DIFFUSION OF KNOWLEDGE: THE IGNORED GOAL OF PUBLIC EDUCATION

JAMES E. COLEMAN, JR†

> Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislators and magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools, and grammar schools in the towns. . . .
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> Massachusetts Constitution of 1780[1]

> A free government can only exist in an equal diffusion of literature. Without learning, men become savages or barbarians, and where learning is confined to *a few* people, we always find monarchy, aristocracy, and slavery.
>
> Benjamin Rush[2]

I. INTRODUCTION

For the last two decades, the University of Texas at Austin (the "University") has struggled to increase its enrollment of racial minorities. In 1996, the United States Court of Appeals for the Fifth Circuit held that the University's program of explicitly considering an applicant's race was unconstitutional.[3] In response, the University adopted a race-blind admissions program. To increase minority enrollment by taking advantage of the racial segregation of Texas' secondary schools, the Texas State Legislature adopted the Top Ten Percent Law.[4] Under that legislation, all Texas students in the top 10% of their high school graduating class were automatically admitted to any state public college, including the University. In the last year of this race-blind

† James E. Coleman, Jr is the John S. Bradway Professor of the Practice of Law, Director of the Center for Criminal Justice and Professional Responsibility, and Co-Director of the Wrongful Convictions Clinic at Duke Law School. He is a graduate of Columbia University (J.D. 1974) and Harvard University (A.B. 1970).

1. MASS. CONST. Ch. 5, § 2.

2. BENJAMIN RUSH, A PLAN FOR THE ESTABLISHMENT OF PUBLIC SCHOOLS AND THE DIFFUSION OF KNOWLEDGE IN PENNSYLVANIA; TO WHICH ARE ADDED, THOUGHTS UPON THE MODE OF EDUCATION PROPER IN A REPUBLIC. ADDRESSED TO THE LEGISLATURE AND CITIZENS OF THE STATE, at 3–4 (1786) (emphasis in original).

3. Hopwood v. Texas, 78 F. 3d 932, 955 (5th Cir. 2006).

4. TEX. EDUC. CODE ANN. §51.803. (West 1997).

admissions approach, the University's entering class was 16.9% Hispanic and 4.5% African American.[5]

In 2003, the United States Supreme Court decided *Gratz v. Bollinger*[6] and *Grutter v. Bollinger*,[7] upholding "the use of race as one of many 'plus factors' in a race-blind admissions program that considered the overall individual contribution of each candidate."[8] Thereafter, the University tweaked its admissions program to increase minority enrollment further, with the goal of achieving a "critical mass" of minority students.[9] Under this new program, in addition to students admitted automatically pursuant to the Top Ten Percent Plan, the University conducted a holistic review of each applicant's file to fill the remaining seats in the entering class that had been set aside for Texas applicants; that review explicitly took race into consideration, among many other factors.[10]

Abigail Noel Fisher, a white woman, challenged this holistic review program, arguing that, in light of minority admissions under the race-blind Top Ten Percent plan, the holistic review's consideration of race was unconstitutional.[11] Fisher applied for admission to the University in the fall of 2008. She did not qualify for admission under the Top Ten Percent Plan, under which 81% of the entering class was admitted. As a result, her application was considered under the holistic review program; she was one of 17,131 applicants considered for 1,216 seats set aside for Texas residents in that program. Although

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5. As the Court of Appeals noted in Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 650–51 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888, (2015) "[t]he sad truth is that the Top Ten Percent Plan gains diversity from a fundamental weakness in the Texas secondary education system. The de facto segregation of schools in Texas enables the Top Ten Percent Plan to increase minorities in the mix, while ignoring contributions to diversity beyond race." Ironically, as the Supreme Court pointed out in Grutter, "even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessment necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." Grutter v. Bollinger, 539 U.S. 306, 340 (2003).

6. 539 U.S. 244 (2003).

7. 539 U.S. 306 (2003).

8. Fisher v. Univ. of Tex. at Austin (*Fisher I*), 133 S. Ct. 2411, 2416 (2013)

9. The concept of "critical mass" for minority enrollment in institutions of higher education is discussed in *Grutter* and *Gratz*. *Grutter* recognized that the University of Michigan Law School had a legitimate interest in admitting a "critical mass" of minority students for several reasons, including to avoid racial or ethnic isolation; the Court also noted that a "critical mass" of minority students "diminish[es] the force of . . . stereotypes." Grutter, 539 U.S. at 333.

