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## When Diversity for Diversity's Sake is not Enough: Should Black Immigrants Receive the Benefit of Affirmative Action at the Detriment of Native Blacks?

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**WHEN DIVERSITY FOR DIVERSITY'S SAKE IS NOT ENOUGH: SHOULD BLACK IMMIGRANTS RECEIVE THE BENEFIT OF AFFIRMATIVE ACTION AT THE DETRIMENT OF NATIVE BLACKS?**

CEDRIC GORDON<sup>1</sup>

The issue of black immigrants benefitting from affirmative action in the admissions process at selective colleges and universities has become a subject of increasing debate.<sup>2</sup> Selective universities and colleges have touted gains made in student body diversity, particularly with the increase of black student enrollment.<sup>3</sup> Although these colleges and universities would like to attribute this success to their affirmative action programs, data suggests that such gains in black student enrollment have resulted from the increasing

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1 Indiana University Maurer School of Law, 2013. I would like to give special thanks to Professor Kevin Brown. He advised me in writing this Note; his help was invaluable. I would also like to thank my Notes and Comments Editor, Chris Kimbrough.

2 See, e.g., Douglas S. Massey, Margarita Mooney, Kimberly C. Torres & Camille Z. Charles, *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, 113 AM. J. EDUC. 243, 246 (2007); Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1231 (2007); Joanna Walters, *Any Black Student Will Do*, THE GUARDIAN (May 28, 2007), <http://www.guardian.co.uk/education/2007/may/29/internationaleducationnews.highereducation>. See also Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229 (2008).

3 See Walters, *supra* note 1.

enrollment of black immigrants<sup>4</sup> and at the expense of native black<sup>5</sup> students—the students for whom affirmative action was initially intended to benefit.<sup>6</sup>

The continued admission of large proportions of black immigrants relative to native blacks goes against an important diversity rationale in *Grutter v. Bollinger*.<sup>7</sup> A cornerstone of the diversity rationale in *Grutter*, which allowed the use of race-based preferences in higher education admissions policies, was to create an environment of diverse experiences that would help to dispel negative stereotypes held of certain minority groups.<sup>8</sup> Black immigrants have now become an overrepresented group within black populations at many colleges and universities, particularly at more selective institutions.<sup>9</sup> This trend is significant because black immigrants bring with them experiences and perspectives similar to those held by other immigrant groups, as compared to native blacks,<sup>10</sup> and more importantly, black immigrants harbor views of native blacks that are similar to those held

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4 “Black immigrants,” for the purposes of this Note, are persons born outside the United States and those who have at least one foreign-born parent. A first-generation black immigrant is a person who was born outside the United States but who now resides in the United States. See Onwuachi-Willig, *supra* note 1, at 1148 n.23. A second-generation black immigrant is a person with at least one parent born outside the United States. See *id.*

5 For the purposes of this Note, the term “native blacks” includes blacks who descended from slaves and those who are the descendants of blacks that immigrated to the United States but who have now assimilated into the dominant black culture within the United States.

6 See Massey et al., *supra* note 1, at 243, 267. Quoting President Lyndon B. Johnson, the authors note that the initial rationale behind affirmative action was to make up for the past exclusion of African Americans. *Id.* at 243–44.

7 539 U.S. 306 (2003).

8 See *Grutter*, 539 U.S. at 330.

9 See Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, but Which Ones?*, N.Y. TIMES, June 24, 2004, <http://www.nytimes.com/2004/06/24/us/top-colleges-take-more-blacks-but-which-ones.html?pagewanted=all&src=pm>.

10 See *infra* notes 116–38 and accompanying text.

by the dominant American culture, including many of the negative stereotypes of native blacks and the black subculture.<sup>11</sup>

In 2003, the *Grutter* Court stated an expectation that twenty-five years from the issuance of its opinion, affirmative action would no longer be necessary to further the diversity interest.<sup>12</sup> A key issue with the Court's expectation is whether, during this twenty-five year period, native blacks will continue to be heard with significant force at many colleges and universities now and into the distant future. This Note argues that extending race-based preferences to black immigrants works against a fundamental rationale in *Grutter*.<sup>13</sup> Extending race-based preferences to black immigrants, who overall have higher admissions metrics compared to native blacks,<sup>14</sup> leads to the admission of a disproportionate number of black immigrants compared to native blacks, particularly at the most selective institutions.<sup>15</sup> Part I of this Note analyzes statistics on the trend of overrepresentation of black immigrants among black student populations at selective universities and colleges. Part II discusses the history of black immigration to the United States, providing a foundation for how the experiences of black immigrants are fundamentally different from those of native blacks. Part III discusses the history of affirmative action and the original intent of affirmative action to assist native blacks who

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11 See *infra* notes 198–201 and accompanying text.

