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TOWARD A MORE PERFECT UNION?: THE DANGER OF CONFLATING PROGRESS AND EQUALITY

Leo P. Martinez*

[C]onditions . . . have dramatically improved.¹

During the 2008 presidential campaign, a time that seems eons removed from the present, then candidate Barack Obama delivered a speech to address claims that his minister, the Reverend Jeremiah Wright, had made racially charged remarks. Obama, citing the preamble to the Constitution, “We the people, in order to form a more perfect union,” noted the very real disconnect between our ideals as a nation and the reality of race in 21st Century America.²

Six years after this speech, we again confronted the disconnect between our ideals and reality. Two years ago, in the space of a week, the United States Supreme Court decided four cases, two of which are at apparent odds with the ideals expressed in the Constitution and two of which seem to affirm that we are indeed moving toward a more perfect union. Last spring yet another case was decided that conflicts with the ideals expressed in the preamble.

In a very real way, these cases well represent the “two steps forward, one step back” approach that has characterized this nation’s entire approach

* Albert Abramson Professor of Law, University of California, Hastings College of the Law. Special thanks to the Sedgwick law firm for allowing me to present an early version of this essay at Sedgwick’s Second Annual Symposium on Diversity held in San Francisco in June 2011. A later version of this piece was presented at the University of California Davis School of Law in November 2014 at the ClassCrits VII conference on Poverty, Precarity, & Work. I am grateful for the insights of my colleagues Professors David Faigman, Evan Lee, and Richard Marcus as well as Professor Vik Amar of UC Davis. I appreciate the sharp editorial eye and astute input of Emily Goldberg, Hastings class of 2015; Alex Poon, Cornell Law School class of 2015; and Emalie Sundale, Hastings class of 2016.

1. *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2627 (2013) (Roberts, C.J.).
2. Senator Barack Obama, Presidential Campaign Speech (Mar. 18, 2008), *available at* <http://blogs.wsj.com/washwire/2008/03/18/text-of-obamas-speech-a-more-perfect-union/>.

to racial and gender equality, prevalent since its founding. At bottom, despite steps taken to cure discrimination, racial and gender inequality persist.

This paper will make the point that our past is inextricably linked to our present and future, contrary to the perception of many of the Justices on the Supreme Court. The observations regarding the state of racial and gender equality should be so obvious as to defy all but the most obtuse to ignore. The claims that “things have changed dramatically” elevate a rose-tinted glasses view of the world over the reality that we occupy. The conflation of progress and equality means that equality will be delayed to an intolerable extent. To continue on the path laid out by a majority of the United States Supreme Court will mean that our hopes and ideals will never match reality and the aspiration of a perfect union will never be realized.

The cases seem to conclude, without a shred of empirical support, that all is rosy when it comes to racial harmony and sexual equality in this country. The latter is exemplified in the Chief Justice’s pronouncement in *Shelby County v. Holder* that “conditions . . . have dramatically improved” with respect to voting rights.

INTRODUCTION

During the 2008 presidential campaign, a time that seems eons removed from the present, then candidate Barack Obama delivered a speech to address claims that his minister, the Reverend Jeremiah Wright, had made racially charged remarks. Obama, citing the preamble to the Constitution, “We the people, in order to form a more perfect union,”³ noted the very real disconnect between our ideals as a nation and the reality of race in 21st Century America.⁴

Six years after this speech, we are more able to assess the disconnect between our ideals and reality. Two years ago, in the space of a week, the United States Supreme Court decided four cases, two of which are at apparent odds with the ideals expressed in the Constitution and two of which seem to affirm that we are indeed moving toward a more perfect union.⁵

3. U.S. CONST. pmb1.

4. Obama, *supra* note 2.

5. I have taken pains to avoid some of the more spectacular instances of individual expressions of racism. See Jack Healy, *Ferguson, Still Tense, Grows Calmer*, N.Y. TIMES (Nov. 26, 2014), <http://www.nytimes.com/2014/11/27/us/michael-brown-darren-wilson-ferguson-protests.html>; Scott Cacciola & Billy Witz, *N.B.A. Investigating Racial Remarks Tied to Clippers Owner*, N.Y. TIMES (Apr. 26, 2014), http://www.nytimes.com/2014/04/27/sports/basketball/nba-clippers-owner-donaldsterling.html?module=Search&mabReward=relbias%3As%2C%7B%22%22%3A%22RI%3A15%22%7D&_r=0;%20Ral; Ralph Ellis & Greg Botelho, *Rancher Says He’s Not Racist, Still Defiant Over Grazing Battle*, CNN (Apr. 25, 2014, 6:16 PM), <http://www.cnn.com/2014/04/24/politics/cliven-bundy-interview/>.

In the first two cases, the Court suggested affirmative action in higher education will be deemed unconstitutional unless the school can prove that no other meaningful alternative would result in a diverse student body, requiring universities to present evidence to justify their policies, and the Court dismissed the salutary effect of section 4 of the Voting Rights Act, seemingly on the basis that discrimination in voting is a relic of the past. Last spring the United States Supreme Court decided *Schuette v. Coal. to Defend Affirmative Action*, and upheld the ability of the citizens of Michigan to prohibit racial preferences in University admissions.⁶ Together, these three cases very well might have the effect of perpetuating, and potentially facilitating, inequality. In contrast, during last spring's term, the Court held the Defense of Marriage Act unconstitutional, as well as confirming the California Supreme Court's decision, finding California's Proposition 8 – the ban on same-sex marriage – to be unconstitutional.⁷

In a very real way, these cases well represent the “two steps forward, one step back” approach that has characterized this nation's entire approach to racial and gender equality, prevalent since its founding. At bottom, despite steps taken to cure discrimination, racial and gender inequality persist.

The two categories of cases mentioned above highlight three significant problems. First, there is an apparent constitutional dilemma: the Court seems to draw a distinction between policies that try to fix old wrongs (affirmative action and Voting Rights Act) and those policies that actively discriminate (Prop 8 and DOMA) in the present.⁸ This line of thinking leads to the

These, in my judgment, do not as easily make the point that we have a long way to go before racial harmony is achieved. These can be brushed aside as the rantings of isolated individuals. Attorney General Eric Holder has made essentially the same point. Pares Dave, *Eric Holder to Grads: Biggest Civil Rights Issue Not 'Hateful Rants,'* L.A. Times (May 17, 2014, 11:35 AM), <http://www.latimes.com/nation/nationnow/la-na-nn-holder-morgan-racism-commencement-20140517-story.html>. The broader view described in the paper more nearly confronts the dismal picture of racial harmony more than 200 years after the allusion to a perfect union in our constitution.

