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Fisher v. University of Texas at Austin and the New White Nationalism

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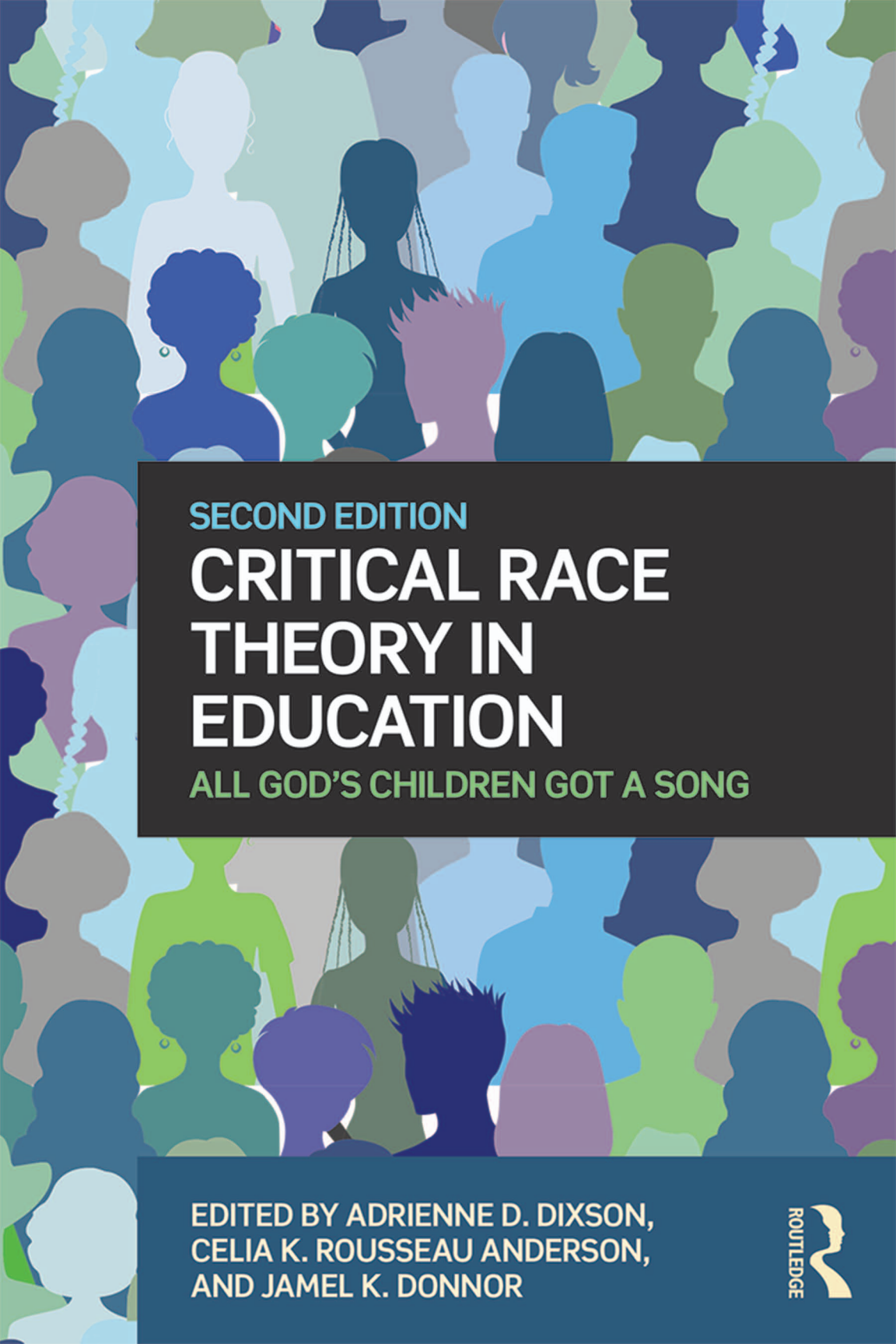