12 *Grutter*, 539 U.S. at 343.

13 See *infra* notes 37–39 and accompanying text.

14 See *infra* note 177 and accompanying text.

15 See *infra* notes 19–23 and accompanying text.

suffered from oppression in the United States. In addition, Part III analyzes the key economic and sociological differences between native blacks and black immigrants and discusses how these differences can contribute to the diversity experience in higher education.

I. OVERREPRESENTATION OF BLACK IMMIGRANTS AT INSTITUTIONS OF HIGHER EDUCATION

The practice of selecting black immigrants over native blacks who have roots in the United States is a sensitive issue within academic circles, particularly in the admissions process.<sup>16</sup> In 2004, *The New York Times* reported on the large immigrant populations within black student bodies on the campuses of many elite colleges and universities.<sup>17</sup> During a reunion of Harvard University's black alumni, two prominent professors pointed out that of the roughly 530 members of Harvard's black undergraduate population, black immigrants comprised as much as two-thirds.<sup>18</sup> The article shed light on the fact that although there are many native black students who could perform well at a top-tier institution, many selective institutions have seemed content to take higher-performing black immigrants over native blacks.<sup>19</sup> What at the time appeared like an observation of two professors of one black student body, at one university, in actuality was indicative of a larger trend that has been

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<sup>16</sup> See Rimer, *supra* note 8.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* For more discussion about the large black immigrant population at Harvard College, see Aisha Cecilia Haynie, *Not 'Just Black' Policy Considerations: The Influence of Ethnicity on Pathways to Academic Success Amongst Black Undergraduates at Harvard University*, 13 J. PUB. INT'L AFF. 40 (2002).

<sup>19</sup> See Rimer, *supra* note 8.

occurring at many selective colleges and universities around the country over the past couple of decades.

As early as 1999, data on the makeup of black student populations at America's selective institutions of higher education began to exhibit a trend of black student populations being comprised of large immigrant populations.<sup>20</sup> One such study reported that although first- and second-generation black immigrants aged eighteen-to-nineteen years old accounted for only about thirteen percent of the United States' black population, this group comprised over a quarter of the black freshmen entering selective institutions in 1999.<sup>21</sup> Though native blacks and black immigrants attend two-year colleges and non-historically black colleges and universities at similar rates, they differ greatly in the percentage of students who enroll in selective colleges.<sup>22</sup> Black immigrants comprise even higher percentages of black student populations as the selectivity of the institution rises.<sup>23</sup> For instance, the proportion of black immigrants within a black student population increases dramatically when looking solely at Ivy League institutions, where black immigrants account for as much as forty-one percent of the black student population.<sup>24</sup>

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20 Massey et al., *supra* note 1, at 245.

21 *Id.* The data used in this article is from the National Longitudinal Survey of Freshmen. The survey found that among black freshmen entering twenty-eight selective colleges and universities, twenty-seven percent of them were first- or second-generation immigrants. *Id.*

22 Pamela R. Bennett & Amy Lutz, *How African American Is the Net Black Advantage? Differences in College Attendance Among Immigrant Blacks, Native Blacks, and Whites*, 82 SOC. EDUC. 70, 77 (2009).

23 Massey et al., *supra* note 1, at 249.

24 *Id.*

The reaction by college and university administrators to the trend of increasing black immigrant populations on college campuses has been mixed.<sup>25</sup> Proponents of distinguishing black immigrants from native blacks in the admissions process believe that colleges should care more about the type of black students admitted.<sup>26</sup> Proponents justify this by pointing to the original purpose behind affirmative action, which was to correct past injustices in the United States.<sup>27</sup> Proponents also add that admitting black immigrants over native blacks deprives college campuses and classrooms of the unique perspective that native blacks bring.<sup>28</sup>

Some administrators may not believe that the ancestry of black students is a concern and may instead believe that the ancestry of black students is irrelevant for the purposes of admission.<sup>29</sup> The current president of Columbia University stated that “[t]he issue is not origin, but social practices. It matters in American society whether you grow up black or white. It’s that differential effect that really is the basis for affirmative action.”<sup>30</sup> Whatever the reason for black immigrants being favored over native blacks, by avoiding this issue, colleges and universities run the risk of diluting a valuable voice in their student bodies.