10. Fisher v. Univ. of Tex. at Austin, 758 F.3d at 637, n.4. The Court of Appeals noted that, "following the *Hopwood v. Texas* decision, UT Austin faced a nearly intractable problem: achieving diversity – including racial diversity – essential to its educational mission, while not facially considering race even as one of many components of diversity." *Id. at* 645 (footnote 65 omitted). Thus, "[f]oreshadowing *Grutter*, admission supplementing the Top Ten Percent Plan included factors such as socioeconomic diversity and family educational achievements but, controlled by Hopwood, it did not include race. In short, a holistic process *sans* race controlled the gate for the large percent of applicants not entering through the Ten Percent Plan." *Id.*

11. Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587, 589 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013), and *aff'd*, 758 F.3d 633 (5th Cir. 2014). The facts relating to Fisher's challenge are taken from the decision of the United States Court of Appeals for the Fifth Circuit, affirming summary judgment for the University of Texas at Austin. Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 637–639 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888, (2015).

race was considered in the holistic review, it was not given a numerical value; "because race is a factor considered in the unique context of each applicant's entire experience, it may be a beneficial factor for a minority or a non-minority student."[12]

The holistic review challenged by Fisher did not "function as an open gate to boost minority headcount for a racial quota. Far from it."[13] Instead, because of the intense competition for a dwindling number of non-Top Ten Percent Plan seats for Texas applicants in each entering class, minority students were "*under-represented* – and white students . . . over-represented – in holistic review admissions relative to the program's impact on each incoming class."[14]

The record in *Fisher* showed that she would not have been admitted to the University in the fall of 2008 under the holistic program, even if race had not been considered as a factor.[15] Thus, the only avenue Fisher had for admission to the entering class was a special summer program under which white and minority applicants were offered provisional admission, "subject to completing certain academic requirements over the summer."[16] Through that program, four Hispanic applicants and one African-American applicant with holistic reader scores lower than Fisher's score were provisionally admitted.[17] In addition, however, 168 minority applicants with the same or higher reader scores than Fisher were denied admission and 42 white applicants with identical or lower scores than her were admitted, some of whose race may have been taken into consideration.[18] Fisher's challenge, however, was directed only at the five minority applicants who were admitted with lower scores.

Considering how little Fisher personally has at stake in her litigation,[19] it appeared the Supreme Court may have decided to review her case primarily to hold that *any* consideration of race in public higher education admissions was unconstitutional, overturning *Grutter*[20] and *Reagents of Univ. of Cal. v. Bakke*.[21]

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12. *Id.* at 638 (footnote 13 omitted).

13. *Id.* at 646.

14. *Id.* (emphasis in original).

15. Fisher v. Univ. of Tex. at Austin, 758 F. 3d at 639 ("[E]ven if she had received a perfect [score on her file], she could not have received an offer of admission to the Fall 2008 class. If she had been a minority, the result would have been the same.") (footnote omitted).

16. These facts were set out in the University's Supreme Court brief in 2012. Brief for Respondents at 15, Fisher v. Univ. of Tex. at Austin (*Fisher I*), 133 S.Ct. 2411 (2013) (No. 11-345).

17. *Id*. at 15–16.

18. *Id*.

19. In the *Fisher* litigation on remand from the Supreme Court, the University has argued strenuously that Fisher lacked standing to maintain her challenge. Brief for Respondents at 17–24, Fisher v. Univ. of Tex. at Austin (*Fisher II*), No. 14-981 (argued Dec. 9, 2015). The Fifth Circuit said the University's "standing arguments carry force, but in our view the actions of the Supreme Court do not allow our reconsideration." Fisher, 758 F. 3d at 640 (footnote omitted). She turned down an offer for admission under a program that would have allowed her to transfer from another school in the UT System in her sophomore year, if she met certain requirements. Brief for Respondents, Fisher v. Univ. of Tex. at Austin, No. 14-981, at 17. Instead, Fisher enrolled at Louisiana State University, from which she graduated in 2012. *Id*. Fisher claims her actual damages consist of the $100.00 non-refundable application fee she paid with her application in 2008. *Id.* at 18.

20. 539 U.S. 306 (2003).

Such a result would sanction elite public universities with virtually no black or Hispanic students, even against the wishes of the universities. As Justice Antonin Scalia commented during oral argument in *Fisher*, "I don't think it stands to reason that it's a good thing for the University of Texas to admit as many blacks as possible."[22] But, would such a result be consistent with the democratic purpose of public education? More specifically, in a state such as Texas, for example, where 50.7% of its population in 2014 was estimated to be Hispanic or black, would such a result be consistent with the original intent of public education?

II. DIFFUSION OF KNOWLEDGE: THE ORIGINAL INTENT

Every American state has a system of public education.[23] Many of them explicitly state in their constitutions or enabling statutes that the purpose of the system is the "diffusion of knowledge." Article 7 of the Texas Constitution, for example, provides for the support and maintenance of a system of public education. Section 1 of that Article declares that, "[a] general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."[24] Neither Texas nor any other state defines "diffusion of knowledge." At first blush, the term may appear to be nothing more than the quaint language of a bygone era, with no contemporary significance. While one might make such an argument, the original intent of the term is neither a relic nor currently insignificant.

"Diffusion of knowledge" identifies both the primary purpose of public education and, as the Texas Constitution suggests, a fundamental function of democratic government. At a time of racial, ethnic, and religious strife, of historic levels of income and wealth inequality, we should consider the original meaning of "diffusion of knowledge" before the Supreme Court sets in stone a constitutional principle of colorblindness for higher education admissions that is fundamentally at odds with the original intent of public education.[25]

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21. 438 U.S. 265 (1978).

