

AN OUNCE OF PREVENTION IS WORTH A POUND OF CURE:  
REFRAMING THE DEBATE ABOUT LAW SCHOOL  
AFFIRMATIVE ACTION

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INTRODUCTION

Among the many other accomplishments of Benjamin Franklin is the creation of the first firefighting organization in Philadelphia. That it was difficult to convince colonial Philadelphians that a group committed to firefighting was a good idea is hard to imagine, but Franklin had to advocate for the creation of just such a group for some time.<sup>1</sup> In one submission to a local newspaper, Franklin argued that prevention of a catastrophic city-wide fire was certainly preferable to rebuilding a burned city from scratch.<sup>2</sup> It was in this context that Franklin noted that “an Ounce of Prevention is worth a Pound of Cure.”<sup>3</sup> By the close of 1736, Philadelphia had its first volunteer fire department, the Union Fire Company.<sup>4</sup>

Although modern legal debates about the constitutionality of affirmative action in higher education admissions may look to the founding fathers for guidance on the meaning of the Constitution, it is unlikely much focus has fallen on Ben Franklin’s Bucket Brigades, as the Union Fire Company was affectionately known.<sup>5</sup> However, it is Franklin’s prescient preference for prevention over cure that has the potential to lead

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1. *Fire Department: The Electric Ben Franklin*, USHISTORY.ORG, <http://www.ushistory.org/franklin/philadelphia/fire.htm> (last visited May 18, 2011).

2. *Id.*

3. *Id.* This quote appeared in the February 4, 1735 edition of the *Pennsylvania Gazette*. Writing anonymously as an “old citizen,” Franklin wrote:

In the first Place, as an Ounce of Prevention is worth a Pound of Cure, I would advise 'em to take care how they suffer living Coals in a full Shovel, to be carried out of one Room into another, or up or down Stairs, unless in a Warmingpan shut; for Scraps of Fire may fall into Chinks and make no Appearance until Midnight; when your Stairs being in Flames, you may be forced, (as I once was) to leap out of your Windows, and hazard your Necks to avoid being oven-roasted.

*Id.*

4. *Citizen Ben: Firefighter*, PBS, [http://www.pbs.org/benfranklin/l3\\_citizen\\_firefighter.html](http://www.pbs.org/benfranklin/l3_citizen_firefighter.html) (last visited May 18, 2011).

5. *See generally* Andrew H. Neilly, *The Violent Volunteers: A History of the Volunteer Fire Department of Philadelphia 1736–1871* (1959) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with the Scholarly Commons Repository, University of Pennsylvania).

the affirmative action debate from the moral, legal, and educational quicksand in which it currently lingers.

In its current incarnation, affirmative action in higher education admissions is the pound of cure. Indeed, the volumes dedicated to the wisdom or legality of affirmative action or the many details of its implementation—this volume included—would weigh hundreds of pounds. Within that conversation is hardly an ounce of discussion of prevention. This is in part a result of the Supreme Court's consistent rejection of remedial justifications for affirmative action. However, the omission of prevention causes the ultimate goals of affirmative action to be obscured and leads to an unnecessarily confrontational debate on means to attain those goals. This Article seeks to re-insert the concept of prevention into the affirmative action discussion.

Challenging the underlying premise that higher education admissions (cure) can be considered independently of underlying educational disparities (prevention), this Article criticizes affirmative action in higher education admissions—along with the bulk of the debate concerning it—as focusing too much energy on treating the symptoms that result from educational disparities along racial, socioeconomic, and other demographic lines and too little attention on the disparities themselves. Prevention or minimization of those disparities offers an opportunity to shift the affirmative action conversation away from the divisive arguments about the use of race and toward the goal of leveling the playing field so that race need not be used. This Article then offers some actions universities, and law schools in particular, can take to participate in broadening the concept of what affirmative action can mean.

This Article, however, recognizes that universities and law schools can only play a limited role in directly addressing the larger educational and societal disparities that make affirmative action necessary to achieve diverse student bodies. Further, the Article recognizes that even a panacean solution to the underlying disparities would take a generation or more to impact higher education applicant pools. Thus, although introducing prevention into the debate, this Article goes on to discuss the current cure. Specifically, this Article considers the arguments offered by Professor Sander regarding socioeconomic diversity in legal education, agreeing with much, but cautioning against discarding entirely the use of race in the admissions process. Although the current use of race is imperfect and merits significant modification, removing race from the process erroneously pretends that race, independent of socioeconomic status, does not affect an applicant's credentials when data indicates otherwise.

Fire prevention is undoubtedly a more efficient way of limiting fire damage than putting fires out after they have begun. For many minority and low socioeconomic students applying to college and law school, the fires of disparate educational opportunities have been burning their entire lives. Fighting these fires with preferences in the admissions process is

inefficient and probably ineffective at addressing the underlying educational disparities—it occurs well after much of the damage has been done. Putting the fires out earlier in life—or, ideally, preventing them entirely—should be an explicit goal of any affirmative action policy. Losing sight of this ultimate goal and limiting the debate to the narrow means of higher education admissions policies puts any affirmative action program at risk of legal, moral, and educational failure.