Examining the issue of whether black immigrants should benefit from affirmative action is important because black immigrants and native blacks bring with them to an

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25 See Rimer, *supra* note 8.

26 See *id.* See also *e.g.*, *infra* note 209 and accompanying text.

27 See Rimer, *supra* note 8.

28 See *id.*

29 See *id.*

30 *Id.*

institution very different perspectives and experiences.<sup>31</sup> Selective institutions of higher education train and graduate students who not only contribute to the educational environment of the institution they attend, but who go on to become future leaders in industry and government.<sup>32</sup> These students carry with them an education filtered through past and present experiences.

Diversity of student experiences within a student body helps to break down deeply held stereotypes of certain minority groups held by both black and non-black students, who will likely go on to become leaders in American society.<sup>33</sup> In a society where a long history of racial division has led to the dominant culture often viewing all black people as the same, admitting disproportionate numbers of black immigrants dilutes the intended effect of diversity when the black immigrants attending an institution also hold negative stereotypes of native blacks and are overrepresented within a student population.<sup>34</sup> Students attending these institutions may look to those immigrants as representing the “black American experience.”

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31 See *infra* notes 116–38, 185–206 and accompanying text.

32 See *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (citing *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)). The Court, in noting the importance of obtaining an advanced degree, stated: “Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. [Citation omitted.] The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges. *Id.* (citation omitted) (citing Brief for Association of American Law Schools as Amicus Curiae Supporting Respondents at 5–6, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399076).

33 See SAMUEL LEITER & WILLIAM M. LEITER, *AFFIRMATIVE ACTION IN ANTIDISCRIMINATION LAW AND POLICY* 141 (2002).

34 See *infra* notes 185–89 and accompanying text.

Furthermore, attending a selective institution can open many doors to its graduates, particularly black graduates.<sup>35</sup> Graduating from a top-tier institution can lead to higher incomes.<sup>36</sup> These higher incomes are likely associated with the beneficiaries of affirmative action obtaining employment where blacks were historically and are presently underrepresented.<sup>37</sup> The overrepresentation of the black immigrant perspective compared to that of native blacks at selective institutions could result in further repercussions, such as in work place diversity, where black immigrants displace native blacks not only at selective colleges and universities but also in these future employment opportunities.<sup>38</sup> Those black immigrants would carry with them very different perspectives than those of native blacks.<sup>39</sup>

The Supreme Court in *Grutter v. Bollinger* recognized the importance of an applicant's experience in upholding the University of Michigan Law School's admissions process, which attempted to look at each applicant individually and holistically.<sup>40</sup> The Court in *Grutter* reiterated the importance of having a diverse student body with a multitude of

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35 See Lynn O'Shaughnessy, *The Ivy League Earnings Myth*, US NEWS (Mar. 1, 2011),

<http://www.usnews.com/education/blogs/the-college-solution/2011/03/01/the-ivy-league-earnings-myth>.

36 See *id.* O'Shaughnessy discusses a study conducted by Alan Krueger of Princeton University and Stacy Dale of Mathematica Policy Research which looked at the earnings potential of students who graduated from Ivy League institutions. The researchers found no significant difference in earnings when comparing students who actually attended Ivy League institutions to students who were admitted to an Ivy League institution but passed on the opportunity. *Id.* However, the researchers did find a significant positive impact on earnings potential when looking at the same comparison with black and Latino students. See Stacy Dale & Alan B. Krueger, *Estimating the Return to College Selectivity Over the Career Using Administrative Earnings Data 24* (Nat'l Bureau of Econ. Res., Working Paper No. 17159, 2011).

