost in scholarship money is minimized when a public school has the program and is trying to compete with a private school offer, since the public school tuition will usually be lower.

Another alternative for the awarding of race-neutral scholarships with a goal of enhancing diversity is to solicit from all students, regardless of race, statements about overcoming obstacles or about the ability to contribute a diverse perspective to the law-school classroom. Scholarships are then awarded based on those statements. Finally, the most successful way for law schools restricted in awarding race-based scholarships to compete is through external interested parties. Alumni groups and private entities not constrained in the use of race have proven effective in raising scholarship money, initiating their own scholarship programs, and recruiting on behalf of the law school.

More and more law schools are competing for admitted students by using personal contact. The competition is highest for students of color. Ideally, an admitted student will be contacted by the chief admissions officer initially. Letters from the dean and various student groups follow the initial contact. Many law schools find that currently enrolled students of color are the best recruiters of admitted students of color. Generally, enrolled students are more than happy to assist with recruiting efforts; admitted students of color are
often swayed by calls and encouragement from minority alumni and current students. At The University of Texas School of Law, for example, admitted students of color were for several years flown into town on flights donated by a generous African-American alumnus, Texas Senator Rodney Ellis; current students invited these visitors to stay in their homes for the weekend while they visited the school. Law schools understand that the key to recruiting is personal contact, and they are using a variety of resources to implement as many such contacts as possible.

With an educational system that fails to produce enough qualified candidates of color to create a professional workforce that is representative of the population, the biggest challenge is increasing the pool of qualified applicants of color. The Law School Admissions Council (LSAC) has been a leader in these efforts by searching for existing successful programs, developing new ideas, and encouraging and financially supporting programs aimed at this long-term goal. One of the first programs designed with this goal in mind was developed at The University of Texas at El Paso (UTEP). In 1998, the pilot program of the Law School Preparation Institute (LSPI) was launched with just ten students. The program, which has experienced significant success, is run by the Center for Law and Border Studies and was developed by Dr. William Weaver and Dr. Robert Webking. Universities like UTEP, where the student body is approximately 80% Hispanic and overwhelmingly first-generation college students, are ideal locations for race-neutral preparation programs aimed at increasing diversity and the number of qualified Hispanic applicants to law schools. The program aims to better prepare students to succeed by presenting them with a rigorous workload, and focuses on those academic and thinking skills that are necessary for the study and practice of law; such skills are also useful on the LSAT.

The LSPI is a two-part program beginning the summer after the sophomore year. Ideally, students will participate in Phase I during the summer following their sophomore year and return for Phase II during the summer following their junior year. However, some students join the program during the spring of their junior year and complete both phases during that summer. This was the first program of its kind to capture motivated students at the sophomore level.

The program strives to improve upon the students’ analytical thinking and logical reasoning skills and to familiarize them with the kind of legal analysis that they can expect in law school. Instruction during the summer is intense, lasting from 8:30 a.m. until 4:30 p.m., Monday through Friday, with several Saturday obligations. Students explore philosophical and literary texts to develop critical thinking skills; read cases to familiarize themselves with the case-law method; and focus on further developing their writing skills and learning some basic legal research skills, while drafting a brief and preparing for an oral argument to be

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8. Phase I is in June, and Phase II is in July
presented at the end of the program. Additionally, a number of speakers allow the students to learn more about law school, the admissions process, and the legal profession.

The success of the program has inspired the LSAC and other institutions of higher education to create similar preparation institutes. The UTEP program has grown to accommodate up to fifty students in each phase. Selectivity is increasing each year as more students apply. Students are selected based on academic performance and promise, as well as seriousness of intent to attend law school. Over ninety different law schools, including many of the most prestigious schools in the country, have accepted one or more program graduates. In the ten years before the establishment of the LSPI, the average number of UTEP graduates that had been offered admission to at least one top-fifty law school was slightly below seven. It is a testament to the LSPI’s success that approximately two-thirds of the students currently completing the LSPI and applying to law schools have been offered admission to law schools ranked in the top 25%. Additionally, more than 80% of the students show an increase in their GPA from the date they enter the LSPI to the time that they apply to law schools, and they show a significant increase on their LSAT score.

The United States Supreme Court has clearly breathed new life into affirmative action programs and better defined what kinds of programs are constitutionally acceptable. However, the Court’s desire to find an appropriate time to end affirmative action leaves law schools in a difficult position. Although law schools can continue to use race-conscious methods of achieving diversity at present, they must be prepared for the likely future restrictions on those programs. The already-tried race-neutral alternatives of new application review methods, aggressive recruiting efforts, and program adoption focusing on improving the long-term applicant pool will necessarily be employed even more broadly in the future. Thus, while proponents of law-school diversity cautiously celebrate the Supreme Court’s boost to their efforts, they must simultaneously prepare innovative race-neutral programs in anticipation of the day when that support is withdrawn. As a program that diversifies the applicant pool without resorting to race-conscious means, the LSPI will remain a key feature in diversity efforts irrespective of the course of affirmative-action jurisprudence.