6. 134 U.S. 1623, 1651-83 (2014). Dissenting from the plurality in *Schuette*, Justice Sotomayor, joined by Justice Ginsberg, avers that “the Fourteenth Amendment does not tolerate” Michigan's constitutional amendment that prohibits consideration of race in college admission because it constitutes a “political restructuring[] that create[s] one process for racial minorities and a separate, less burdensome process for everyone else.” *Id.* at 1653. Justice Sotomayor carefully recounts the Court's protection of minority rights since the adoption of the Fourteenth Amendment and demonstrates with hard data the frightening consequences of Michigan's circumvention of the Equal Protection clause. *Id.*

7. Adam Liptak, *Supreme Court Bolsters Gay Marriage With Two Major Rulings*, N.Y. TIMES (Jun. 26, 2013), <http://www.nytimes.com/2013/06/27/us/politics/supreme-court-gay-marriage.html?pagewanted=all>.

8. I realize that discrimination based on gender identity and the resulting judicial reaction is much more nuanced than the picture I paint. Such finer-grained analysis is not necessary to make the broader points in this article.

inescapable conclusion that old wrongs are irrelevant, or at least do not need to be balanced anymore.⁹ Implicit in this idea is that progress toward equality *is* equality. My own view is that improvement does not warrant complacency with the status quo, especially when equality is the objective.

Second, there is a suggestion in *Fisher v. Texas* that the corrective aspects of affirmative action as espoused in *Grutter* are “limited in time”¹⁰ and hence have a shelf life. Though this was implicit in *Brown v. Board of Education* and its “all deliberate speed” language, the more recent cases seem to take a more nuanced, and limited, approach in this regard.¹¹ This too begs the question of whether improvement will serve to derail achieving true equality by eviscerating the instruments that made improvement possible.

Third, there is an almost maddening desire to conclude, without a shred of empirical support, that all is rosy when it comes to racial harmony and sexual equality in this country. The latter is exemplified in the Chief Justice’s pronouncement in *Shelby County v. Holder* that “conditions . . . have dramatically improved” with respect to voting rights.¹² Indeed this has echoes of Justice Thomas’ dissent in *Fisher* in which he cited *Korematsu v. United States* that “[p]ressing public necessity may some-times justify the existence of [racial discrimination]; racial antagonism never can.”¹³ This despite the unfounded basis for the public necessity in *Korematsu*.¹⁴

In this essay, I hope to make the point that our past is inextricably linked to our present and future. As I have taken pains to explain in other works,¹⁵ I am not a close student of Constitutional law. At the same time, the observations I make are too plain to ignore and the claims that “things have changed dramatically” elevate a rose-tinted glasses view of the world over the reality that we occupy.¹⁶ The conflation of progress and equality means

9. Justice Sotomayor’s passionate dissent in *Schutte* eloquently makes this point.

10. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

11. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

12. *Shelby Cnty. v. Holder*, 133 U.S. 2612, 2627 (2013).

13. *Fisher v. Univ. of Tex.*, 133 U.S. 2411, 2423 (Thomas, J., dissenting) (citing *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944)).

14. *Korematsu*, 323 U.S. at 214.

15. See, e.g., Leo P. Martinez & Jennifer M. Martinez, *Latino Realities and the Internal Revenue Code: A Critical Perspective*, 22 U. FLA. J.L. & PUB. POL’Y 377 (2011); Leo P. Martinez, *The Problem with Taxes: Fairness, Tax Policy, and the Constitution*, 31 HASTINGS CON. L. QTRLY. 413 (2004); Leo P. Martinez, “[T]o Lay and Collect Taxes,” *The Constitutional Case for Progressive Taxation*, 18 YALE L. & POL’Y REV. 111 (1999).

16. *McClesky v. Kemp* spawned scholarship on “constitutional facts.” 481 U.S. 279 (1987) (a comprehensive scientific study showing a “racially disproportionate impact” in application of the Georgia death penalty shown was not enough to overturn a guilty verdict without showing a “racially discriminatory purpose”); see JAMES R. ACKER & ALLISON D. REDLICH, *WRONGFUL CONVICTION: LAW, SCIENCE, AND POLICY* (2011); Scott E. Sundby, *The Loss of Constitutional*

that equality will be delayed to an intolerable extent. Our hopes and ideals do not and will not match reality if we continue on the path—the aspiration of a perfect union will never be realized.

I. TODAY'S REALITY

I do not quarrel that our notions of diversity have unquestionably evolved over the last century and a half. For example, in 1854 the California Supreme Court stated in *People v. Hall* that the Chinese were “a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown.”¹⁷ Sadly, there was but a single dissent from that view.

In 2010, then-Governor of California, Arnold Schwarzenegger, signed legislation authorizing the University of California to award honorary degrees to former students of Japanese ancestry whose studies were interrupted by internment during World War II.¹⁸ California's notions of diversity have thankfully progressed since *People v. Hall*.

It is then perhaps tempting, if not facile, to claim today that the pronouncements of *People v. Hall* and *Plessy v. Ferguson* are outdated, discredited, and behind us. Foreshadowing Chief Justice Roberts' assertion that “conditions . . . have dramatically improved,”¹⁹ Judge Noonan in a 2011 Ninth Circuit opinion, *Darensburg v. Metropolitan Transportation Commission*, described well-documented and persistent racial disparities in the allocation of funds for mass transit in the Bay Area as involving “hopelessly outdated” racial categories.²⁰

Despite the temptation to believe that we have reached a point in our history where race and other statuses no longer give rise to discrimination, one is left with the disquieting feeling that in many respects, things have not changed or improved all that much. Moreover, it is plain that discrimination and its cure have many moving parts.

Faith: McClesky v. Kemp and the Dark Side of Procedure, 10 OHIO ST. J. CRIM. L. 5 (2012). Chief Justice Roberts' pronouncement that “things have changed dramatically” seems without foundation and yet seems to form the basis on which we can dispense with the prescriptions of the Voting Rights Act.

17. *People v. Hall*, 4 Cal. 399, 405 (1854).

18. Assemb. B. 37, 2009 Cal. Legis. Servs., 2009-2010 Reg. Sess. ch. 213 (Cal. 2009) (codified at CAL. EDUC. CODE. § 66020 (West 2013)); Patrick McDonnell, *UCLA Awards Honorary Degrees to Japanese Americans Who Were Interned*, L.A. TIMES (May 16, 2010), <http://articles.latimes.com/2010/may/16/local/la-me-honorary-degree-20100516>.

19. *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2627 (2013).

20. *Darensburg v. Metro. Transp. Comm'n.*, 636 F.3d 511, 523 (9th Cir. 2011) (Noonan, J., concurring).

A. *The More Things Change the More They Stay the Same*

In *Brown v. Board of Education*, the United States was still molding the contours of the “separate but equal doctrine” articulated in *Plessy v. Ferguson*.²¹ While the case dealt with the question of whether separate but equal passed constitutional muster, the record indicates that in three of the four consolidated cases, the schools attended by African-American children were decidedly inferior.²²

Students of racial or ethnic minorities still find that they still receive “separate but equal” education today. On May 17, 2000—the 46th anniversary of *Brown v. Board of Education*—the American Civil Liberties Union, Public Advocates, the Mexican American Legal Defense and Educational Fund, and other civil rights organizations, along with Morrison & Foerster LLP, filed a class-action lawsuit, styled *Williams v. California*, on behalf of public school students against the State of California.²³ The plaintiffs argued that the State and its agencies were denying thousands of California students their fundamental right to an education, as provided under the California Constitution,²⁴ by failing to provide them with the basic tools necessary for that education. The State operated thousands of classrooms without enough textbooks for students; provided school facilities that were overcrowded, in disrepair, and unhealthy for students; and employed many under-trained teachers. Indeed, most affected schools were located primarily in urban areas and were disproportionately attended by children who were members of racial or ethnic minorities.²⁵ The parallel to the consolidated cases in *Brown v. Board of Education* should not be overlooked.