#### I. PREVENTION

In narrowly upholding the University of Michigan Law School's consideration of race in making admissions decisions in order to achieve student body diversity, Justice Sandra Day O'Connor wrote for the majority of the Supreme Court in 2003 that, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."<sup>6</sup> Implicit in the Court's statement is the assumption that something significant will have changed to make the objective qualifications<sup>7</sup> of the applicant pool for law school admissions less racially disparate by 2028. Indeed, Justice O'Connor looked to the increases in application credentials of minority applicants in the quarter century following *Regents of the University of California v. Bakke*<sup>8</sup> in forecasting similar gains following *Grutter v. Bollinger*.<sup>9</sup> Those increases between 1978 and 2003, of course, had little to do with the use of race at the university or graduate school admissions stage—making higher education more accessible for minority applicants impacts which students are admitted, not how students are schooled in the decades leading up to admission.

Thus, the twenty-five year sunset provision for the use of race in admissions decisions presumes that something wholly outside of the admissions process will render the use of race in that process unnecessary. The affirmative action debate of today, however, remains largely limited to the intricacies within the admissions process and does not consider the ways in which universities and law schools can aid in proving the Court right. After all, Justice O'Connor's projection of more racially equitable applicant pools is not going to happen magically, just as the gains fol-

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6. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

7. My use of objective criteria, such as standardized tests, in determining qualification is not an endorsement of such use, but rather an acknowledgement of the prevalence of it. It is beyond the scope of this Article to critique the meaning of "qualified" for higher education admissions, though such a reimagining may do more to affect higher education admissions than any tinkering with the current admissions process.

8. 438 U.S. 265 (1978).

9. 539 U.S. 306, 343 (2003) ("It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased.").

lowing *Bakke* were not a result of natural evolution.<sup>10</sup> And there is some evidence that the post-*Bakke* gains have plateaued, creating an even greater urgency to confront current disparities.<sup>11</sup> Law schools and universities can be partners in the broader effort to provide equitable educational opportunities and ensure that race can indeed “no longer be necessary” when today’s toddlers apply to college.

*A. Why Do We Have Affirmative Action in Higher Ed Admissions? And Why Do We Need It?*

Before one can engage in a meaningful discussion of affirmative action, the purpose of the program must be defined. At its core, affirmative action in higher education seeks to increase the accessibility of a university or graduate education for members of underrepresented groups, most typically members of minority groups. It was born from a recognition that simply lifting the restrictions on minority enrollment would not result in meaningful accessibility for disadvantaged populations.<sup>12</sup>

Qualified individuals, such as Heman Sweatt<sup>13</sup> or G.W. McLaurin,<sup>14</sup> may attain advanced degrees, but without more—without something affirmative—minority representation in higher education would remain isolated, a status quo some universities were unwilling to accept.

To confront that status quo, institutions began intervening in the admissions process to ensure greater diversity in incoming classes.<sup>15</sup> Cur-

10. In the 1970s and 1980s, shrinking of the black-white disparity for 9-year-olds on the NAEP test follows the same nonlinear trajectory as national reductions in pupil-to-teacher ratios. RONALD F. FERGUSON, TOWARD EXCELLENCE WITH EQUITY: AN EMERGING VISION FOR CLOSING THE ACHIEVEMENT GAP 43–45 (2007). In addition civil rights gains and changes in family educational background may have played an important role in decreasing the achievement gap during that period. See David Grissmer, Ann Flanagan & Stephanie Williamson, *Why Did The Black-White Test Score Gap Narrow in the 1970s and 1980s?*, in THE BLACK-WHITE TEST SCORE GAP 182, 183 (Christopher Jencks & Meredith Phillips eds., 1998). Further, more demanding coursework that was part of a broad-based movement for accountability in the 1980s may have had significant effects on increasing achievement. FERGUSON, *supra*, at 55–58.

11. See NAOMI CHUDOWSKY, VICTOR CHUDOWSKY & NANCY KOBER, CTR. ON EDUC. POLICY, STATE TEST SCORE TRENDS THROUGH 2007–08, PART 3: ARE ACHIEVEMENT GAPS CLOSING AND IS ACHIEVEMENT RISING FOR ALL? 12 (2009) (noting that while education gaps have narrowed since the 1970s, “[e]ven with the general narrowing trend, the black-white and Latino-white gaps on NAEP [National Assessment of Educational Progress] remain large”); FERGUSON, *supra* note 10, at 43 (noting that all of the progress for 9-year-olds in narrowing the achievement gap was completed by 1986 in math and 1988 for reading).

12. See, e.g., *About the AAAA*, AM. ASS’N FOR AFFIRMATIVE ACTION, <http://www.affirmativeaction.org/about.html> (last visited May 18, 2011) (claiming that the goal of affirmative action is to provide the country with a way “to finally address the systematic exclusion of individuals of talent on the basis of their gender, or race from opportunities to develop, perform, achieve and contribute”).

13. See *Sweatt v. Painter*, 339 U.S. 629, 636 (1950) (declaring a constitutional requirement that an African American applicant be admitted to University of Texas law school).

14. See *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 642 (1950) (declaring functional segregation, such as a separate seating area within a classroom, within University of Oklahoma graduate school of education to be unconstitutional).

15. See TERRY H. ANDERSON, THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION 150–51 (2004). After *Bakke*, a number of other colleges and law schools began to formulate

rently, those interventions include consideration of an applicant's demographic characteristics—including race—in evaluating credentials for admission. It is that consideration of race that sparks much of the modern affirmative action debate.