37 See O'Shaughnessy, *supra* note 34.

38 See *infra* note 181 and accompanying text.

39 See *infra* notes 196–206 and accompanying text.

40 539 U.S. 306, 337 (2003).

experiences in order to dispel ingrained stereotypes about certain minority groups.<sup>41</sup> The significance of *Grutter*'s diversity rationale is that the Court expressed its intent to allow an admissions process to consider race as a plus factor as a way of attaining the goal of dispelling deeply held stereotypes.<sup>42</sup>

## II. BLACK IMMIGRANTS BY THE NUMBERS: WHO ARE THEY AND HOW ARE THEY DIFFERENT FROM NATIVE BLACKS?

The number of black immigrants entering the United States remained largely depressed before the civil rights era in the 1960s.<sup>43</sup> Immigration to the United States before this time was limited largely to immigrants from European countries.<sup>44</sup> The principal reason for the lower immigration of people of African origin likely resulted from the racism based on skin color that so pervaded U.S. culture and immigration policies during that time.<sup>45</sup>

The prevalent racism and segregation in the United States before the civil rights movement likely provided a disincentive for black immigrants contemplating coming to the United States. Potential immigrants often consider the laws and policies of the place they intend to migrate to before making the final decision to move.<sup>46</sup> Furthermore, before the civil rights movement in the 1960s, U.S. immigration policy made it difficult, if not

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41 *Id.* at 333.

42 *Id.* at 333-34.

43 See Kwadwo Konadu-Agyemang & Baffour K. Takyi, *An Overview of African Immigration to U.S. and Canada*, in *THE NEW AFRICAN DIASPORA IN NORTH AMERICA* 2, 3-4 (Kwado Konadu-Agyemang, Baffour K. Takyi, & John A. Arthur eds., 2006).

44 DAVID A. GERBER & ALAN M. KRAUT, *AMERICAN IMMIGRATION AND ETHNICITY* 3 (2005).

45 Konadu-Agyemang, *supra* note 42, at 3.

46 Mojúbàolú Olúfúnké Okome, *The Contradictions of Globalization: Causes of Contemporary African Immigration to the United States of America*, in *THE NEW AFRICAN DIASPORA IN NORTH AMERICA* 29, 37 (Kwado Konadu-Agyemang, Baffour K. Takyi, & John A. Arthur eds., 2006).

impossible, for immigrants of African origin to legally enter the United States.<sup>47</sup> At the same time, European countries and Canada had less restrictive immigration policies, which made those countries more attractive destinations for black immigrants.<sup>48</sup>

In the 1960s, the United States began to ease its restrictive stance toward immigrants of African origin, and the number of immigrants from Africa and the West Indies began to increase.<sup>49</sup> Generally, black immigrants had multiple reasons to migrate once the legal barriers were removed in the United States. Many of these reasons were shared by non-black immigrants who decided to leave their countries and come to the United States.<sup>50</sup> This Note will examine two major sources of black immigration: Africa and the Caribbean.

#### *A. Africans*

After the abolishment of the African slave trade in the first decade of the 1800s, immigration of African-born blacks to the United States virtually ceased.<sup>51</sup> The voluntary immigration of black Africans is a fairly recent phenomenon.<sup>52</sup> Until the 1960s, Africans migrated to the United States in relatively small numbers compared to other immigrant groups. During the 100-year period between 1861 and 1961, the United States saw only

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47 See Konadu-Agyemang, *supra* note 42, at 3.

48 See *id.*; SUZANNE MODEL, WEST INDIAN IMMIGRANTS: A BLACK SUCCESS STORY? 22 (2008). One example of Europe's more relaxed immigration policy was the Nationality Act, which was passed in 1948. MODEL, *supra* note 47, at 22. The Act allowed residents of British colonies to enter Britain at will. *Id.*

49 See *infra* notes 52–68.

50 Okome, *supra* note 45, at 32–33.

51 Konadu-Agyemang, *supra* note 42, at 4.

52 Randy Capps, Kristen McCabe, & Michael Fix, *New Streams: Black African Migration to the United States*, MIGRATION POL'Y INST. 1 (2011), <http://www.migrationpolicy.org/pubs/AfricanMigrationUS.pdf>.