22. Transcript of Oral Argument at 68, Fisher v. Univ. of Tex. at Austin, No. 14-981 (argued Dec. 9, 2015) (Scalia, J.).

23. All of the state systems of education include institutions of higher education. Twenty-three states established such institutions in their constitutions. The remaining twenty-seven states and the District of Columbia established state universities by statute.

24. TEX. CONST. art. VII, § 1.

25. The Supreme Court heard argument in Fisher v. Univ. of Tex. at Austin (*Fisher II*), on December 9, 2015. *See* Fisher v. Univ. of Tex. at Austin, No. 14-981 (argued Dec. 9, 2015). The issue in *Fisher* case is whether the use of racial preferences in undergraduate admissions decisions can be sustained under the Fourteenth Amendment to the Constitution of the United States. Fisher does not claim that she was denied admission to the University of Texas because of her race, but that five black and Latino students who allegedly were less qualified than her were admitted under a program that set aside 841 spots in the class for Texas students not in the top 10% of their high school graduating class. Nor does Fisher claim that she necessarily would have been admitted to the University, but for the admissions of these five students; indeed, there were 42 white students who were equally or less qualified than her who were admitted, as well as many white students more qualified than her who

The link between public education and American democracy was forged at the birth of this nation; however, the leaders of the American Revolution were not the first to recognize a link between education and government, or even between education and citizenship. "For democratic theorists, education has defined not merely citizenship, but democracy itself."[26] Among the founders, Thomas Jefferson was one of the foremost proponents of this view; Dumas Malone called him "the chief prophet of public education in the first half-century of the Union."[27]

Jefferson believed that education was the "sine qua non of a truly viable democracy, as the inescapable prerequisite to any intellectual rule."[28] In a letter to George Washington, Jefferson wrote that it was "an axiom in my mind that our liberty can never be safe but in the hands of the people themselves, and that too of the people with a certain degree of instruction. That is the business of the state to effect, and on a general plan."[29]

Jefferson's well-known distrust of government was rooted in his belief that all governments are susceptible to corruption. History has shown, he argued, that the best protection a democracy has against such degeneracy is "to illuminate, as far as practicable, the minds of the people at large, and more especially to give them knowledge . . . that they may be enabled to know ambition under all its shapes, and prompt to exert their natural powers to defeat its purposes. . . ." [30] Jefferson put his ultimate faith in public education for "enlightenment of the people as a whole, or of individuals gathered into a people."[31] This is the "diffusion of knowledge" that animates public education and sustains democratic government; moreover, as its expression in the constitutions of so many states attest, it "is the business of the state to effect, and on a general plan."[32]

As envisioned by Jefferson and others in the eighteenth and nineteenth centuries, the goal of public education was inclusion, not exclusivity or concentration: "where learning is confined to a *few* people, we always find monarchy, aristocracy, and slavery." [33] To achieve the purpose of public

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also were not admitted. *See supra* note 16 at 15–16. Thus, Fisher's claim allows for the diffusion of knowledge among white students less qualified than her, but not among minority students equally or less qualified.

26. BENJAMIN R. BARBER, A PASSION FOR DEMOCRACY 162 (Princeton Univ. Press 1998).

27. DUMAS MALONE, JEFFERSON THE VIRGINIAN 280 (1948).

28. GORDON C. LEE, CRUSADE AGAINST IGNORANCE: THOMAS JEFFERSON ON EDUCATION 2 (1961).

29. Letter from Thomas Jefferson to George Washington (Jan. 4, 1786) (Boyd, vol. IX, p. 150). Jefferson's plan for the diffusion of knowledge in Virginia was similar to the Ten Percent Plan adopted by Texas in response to the *Hopwood* decision. *See* Bill 79 of 1779, Plan for the "More General Diffusion of knowledge." Jefferson called his plan, "by far the most important bill in our whole code . . . . No other sure foundation can be devised for the preservation of freedom and happiness." Letter from Thomas Jefferson to George Wythe (Aug. 13, 1786).

30. Bill 79 of 1779, *supra* note 29, § 1.

31. LORRAINE SMITH PANGLE AND THOMAS L. PANGLE, THE LEARNING OF LIBERTY: THE EDUCATIONAL IDEAS OF THE AMERICAN FOUNDERS 108 (1993).

32. *Supra* note 29, Letter from Thomas Jefferson to George Washington (Jan. 4, 1786).

33. *Supra* note 2 at 3–4 (emphasis in original).

education in a democratic society, a primary function of the "general plan" of government must be to remove obstacles to the broad diffusion of knowledge. In his time, for example, Jefferson believed that poverty was the principal such obstacle in the racially homogenous country. Consistent with that, he proposed a public education system for Virginia that had as its primary goal education of the poor. Because of its paramount importance, Jefferson assumed that the wealthy would pay for the education of their own children; as a result, by his plan knowledge would be diffused among the people as a whole.