Although the Supreme Court has narrowed the constitutionally compelling reasons for considering race, there are a variety of reasons why schools might consider it in their interests to pursue diverse student bodies. In *Bakke*, the admissions program at the UC-Davis Medical School claimed to serve the purposes of “(i) [R]educing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.”<sup>16</sup>

As is clear from the *Bakke* list, the program was as much, if not more, about remedying prior and current discrimination in the world outside of university admissions (items (i) through (iii)) as it was about obtaining benefits within higher education (item (iv)). *Bakke* validated only the final purpose—pursuing the educational benefits of diversity—as being constitutionally valid,<sup>17</sup> a holding affirmed in *Grutter*.<sup>18</sup> In so doing, *Bakke* and *Grutter* have excluded any discussion of remedial goals from the legal discussion surrounding affirmative action—a result that contributes to the exclusive focus on cure over prevention in the legal literature.

However, the affirmative action debate is not limited to the courtroom. In the broader public debate about affirmative action in higher education—a debate that is moral, philosophical, and political as much as legal—the rejected purposes remain relevant. Even if these justifications are not compelling to courts, remedial goals are undoubtedly part of what drives the desire for diversity. The *Grutter* Court acknowledged as much, noting that law schools in particular “must be inclusive of talented and

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their admissions processes around the goal of student body diversity. See Victor V. Wright, Note, *Hopwood v. Texas: The Fifth Circuit Engages in Suspect Compelling Interest Analysis in Striking Down an Affirmative Action Admissions Program*, 34 HOUS. L. REV. 871, 890 (1997). As a result, many law schools and colleges now consider race as part of an applicant's overall profile. See Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 390 (1998).

16. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 (1978) (citations omitted) (internal quotation marks omitted).

17. *Id.* at 311–12. Justice Powell, who authored the controlling opinion in *Bakke*, rejected the preference for members of racial groups solely for the purposes of increasing their numbers in the medical school as being “facially invalid.” *Id.* at 307. In addition, he rejected the University's efforts to remedy societal discrimination as being too broad without any specific holding of prior discrimination by the university. *Id.* at 307–08. Finally, Justice Powell rejected the argument that admitting more minority applicants would lead to better medical care in minority communities because of a failure of proof that such enhanced medical care would actually result. *Id.* at 311.

18. *Grutter v. Bollinger*, 539 U.S. 306, 328–29 (2003).

qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.”<sup>19</sup> Unstated in identifying the need for prospective inclusion is the history of *exclusion* of many members of various races and ethnicities from universities and law schools, institutions which are “the training ground for a large number of our Nation’s leaders.”<sup>20</sup> Remedying that historical wrong remains a baseline motivation for any affirmative action policy, even if institutions cannot say so in court.

*B. Prevention is a More Efficient Solution*

These justifications—educational or remedial—do not indicate on their own why it is necessary to consider demographic characteristics in making admissions decisions to attain them. The underlying problem that makes admissions interventions necessary to achieve diverse student bodies is the fact that there are vast inequities in the applicant pools that fall along demographic lines. That problem—educational disparities—has nothing to do with law school admissions. Indeed, if that problem were solved (i.e., prevented), then there would be no need for admissions preferences and the purposes offered in *Bakke* and *Grutter* could be achieved without controversy.

Of course, the problem is not solved. Universities and law schools confront demographic disparities in objective qualifications within their applicant pools. That reality forces institutions to make a choice: they may either take affirmative action to enhance broader accessibility across demographic lines or they may live with the status quo and less diverse student bodies. Most universities and law schools choose to intervene in the admissions process in order to ensure diversity. Typically, the interventions are significant<sup>21</sup> because they come at the highest level of education within a society where there are educational disparities nearly every step of the way from birth to law school admission. In other words, law schools are attempting to put out a very large fire. As a result, the effort to achieve diversity within the student body is necessarily significant.

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19. *Id.* at 332–33 (describing the degree to which the nation’s political leadership includes individuals with law degrees).

20. *Id.* at 308.

21. As Professor Sander demonstrates using the University of Missouri at Columbia as an example, an admissions index score between 58 and 62 led to a 35% chance of admittance for a white student, but a guarantee of admittance for an African American student. Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 654–55 (2011). Professor Sander also notes that the interventions may be the “equivalent [of] a fifteen point LSAT boost for African Americans, and a seven or eight point LSAT boost for Hispanics.” *Id.* Similarly, the University of Michigan law school argued that without its interventions in the admissions process, “the number of underrepresented minority students admitted to the Law School would be significantly smaller.” *Grutter*, 539 U.S. at 385 (Rehnquist, J., dissenting).

In *Class in American Legal Education*, Professor Sander recognizes as much when he asks the “interesting and important question” about whether the disparities in law school enrollment along socioeconomic lines are caused not by law school admissions policies but by the cumulative effects of disadvantages in the educational system that students from low-socioeconomic circumstances encounter throughout their academic careers.<sup>22</sup> Specifically, Professor Sander asks: “[A]re the relative odds of completing college so heavily tilted against low-SES students that there is no meaningful pool of potential law school entrants?”<sup>23</sup> In order to isolate his question about the degree to which law schools are barring access for low-SES students, Professor Sander is forced to screen out the socioeconomic disparities in attaining bachelor’s degrees. For example, it is certainly troubling to learn that only 5% of law students come from the bottom SES quartile.<sup>24</sup> However, the degree to which law schools are responsible for this is limited.<sup>25</sup> After all, only 7.6% of bachelor’s degree holders come from the bottom SES quartile.<sup>26</sup> Comparing 5% to 25% to note the degree of underrepresentation of low-SES students in law school is ghastly; comparing 5% to 7.6% remains troubling, but is far less dramatic.<sup>27</sup>

Sadly, the same screening out would be required at every step of the educational process. Isolating the degree of disadvantage faced in college admissions, therefore, would have to account for the fact of disparities in high school graduation rates. Isolating the degree of disadvantage faced in high school graduation would require accounting for the disparities in school quality during elementary and high school. Isolating the degree of disadvantage in school quality during elementary and high school would require accounting for disparities in pre-school literacy. And so on.