This story has a moderately happy ending. On August 13, 2004, after more than four years of litigation, the parties announced a settlement agreement, embodying the central principles of the plaintiffs’ case and included significant changes to California’s education laws. Six weeks later, on September 29, 2004, then-Governor Schwarzenegger signed into law five bills implementing the legislative proposals set forth in the settlement

21. *Brown v. Bd. of Educ.*, 347 U.S. 483, 488 (1954) (questioning whether the constitutional requirement of “equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate.”).

22. *Id.* at 486 n.1.

23. Brooks M. Allen, *Williams v. California: A Progress Update*, ACLU FOUND. S. CAL. (2009), http://www.decentschools.org/settlement/Williams_Progress_Update_May_2009.pdf.

24. CAL. CONST. art. IX, § 1.

25. Cindy Lavorato & Frank Spencer, *Back to the Future with Race-Based Mandates: A Response to Missed Opportunity*, 36 WM. MITCHELL L. REV. 1747, 1774-75 (2010).

agreement, and they took effect immediately.²⁶ While the settlement is complex, at its core is the idea that each and every student has a right to “sufficient textbooks,” a school in “good repair,” and a qualified teacher.²⁷ The improvements are in line with James Truslow Adams’ initial iteration of the American Dream, “life should be better and richer and fuller for everyone, with opportunity for each according to ability or achievement,”²⁸ albeit more than fifty years after *Brown v. Board of Education*.

The creation of these legal rights, however, does not guarantee enforcement thereof. Indeed, “[a]lthough *Brown* banned racial segregation in public schools, it did not automatically lead to equal educational opportunities for [African-Americans].”²⁹ The same is likely to be true of *Williams* and other efforts to eradicate discrimination. There remains a long path to walk before we have a perfect union. While conditions have progressed, the evolution has been far shy of “dramatic.” This can perhaps best be seen in gender and racial representation in the workplace.

Many believe we have achieved gender equality, and while there are glimmers of hope, the workplace lags far behind perception. Currently, the percentage of women in the U.S. labor force is 46.9 and the percentage of women in management, professional, and related occupations is 51.5.³⁰ Although these statistics show that there is equal opportunity for women to be employed in management, professional, and related occupations, persistent disparities remain. In 1979, the first year for which comparable earnings data were available, women earned about 62 percent as much as men.³¹ Despite progress, in 2011 women were still earning around 82 percent

26. S. B. 550, 2004 Cal. Legis. Servs., 2003-2004 Reg. Sess. ch. 900 (Cal. 2004); Assemb. B. 2727, 2004 Cal. Legis. Servs., 2003-2004 Reg. Sess. ch. 903 (Cal. 2004) (for minimum standards regarding school facilities, teacher quality, and instructional materials); Assemb. B. 1550, 2004 Cal. Legis. Servs., 2003-2004 Reg. Sess. ch. 901 (Cal. 2004) (phase out of the use of the Concept 6 calendar by July 1, 2012); Assemb. B. 3001, 2004 Cal. Legis. Servs., 2003-2004 Reg. Sess. ch. 902 (Cal. 2004) (encouraging placement of qualified teachers in under-performing schools, preventing misassignments, and streamlining the process for out-of-state hires); S. B. 6, 2004 Cal. Legis. Servs., 2003-2004 Reg. Sess. ch. 899 (Cal. 2004) (provides \$800 million for districts to repair facility conditions that threaten health and safety and \$25 million to identified low-performing schools).

27. Brooks M. Allen, *Williams v. California: The Statewide Impact of Implementation*, ACLU FOUND. S. CAL. (Jan. 29, 2009), <http://www.ctc.ca.gov/commission/agendas/2009-01/Brooks-Allen-presentation.pdf>.

28. JAMES TRUSLOW ADAMS, *THE EPIC OF AMERICA* 404 (1931).

29. Pamela W. Carter & Phoebe A. Roaf, *A Historic Overview of Brown v. Board of Education*, 51 LA. B.J. 410, 413 (2004).

30. *Women in the United States*, CATALYST (June 10, 2014), <http://www.catalyst.org/knowledge/women-united-states>.

31. U.S. DEP’T. OF LABOR, 1038, HIGHLIGHTS OF WOMEN’S EARNINGS IN 2011 at 1 (2012), <http://www.bls.gov/cps/cpswom2011.pdf>.

as much as their male counterparts.³² Improvement over the span of thirty years, however substantial, is not equality.

Continuing with this theme, according to the Department of Labor, in 2010, women were still only dominating fields and industries seen as traditionally “feminine.”³³ For example, women tend to be secretaries (96.1%), nurses (91.1%), elementary and middle school teachers (81.8%), maids (89%), childcare workers (94.7%), and receptionists (92.7%).³⁴ While all are honorable pursuits, the high proportion of women who occupy each raises concerns that women are herded into these professions.

Though women and men now enter the business world in equal numbers, women have yet to be well represented in positions of power, making up only 14.4 percent of Fortune 500 corporate officers.³⁵ Worse yet, women account for only 8.1 percent of the top earners in Fortune 500 Companies and only 4.8 percent of Fortune 500 CEOs.³⁶ In fact, *Corporate Board Member*, a magazine distributed to the board members of public company boards, noted that the percentage of women sitting on board seats nationwide is on the order of 12 percent.³⁷

The composition in the legal profession does not fare much better. While men and women have been graduating from the nation’s law schools in nearly equal numbers over the last twenty years, women make up only 19.2 percent of partners in the nation’s major firms.³⁸ Legal academia mirrors this sad

32. *Id.*

33. *See id.* at 2; for further reference, see Chart 4 and Table 2; WOMEN’S EARNINGS, *supra* note 31, at 7, 10-35.

34. The numbers have been rounded down. U.S. DEP’T. OF LABOR, 1038, HIGHLIGHTS OF WOMEN’S EARNINGS IN 2011 at 1 (2012), <http://www.bls.gov/cps/cpswom2011.pdf>.

35. *Women in the United States*, *supra* note 30.

36. *Id.*

37. Kimberly Crowe, *The Missing X Factor on Corporate Boards*, CORP. BOARD MEMBER, Second Quarter 2011, https://archive.boardmember.com/MagazineArticle_Details.aspx?id=6233. In 2012, of the 2010 Fortune 1000 companies, a slightly higher percentage of corporate directors were women. In such companies, 16.6 percent of corporate directors were women. *Why Gender Diversity Matters*, 2020 WOMEN ON BOARDS, <http://www.2020wob.com/learn/why-gender-diversity-matters> (last visited Mar. 30, 2015).