46,326 immigrants from Africa.<sup>53</sup> Nonetheless, black Africans are now one of the fastest-growing immigrant groups in the United States.<sup>54</sup>

Several theories could explain why the number of immigrants of African origin remained depressed until fairly recently. Some possible explanations include the difficulty of immigrants of African origin in obtaining visas to enter the United States and the lengthy and costly journey from Africa to the United States being too burdensome for immigrant families.<sup>55</sup> Nevertheless, as stated above, the principal causes were likely the racially biased immigration policies of the United States and the pervasive racism inside the country during this period.

In addition to racism in American culture and the United States' strict immigration policy toward people of African origin, other countries, particularly some European countries and Canada, had more liberal immigration policies. In Europe, during the post-World War II era, there were great labor shortages as countries attempted to rebuild after the war.<sup>56</sup> European nations needed a source of skilled and unskilled labor and some European countries looked toward less industrialized countries for that labor, including

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<sup>53</sup> Konadu-Agyemang, *supra* note 42, at 4.

<sup>54</sup> *See id.*

<sup>55</sup> *Id.* at 3.

<sup>56</sup> *See* Gilles Verbunt, *France*, in *EUROPEAN IMMIGRATION POLICY: A COMPARATIVE STUDY* 127, 136 (Tomas Hammar ed., 1985).

Africa.<sup>57</sup> Some European countries liberalized their immigration policy officially.<sup>58</sup> Some countries relaxed the administration of current immigration laws.<sup>59</sup>

In the United States, several legislative measures passed in the 1960s and 1980s relaxed or abolished immigration restrictions imposed on the immigration of blacks from Africa. In 1965, Congress passed the Immigration and Nationality Act (commonly known as the Hart-Cellar Act).<sup>60</sup> The Act went into full effect in 1968<sup>61</sup> and removed many of the restrictive laws passed in the pre-1960 era that impeded immigration of black immigrants from Africa.<sup>62</sup> With Hart-Cellar, U.S. immigration policy moved from a discriminatory policy favoring immigration from European countries to one that focused on family ties and reunification.<sup>63</sup> The Act made family ties a primary criterion in considering whether to admit new immigrants into the United States, and the Act allowed Africans already in the

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<sup>57</sup> *Id.*

<sup>58</sup> See, e.g., MODEL, *supra* note 47 (discussing the Nationality Act, which Britain passed in 1948). The Nationality Act reduced restrictions on immigration from British colonies. *Id.* Britain's immigration policy had more of an effect on West Indian immigration than African immigration, as a large part of the Caribbean region was under British control at the time.

<sup>59</sup> For example, France took a laissez-faire attitude towards its immigration policy, where many of its workers came first as tourists but were later allowed to stay if they found work. Verbunt, *supra* note 55. In North America, Canada liberalized its immigration policy in 1952 with passage of the 1952 Immigration Act. Konadu-Agyemang & Takyi, *supra* note 42, at 4. The Act removed the color barrier to immigration into the country and instituted a work recruitment program. *Id.*

<sup>60</sup> Konadu-Agyemang & Takyi, *supra* note 42, at 4–5. For language of the Hart-Cellar Act, see Hart-Cellar Act, Pub. L. No. 89–236, 79 Stat. 911 (1965).

<sup>61</sup> Arun Peter Lobo, *Unintended Consequences: Liberalized U.S. Immigration Law and the African Brain Drain*, in THE NEW AFRICAN DIASPORA IN NORTH AMERICA 189, 191 (Kwado Konadu-Agyemang, Baffour K. Takyi, & John A. Arthur eds., 2006).

<sup>62</sup> Konadu-Agyemang, *supra* note 42, at 4–5.

<sup>63</sup> Mary V. Alfred, *Coming to America: The Politics of Immigration and Our Realities as Transnational Migrants in US Higher Education*, 15 PROGRESS EDUC. 55, 57 (2007).

United States to sponsor family attempting to immigrate into the country.<sup>64</sup> In addition, the legislation removed the restrictive quotas on the numbers of Africans who could legally enter the United States.<sup>65</sup>

At the same time that the Hart-Cellar Act passed in the United States, many African countries were experiencing a lack of economic opportunity, increasing population pressures, and political instability.<sup>66</sup> However, the passage of Hart-Cellar in combination with these factors did not immediately lead to an increase in black immigration.<sup>67</sup> Black immigration remained depressed after the passage of Hart-Cellar, likely due in part to a lack of strong political, economic, and social ties between the United States and countries with large black populations.<sup>68</sup>

Though immigration numbers remained relatively low for black immigrants immediately after Hart-Cellar in the mid-1960s, the numbers of Africans entering the United States began to rise steadily.<sup>69</sup> Several events conflated with each other in the 1960s to cause more black immigrants to come to the United States. The 1960s brought independence from colonial rule for many sub-Saharan countries.<sup>70</sup> With independence

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64 Konadu-Agyemang, *supra* note 42, at 4–5.