There are fires at every stage of the educational process and they culminate in the need for a significant intervention during the higher education admissions process. The conversation Professor Sander’s article triggers can only shrug this phenomenon off as “interesting and important.” To be fair, Professor Sander’s goal is not to fix the education system and the broader societal disparities facing students from low socioeconomic circumstances, but rather to fix modern affirmative action in law schools—which is precisely the point. Restricting the conversation to the least efficient (and most controversial) means of addressing the problem can provide only a superficial fix. Broadening the conversation to include prevention helps reveal a more comprehensive solution.

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22. Sander, *supra* note 21, at 639.

23. *Id.*

24. *Id.* at 646 tbl.5.

25. I am not, however, suggesting that law schools are absolved from responsibility. I only mean to point out that law schools are the final step in a process rife with disparities.

26. Sander, *supra* note 21, at 640.

27. *Id.* at 640 tbl.2.

There are many scholars and advocates, not necessarily in the legal field, who are working on prevention. For instance, there is data indicating that pre-school literacy can have long-term educational effects.<sup>28</sup> There is data on the impact of teacher quality on school performance, particularly for low-SES students.<sup>29</sup> There are programs that attempt to create a cradle-through-college safety net that ensures that students, regardless of race or socioeconomic status, have the objective credentials to attain college admission even without admissions preferences.<sup>30</sup>

This is not the proper forum to summarize the significant research being done on prevention. The goal here is to indicate that this research represents the comprehensive fix to modern affirmative action—it is the way modern affirmative action becomes, as Justice O'Connor predicts, unnecessary. Excluding it from an affirmative action debate, policy, or conversation endangers any affirmative action program from being exposed, often properly, as inadequate and ineffective at achieving its goals.

### *C. Including Prevention Can Increase Public Support for Equitable Educational Opportunity*

Incorporating prevention into an affirmative action policy or conversation not only explicitly acknowledges the root causes that make admissions interventions necessary and the inadequacies of the current cure, but also builds a broader coalition of supporters of equitable educational opportunities that includes even opponents to the practice of affirmative action in admissions. Criticisms of modern affirmative action are typically not leveled against the goal of increasing diversity, but rather are offered against achieving diversity by manipulating the admis-

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28. CHRISTINE WINQUIST NORD ET AL., NAT'L CENTER FOR EDUC. STAT., HOME LITERACY ACTIVITIES AND SIGNS OF CHILDREN'S EMERGING LITERACY, 1993 AND 1999, at 2, 5 (1999), available at <http://nces.ed.gov/pubs2000/2000026.pdf> (noting that there is an increasing number of families emphasizing literacy, and that there is a strong association between family literacy and children's emerging literacy, and also discussing the differences among ethnicities in familial literacy emphasis); HARVARD FAMILY RESEARCH PROJECT, RESEARCH BRIEF: FAMILY INVOLVEMENT MAKES A DIFFERENCE IN SCHOOL SUCCESS (2006), available at <http://www.hfrp.org/publications-resources/browse-our-publications/family-involvement-makes-a-difference-in-school-success> (finding that “[c]hildren whose parents read to them at home recognize letters of the alphabet . . . sooner than those whose parents do not; [c]hildren whose parents teach them how to write words are able to identify letters and connect them to speech sounds; [and] [c]hildren whose mothers use complex sentences in their everyday conversations achieve high scores on literacy-related tasks in kindergarten.”). On average, African American three- and four-year-olds score lower on tests of school readiness than white students. Christopher Jencks & Meredith Phillips, *The Black-White Test Score Group: An Introduction*, in BLACK-WHITE TEST SCORE GAP 1, 1–2 & fig.1-1 (Christopher Jencks & Meredith Phillips eds., 1998); see also FERGUSON, *supra* note 10, at 3.

29. *Teacher Quality and Student Achievement: At a Glance*, CENTER FOR PUB. EDUC. (Oct. 4, 2005), <http://www.centerforpubliceducation.org/Main-Menu/Staffingstudents/Teacher-quality-and-student-achievement-At-a-glance/default.aspx> (citing studies finding that “[t]eacher quality more heavily influences differences in student performance than did race, class, or school of the student”).

30. See, e.g., *100 Blocks, One Bright Future*, HARLEM CHILDREN'S ZONE, <http://www.hcz.org/about-us/the-hcz-project> (last visited May 23, 2011); *The Partnership*, STRIVE TOGETHER, <http://www.strivetgether.org/about-the-partnership> (last visited May 23, 2011).

sions process. A bottom-up solution—such as prevention—that could get to diversity in higher education without the top-down manipulation of the admissions process would likely enjoy significant public support.<sup>31</sup> Affirmative action advocates who omit at least an acknowledgement that prevention would be a better result for everyone do so at the risk of losing support not only for affirmative action in its current form but for the broader goals in the quest for more equitable educational opportunity—the well-supported ends get lost in the controversial means.