SECOND EDITION

CRITICAL RACE THEORY IN EDUCATION

ALL GOD'S CHILDREN GOT A SONG

EDITED BY ADRIENNE D. DIXSON, CELIA K. ROUSSEAU ANDERSON, AND JAMEL K. DONNOR

ROUTLEDGE

CRITICAL RACE THEORY IN EDUCATION

All God's Children Got a Song

Edited by Adrienne D. Dixson,
Celia K. Rousseau Anderson,
and Jamel K. Donnor

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A FOCUS ON HIGHER EDUCATION

Fisher v. University of Texas at Austin and the *New* White Nationalism

Jamel K. Donnor

Introduction

In the absence of overt methods of racial exclusion, such as *de jure* school segregation, contemporary instantiations of racism toward persons of color in education occur primarily through a set of strategic discursive and legal challenges against policies and practices meant to foster racial inclusion. No less powerful or impactful than Jim Crow or South African Apartheid, contemporary practices of racial exclusion in education at the hands of White people remain informed by a White supremacist logic. While explicit methods of racism and racial exclusion were required for establishing the existing sociopolitical and economic hegemonic racial hierarchy in the United States, present day practices of racial exclusion, which are operationalized subtly through a racially coded process of discernment and differentiation, are still intended to maintain the racial status quo. Stated differently, the purpose of contemporaneous racial exclusion is to not only entrench the historically derived advantages traditionally accorded to White people collectively, but to also ensconce non-White disadvantage.

This chapter discusses the latest attempt of White exclusion in education. Utilizing legal scholar Carol Swain's (2002) new White nationalist thesis, this chapter contextualizes the legal arguments against the University of Texas at Austin's diversity policy in *Fisher v. University of Texas at Austin*. Despite being determined academically unqualified for admission to the University of Texas at Austin, Ms. Abigail Fisher, a White female, argued that the State of Texas' flagship university's diversity policy was the reason for her admissions denial. According to Ms. Fisher, "I took a ton of AP classes, I studied hard and did my homework—and I made the honor roll. I was in extracurricular activities. I played the cello and was in the math club, and I volunteered. I put in the work I thought was necessary to get into UT"

(Tolson, 2012). Ms. Fisher's sense of aggrievedness is neither rhetorical nor a fleeting instance of sour grapes. To the contrary, Ms. Fisher's assertion of incurring an injury is the reflection of increasing "[W]hite anxiety over the intensely competitive nature of selective admissions" (Liu, 2002, p. 1046), and modern White nationalistic proclivities (Swain, 2002).

Since the Black Civil Rights Movement of the 20th century, White people have engaged in a countermovement to preserve its version of a "White democracy" (Ward, 2011). As the ruling racial group of the United States since its founding, White people, irrespective of socioeconomic status, have engaged in a myriad of opposition campaigns to thwart policy prescriptions designed to ameliorate the legacy of Black disenfranchisement (Ward, 2011). According to historian Jason Morgan Ward (2011), "[f]rom the rise of the New Deal to the climatic civil rights legislation of the 1960s, a consciously 'segregationist' countermovement emerged in tandem with the African American freedom struggle. Rather than a knee-jerk insurgency, white opposition to the civil rights movement was a carefully constructed political project" (p. 2). Consider for example that six years after the U.S. Supreme Court declared *de jure* school segregation unconstitutional in *Brown v. Board of Education* 1954, and ordered the desegregation of public schools in the South with "all deliberate speed" in *Brown v. Board of Education* 1955, "not one of the 1.4 million [B]lack schoolchildren attended a racially mixed school in the five Deep South states until the fall of 1960" (Klarman, 2004, p. 349). According to Klarman (2004), *Brown* was a "solid victory for [W]hite Southerners" (p. 318), because the high Court "approved gradualism, imposed no deadlines for beginning or completing desegregation, issued vague guidelines, and entrusted (southern) district judges with broad discretion" (p. 318).

As the policy progeny of affirmative action, which among other things established hiring guidelines for federal contractors, instituted employment preferences for military veterans, and required employers "found to be discriminating against union members or organizers to stop discriminating and take affirmative action to place those victims where they would have been without discrimination" (Skrentny, 1996, p. 6); diversity's loose phraseology, like *Browns*', has rendered it vulnerable to unrelenting challenges by White people, particularly White nationalists. In fact, the decision by White people, such as Ms. Fisher, to overstate the harmful impact of diversity on White people is not only strategic, but also racist (López, 2014; Donnor, 2015). Thus, the *Fisher v. University of Texas at Austin* case is simply the latest instance of a White nationalist movement.