65 Capps et al., *supra* note 51, at 2.

66 Lobo, *supra* note 60.

67 See Baffour K. Takyi & Kwadwo Konadu-Agyemang, *Theoretical Perspectives on African Migration, in THE NEW AFRICAN DIASPORA IN NORTH AMERICA* 13, 14–15 (Kwado Konadu-Agyemang, Baffour K. Takyi, & John A. Arthur eds., 2006).

68 Lobo, *supra* note 60.

69 Konadu-Agyemang, *supra* note 42, at 4.

70 Mary Mederios Kent, *Immigration and America's Black Population*, POPULATION BULL., Dec. 2007, at 1, 6.

came political turmoil and corruption.<sup>71</sup> Until fairly recently, black Africans had a long history of moving within their own countries or between other African countries rather than emigrating abroad.<sup>72</sup> A combination of political strife, declining economies, political corruption, and ineffective governments resulted in many black Africans looking to migrate to the United States.<sup>73</sup> In addition, globalization lowered the cost of international migration, and the creation of service industries aided immigrants in coming to the United States by guiding black immigrants through the bureaucratic process.<sup>74</sup>

The influx of blacks from African countries accelerated in the 1980s and 1990s.<sup>75</sup> In 1986, Congress passed the Immigration Reform and Control Act (IRCA), which regularized the immigration status of Africans who had illegally entered the United States or had violated their immigration status before 1982.<sup>76</sup> The passage of the IRCA regularized the immigration status of at least 39,000 Africans.<sup>77</sup>

In the 1980s and 1990s, the United States began granting diversity visas to Africans.<sup>78</sup> In 1990, the U.S. State Department introduced a diversity program for distributing visas through a visa lottery. Since the program's inception in 1990, African immigrants have consistently accounted for forty-two percent of approximately 55,000 visas issued by the

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71 *Id.*

72 *Id.*

73 *Id.*

74 Okome, *supra* note 45, at 35.

75 Konadu-Agyemang, *supra* note 42, at 4.

76 *Id.* at 5; *see* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201(a), 100 Stat. 3359, 3394-403 (codified as amended at 8 U.S.C. § 1255a (2006)).

77 Konadu-Agyemang, *supra* note 42, at 5.

78 *Id.* at 4.

State Department every year.<sup>79</sup> The program has allowed about 20,000 persons to emigrate from Africa each year.<sup>80</sup>

During the 1980s and 1990s, the population of black Africans grew about 200 percent.<sup>81</sup> During the period of 1995 to 1998 alone, over 184,000 African immigrants were admitted to the United States, which accounted for six percent of all immigrants during this four-year period.<sup>82</sup> In the 2000s, the growth of the black African population continued at a rapid pace, albeit not as rapidly as in the previous two decades. In the 2000s, the black African population in the United States grew by almost 100 percent.<sup>83</sup> Today, there are about 1.1 million black Africans in the United States, comprising approximately three percent of the foreign-born population.<sup>84</sup> Black Africans comprise approximately three percent of the black American population.<sup>85</sup>

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79 *Id.* at 5.

80 *Id.*

81 Capps et al., *supra* note 51, at 1.

82 Konadu-Agyemang, *supra* note 42, at 4.

83 Capps et al., *supra* note 51, at 1.

84 *Id.*

85 *Id.* at 2. All data in this section was taken in 2009. Of the black immigrants currently in the United States, Nigerians comprise the largest percentage, accounting for nineteen percent of the black African population. *Id.* at 4. The next largest groups are from Ethiopia and Ghana, accounting for thirteen and ten percent respectively. *Id.* These three groups combine to account for forty-two percent of the black African immigrants in the United States. The next highest percentage comes from three countries that each account for six percent: Kenya, Somalia, and Liberia. *Id.* Adding in these three countries, the top six countries account for sixty percent of the black immigrants in the United States. *Id.*