Restricting the concept of affirmative action to the consideration of race in admissions puts the entire effort to achieve diversity and equitable educational opportunity in a constant state of uncertainty because the use of race in the admissions process is morally, legally, and educationally controversial. The controversy is only heightened when the significance of the intervention is revealed.<sup>32</sup>

Moral opponents of affirmative action argue that it is unjust to treat people differently based on race or other factors that do not relate to individual merit.<sup>33</sup> Legal opponents of affirmative action morph the moral criticism into a legal argument, claiming that differential treatment based on race is inherently suspect (even when allegedly pursued for benevolent ends).<sup>34</sup> Legal opponents go on to argue that affirmative action policies serve no compelling government interest or are not narrowly tailored to a compelling interest to withstand the strict constitutional scrutiny applied to all racial classifications or to diversity.<sup>35</sup> Finally, educational opponents of affirmative action argue that the means employed to

31. DOUGLAS S. REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY 96–99 (2001) (referencing four state surveys on support for educational opportunity equality, including one Kentucky survey in which 72.6 percent of pollsters said they preferred equal educational opportunity more than high academic achievement).

32. See Sander, *supra* note 21, at 654 (noting that in most cases, the impact is of being identified as an African American is the equivalent of fifteen LSAT points, and seven or eight LSAT points for Hispanics).

33. See, e.g., Louis P. Pojman, *The Case Against Affirmative Action*, 12 INT'L J. FOR APPLIED PHIL. 97 (1998) (arguing that affirmative action itself requires discrimination, encourages mediocrity and incompetence, and fails to value merit for merit's sake); G. Stolyarov II, *Three Ethical Arguments Against Affirmative Action*, ASSOCIATED CONTENT FROM YAHOO! (June 1, 2007), [http://www.associatedcontent.com/article/264310/three\\_ethical\\_arguments\\_against\\_affirmative.html?cat=72](http://www.associatedcontent.com/article/264310/three_ethical_arguments_against_affirmative.html?cat=72) (arguing that “affirmative action harms its intended beneficiaries . . . punishes the most innocent and industrious of persons, and that it defies an essentially individualistic American work ethic”).

34. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 387–88 (2003) (Kennedy, J., dissenting) (“Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality.”).

35. For example, Justice Thomas has repeatedly insisted that any admissions policy that considers race is unconstitutional. *Gratz v. Bollinger*, 539 U.S. 244, 281 (2003) (Thomas, J., concurring) (suggesting that use of programs that promote differential treatment of minorities based solely on race should be “categorically prohibited by the Equal Protection Clause”); see also *Grutter*, 539 U.S. at 350 (Thomas, J., concurring in part and dissenting in part). Justice Thomas is by no means alone in this position. See, e.g., Brief Amicus Curiae of Pac. Legal Found. in Support of Petitioner at 21–22, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 144985.

achieve diversity distort the educational system when they deemphasize individual merit.<sup>36</sup>

Although these criticisms argue for doing away with modern affirmative action, they should not be mistaken as opposition to equitable educational opportunity.<sup>37</sup> An affirmative action program that more explicitly demonstrates—both in its rhetoric and its policies—that it is not solely about admissions preferences, but also about leveling the playing field through prevention can capture the public enthusiasm for decreasing educational disparities throughout the education system. If ultimately successful, prevention would render the moral, legal, and educational opposition moot—there would be no more need for disparate treatment based on demographic factors, muting the moral and legal arguments, and the educational argument would disappear as individual merit increased in importance. The current affirmative action conversation, focused solely on top-down means, misses the opportunity to engage even current opponents of admissions preferences in crafting bottom-up solutions to the underlying problem of educational disparities along demographic lines.

#### *D. What Can Law Schools Do?*

A proper criticism at this point would be that law schools are not in the business of fixing all the problems of the world, but rather are in the business of training law students. Taken literally and to its logical extreme, an affirmative action program focused on prevention would require universities and law schools to drop everything for a couple decades and focus entirely on addressing disparities throughout the education system. Although it may be tempting to imagine what could be accomplished if the whole of society committed to getting education right, it is obviously unrealistic. So, what *can* law schools do?

At a minimum, law schools pursuing diversity can adjust their rhetoric to include prevention. As discussed above, limiting the conversation to the most controversial method of addressing the problem—

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36. In addition to the “academic mismatch” hypothesis discussed in Professor Sander’s article, arguing that admitting minority students to schools for which they are not academically prepared does them a great disservice, others have argued that using affirmative action creates bifurcated student bodies. See Sander, *supra* note 21, at 666–67. Rather than benefit from student diversity, the goal condoned by the Supreme Court, students begin to resent and stigmatize one another, focusing only on potential or perceived academic differences and inferiorities. See Jeffrey B. Wolff, Comment, *Affirmative Action in College and Graduate School Admissions—The Effects of Hopwood and the Actions of the U.C. Board of Regents on its Continued Existence*, 50 SMU L. REV. 627, 637 (1997).

37. To the contrary, some affirmative action opponents would argue that they are in fact the purest of equitable education advocates since they advocate a system that prohibits the use of anything other than merit in delivering educational opportunities. See, e.g., *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part) (“The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”).

intervention in the admissions process—creates an unnecessarily confrontational atmosphere and puts the entire undertaking at risk of being dismissed as inadequate, ineffective, or even unconstitutional. Broadening the discussion to include prevention has the potential to make allies (at least partial allies) out of critics in the short term and, in the long term, to contribute to the ultimate goal of making affirmative action unnecessary.<sup>38</sup>

Beyond the rhetorical shift to include prevention, law schools can take a variety of meaningful action signaling a commitment to support prevention efforts. Each of these suggestions could be incorporated as an element of a school's affirmative action process to serve as a tangible commitment to prevention.