Chapter Organization

This chapter is comprised of four sections. The first section presents an overview of Ms. Fisher's argument against the University of Texas' diversity policy as articulated in her initial petition to the U.S. Supreme Court. The second section of this chapter expounds on Swain's (2002) new White nationalist thesis. The

third section analyzes Ms. Fisher's anti-diversity arguments through the new White nationalist lens, while the final section offers concluding thoughts on *Fisher* and White nationalism.

Fisher v. University of Texas at Austin: An Overview

Dissatisfied with the rulings handed down by the Western District Court of Texas and the U.S. Fifth Circuit Court of Appeals regarding her request that the University of Texas at Austin discontinue the use of race as a factor among many in its undergraduate admissions and admit her immediately, Ms. Fisher petitioned the U.S. Supreme Court contending that her rejection for undergraduate admission to the University of Texas at Austin caused her to "suffer an injury" (Petition for Writ of Certiorari, 2011, p. 2). In contrast to her previous challenges in which the judicial relief sought was personal, Ms. Fisher pursued a more expansive legal remedy in her petition to the U.S. Supreme Court.

Contending that her case *now* had national and Constitutional implications, Ms. Fisher posited that the Fifth Circuit Court's ruling, which stated that the University of Texas acted in good faith, transferred the responsibility for ensuring a student's equal protection rights from the judiciary to universities (Petition for Writ of Certiorari, No. 11–345, 2011). According to Fisher, individual students were now being asked to bear a burden in the name of diversity (Petition for Writ of Certiorari, No. 11–345, 2011). The purported shift in legal authority that Ms. Fisher accuses the university of engaging in replaces the judicial standard review of strict scrutiny for the lower good faith process-oriented standard of judicial review, which can potentially include the matters "unrelated to educational quality" (Petition for Writ of Certiorari, No. 11–345, 2011, p. 20). Developed by the high Court as a "means to facilitate close judicial review of Jim Crow and other 'suspicious' legislative enactments" (Brooks, 2004, p. 175), strict scrutiny "operates to strike down, as a denial of equal protection of the laws, any governmental activity or other 'suspect classification' or is violative of a 'fundamental personal interest'" (Brooks, 2004, p. 175). In other words, the Supreme Court through its strict scrutiny review standard presumes that the U.S. Constitution is color-blind, and that any governmental use or consideration of race in the allocation of opportunity, such as employment and college admissions, irrespective of purpose must be closely monitored to protect citizens from harm and injustice (Ball, 2000; Swain, 2002).

Similar to the aforementioned argument, Ms. Fisher also claimed that the lower courts misapplied the Supreme Court's strict scrutiny standard of review (Petition for Writ of Certiorari, No. 11–345, 2011). Reiterating her initial argument that the lower courts were too deferential to the University of Texas, Fisher further posits that the University uses a system of racial preferences that has "negligible gains in minority enrollment" (Petition for Writ of Certiorari, No. 11–345, 2011, p. 30). According to Ms. Fisher (2011), the University of Texas is not interested in

achieving racial diversity in order to enhance the educational dialogue in the classroom by "keeping minority students from feeling 'isolated or like spokespersons for their race'" (Petition for Writ of Certiorari, No. 11–345, 2011, p. 30). Instead, Fisher posits that the University of Texas is interested in promoting a form of racial diversity that "exacts a cost disproportionate to its benefit" onto White students (Petition for Writ of Certiorari, No. 11–345, 2011, p. 29). In other words, the University of Texas is discriminating against White people, according to Ms. Fisher, solely because they are White.

The third challenge advanced by Ms. Fisher focused on the overall legality of the University of Texas' diversity policy. For Fisher, the University of Texas at Austin's diversity policy "lack[s] a meaningful termination point" (Petition for Writ of Certiorari, No. 11–345, 2011, p. 33). Citing the high Court's decision in *Grutter v. Bollinger* (539 U.S. 306, 2003), a case that determined that the University of Michigan's Law School's use of race in admissions not only "did not unduly burden individuals who were not members of the favored racial and ethnic groups…[but also] took the law school at its word that it would terminate its race conscious admissions program as soon as practicable" (*Grutter v. Bollinger*, 2003, Case in Brief, Section V, p. 6); Ms. Fisher contended that the lower courts erred in determining that the University of Texas' diversity policy was aligned with the aforementioned verdict. As a result, Ms. Abigail Fisher asked the Court to either clarify or reconsider its decision in *Grutter* in order to "restore the integrity of the Fourteenth Amendment's guarantee of equal protection" (Petition for Writ of Certiorari, No. 11–345, 2011, p. 35). Before discussing how *Fisher v. University of Texas at Austin* is a modern-day White nationalist project, the following section will explain what is "new" about present-day White nationalism, including how it differs from conventional racist organizations, such as the Ku Klux Klan and the Aryan Nation.