38. Leslie A. Gordon, *Reinvigorating the Initiative and Celebrating Successful Women: Breaking the Glass Ceiling*, 36 S.F. ATT’Y, Spring 2010, at 16. A more recent work yields a similar result. *See, e.g.*, Rachel M. Zahorsky, *Meet 6 Law Firm Leaders, Each with a Different Story, Each at the Top of Her Game*, A.B.A. J. (June 1, 2013), http://www.abajournal.com/magazine/article/women_in_charge_at_the_top_of_their_game/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email (citing a number “[j]ust under 20 percent”).

ratio. In the 2008-2009 academic year, women deans led approximately 20.6% of American law schools.³⁹

Racial and ethnic minorities fare worse than women. African-Americans hold less than 9.2 percent of Fortune 100 board positions, and Latinos hold only 4.3 percent.⁴⁰ Similarly, in the legal world, only 1.7 percent of law firm partners are African-American and only 1.9 percent are Latino.⁴¹

African-Americans and Latinos still disproportionately occupy the bottom half of the income distribution – and the trend only suggests an inauspicious future.⁴² Our world remains one where whites are twice as likely as African-Americans to have an income of \$100,000 and over.⁴³ Moreover, the median wealth of white households is twenty times that of African-American households and eighteen times that of Latino households.⁴⁴ As noted below, this disparity has ramifications.

Similarly, since 1992, there has been a significant income gap between Asian-Americans and their white counterparts. A 1992 report by the United States Commission on Civil Rights debunked the belief that Asian-Americans are treated fairly in this country.⁴⁵ This report stands in contradistinction to a 1991 *Wall Street Journal* poll that found that most Americans believed that Asian-Americans were not discriminated against.⁴⁶

39. *Women in Law in Canada and the U.S.*, CATALYST (Mar. 3, 2015), http://www.catalyst.org/knowledge/women-law-canada-and-us#footnote14_z660428 (citing A.B.A., COMM’N ON WOMEN IN THE PROF., A CURRENT GLANCE AT WOMEN IN THE LAW 4 (Feb. 2013),

http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_feb2013.authcheckdam.pdf); see also Laura M. Padilla, *A Gendered Update on Women Law Deans: Who, Where, Why, and Why Not?*, 15 AM. U. J. GENDER SOC. POL’Y & L. 443, 461 (2007) (stating that in 2005-2006, men comprised 81 percent of American law deans).

40. See 2012 ABD CENSUS, MISSING PIECES: WOMEN AND MINORITIES ON FORTUNE 500 BOARDS 4 (Aug. 15, 2013), http://theabd.org/2012_ABD%20Missing_Pieces_Final_8_15_13.pdf.

41. *Women and Minorities in Law Firms - By Race and Ethnicity*, NALP BULL. (Jan. 2012), http://www.nalp.org/women_minorities_jan2012.

42. See Tami Luhby, *Whites Get Wealthier, While Blacks and Hispanics Lag Further Behind*, CNN MONEY (Dec. 15, 2014), <http://money.cnn.com/2014/12/12/news/economy/wealth-by-race-pew/>.

43. See Les Christie, *Pay Gap Persists for African-Americans*, CNN MONEY (July 30, 2010), http://money.cnn.com/2010/07/30/news/economy/black_pay_gap_persists/.

44. See Rakesh Kochhar et al., *Wealth Gaps Rise to Record Highs Between Whites, Blacks, Hispanics*, PEW RES. CTR. (July 26, 2011), <http://pewresearch.org/pubs/2069/housing-bubble-subprime-mortgages-hispanics-blacks-household-wealth-disparity>; Sabrina Tavernise, *Recession Study Finds Hispanics Hit the Hardest*, N.Y. TIMES, July 26, 2011, at A1, available at <http://www.nytimes.com/2011/07/26/us/26hispanics.html&r=0>.

45. See U.S. COMM’N ON CIV. RTS., CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S (1992), available at <https://www.ncjrs.gov/pdffiles1/Digitization/135906NCJRS.pdf>.

46. Celia W. Dugger, *U.S. Study Says Asian-Americans Face Widespread Discrimination*, N.Y. TIMES (Feb. 29, 1992), <http://www.nytimes.com/1992/02/29/us/us-study-says-asian->

A more recent University of Kansas study confirms the 1992 report, finding that “native-born Asian-Americans — who were born in the U.S. and speak English perfectly” have an income level 8% less than Whites — “after controlling for their college majors, their places of residence and their level of education.”⁴⁷

Although race and ethnicity are the most common bases for discrimination, many are also treated differently based on their sexual or gender identity. Though members of the LGBT community may not be a “visible” (visible in the sense that a woman or an African-American is “visible”) minority group, they still face significant discrimination.⁴⁸ The struggles they face, while still rooted in discrimination, are of a slightly different nature than “traditional” discrimination. The stigma of being a racist is much harsher than one who discriminates against someone who identifies as LGBT. This, of course, does not legitimize such discrimination, but does allow for much more “upfront” discrimination that perhaps does not manifest itself implicitly through subjugation in the workplace or incarceration, but rather through hate crimes.

The Federal Bureau of Investigation reported that in 2011, over 6,000 hate crimes were committed, with nearly 1,300, just slightly over 20 percent, committed because of bias against sexual orientation.⁴⁹ This is an increase from the number of hate crimes linked to sexual-orientation bias in 2009.⁵⁰

According to a 2013 Gallup Poll, 59 percent of people find homosexual relations “acceptable.”⁵¹ Digging deeper, the Gallup Poll reports that 38 percent of Americans find gay relations “morally wrong,” representing a

americans-face-widespread-discrimination.html. The Commission also described a public largely ignorant of the problems confronting Asian-American women. *See id.*

47. *Research Exposes Racial Discrimination Against Asian-American Men in Job Market*, PHYS.ORG (Dec. 7, 2010), <http://www.physorg.com/news/2010-12-exposes-racial-discrimination-asian-american-men.html>. Full results of the research appear in ChangHwan Kim & Arthur Sakamoto, *Have Asian American Men Achieved Labor Market Parity with White Men?*, 75 AM. SOC. REV. 934 (2010).

48. *See Combatting Discrimination Based on Sexual Orientation*, U.N. HUM. RTS., <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx>. (last visited Apr. 7, 2015). I use LGBT for the longer LGBTQIA. *See* Michael Schulman, *Generation LGBTQIA*, N.Y. TIMES, Jan. 9, 2013, at E1, available at <http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html>.

49. *Hate Crimes Accounting*, FBI (Dec. 10, 2012), <http://www.fbi.gov/news/stories/2012/december/annual-hate-crimes-report-released/annual-hate-crimes-report-released>.