Institutionally, universities and law schools can support research aimed at eliminating disparities throughout the educational system. Within a local community, law schools could signal their commitment to prevention by engaging directly with minority and low socioeconomic students facing educational disparities. This could include anything from adopting a school and committing resources to directly aid students to organizing and supporting individual students, faculty, and staff involved in direct mentoring or tutoring.

On a more substantial level, law schools could offer loan forgiveness to graduates who teach or counsel students from underrepresented demographic groups. Many law schools offer loan forgiveness for students engaging in public service legal work;<sup>39</sup> broadening the criteria to include students who commit to addressing educational disparities, either as teachers or in other capacities would signal an institution's commitment to prevention.<sup>40</sup> This seems particularly promising considering the fact that many students may enroll in law school without quite knowing what they would like to do with their law degree and exit with a debt load that requires them to work as lawyers, at least in the short term.<sup>41</sup> In

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38. One potential negative side effect to such a rhetorical shift could be that it may undermine an institution's claim that its policies are tailored to achieve the limited compelling interest of capturing the educational benefits of diversity.

39. See, e.g., *COAP (Loan Repayment Assistance Program (LRAP))*, YALE L. SCH., [http://www.law.yale.edu/admissions/COAP.htm#Who\\_COAP\\_Serves](http://www.law.yale.edu/admissions/COAP.htm#Who_COAP_Serves) (last visited May 23, 2011); *Low Income Protection Plan (LIPP)*, HARV. L. SCH., <http://www.law.harvard.edu/current/sfs/lipp/index.html> (last visited May 23, 2011); *Loan Repayment Assistance Program (LRAP)*, STAN. L. SCH., <http://www.law.stanford.edu/program/tuition/assistance/#overview> (last visited May 23, 2011). It is typical for these programs to require law-related employment.

40. Students who teach in public schools that primarily serve low-income students are eligible to have portions of any federal Perkins loans forgiven. *Stafford Loan Forgiveness*, STAFFORDLOAN.COM, <http://www.staffordloan.com/repayment/forgiveness.php> (last visited May 23, 2011). It appears that the Yale Loan Repayment Assistance Program might consider employment as a teacher to qualify for loan forgiveness. *COAP (Loan Repayment Assistance Program (LRAP))*, *supra* note 39.

41. One example of this is discussed in the American Bar Association's 2003 study on loan repayment and forgiveness. See ABA COMM'N ON LOAN REPAYMENT & FORGIVENESS, LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE (2003), available at

addition, in the current economy, students are exiting law school with J.D.'s and without legal jobs—that talent would be welcomed to help fill the vast national need for quality teachers.<sup>42</sup>

The possibilities are limitless, but will only be conceived if law schools are willing to recognize the broader mission of their affirmative action programs. By contributing not only to firefighting, but also fire prevention, law schools can redefine what affirmative action means.

## II. CURE

Benjamin Franklin was smart enough to understand that even though prevention was more efficient than cure, cure could not be ignored. The Union Fire Company and other firefighting companies like it could prevent a citywide conflagration but would never be able to prevent every fire in Philadelphia. Recognizing the limitations of prevention, Franklin helped form the Philadelphia Contributorship in 1752.<sup>43</sup> The Contributorship was the first successful fire insurance company in the colonies, insuring Philadelphians against catastrophic financial loss in the event of a fire.

Just as Franklin confronted fires from both front-end prevention and back-end insurance, so too must any discussion of affirmative action in higher education consider both ways to minimize educational disparities confronting students in the years before they apply and ways to utilize the admissions process to address the disparities that persist. Thus, while this article has been critical of the *exclusive* focus on cure, it now enters that discussion.

As discussed above, law schools and universities have a limited ability to implement policies aimed at prevention. The suggestions above will not have any impact on the diversity within law schools in the immediate future; they are instead aimed at reframing the affirmative action debate. In addition, the impact of even perfect prevention of educational disparities would take decades to reach university and law school applicant pools, suggesting that some form of cure is therefore necessary for the foreseeable future, just as Justice O'Connor suggested. The current cure of utilizing demographic considerations in the admissions process is sufficiently flawed to merit reexamination.

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<http://www.abanet.org/legalservices/downloads/lrap/lrapfinalreport.pdf>. That study concluded that because of increasingly high debt amounts for law students, as many as 66% of graduates were dissuaded from entering any kind of public interest or government job because those types of jobs would not allow them to pay back their loans. *Id.* at 10. The study further noted that even those who did initially enter public service left after only a few years due to financial constraint. *Id.*

42. See David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 8, 2011, at BU1, available at <http://www.nytimes.com/2011/01/09/business/09law.html?src=me&ref=general>.

43. *Citizen Ben: Insurance Ben-EFactor*, PBS.ORG, [http://www.pbs.org/benfranklin/l3\\_citizen\\_insurance.html](http://www.pbs.org/benfranklin/l3_citizen_insurance.html) (last visited May 23, 2011); see also NICHOLAS B. WAINWRIGHT, A PHILADELPHIA STORY: THE PHILADELPHIA CONTRIBUTIONSHIP FOR THE INSURANCE OF HOUSES FROM LOSS BY FIRE 28–29 (1952).