Jefferson argued that, by eliminating poverty as an obstacle to the diffusion of knowledge, Virginia could claim for its people "those talents which nature has sown as liberally among the poor as the rich, but which perish without use, if not sought for and cultivated."[34] In 1813, Jefferson summed up his view of the importance of public education in a letter to John Adams in which he expressed his hope that the public education system someday would be the "keystone of the arch of our government."[35]

The broad diffusion of knowledge also serves to assimilate diverse groups of people into a functioning democracy. The diffusion of knowledge seeks to overcome those indelible differences among citizens, such as religion, poverty, and nationality, that inherently threaten democratic self-government.[36] In discussing his proposal for a national university to bring together students from different backgrounds, regions, and national origins, for example, George Washington said, "the more homogenous our citizens can be made in these particulars, the greater will be our prospect of permanent Union." Benjamin Rush made a similar point when he argued that a system of public education was important in Pennsylvania, "while our citizens are composed of the natives of so many different kingdoms in Europe. Our schools of learning, by producing one general and uniform system of education, will render the mass of the people more homogenous and thereby fit them more easily for uniform and peaceable government."[37]

We now take for granted that education is an important responsibility of government, "rank[ing] at the very apex of the function of a state,"[38] but we have lost sight of diffusion of knowledge as the explicit goal.[39] Divorced from that purpose, however, public education ceases to perform the democratic function expected of it. That fact has nowhere been more apparent than in the country's

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34. Thomas Jefferson, *Notes on the State of Virginia*, Queries 14 and 19, 146–49, 164–65 (1784).

35. Letter from Thomas Jefferson to John Adams (Oct. 28, 1813).

36. Although it was not relevant at the time the founders were writing, race also is such a difference; indeed, today, it is one of the principal differences that divides Americans and threatens our democracy.

37. BENJAMIN RUSH, OF THE MODE OF EDUCATION PROPER IN A REPUBLIC (1798), reprinted in The Selected Writings of Benjamin Rush 87, 88 (Dagobert D. Runes ed., 2008).

38. Wisconsin v. Yoder, 406 U. S. 205, 213 (1972).

39. As the author of a recent book notes, "In the years following World War II, as education became more professionalized and vocationalized, it was increasingly decoupled from the life and practice of democracy. Today, while education is widely discussed, the focus on performance, standards, global competition, and outcomes has largely eclipsed the linkage to citizenship." BENJAMIN R. BARBER, A PASSION FOR DEMOCRACY: AMERICAN ESSAYS 161 (1998) (note omitted).

treatment of the public education of black Americans.

III. EXCLUSION OF AFRICAN AMERICANS FROM THE "HEADY VISION"

The Revolutionary leaders who believed public education was intrinsically linked to democratic government had in mind a society that was racially homogenous. "It was a heady vision of a new world in which rich and poor, German and French, Protestant and Catholic—but not black and red—would take part in the great experiment."[40] As a result, Jefferson and others had no occasion to consider the implications for diffusion of knowledge in the kind of multiracial democracy we have today. As James Conant wrote of Jefferson's ideas on public education, "[o]ne might note in passing an assumption here about the diffusion of talent [among the people] which reflects the homogeneity of the white population."[41]

The exclusion of black people from the "heady vision of a new world" was not inadvertent, but by design, and continued long after formal slavery ended. One of the principal characteristics of American slavery was a systematic effort to keep slaves in a state of ignorance.[42] As one white man said, referring to Fredrick Douglass: "If you teach that nigger how to read, there would be no keeping him. It would forever unfit him to be a slave. He would at once become unmanageable, and of no value to his master. As to himself, it would do him no good, but a great deal of harm. It would make him discontented and unhappy."[43]

Following the Civil War, whites sought to perpetuate the ignorance enforced on slaves in order to disenfranchise them and thereby preserve white control of government, predicated on their self-declared racial supremacy. This gave credence to Jefferson's deeply pessimistic view that, even after the inevitable abolition of slavery, the country could not "retain and incorporate the blacks into the state," because "[d]eep rooted prejudices entertained by the whites; ten thousand recollections, by the blacks, of the injuries they have sustained; new provocations; the real distinctions which nature has made; and

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40. LAWRENCE A. CREMIN, AN AMERICAN EDUCATION: THE NATIONAL EXPERIENCE, 1783–1876 105 (HarperCollins 1980).

41. JAMES CONANT, THOMAS JEFFERSON AND THE DEVELOPMENT OF PUBLIC EDUCATION 8 (Univ. of Cal. Press 1962).

42. As one scholar recently noted, despite his racism and hypocrisy, Jefferson still advanced a view of democracy that "embraced a participatory politics that opened the way to struggle for rights within rather than against the political system." BENJAMIN R. BARBER, A PASSION FOR DEMOCRACY: AMERICAN ESSAYS 167 (Princeton Univ. Press 1998). Indeed, after the Civil War, Jefferson's vision of democracy motivated both the freed slaves who embraced it and the white supremacists who sought to subvert it. One hungered for education as the way to citizenship and the other sought to limit citizenship by limiting education. There were advocates of public education during the ante-bellum period who included blacks and Indians. Most of these, however, envisioned a role for blacks that was less equal than the role of whites; therefore, the education that was appropriate was more limited. None of these advocates of limited education seemed to consider the inconsistency of that concept with the concept of democratic government. The conclusion is that none of them could imagine a society in which people they considered socially inferior would be full citizens. That view prevailed after the Civil War and likely is a view shared by many today.

43. FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE, WRITTEN BY HIMSELF 33 (1845).

many other circumstances, will divide us into parties, and produce convulsions which will probably never end but in the extermination of the one or the other race."[44]

Jefferson's solution, however, was not a society divided into two classes of citizens based on race; rather, he called for deportation of the freed slaves to a place where they could be "free and independent people." But before that happened, the state had a duty to educate free black children "at the public expense, to tillage, arts or sciences, according to their geniuses, till the females should be eighteen and the males twenty-one years of age. . . ."[45] This proposal was consistent with Jefferson's view that diffusion of knowledge was indispensable to self-government; it paralleled his plan for the education of poor whites in Virginia, described as, "rak[ing] the best geniuses from the rubbish and train[ing] Americans to accept the leadership of the good and the just."[46]

It would have been inconsistent with his views on education for Jefferson to suggest that, after slavery, black citizens should be excluded from the diffusion of knowledge that he envisioned for America's slave society; indeed, it would have been irreconcilable with true democracy and would have accelerated the inevitable racial degeneration that he feared. Freedom for former slaves without diffusion of knowledge still would have been slavery, but under a different name. Thus, contrary to the course actually taken after the Civil War, the only legitimate course for education in a racially diverse democracy would have been to identify and develop the talents of the new black citizens, "according to *their* geniuses."[47] Instead, the country took a different, undemocratic route; relegating its second class black citizens to a second-class education under the separate but equal doctrine of *Plessy v. Ferguson*.[48]

The country did not make a systematic effort to educate African Americans to the full extent of their talents and under the same circumstances that the white majority were educated until the early 1970s.[49] Many now argue,

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44. Thomas Jefferson, *Notes on the State of Virginia*, *Query XIV* (1787), reprinted in JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 105–10 (2007). Jefferson's explanation undoubtedly reflected his concept of civil society, which depended upon "the willingness to get along with others for the sake of peace and prosperity." Gordon S. Wood, *Thomas Jefferson, Equality, and the Creation of a Civil Society*, 64 Fordham L. Rev. 2133, 2144 (1996). Between black and white citizens, there would not have been the "natural feelings of love and benevolence between equal individuals" that characterized a republican society. *Id*. at 2145.

45. Thomas Jefferson, *supra* note 44. Jefferson's inclusion of "sciences" in the areas of education indicates that he had in mind higher education and not just "tillage."

46. Bennett Weaver, *Thomas Mann: Political Thinker*, 52 Q. REV. MICH. ALUMNUS 44, at 46–47 (Autumn 1945) (internal citations omitted).

47. As noted, when Jefferson proposed educating the freed slaves for deportation and subsequent self-government, he included higher education. *See* Thomas Jefferson, *supra* note 44, n. 42.

48. 163 U.S. 537 (1896).

49. The concept of "affirmative action" was first articulated by President John F. Kennedy in 1961, when he issued Executive Order 10925, requiring contractors with the federal government to "take affirmative action" to ensure that racial minorities were employed on federal projects. Exec. Order No. 10,925, 3 C.F.R. 448 (1959–1963). In 1974, the California State Legislature adopted a resolution calling on its state university system to take race-conscious action to ensure that the racial composition of its student body reflected the racial composition of graduating high school seniors in California each year. *See generally,* Joseph O. Jewell, *An Unfinished Mission: Affirmative Action, Minority*

however, fewer than fifty years later, that the time has come to abandon such efforts and to decide whom to educate on the basis of objective qualification, without consideration of race.[50] As Jefferson observed, however, the habits, opinions, and expectations that are the products of our long history of difficult race relations are not so easily overcome; it still is necessary to make a deliberate race-conscious effort to ensure racial inclusion. More important still, a race-blind allocation of higher education would not spread "the opportunities and advantages of education in the various parts of the country, and among the different orders of the people."[51]

Diffusion of knowledge is not a remedial device. Rather, it is the end that public education was conceived to achieve. A concentration of education among white or any identifiable group of citizens, to the exclusion of racial and ethnic minorities, undermines that goal, regardless of whether the concentration results from discrimination. No one disputes today that denying students admission to public universities *because of their race* violates the constitution; it also subverts democracy, although we have not always acknowledged that fact. In the same way, the race-blind allocation of public education, which results in the exclusion of racial and other minorities, also deprives government of the ability to ensure the broad education of citizens, including insular racial and ethnic minorities. Ensuring such broad diffusion of knowledge is a fundamental function of democratic government, reflected in the constitutions of states like Virginia and Texas.