50. FBI hate crime statistics from 2009 showed that 18.5 percent of single-bias incidents were linked to sexual-orientation bias. *Hate Crime Statistics, 2009: Incidents and Offenses*, FBI (Nov. 2010), <http://www2.fbi.gov/ucr/hc2009/incidents.html>.

51. *Gay and Lesbian Rights*, GALLUP, <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited June 3, 2013).

record low number for the question in the last decade.⁵² In another Gallup poll, the public was asked: “If your party nominated a generally well-qualified person for president who happened to be [homosexual], would you vote for that person?”⁵³ Thirty percent of respondents said they would not vote for that candidate based solely on the candidate’s sexual orientation.⁵⁴ Perceptions have changed dramatically since 2011, when Gallup began tracking public opinion on LGBT issues, and there is some cause to believe that attitudes can change for the better over time. However, these statistics still indicate that true equality remains elusive.

I could go on and on, but the basic truth is obvious. It is frighteningly easy to find present-day indicators of a lack of progress, and this lack of progress on some fronts is exacerbated by the complexity of diversity today.

B. Discrimination Has Many Moving Parts

My simple observation is that discrimination has many moving parts. Discrimination stems from attitudinal impediments to progress and persists due to deeply rooted systemic problems. The sum of these parts may very well be greater than their whole. They all build up to create an almost insurmountable system of discrimination that prevents rising above.

Latinos, African Americans, Asian Americans, and other people of color comprise an increasing proportion of this country’s population. The most recent census revealed that the United States is rapidly trending to a majority minority country.⁵⁵ Currently, 50.5 million Latinos live in the United States and make up approximately 16 percent of the population.⁵⁶ This number represents a population growth of 15.2 million since the last census, which accounts for more than half of the country’s population growth during the same period.⁵⁷ The trend also holds true for African Americans, whose numbers increased by 4.2 million since the last census, now accounting for 12.6 percent of the total United States population.⁵⁸ Asian Americans are

52. *Id.*

53. Jeffrey M. Jones, *Atheists, Muslims See Most Bias as Presidential Candidates*, GALLUP (June 21, 2012), <http://www.gallup.com/poll/155285/atheists-muslims-bias-presidential-candidate.s.aspx>.

54. *Id.*

55. See Sam Stein, *Hispanic Population, Rising Faster Than Anticipated, A ‘Huge Weapon’ For Obama*, HUFFINGTON POST (May 31, 2011), http://www.huffingtonpost.com/2011/05/31/hispanic-population-rising-faster-thananticipated_n_869209.html.

56. *Id.*

57. *Id.*

58. KAREN R. HUMES ET. AL., U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, U.S. CENSUS BUREAU 1, 4 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

unquestionably participants in this trend with one qualification: they, among the ethnic groups, are the most internally diverse with several distinct subpopulations.⁵⁹

Conditions are not improved, when considering certain realities like disparate incarceration rates and education levels. African Americans and Latinos are incarcerated at a higher rate than whites. African Americans, who comprise 12.6 percent of the population, represent 37 percent of the total prison population.⁶⁰ Statistics also show that African-American males are incarcerated at a rate six times higher than whites.⁶¹ Latinos fare just as poorly in this regard. While Latinos make up 16.3 percent of the population, they account for nearly 35 percent of prison inmates.⁶² It is worth repeating that it is very difficult for an underrepresented group to advance in light of these statistics, which color social views on these minority groups more generally.

African-Americans and Latinos also do not achieve the same education levels as whites. Nearly 15.2 percent of African-Americans do not have a high school diploma,⁶³ and in 2011, only 20.2 percent of African-Americans aged 25 years and older held a bachelor's degree.⁶⁴ Latinos are more likely than any other racial group to drop out of high school.⁶⁵ Of those Latinos aged 25 years and older, 35.7 percent do not possess a high school diploma, compared to only 7.6 percent of whites.⁶⁶ Only 14.1 percent of Latinos hold a bachelor's degree or higher, compared to 34 percent of whites.⁶⁷ Much remains to be done before we all stand on equal ground.

59. *Id.* at 3.

60. *Inmate Race*, FED. BUREAU OF PRISONS, http://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last updated Feb. 21, 2015). Interestingly enough, county and city jails have almost the same composition. See TODD D. MINTON, JAIL INMATES AT MIDYEAR 2012 – STATISTICAL TABLES, U.S. DEP'T OF JUSTICE 1, 1 (2013), <http://www.bjs.gov/content/pub/pdf/jim12st.pdf>. Required reading on African-American incarceration rates is Michelle Alexander's well-researched though sobering work *The New Jim Crow*. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010).

61. HEATHER C. WEST, PRISON INMATES AT MIDYEAR 2009 – STATISTICAL TABLES, U.S. DEP'T OF JUSTICE 1, 2 (2010), <http://bjs.gov/content/pub/pdf/pim09st.pdf>.

62. See HUMES, *supra* note 58. When broken down by citizenship, 18 percent of inmates are Mexican. *Id.*

63. INST. EDUC. SCIS., NAT'L CTR. FOR EDUC. STAT., DIGEST OF EDUCATION STATISTICS: 2011 Table 8 (May 2012), available at http://nces.ed.gov/programs/digest/d11/tables/dt11_008.asp.

64. *Id.*

65. See *Hispanics: A Statistical Portrait*, AM. RENAISSANCE (Sept. 2006), <http://www.amren.com/features/hispanics/index.html>.

66. NAT'L CTR. FOR EDUC. STAT., *supra* note 63; ANTONIA DARDER ET AL., LATINOS AND EDUCATION: A CRITICAL READER 53 (Routeledge 1997); Barbara J. Robles, *Advancing Research on Minority Entrepreneurship; Tax Refunds and Microbusinesses: Expanding Family and Community Wealth Building in the Borderlands*, 613 ANNALS AM. ACAD. POL. & SOC. SCI. 178, 178 (2007) (describing low educational attainment by Latinos).

67. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 63.

Surely, this educational disparity results in far-reaching ramifications. In the business world, while 38.7 percent of whites pursue a career in management or professional occupations, only 29.5 percent of African-Americans and 20.6 percent of Latinos pursue such careers.⁶⁸ One is left to wonder whether this “ambition gap” is the result of a lack of educational attainment or, worse yet, the result of a certain hopelessness about one’s prospects.⁶⁹

Yet, there is some progress. Non-profit agencies and religious institutions alike have responded to this educational disparity. College Track, a bay area non-profit, provides comprehensive college preparatory support to low-income students.⁷⁰ College Track’s programming begins before high school and helps students develop strong academic and social skills, apply to and finance college, and thrive throughout the student’s college career.⁷¹ College Track actively serves over 2000 students in the San Francisco Bay Area; New Orleans; East Los Angeles; Aurora, Colorado; and Sacramento with 92% of program participants attending college.⁷²

In Los Angeles, Verbum Dei High School, a Jesuit college preparatory high school, exclusively serves young men from low-income families from Watts and surrounding areas. Verbum Dei’s student population is nearly entirely comprised of African-American and Latino young men.⁷³ Verbum Dei provides extensive support to its students in preparing, applying to, and financing college. The high school also partners with corporations operating in Los Angeles to provide internship opportunities to each of its students.⁷⁴ The corporations include Sony, Nike, Wells Fargo Bank, Sidley Austin LLP, and Aon Risk Solutions among others.⁷⁵ Each student is required to work one day a week in lieu of class and gains valuable work experience and

68. BUREAU LAB. STAT., CURRENT POPULATION SURVEY, EMPLOYED PERSONS BY OCCUPATION, RACE, HISPANIC OR LATINO ETHNICITY, AND SEX (Feb. 5, 2013), <http://www.bls.gov/cps/cpsaat10.htm>.