The "New" White Nationalism

In contrast to utilizing an explicit justificatory doxa of White dominance over people of color, such as Manifest Destiny, contemporary White nationalism is more nuanced (Gallagher, 2008). Invoking a rhetorical bricolage comprised of narratives, tropes, and discursive constructs from the Black Civil Rights movement, multiculturalism, free-market fundamentalism, evangelical Christianity, and social conservatism, present-day White nationalists are adept at concealing their racism from plain sight (Swain, 2002). Intentionally appearing to be more racially tolerant than their predecessors, contemporary White nationalists "employ the same brand of identity politics that minorities have successfully used in the past to further their own group interests and group identities" (Swain, 2002, p. 5). Moreover, modern White nationalists are "more [c]ultured, intelligent, and often possess impressive degrees from some of America's premier colleges and universities" (Swain, 2002, p. 15). In short, present-day White nationalists have forsaken the

tactics typically associated with cruder racist organizations, such as the Ku Klux Klan (e.g., burning crosses) and the American Nazi/Skinhead Party (e.g., swastikas), in order to "expand their influence and appeal to a larger and more mainstream audience" (Swain, 2002, p. xxiii) of white people who no longer publicly identify with overt forms of racism and racial exclusion.

Contemporary White nationalists are able to garner mass White support in two ways. The first method involves enkindling White resentment toward policies meant to promote racial equality and inclusion, such as affirmative action; while the second method consists of engendering White people's fears about future racial demographic trends and corresponding structural changes associated with the global economy (Marx, 2001; Swain, 2002). Because America's foundational policy constructs, (i.e., freedom, individualism, and liberty), were established to situate Whites atop its social, political, and economic hierarchy, efforts on the part of non-Whites to disrupt the status quo ante are instinctively resisted by most White people (Lipsitz, 1998). According to legal scholar Ian Haney López (2014), "many Whites believe that major social institutions are racially fair *and* include vast racial disparities… among those who accept dramatic racial inequalities as a normal and legitimate feature of society, hearing about discrepancies alone tends to solidify their beliefs regarding minority failings and society's basic fairness" (p. 37). Thus, public policies and social programs supporting the socioeconomic inclusion of non-Whites in the absence of overt racism are intuitively framed by White nationalists as unprincipled and undemocratic.

Similarly, the continued emphasis on the impending demographic fact that America will "cease to be a White majority nation" (Swain, 2002, p. xv), is intended to invoke a "color-coded solidarity" (López, 2014, p. 3) among White people irrespective of political affiliation and socioeconomic status. In addition, the corresponding structural changes associated with the global economy have not only led to a "decline in high-wage production jobs for unskilled workers" (Swain, 2002, p. 2), but have also increased competition between "legal and illegal immigrants for a dwindling share of low-paying employment opportunities" (Swain, 2002, p. 2). Analogous to the first method of securing broad White consensus, contemporary White nationalists are able to amass White solidarity because they appear willing to address specific concerns and "many contemporary issues and developments that mainstream politicians and media sources either ignore entirely or fail to address with any degree of openness or candor" (Swain, 2002, p. xv). The following section will explain how the arguments against the University of Texas' diversity policy in *Fisher v. University of Texas at Austin* fall under the rhetorical purview of modern White nationalism.

Strategic Omissions and the Distortion of Reality

As the preceding section suggests, the policy rationale espoused by modern-day White nationalists is not only specious, but also racist. Furthermore, what the

foregoing section reveals is the importance of possessing a strong sociohistorical understanding in order to recognize and counter the racially coded language used by White nationalists to: 1) distort reality by framing historically advantaged groups (i.e., White people) as burdened and under siege, and 2) depict traditionally marginalized populations (i.e., Black people) as undeserving beneficiaries of an unearned opportunity. It is through this prism that present-day White nationalists' policy rationales should be viewed.