The cure constitutionally licensed in *Grutter* involves the consideration of an applicant's race in arriving at admissions decisions. Under *Grutter*, which permits the use of race in seeking the educational benefits of a diverse student body, "diversity" should mean more than simply race. Although the *Grutter* Court suggested ways to ensure proper tailoring,<sup>44</sup> it refused to offer precise guidelines as to how race may be used. Indeed, the Court prohibited the use of any fixed formula in the companion *Gratz* case.<sup>45</sup> Scholars are thus left to look at the outcomes to attempt to determine the degree to which race impacts admissions decisions.

There is no need here to rehash the litany of potential criticisms with this behind-the-curtain system. Professor Sander has identified one particular side effect of focusing primarily on racial group membership in providing admissions preferences—the difficulty applicants of all races from lower socioeconomic backgrounds have in accessing legal education. To the extent Professor Sander's article is identifying that problem and proving its existence with data, I applaud it. As Professor Sander notes, "Some law school policies militate against the admission of low- and moderate-SES applicants. Even in awarding grants and scholarships, law schools apparently generally ignore need . . . ."<sup>46</sup> This is morally and educationally indefensible.

I wholly support the call for a comprehensive and thoughtful response to these circumstances, though I must reiterate that Professor Sander's own data shows that a significant portion of these disparities is caused by the multiple other hurdles facing low and moderate SES students throughout their lives and not by law school admission practices. It is attention to the pre-law school disparities that is contemplated in Part I of this Article.

For those who support the goal of increasing socioeconomic diversity in law schools, there is little to quibble with in Professor Sander's suggestions to: (1) "eliminate or minimize the harmful effects of practices that favor high-SES applicants"; (2) "institute . . . financial aid policies tied to student need"; and (3) begin implementation of admissions preferences based on socioeconomic status.<sup>47</sup> With regard to the admissions preferences, Professor Sander suggests them as "at least a partial substitute for current racial preferences."<sup>48</sup> So long as consideration of

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44. *Grutter v. Bollinger*, 539 U.S. 306, 333–42 (2003). Specifically, the Court instructed that narrow tailoring requires (1) a serious and good-faith consideration of race-neutral alternatives prior to adopting a race-conscious plan; (2) use of race in a flexible, non-mechanical manner; (3) no undue burden being placed on non-minority applicants; and (4) periodic reviews of the program's continued necessity. *Id.*

45. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (striking down the automatic addition of a fixed number of points to an applicant's admissions index based on status as a member of an under-represented minority group).

46. Sander, *supra* note 21, at 633.

47. *Id.* at 660–61.

48. *Id.* at 664.

socioeconomic status works in conjunction with, as opposed to supplanting, consideration of race, this is a useful suggestion.<sup>49</sup> Sadly, the broader forces operating in our society—a society that very much considers race in multiple ways—justify the continued consideration of race in higher education admissions.

In Tables 5 and 6, Professor Sander demonstrates that law schools are more successful in proportionately admitting African American applicants than low-SES applicants. This data proves that focusing exclusively on race in allocating admissions preferences does not achieve substantial socioeconomic diversity. That phenomenon is important to know.

It is tempting, given this data, to embrace socioeconomic preferences over racial ones for all the reasons Professor Sander suggests—they stand on firmer legal ground, they are more broadly supported,<sup>50</sup> and they do better at allocating advantages to the most individually disadvantaged applicants. However, focusing exclusively on socioeconomic diversity may lead to the opposite result where law schools are more successful in proportionately admitting low-SES applicants than members of racial minority groups. In the discussion of UCLA's experiment with socioeconomic preferences in 1997 and 1998, the resulting class may have been racially diverse, as Professor Sander notes, but the fact that the majority of nonwhites were Asian suggests that some racial diversity was sacrificed.<sup>51</sup>

The fact that California has been able to devise creative and effective plans in the aftermath of Prop 209 is laudable, but it does not mean that taking racial considerations off the table is ideal for pursuing the educational benefits of a diversity that includes racial diversity. After all, it was the quest for *racial* diversity that led to the filing of briefs in the *Grutter* and *Gratz* cases by multinational corporations and the American military in support of the University's affirmative action policies.<sup>52</sup>

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49. Although in the article for this volume Professor Sander suggests only "at least a partial substitute," the body of his work could be read to suggest the elimination of racial preferences. See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 482–83 (2004). As a result, I feel it is appropriate to address that suggestion.

50. For instance, socioeconomic affirmative action garners public support as high as 65%, whereas racial affirmative action only receives approximately 26% support. Richard D. Kahlenberg, Higher Education: Reconnecting with the American Dream, Powerpoint accompanying presentation at University of North Carolina at Chapel Hill (Sept. 11, 2006), available at [http://www.unc.edu/inclusion/0911Kahlenberg\\_UNC.pdf](http://www.unc.edu/inclusion/0911Kahlenberg_UNC.pdf) (citing EPIC/MRA poll (conducted January 29–February 3, 2003); *Los Angeles Times* poll (conducted January 30–February 2, 2003); and *Newsweek* poll (conducted January 16–17, 2003)).

51. Sander, *supra* note 21, at 662–63. Similarly, Professor Sander notes that African American and Hispanic numbers have fallen at the two most elite UC campuses in the wake of Prop 209 even as black enrollment throughout the system has increased. *Id.* at 655.