69. Guy Garcia, *The Hispanic Gender Gap: Can Latinas Save the American Family?*, HUFFINGTON POST (Aug. 11, 2011), http://www.huffingtonpost.com/guy-garcia/the-hispanic-gender-gap-c_b_924932.html.

70. WHO WE ARE, C. TRACK, <http://collegetrack.org/who-we-are/> (last visited Aug. 20, 2014).

71. *Id.*

72. WHY IT MATTERS, C. TRACK, <http://collegetrack.org/why-it-matters/> (last visited Aug. 20, 2014).

73. FACT SHEET (CONTINUES), VERBUM DEI HIGH SCH., <http://www.verbumdei.us/about/facts2.html> (last visited Aug. 20, 2014).

74. WORK STUDY: HOW IT WORKS, VERBUM DEI HIGH SCH., <http://www.verbumdei.us/workstudy/howitworks.html> (last visited Aug. 20, 2014).

75. WORK STUDY: PARTNERS, VERBUM DEI HIGH SCH., <http://www.verbumdei.us/workstudy/partners.html> (last visited Aug. 20, 2014).

meaningful connections.⁷⁶ At Verbum Dei, 100% of graduating seniors are accepted to college.⁷⁷

Further, in 2012 in Marin County, north of San Francisco, Mark Talamantes was the first Latino Superior Court judge appointed to this bench in California's history.⁷⁸ In 2011 the U.S. Senate confirmed The Hon. Ed Davila to the Court for the Northern District of California, the only Latino judge in the district.⁷⁹ Despite this progress, white men continue to hold a disproportionate share of judicial seats.⁸⁰ For example, white males are represented on state appellate benches by a margin of nearly two-to-one.⁸¹

Against this backdrop is a new phenomenon: a correlation between income and higher education. For all the ways that top colleges have become diverse, their student bodies are shockingly affluent. Seventy percent of students at the most selective schools in the country come from the wealthiest quarter of American families.⁸² Further, only 14 percent of students at these institutions come from the poorest half.⁸³ One commentator explained that elite colleges consistently do a poor job recruiting intelligent, low-income high school students because it is expensive.⁸⁴ Additionally, low-income

76. See HOW IT WORKS, *supra* note 74.

77. See FACT SHEET, *supra* note 73.

78. Richard Halstead, *Governor Appoints First Latino to Marin Judgeship*, MARIN INDEP. J. (Dec. 27, 2012), http://www.marinij.com/sausalito/ci_22270689/governor-appoints-first-latino-marin-judgeship.

79. *Hispanic National Bar Association Commends the Confirmation of the Honorable Edward Davila*, HNBA (Feb. 16, 2011), <http://www.hnba.com/hnba-commends-the-confirmation-of-the-honorable-edward-davila/>. The last Latino judge to serve on this court was Robert Aguilar, who resigned in 1996. *President Nominates Edward Davila as U.S. District Judge*, KTVU (May 20, 2010), <http://www.ktvu.com/news/news/president-nominates-edward-davila-as-us-district-j/nKRPw/>.

80. CIARA TORRES-SPPELLISCY, MONIQUE CHASE, & EMMA GREENMAN, *IMPROVING JUDICIAL DIVERSITY 1* (Brennan Center for Justice, 2d ed. 2010), available at http://www.brennancenter.org/sites/default/files/legacy/Improving_Judicial_Diversity_2010.pdf.

81. *Id.* at 8.

82. Jordan Weissmann, *America's Top Colleges Have a Rich-Kid Problem*, ATLANTIC (May 24, 2013), <http://www.theatlantic.com/business/archive/2013/05/americas-top-colleges-have-a-rich-kid-problem/276195/>, (citing THE CENTURY FOUND., *BRIDGING THE HIGHER EDUCATION DIVIDE* (2013), available at http://tcf.org/assets/downloads/20130523-Bridging_the_Higher_Education_Divide-REPORT-ONLY.pdf (using statistics from 2006)).

83. *Id.*

84. Josh Freedman, *Why American Colleges are Becoming a Force for Inequality*, ATLANTIC (May 16, 2013), <http://www.theatlantic.com/business/archive/2013/05/why-american-colleges-are-becoming-a-force-for-inequality/275923/>. See generally Caroline M. Hoxby & Christopher Avery, *The Missing "One-Off's": The Hidden Supply of High-Achieving, Low Income Students*, BROOKINGS INST. (March 2013), http://www.brookings.edu/~media/projects/bpea/spring%202013/2013a_hoxby.pdf.

students often do not apply to the top-tier colleges, even if they are qualified.⁸⁵

If a high-income level is a prerequisite to admission at an elite school, access to higher education is unquestionably headed in the wrong direction. African Americans suffer from a 25.8 percent poverty rate.⁸⁶ Latinos are more likely to live in poverty than non-Latinos.⁸⁷ They are also more likely to be employed in low-wage jobs.⁸⁸ Access to elite schools becomes impossible and access to any school becomes more difficult, creating a self-perpetuating downward spiral for communities of color.

All of this combines to make a perfect storm. If a minority family faces discrimination in the work place, they end up earning less money. Less money means their children won't go to elite schools. Failure to attend elite schools creates obstacles to reaching positions of power. Even those who are able to attend elite schools face implicit discrimination in the workplace, either through failure to get promoted, or by earning a lower salary. Either way, this continually perpetuates the cycle. We are trending toward increasing minority populations and a diminishing access to higher education. If an education is a key to advancement within our society, equality and the perfect union may be little more than a quaint idea if this trend continues.⁸⁹

II. TRUE IMPROVEMENT

In suggesting how we can improve conditions, let me dispose of two aspects of a solution on which I will spend little time. First, encouraging diversity is a step in the right direction. It is also the right thing to do – at a minimum, employers have legal obligations under a wide variety of state and federal civil rights laws to use employment practices that have the effect of increasing diversity by prohibiting certain kinds of discrimination.⁹⁰

85. See Hoxby & Avery, *supra* note 84, at 46.

86. U.S. CENSUS BUREAU, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2009 (Sept. 16, 2010), http://www.census.gov/newsroom/releases/archives/income_wealth/cb10-144.html.

87. Ana M. Martinez-Aleman, *Latino Demographics, Democratic Individuality, and Educational Accountability: A Pragmatist's View*, 35 EDUC. RESEARCHER 25, 26 (2006).