With respect to the assertion that the Fifth Circuit Court of Appeals' decision affirming the constitutionality of the University of Texas at Austin's policy on diversity shifts responsibility for ensuring a student's equal protection rights from the judiciary to university, Ms. Fisher's logic is fraught with fabrications, half truths, and contradictions. For instance, the American judicial system, in particular the United States Supreme Court, has traditionally deferred to colleges and universities because of its unique societal niche (*Grutter v. Bollinger*, 2003). According to the high Court, "[w]e have long recognized that given the important purpose of public education… universities occupy a special niche in our constitutional tradition" (*Grutter v. Bollinger*, 2003, p. 8). In the area of admissions and racial diversity, the Supreme Court has acknowledged that universities have the "freedom to make [their] own judgments" (*Grutter v. Bollinger*, 2003, p. 8).

Consider the Court's opinion in *Regents of University of California v. Bakke* the landmark "reverse discrimination" case (438 U.S. 205, 1978). Despite acknowledging that Mr. Allan Bakke, a Caucasian male Vietnam veteran, had been injured by the University of California Davis Medical School's admission program, which was established to remediate the imbricated impact of slavery and Jim Crow by increasing the number of doctors of color, the Court maintained that the university had a "fundamental freedom" to attain a diverse student body, and that race was a permissible criterion in the admissions decision-making process "if it was factored in with other characteristics in a competitive process" (Regents of University of California v. Bakke, 1978, Case in Brief, p. 8–9). Thus, Ms. Fisher and her lawyers' disregard for the high Court's preference of respecting a university's educational autonomy regarding student admissions was not a simple instance of negligence, but rather an intentional attempt to engender White racial animus. According to historian Anderson (2004), the majority, if not all, of the alleged victims of reverse discrimination cases in higher education portrayed in the media have been White people. The en masse portrayal of White teenagers as victims of policies promoting racial inclusivity and diversity regardless of accuracy is intended to trigger schematically within individual White people a racialized and communal sense of systematic disadvantage. Because people "think in frames" (Lakoff, 2004, p. 17) to make meaning individually and as members of groups, the media portrayal of White victimization provides visual credence to the White nationalist trope of White loss at the expense of non-White progress.

Likewise, Fisher and her lawyers' assertion regarding the "negligible gains in minority enrollment" (Petition for Writ of Certiorari, No. 11–345, 2011, p. 30)

associated with the University of Texas' diversity policy is not only overly simplistic and misleading, but also propagates a false empathetic understanding of the causes for racial disparities in non-White undergraduate enrollments. Using the miniscule increase in student of color enrollment associated with the State of Texas' 10 Percent Admissions Law to buttress their position, Ms. Fisher and her legal team contended that the University of Texas did not need to institute its diversity policy to increase the number of non-White undergraduates because the aforementioned state law produced modest gains in creating a diverse undergraduate student body. Similar to disregarding judicial precedent, Fisher's decision to highlight the minimal enrollment gains associated with the State of Texas' admissions statute is also racially self-serving. Indeed, the Top 10% law produced a noticeable increase in the number of non-White students enrolled at the university, however, officials at the University of Texas at Austin determined that the "full educational benefits of diversity" (Brief for Respondents, 2011, p. 7) had not been achieved, because the Top 10 Percent policy relied primarily on standardized test scores and public school segregation (Brief for Respondents, 2011; Tienda & Niu, 2006). According to the University of Texas, the enrollment for qualified African American and Hispanic applicants from the "second decile of their high school class declined after the top 10% law took effect" (Brief for Respondents, 2011, p. 9), while the odds for admission by Caucasian applicants in the second decile of their high school class increased. In accordance with present-day White nationalist logic, Ms. Fisher overstates the harm she incurred, and the fairness of race neutral policies, such as the Top 10 Percent Law, to allocate opportunities equitably.

Also in accordance with contemporary White nationalist logic is Fisher's conflation of her academic worthiness and the overall impact of diversity policy on White applicants. For example, when one examines the admissions and enrollment data for the year that Fisher applied to the University of Texas, s/he learns that Ms. Fisher's chances for acceptance were remote. Table 8.1, which presents by race and ethnicity, the total number of the top 10 percent vs. non-top 10 percent applicants who were admitted the same year that Ms. Fisher sought admission, shows that proportionately White applicants constituted the majority of the University of Texas' non-top 10 percent admissions.