52. Brief of Gen. Motors Corp. as Amicus Curiae in Support of Respondents at 2, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-516), 2003 WL 399096; Brief for Amici Curiae 65 Leading Am. Bus. in Support of Respondents at 2, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-516), 2003 WL 399056; Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae in

Achieving that racial diversity without consideration of an applicant's race is likely to prove difficult.<sup>53</sup>

In addition to this uncertainty about the impact eliminating racial considerations would have on racial accessibility, there are further reasons for maintaining consideration of race in the application process. Race, independent of socioeconomic status and across the income spectrum, continues to impact the life trajectory of individuals. When institutions are faced with choosing between two equally-qualified applicants of identical socioeconomic status, there are credible reasons why an applicant's race should be considered. Two phenomena in particular make this point.

First, there remain disparities in upward social mobility along racial lines—low-income whites are more likely to ascend the income ladder than their African American counterparts. When controlling for other variables, whites from the lowest socioeconomic quartile are five times as likely as African Americans from the same quartile to advance economically.<sup>54</sup> Thus, it is not merely the lack of accessibility of higher education that is holding low-income African Americans back relative to their white peers.

In addition, there is a growing body of research suggesting significant evaluative disparities that occur across racial lines.<sup>55</sup> In one representative study, reviewers comparing identical resumes of African American and white job seekers rated white candidates more highly.<sup>56</sup>

Support of Respondents at 9, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-516), 2003 WL 1787554.

53. For instance, in Charlotte-Mecklenburg schools, after replacing racial with socioeconomic student assignment consideration, 19.4% fewer elementary schools, 8.8% fewer middle schools, and 14.7% fewer high schools were racially integrated compared to the last year that the district was under court-ordered race-conscious student assignment. Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1556–58 (2003). In San Francisco, a consent decree in that district's desegregation case replaced race with consideration of non-racial factors, including socioeconomic status, in student assignment decisions. Brief of 553 Soc. Scientists as Amici Curiae in Support of Respondents, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2006) (No. 05-908), 2006 WL 2927079, at \*53a n.176 (citing STUART BIEGEL, ANNUAL REPORT NO. 22 OF CONSENT DECREE MONITOR (2005) (submitted in S.F. NAACP v. S.F. Unified Sch. Dist., No. C-78 1445 WHA, 2001 U.S. Dist. LEXIS 25904 (N.D. Cal. Oct. 24, 2001))). The district's race-neutral policies did not maintain racial integration. *Id.* at \*53a.

54. See TOM HERTZ, CTR. FOR AM. PROGRESS, UNDERSTANDING MOBILITY IN AMERICA 4 (2006), available at [http://www.americanprogress.org/kf/hertz\\_mobility\\_analysis.pdf](http://www.americanprogress.org/kf/hertz_mobility_analysis.pdf).

55. See Patricia G. Devine et al., *The Regulation of Explicit and Implicit Race Bias: The Role of Motivations to Respond Without Prejudice*, 82 J. PERSONALITY & SOC. PSYCHOL. 835, 835 (2002) (examining the “moderating role of motivations to respond without prejudice (e.g., internal and external) in expressions of explicit and implicit race bias”); Samuel L. Gaertner et al., *Aversive Racism: Bias Without Intention*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 377, 377–94 (Laura Beth Nielsen & Robert L. Nelson eds., 2005) (emphasizing studies on unintentional discrimination in selective hiring).

56. See generally Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal?: A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004), available at <http://www.economics.harvard.edu/faculty/mullainathan/files/emilygreg.pdf>.

Paradoxically, this discrepancy was more significant the more qualified the candidates were. While modestly-qualified candidates of different races were evaluated relatively equally, higher qualified African American candidates were, on average, subjectively judged to be inferior to white candidates with identical objective qualifications.<sup>57</sup> Students who have reached the point of applying for law school—a point that is among the highest reaches for education—have likely encountered such evaluative bias even more than most other African Americans. These disparities, like those regarding the limitations on social mobility, exist regardless of socioeconomic status.

Together, these phenomena indicate that ignoring race imposes a colorblindness in the admissions process that does not exist in society at large, a path likely to exacerbate racial disparities in higher education. Professor Sander is undoubtedly correct that more attention must be paid to leveling the playing field for applicants from low socioeconomic backgrounds. However, because race continues to play a role in individuals' lives both before and after they reach the age for higher education, continued consideration of race remains justifiable in order to attain the educational benefits of diverse student bodies.

#### CONCLUSION

In *Grutter*, the Supreme Court expressed its implicit belief that the fires of disparate educational opportunities prior to higher education will have been put out within a quarter century. Perhaps the Court will be right. However, there is ample evidence that the progress of the 25 years prior to *Grutter* has stalled.<sup>58</sup> Simply allowing the next 25 (now 18) years to elapse without affirmatively working to reduce those disparities—and prevent the continued need for demographic preferences in higher education admissions—will not allow universities or law schools to continue to achieve diversity in their student bodies. To avoid that, universities and law schools should expand the concept of affirmative action to include preventive measures that would make the current controversial use of admissions preferences obsolete. Such an ounce of prevention would go far toward maintaining attention on the best method of preventing the fires of disparate educational opportunities from consuming another generation of American students.

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57. See *id.* at 12.

58. See CHUDOWSKY, CHUDOWSKY & KOBER, *supra* note 11, at 12 (noting that while education gaps have narrowed since the 1970s, “[e]ven with the general narrowing trend, the black-white and Latino-white gaps on NAEP [National Assessment of Educational Progress] remain large”). *But see* FERGUSON, *supra* note 10, at 43 (noting that all of the progress for 9-year-olds in narrowing the achievement gap was completed by 1986 in math and 1988 for reading).