88. *Id.*

89. Amherst College is one of the few institutions to counter this trend. Tamar Lewin, *Chancellor Leaving Troubled Wisconsin for the Presidency of Amherst College*, N.Y. TIMES, June 15, 2011, at A19.

90. See, e.g., 42 U.S.C. § 2000(e) (2012) (Title VII, the federal anti-discrimination statute); 29 U.S.C. § 206(d) (2012) (The Equal Pay Act); 29 U.S.C. §§ 621-634 (2006) (Age Discrimination in Employment Act). Many states have similar equivalent statutes. See generally, e.g., CAL. GOV'T CODE §§ 12900-12996 (West 2012) (The California Fair Employment and Housing Act). The

Second, and I take pains to emphasize that I am not a human resources expert, there are a variety of general human resource principles that aim to encourage and promote diversity. These include: recognizing that diversity is not a one-time issue but a continuing obligation, awareness and appreciation of differences, and an organization-wide commitment to diversity from the top down.⁹¹ In all respects, leadership matters.

My aim is not to trivialize these principles dealing with diversity. Rather, I recognize that these well-known principles are publicized as human resource lore. This allows me room to discuss principles of dealing with discrimination that deserve more emphasis. These are the concepts of critical mass and education.

A. *Critical Mass Matters*

The term critical mass, borrowed from the physics concept of the minimum amount of fissionable uranium needed to achieve a nuclear fission reaction, is the term used by the University of Texas as its goal to “increas[e] minority student enrollment on campus.”⁹²

Critical mass increases the likelihood that a certain underrepresented group’s voice will be heard.⁹³ For example, Corporate Board Member magazine has noted that “magic” seems to happen when three or more women serve on a board together.⁹⁴ The Advocate, a State Bar of Texas publication, made a similar observation:

Once a critical mass of women joins a group, their identities as women become less salient and they are seen more for their individual competencies. By contrast, a sole female member of a team may be overlooked, just as a sole female member of an organization’s executive levels may face the problems associated with tokenism. The best way to ensure that women are treated and appreciated as individuals is to strive for representative numbers of women at every level of [the legal] profession.⁹⁵

California statute protects a broader range of categories that the federal statute does not, e.g., sexual orientation. *Id.*

91. See Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 5-7 (2005).

92. Fisher v. Univ. of Tex., 133 S.Ct. 2411, 2415 (2013).

93. See Crowe, *supra* note 37; Deirdre Brown, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1199 (2010); Gregory M. Walton, *Empirically Validated Strategies to Reduce Stereotype Threat*, at 1 (2012), available at http://www.stanford.edu/~gwalton/home/Welcoming_files/StrategiesToReduceStereotypeThreat.pdf (referring to numerous studies supporting the critical mass concept).

94. Crowe, *supra* note 37, at 2.

95. Justice Ruby Kless Sondock & Connie Pfeiffer, *Four Suggestions for the Future*, 49 ADVOCATE 8, 10 (2009).

Such critical mass increases the likelihood that female voices will be heard.⁹⁶ The silver lining, at least with respect to women, is that Americans are willing to bring women into positions of power. The White House Project found that almost 90% of the public is comfortable and accepting of women assuming leadership positions.⁹⁷ The problem, however, is the misperception that women are already on equal ground with their male peers. As made plain above, this is simply not true. There remains a significant gap between men and women. It is time to mobilize and propel diverse women into leading roles in order to build a stronger, better, and more diverse work place.

The notion of critical mass can also be applied to other groups in different situations. Critical mass of minority racial groups can indeed be a vital factor in student success. For example, findings show that Latinos are more likely to excel in community colleges that have a larger proportion of both Latino students and faculty.⁹⁸

Still, the numbers of minorities in positions of influence is low. In law, the numbers are abysmal.⁹⁹ When law schools lack a critical mass of African-Americans and Latinos, we all lose. We lose the opportunities to learn from one another, to foster a diverse society, and to move forward. As my friend, Michael Olivas, an education expert at the University of Houston, has said, “[f]or the vast majority of law schools, the most effective way to achieve diversity is to take into account the diversity that applicants from racial and ethnic minority groups bring with them.”¹⁰⁰ *Scheutte* stands directly opposed to this necessity.¹⁰¹ We need to progress to a point where enough minorities are present in a classroom setting so that participating in class discussion does not feel like they are spokesmen for their respective races, but rather

96. See Crowe, *supra* note 37.

97. WHITE HOUSE PROJECT REP., BENCHMARKING WOMEN’S LEADERSHIP 3 (2009), available at http://www.in.gov/icw/files/benchmark_wom_leadership.pdf. The White House Project was a group founded to promote women in politics and help one win the presidency, until its closing in 2013; Garance Franke-Ruta, *The White House Project Shuttters Its Doors*, ATLANTIC 1 (Jan. 28, 2013), <http://www.theatlantic.com/politics/archive/2013/01/the-white-house-project-shuttters-its-doors/272576/>.

98. Linda Serra Hagedorn, *An Investigation of Critical Mass: The Role of Latino Representation in the Success of Urban Community College Students*, 48 RES. HIGHER EDUC. 73, 88-89 (2007).

99. NALP BULL., *supra* note 41, at 1-2.

100. Michael Olivas, *Higher Education Admissions and the Search for One Important Thing*, 21 U. ARK. LITTLE ROCK L. REV. 993, 1010 (1999).

101. 134 S. Ct. 1623, 1678 (2014). (Sotomayor, J., dissenting) (“[T]he [University of Michigan] Law School’s Dean of Admissions testified that she expected a decline in minority admissions because, in her view, it is impossible to get a critical mass of underrepresented minorities . . . without considering race.”) (internal quotation marks omitted).

individuals expressing their opinions.¹⁰² The same holds true in the workplace.

There are too many people from underrepresented groups who experience being the sole Latino, the sole African-American, the sole Asian-American, or the sole openly gay person in their workplace, their school, or in their activities outside of work. They know first-hand the relative conspicuousness that they face and the painful awareness in being just one. It doesn't take imagination to know that voices become louder if there are more of them – critical mass matters.

Although *Grutter v. Bollinger* relied on a University's judgment that educational benefits result from a diverse student body¹⁰³, the idea that societal benefits result from diverse workplaces, universities, boardrooms or most other venues should not be a difficult concept to embrace.

B. Education Matters

In this context, there are two distinct ways we can look at the role education plays in achieving a perfect union. First, there is the woeful lack of basic knowledge as to the plight of minorities and women today. Even if there was more awareness, there is also a woeful lack of knowledge as to how things work and where the levers of power are located – if you don't know how something works, you can't fix it. The May 2011 issue of the ABA Journal contained a provocative article titled, *Flunking Civics: Why America's Kids Know So Little*.¹⁰⁴ The article is not as narrow as the title suggests. Rather, it describes how nearly half of all Americans cannot correctly identify the three branches of government and it further details how a surprising number of public figures know little about American history.¹⁰⁵ The article could have been more aptly and more accurately titled "Flunking Civics: Why America's Kids *and their Parents* Know So Little."¹⁰⁶

102. Peter Kirsanow, *Still Unconstitutional*, NAT'L REV. 3 (Sept. 30, 2003), available at <http://www.nationalreview.com/articles/208134/still-unconstitutional/peter-kirsanow>.

103. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003), cited in *Fisher v. Univ. of Tex.*, 570 U.S. 1, 9 (2013) (superseded by constitutional amendment as stated in *Schuette v. BAMN*, 134 S.Ct. 1623 (2014)).

104. Mark Hansen, *Flunking Civics: Why America's Kids Know So Little*, A.B.A. J., May 2011, at 32. The New York Times has also chronicled the same phenomenon. Sam Dillon, *U.S. History Is Still Troublesome for U.S. Students, Nationwide Tests Show*, N.Y. TIMES, June 15, 2011, at A19.

105. Hansen, *supra* note 104, at 34.

106. This is serious stuff. The article goes on to describe former Supreme Court Justice Sandra Day O'Connor's efforts, along with current Supreme Court Justice Stephen Breyer, to convene a conference to address the role of public education in the preservation of judicial independence. *Id.* at 37.

Second, education is a basic component of improving lives and breaking the cycle of poverty – especially by those from underrepresented groups. As observed in one article:

[t]he United States no longer leads the world in educational attainment, partly because so few low-income students — and surprisingly few middle-income students — graduate from four-year colleges. Getting more of these students into the best colleges would make a difference. Many higher-income students would still graduate from college, even if they went to a less elite one. A more educated population, in turn, would probably lift economic growth.¹⁰⁷

As Benjamin Franklin wisely said, “an investment in knowledge always pays the best interest.”¹⁰⁸ In terms of benefits for the individual, higher education has been shown to equate with lower unemployment levels, more job satisfaction, and higher earning power.¹⁰⁹ Findings further show that higher education levels correlate with healthier lifestyles across all racial groups such as lower smoking rates, lower obesity rates, and higher exercise rates.¹¹⁰ In terms of overall societal benefits, adults with higher level of education are more likely to volunteer and more likely to engage civically by voting.¹¹¹ Higher education for underrepresented groups will help better integrate them into society and will break down the discriminatory barriers now in place – both necessary to improve sex and racial diversity.

Here the prospects are bleak. Many states, including California, have slashed public spending for education. A decrease in state funding for K-12 education has led to a decrease in the number of students directly attending college upon high school graduation.¹¹² Moreover, those students who are able to attend the University of California (UC) are, for the first time, contributing more to the UC’s core operating budget than the state.¹¹³

107. David Leonhardt, *Top Colleges, Largely for the Elite*, N.Y. TIMES, May 25, 2011, at B1.

108. Mark A. Nordenberg, *An Investment in Knowledge Always Pays the Best Interest*, PITTCRONICLE 5 (Mar. 16, 2009), available at <http://www.chronicle.pitt.edu/story/”-investment-knowledge-always-pays-best-interest”-winter-2009-report-trustees>.

109. SANDY BAUM ET AL., COLL. BD. ADVOCACY & POLICY CTR., EDUCATION PAYS 2010: THE BENEFITS OF HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY 19-20 (2010), available at <https://trends.collegeboard.org/sites/default/files/education-pays-2010-full-report.pdf>.

110. *Id.* at 29.

111. *Id.* at 32-33.

112. Fermin Leal, *Report: State’s Higher Education System Declining*, OC REGISTER 1 (July 21, 2011), available at http://articles.oregister.com/2011-07-21/news/29804874_1_california-higher-education-cal-state-sacramento-s-institute-college-degrees.

113. University of California, *2011-12 Budget Update*, at i (2012), available at http://www.universityofcalifornia.edu/news/documents/UCDay2011/UCDay_budget_update0211_FINAL.pdf (last accessed Aug. 14, 2011).

California's five public law schools, for example, now charge private school rates.¹¹⁴

State funding for education at all levels is the key to success measured by a productive citizenry, a healthy economy, and a harmonious society. Benjamin Franklin was right; investment in education – measured by dollars, time, and our sweat equity – will pay interest.¹¹⁵ Our recent past, however, suggests that we have not taken Franklin's lesson to heart. Any solution must begin with a recognition that education matters including emphasis on prioritizing public education in budget reorganizations and sending better qualified teachers to schools in dire straits.

III. CONCLUSION

I do not intend to be pessimistic. Rather, my intent is to open some eyes with respect to what we face for “[w]e should not turn a blind eye to something we cannot help but see.”¹¹⁶ The worst scenario is that we fall into a complacency that assumes all is all right – that allows the misperceived dramatic improvement of conditions to take out of the mix some solutions that have worked. From my perspective, those in positions of influence must assure critical mass and seek to educate. This approach is exemplified by Justice Ginsburg's dissent in *Shelby County v. Holder* in which she states that eviscerating the Voting Rights Act is akin to “throwing away your umbrella in a rainstorm because you are not getting wet;”¹¹⁷ it is like Justice Sotomayor's dissent in *Schuetz* in which she implores the court to remember that the judiciary, “ought not sit back and wish away . . . racial inequality, [rather, i]t is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race *does* matter;”¹¹⁸ it is like Nicholas Kristof's five-part series examining pervasive racial inequality between whites and African Americans, in which he avers that “[t]he gaps demand a wrenching, soul-searching excavation of our

114. Karen Sloan, *At Public Law Schools, Tuition Jumps Sharply*, NAT'L L.J. 1 (Aug. 3, 2009), available <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202432679213&slreturn=1&hbxlogin=1> at

115. See Nordenberg, *supra* note 108.

116. *Schuetz v. BAMN*, 134 S.Ct. 1623, 1683 (2014) (Sotomayor, J., dissenting).

117. 133 S.Ct. at 2650 (Ginsburg, J., dissenting).

118. *Schuetz*, 134 S.Ct. at 1676 (Sotomayor, J., dissenting). Justice Sotomayor goes on to say “[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.” *Id.*

national soul;”¹¹⁹ and it is like Michael Lewis’ essay in the *New Republic* in which he decries income inequality and lack of empathy.¹²⁰ We must do what we can to see to the health of public education at all levels in order to avoid choosing, in Professor Scott E. Sundby’s words, “illusion over reality.”¹²¹ It is only in these ways can we even hope to achieve the perfect union promised in our constitution.

119. Nicholas Kristof, *When Whites Just Don’t Get It*, N.Y. TIMES, at 3 (Aug. 30, 2014), available at <http://www.nytimes.com/2014/08/31/opinion/sunday/nicholas-kristof-after-ferguson-race-deserves-more-attention-not-less.html>.

120. Michael Lewis, *Extreme Wealth Is Bad for Everyone—Especially the Wealthy*, NEW REPUBLIC (Nov. 12, 2014), available at <http://www.newrepublic.com/article/120092/billionaires-book-review-money-cant-buy-happiness>.

121. Sundby, *supra* note 16, at 35.