The diffusion of knowledge is especially important today in face of ongoing national debates about race-conscious government decisions and the politically disintegrating effect on undocumented immigration here of people of color and refugees from wars in the Middle East. As the country moves inexorably towards a national population composed of large blocs of different racial, ethnic, and non-Christian citizens, there is legitimate concern about balkanization and its effect of our democracy.[52] But race-blindness in allocating public higher education promotes balkanization, not democracy. Today, race and ethnicity, in addition to religion and income disparity, lie at the fault lines of American democracy, as the 2016 campaigns for president in both parties demonstrated. Facing such a current state of affairs, the wide diffusion of knowledge through public education arguably is even more critical to

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Admissions, and the Politics of Mission at the University of California, 1868-1997, Journal of Negro Education, Vol. 69, Nos. 1/2 (Winter/Spring 2000) at 41–46. The resolution set a six-year goal for compliance. The program was challenged almost immediately as reverse discrimination against more qualified white students, culminating in the Supreme Court's decision in Regents of U. of California v. Bakke, 438 U.S. 265 (1978). A similar affirmative action effort at the University of Washington's system was challenged even earlier in DeFunis v. Odegaad, 416 U.S. 312 (1974).

50. This kind of purely objective admissions policy has never been used for college admissions. In *Fisher,* for example, her challenge to race-conscious admissions was limited to the five minority students who had lower scores that her, not the substantially greater number of white applicants who were admitted with lower scores. Nor does she consider the fact that there were substantially more minority applicants with scores equal to or greater than her score who also were rejected.

51. MASS. CONST. Ch. 5, § 2.

52. *See, e.g.*, JOHN J. MILLER, THE UNMAKING OF AMERICANS: HOW MULTICULTURALISM HAS UNDERMINED AMERICA'S ASSIMILATION ETHIC (1998).

preservation of democratic values than it was in the eighteenth and nineteenth centuries when the primary concern was creating a democracy in a racially homogenous society.

As a result of disconnecting public education from its original democratic purpose, the current debate about race-conscious admissions erroneously focuses on the individual rights of applicants.[53] As the *Fisher* case makes clear, the debate focuses upon the relative "objective" qualifications of white and minority applicants (but not the relative qualifications of competing white applicants) seeking admission to elite public universities, and gives no consideration to diffusion of knowledge as a goal.[54]

Those who advocate race-blind admissions argue that race-conscious admissions unfairly "prefer" less qualified minority applicants over more qualified white applicants such as Abigail Fisher.[55] Such preferences, they argue, unlawfully discriminate against the more qualified white applicants on the basis of race. This argument does not apply to less qualified white applicants who are preferred over more qualified applicants, where the "preference" is not due to race but some other factor or factors important to achieving some goal of the system.[56] Stated differently, if race is not taken into consideration, the number of white students enrolled in public universities would increase, but not necessarily the overall qualifications of the students admitted. Thus, the inevitable effect of a race-blind admissions policy would be relatively more concentration of knowledge among whites and consequently less diffusion among citizens as a whole. Nevertheless, advocates of such a policy argue that admission to public universities should be racially neutral and fair.[57] Such an argument in favor of

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53. *See* Fisher I, 133 S. Ct. 2411 (2013); Gratz, 539 U.S. 244 (2003); Grutter, 539 U.S. 306 (2003); Bakke, 438 U.S. 265 (1978); DeFunis, 416 U.S. 312 (1974); and Hopwood, 78 F. 3d 932, 955 (5th Cir. 2006).

54. This argument does not depend upon the race, ethnicity, or religion of the most qualified applicants. The same argument applies if Asian-Americans from Korea or China or African Americans of West Indian descent were the most qualified applicants disproportionately represented in the applicant pool.

55. Proponents of such race-conscious decisions also include the consideration of gender. This is done often to broaden the appeal of affirmative action by including white women among its beneficiaries. But the disparity in the so-called objective qualifications of white women and white men is not significant. Thus, to whatever extent white women "benefit" from affirmative action, it does not entail any significant preference over more qualified men.

56. As noted, in Fisher v. University of Texas at Austin, only five minority applicants with lower scores than Fisher were admitted to the special summer program for which she may have qualified for admission in 2008. *Supra* note 16. On the other hand, 168 minority applicants with the same or higher reader scores than Fisher were denied admission and 42 white applicants with identical or lower scores than her were admitted. *Id.*

57. Opponents of race-conscious affirmative action ironically have succeeded in casting their cause in the apparently neutral terms of "fairness" and "equal opportunity." One reason that defense of the color line is more sophisticated today is that its defenders speak not in terms of racial supremacy but of objective merit, that has the effect of casting black and Latino students in the role of less qualified students. They use terms such as "fairness" and "equal opportunity" to justify the advantage white students have in this approach. In this way, they have turned things on their heads. *See* Stanley Fish, *Reverse Racism, or How the Pot Got to Call the Kettle Black*, THE ATLANTIC, Nov. 1993, http://www.theatlantic.com/magazine/archive/1993/11/reverse-racism-or-how-the-pot-got-to-call-the-kettle-black/304638 ("'Individualism,' 'fairness,' 'merit'—these three words are continually

individual interests ignores the original intent of public education.[58]