Similarly, Table 8.2, which presents the total number of the top 10 percent and non-top 10 percent applicants who enrolled at the University of Texas at Austin in 2008 by race and ethnicity, indicates that Whites comprised more than half of the non-top 10 percent students that year.

In adhering to the modern White nationalist paradigm, Abigail Fisher's decision to file a racial discrimination lawsuit while consciously knowing that she did not graduate in the top 10 percent of her high school class is nothing short of racial perniciousness. More important, the racial causation fallacy that Fisher propagates is meant to ensure that the University of Texas at Austin remains a virtually White school.

TABLE 8.1 *Racial and Ethnic Breakdown of Top 10 Percent and non-Top 10 Percent Applicants Admitted Summer and Fall 2008 (N = 12,843)*

	Automatic Admits		*Other Admits*		*Total*	
Race/Ethnicity	*n*	*(%)*	*n*	*(%)*	*n*	*(%)*
American Indian	30	<1%	20	1%	50	<1%
Asian American	1,744	19%	565	16%	2,309	18%
Black	582	6%	146	4%	728	6%
Foreign	234	3%	302	8%	536	4%
Hispanic	2,218	24%	403	11%	2,621	20%
White	4,440	48%	2,142	60%	6,582	51%
Not reported	5	0%	12	0%	17	0%
Total	9,253	100%	3,590	100%	12,843	100%

University of Texas at Austin, Office of Admissions (2008a), Student Profile: Admitted Freshman Class of 2008.

TABLE 8.2 *Racial and Ethnic Breakdown of Top 10 Percent and non-Top 10 Percent First-Year Students (N = 6,715)*

	Enrolled Automatic Admits		*Other Enrolled*		*Total*	
Race/Ethnicity	*n*	*(%)*	*n*	*(%)*	*n*	*(%)*
American Indian	14	<1%	9	1%	23	<1%
Asian American	1,025	20%	224	14%	1,249	19%
Black	305	6%	70	4%	375	6%
Foreign	122	2%	86	5%	208	3%
Hispanic	1,164	23%	174	11%	1,338	20%
White	2,480	48%	1,033	65%	3,513	52%
Not reported	4	<1%	5	<1%	9	<1%
Total	5,114	100%	1,601	100%	6,715	100%

University of Texas at Austin, Office of Admissions (2008b), Student Profile: Enrolled Freshman Class of 2008.

Conclusion

Fisher v. University of Texas at Austin is the embodiment of the modern White nationalist movement because of the petitioner's unrelenting effort to have the university's diversity policy abolished. Remanded by the Supreme Court to the Fifth Circuit, whereby the latter determined the matter decided (i.e., stare decisis),

Fisher filed a second writ with the High Court, and was granted a subsequent rehearing on December 9, 2015. While the details of her recent challenge are slightly different, the crux of Fisher's contestation remains constant, the University of Texas' diversity policy is harmful to White people (Donnor, 2015). Like the segregationists' countermovement of the 1950s and 1960s, the contemporary White nationalists' march toward the end-goal of social, political, and economic domination is unwavering. Consider that for more than 20 years, Ms. Fisher's legal benefactor, Edward Blum, has initiated "at least a dozen lawsuits attacking race-based protections" (Biskupic, 2012, p. 1), such as anti-affirmative action lawsuits. In addition to his numerous affiliations with conservative think tanks, including the American Enterprise Institute, Mr. Blum has also leveraged his access to financial resources to eliminating key voting-rights protections associated with the Voting Rights Act of 1965 (Biskupic, 2012). Indeed, Ms. Fisher and her supporters are refined racists, however, like their cruder southern segregationist predecessors, the policy logic of White supremacy is constant. Accounting for societal progression, including the evolutionary shift to a global society, present-day White nationalists under refined racist tropes, such as color-blindness and equal opportunity, are committed to the re-centering of White people, White logic, and White methods as the social norm (Zuberi & Bonilla-Silva, 2008). The phantom objectivity that Ms. Fisher is intent on establishing in this case is nothing more than a self-sustaining master narrative of White besiegement and White credential inflation that structures an impervious racial obliviousness that simultaneously justifies the exclusion of non-Whites from quality institutions of higher education, such as the University of Texas at Austin. To be clear, "new" White nationalists are *still* racist underneath.

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