A race-blind admissions policy elevates individual interests over the fundamentally more important public interest in the diffusion of knowledge. The implication of such a policy is that the state has no legitimate interest in ensuring the education of racial minorities; that, if necessary to give academically more qualified white applicants the best chance of being admitted to elite public colleges and universities, the state must sacrifice the education of academically less qualified racial minorities in those institutions. In effect, the contention is that a multiracial democracy can survive with an educational system that concentrates public education in its elite institutions among whites, more objectively qualified or not. Stripped of its varnish, a race-blind admissions policy directly conflicts with the original core purpose of public education. And, in a society increasingly composed of distinct racial and ethnic groups, such a policy in the long run undermines democracy.[59]

Just as Jefferson argued that government in a racially homogenous society had an affirmative responsibility to prepare the poor "by education for defeating the competition of wealth and birth for public trusts," government in a multiracial, multiethnic, and diverse religious society has a similar responsibility to prepare its racial, ethnic, and religious minorities by education for defeating the competition of a white minority for public trusts. That is essential for our evolving democracy. Indeed, ensuring the diffusion of knowledge among the people as a whole must be the threshold consideration of public education, not an afterthought pursued only indirectly.

The diffusion of knowledge requires a race-conscious admissions policy

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misappropriated by bigots who have learned that they need not put on a white hood or bar access to the ballot box in order to secure their ends. Rather, they need only clothe themselves in a vocabulary plucked from its historical context and made into the justification for attitudes and policies they would not acknowledge if frankly named."). In effect, these latter day defenders suggest that if racial minorities feel further victimized by race-blind admissions, it is "solely because [they] choose[] to put that construction upon it." Plessy v. Ferguson, 163 U.S. at 551.

58. Of course, the admissions process is much more complex than this argument suggests. Even without race consciousness, less qualified applicants may and often are admitted in favor of more qualified applicants. Besides race, numerous other factors affect whether an applicant is admitted "in turn," even among the most qualified applicants, resulting in relatively less qualified applicants being admitted or preferred over relatively more qualified applicants. These non-race factors include geography, preferences for the children of alumni, preferences for the children of significant donors, and special talents. In some cases, these "neutral" factors also result in the admission of some minority applicants out of turn, although race is not the basis for the decision. The success of the current anti-affirmative action forces in controlling the debate is reflected in the fact that they have been successful in isolating race as the only objectionable basis for such out-of-turn admissions. There is no inquiry into why more that 40 white applicants in the University of Texas at Austin's summer program in 2008 were admitted with the same or lower reader scores than Fisher or why 163 minority applicants with the same or better scores were rejected. *Supra* note 16.

59. Justice O'Connor mentions diffusion of knowledge in her opinion in *Grutter*, although she does not explain it. *See* Grutter, 539 U.S. at 331 ("the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity."). It is not clear what she intended by saying it had to be "accessible." That might suggest that diffusion of knowledge is satisfied if the University provides a non-discriminatory opportunity for admissions, rather than it being an affirmative obligation the University has actually to admit a critical mass of racial and ethnic minorities.

to preserve the link between public education and democracy. Otherwise, the government has an obligation to articulate a different purpose for public education that elevates the interests of individuals over that of citizens as a whole.

IV. CONCLUSION

The legal fight over race-conscious admissions is primarily a fight about who gets into elite colleges and universities. It is not by accident that the public universities that have been targeted by opponents of race-conscious admissions have been the University of California at Berkeley, the University of Michigan, and the University of Texas at Austin, crown jewels of their respective state systems of higher education. To justify the exclusion of minority students from these institutions, some scholars and conservative commentators recently have espoused the so-called "mismatch" effect of race-conscious admissions.[60] This hypothesis, that less prepared minority students admitted to elite institutions would personally be better off if they attended less elite universities, is essentially a twenty-first century formulation of the nineteenth century separate but equal doctrine; a way to satisfy a state's obligation to diffuse knowledge, while preserving placements for white students in the elite institutions they have historically dominated.[61]

Justice Scalia referred controversially to this "mismatch hypothesis" during the *Fisher* argument: "there are those who contend that it does not benefit African-Americans to get them into the University of Texas where they do not do well, as opposed to having them go to a less-advanced school, a slower-track school where they do well."[62] This argument suggests that the diffusion of

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60. Rick Sander, *An emerging scholarly consensus on mismatch and affirmative action (ideologues not welcome),* The Volokh Conspiracy, THE WASHINGTON POST (Dec. 10, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/10/an-emerging-scholarly-consensus-on-mismatch-and-affirmative-action-ideologues-not-welcome/;
Anemona Hartocollis, *With Remarks in Affirmative Action Case, Scalia Steps Into 'Mismatch' Debate,* N.Y. TIMES (Dec. 10, 2015), http://www.nytimes.com/2015/12/11/us/with-remarks-in-affirmative-action-case-scalia-steps-into-mismatch-debate.html?_r=0;
Conor Friedersdorf, *Does Affirmative Action Create Mismatches Between Students and Universities?,* THE ATLANTIC MONTHLY (Dec. 15, 2015), http://www.theatlantic.com/politics/archive/2015/12/the-needlessly-polarized-mismatch-theory-debate/420321/

61. Opponents of race-conscious admissions do not oppose diffusion of knowledge generally; their fire is directed only at diffusion of knowledge for minority students, if their race must be taken into consideration to identify them. Abigail Fisher did not challenge the admission of forty-one white students who were less qualified than her; rather, she challenged only the admission of five black and Latino students who were less qualified. Her challenge also assumed that the University had valid reasons for rejecting minority applicants in the same summer program who were more qualified than her. Professor Richard Sander, one of the principal proponents of the mismatch hypothesis of affirmative action, acknowledges that the theory also would apply to non-minorities ("The "mismatch hypothesis" contends that any person (*certainly not just minorities*) can be adversely affected if she attends a school where her level of academic preparation is substantially lower than that of her typical classmate."). Rich Sander, *supra* note 60. Sander and others, like Abigail Fisher, are just not as bothered when white students are the beneficiaries.

62. Fisher v. Univ. of Tex. at Austin, No. 14-981, Transcript of Oral Argument, at 67 (Dec. 9, 2015) (Scalia, J.).

knowledge can be satisfied by steering minority students to slower-track schools; that, unsurprisingly, was also the premise of the separate but equal doctrine.

At virtually the same time Justice Scalia was contemplating sending minority students to "slower track schools," he ironically was lamenting the lack of a certain kind of diversity on the Supreme Court itself. In his dissent in the Court's same-sex marriage decisions, Justice Scalia wrote "separately to call attention to this Court's threat to American democracy. . . .To allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation."[63] Scalia's alarm was over the fact that all of his colleagues on the Court attended either Yale or Harvard Law Schools (Justice Ginsburg attended both Harvard and Columbia). But he just as well could have been talking about social transformation without racial or ethnic representation.[64]

When Heman Sweatt sought admission to the University of Texas Law School at Austin on February 26, 1946, the Law School rejected his application because he was African American.[65] On May 16, 1946, the NAACP Legal Defense Fund filed a lawsuit on Sweatt's behalf, challenging his rejection for admission as a violation of the Constitution.[66] In response, the Texas legislature authorized Prairie View State Normal and Industrial College, one of the Texas schools established to educate black students, to offer the same graduate and professional courses offered to whites by the University of Texas. Seizing on this, the trial court held that Texas had satisfied its obligation under the separate but equal doctrine.[67] According to the court, Prairie View offered Sweatt "[the] privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas."[68] The Supreme Court summarily rejected this disingenuous claim:

> The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial

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63. Obergefell v. Hodges, 135 S.Ct. 2584, 2629 (2015) (Scalia, J., dissenting).

64. Dispute Justice Scalia's lament in *Obergefell* about the lack of one kind of diversity on the Court, racial and ethnic diversity on the Court is attributed to Justices Thomas and Sotomayor having attended the elite Yale Law School. It is doubtful that we will see another Justice like Thurgood Marshall who graduated from a historically black law school, which today some might call a "slower track school. In Marshall's time, however, schools such as Howard attracted many of the most qualified black students like Marshall who, because of their race, were denied admission to flagship state schools such as the University of Maryland.

65. Sweatt v. Painter, 339 U.S. 629 (1950).

66. Application for Writ of Mandamus, Sweatt v. Painter, No. 74,945 (May 16, 1946), http://www.houseofrussell.com/legalhistory/sweatt/docs/svppldng.htm.

67. Plessy v. Ferguson, 163 U.S. 537 (1896).

68. *Supra* note 66.

> groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.[69]

What was true in 1950 is true in 2016. Elite universities and colleges are where community, state, and national leaders are trained. Exclusion of minority students from those institutions denies them that path to leadership. It also denies our evolving democracy the benefits of a racially and ethnically diverse education in those institutions, one of the principal benefits of the diffusion of knowledge. George Washington noted that the "daily intercourse and amity between northerners and southerners" during the Revolutionary War was the "best antidote" for the "evil" of sectional jealousies in the country.[70] The country would derive the same benefit, he argued, from a national university. "What but the mixing of people from different parts of the United States during the War rubbed off these impressions? A century in the ordinary intercourse would not accomplish what seven years associated in arms did; but that ceasing, prejudices are beginning to revive again, and will never be eradicated so effectually by any other means as the intimate intercourse of characters in early life. . . ."[71] That essentially is the diversity rationale for affirmative action in higher education, embraced in *Grutter*.[72] In the eighteenth and nineteenth centuries, it was called diffusion of knowledge.

On June 23, 2016, the Supreme Court upheld the University of Texas' limited use of race in *Fisher v. Univ. of Tex. at Austin* (*Fisher II*).[73] In his majority opinion, Justice Kennedy wrote that, "a university is in large part defined by those intangible qualities which are incapable of objective measurement but which make for greatness. Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission."[74] Although Justice Kennedy's opinion does not directly mention diffusion of knowledge, its rationale is fully consistent with that goal.

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69. Sweatt, 339 U.S. at 634.
70. Letter from George Washington to Alexander Hamilton. (Sept. 1, 1796).
71. *Id.*
72. 539 U.S. 306 (2003).
73. Fisher v. Univ. of Tex. at Austin, No. 14-981, 579 U.S. ____ (U.S. June 23, 2016).
74. *Id.,* slip op. at 19 (internal citations omitted).