*B. West Indians*

West Indians came to the United States in three waves. The first wave occurred between 1898 and 1924.<sup>86</sup> In 1898, the United States defeated Spain in the Spanish-American War, becoming a dominant power in the Caribbean.<sup>87</sup> Two consequences from the aftermath of the war helped pave the way for immigration from this region. One was the development of the banana export industry.<sup>88</sup> The boats carrying bananas from the Caribbean, predominantly from Jamaica, also carried with them tourists and immigrants.<sup>89</sup> Most of these immigrants went to the Northeast, particularly New York.<sup>90</sup> The second development was the construction of the Panama Canal to connect the Gulf of Mexico with the Pacific Ocean in the early 1900s. The builders of the canal preferred Caribbean workers because they were willing to move to find work, especially workers from Jamaica and Barbados, and the builders could pay the workers low wages without incurring political backlash.<sup>91</sup> Though the construction of the Panama Canal drew immigrants from various countries, the most important source of labor during this time was from Barbados.<sup>92</sup>

The immigration of black immigrants from the Caribbean gradually increased between 1898 and 1924. When the Panama Canal was completed in 1914, the United States

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<sup>86</sup> See MODEL, *supra* note 47, at 13-15.

<sup>87</sup> *Id.* at 13.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 13-14.

<sup>92</sup> *Id.* at 14.

became the favored destination of Caribbean workers who had worked on the canal.<sup>93</sup> Immigration from the Caribbean peaked in 1924 with more than 10,000 immigrants arriving in the United States per year and then fell precipitously to under 2,000 entrants per annum for the years shortly thereafter.<sup>94</sup>

The second wave of black immigrants to the United States from the Caribbean occurred between 1924 and 1967, ending in the year prior to when the Immigration and Nationality Act began to take effect.<sup>95</sup> Several factors converged to reduce the amount of immigration during this period. The initial fall in immigration from the Caribbean was likely the result of the passage of the Johnson-Reed Act of 1924, which placed quotas on immigration from European colonies in the Caribbean.<sup>96</sup> The Johnson-Reed Act had the effect of curtailing black immigrants from the West Indies, many of whom had previously immigrated to the United States under generous British quotas before the passage of Johnson-Reed.<sup>97</sup> In addition to Johnson-Reed, the Great Depression and World War II converged to keep the numbers of black immigrants from the Caribbean in the United States low. The Great Depression likely limited employment opportunities for black Caribbean people already in the United States and for those looking to come to the United States. The combination of the depression and the turmoil of war caused many Caribbean immigrants

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93 *Id.*

94 *Id.* at 15.

95 *Id.* at 21; Lobo, *supra* note 60 (noting that the Hart-Celler Act went into full effect in 1968).

96 MODEL, *supra* note 47, at 14–15.

97 *Id.* at 15.

who were in the United States at the time to return home and caused those in their native countries to remain.<sup>98</sup>

The post-war economic boom made the United States more desirable to Caribbean immigrants; however, the passage of the McCarran-Walter Act of 1952 and changing immigration policy in Europe hindered their motivation to return to the United States.<sup>99</sup> The McCarran-Walter Act capped immigration from each colony in the Western Hemisphere to one hundred people.<sup>100</sup> Although the law exempted the spouses and children of current United States citizens, mass immigration was impossible.<sup>101</sup>

During the time the McCarran Act was being debated and passed in the United States, Britain relaxed its immigration laws.<sup>102</sup> In 1948, Britain passed the Nationality Act, which permitted residents of the British Commonwealth to migrate to Britain at will.<sup>103</sup> Post-World War II Britain had deep labor shortages and actively recruited skilled workers from the Caribbean, particularly from Jamaica.<sup>104</sup> This made Britain comparatively more

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98 *Id.* at 22.

99 *Id.*; see Immigration and Nationality Act, Pub.L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C § 1101). While the official name of the act is the Immigration and Nationality Act, it is also referred to as the McCarran-Walter Act of 1952.

100 MODEL, *supra* note 47, at 22.

101 *Id.*

102 *Id.*

103 *Id.* For language of the statute, see British Nationality Act, 1948, 11 & 12 Geo. 6, c. 56.

104 Alex Glennie & Laura Chappell, *Jamaica: From Diverse Beginning to Diaspora in the Developed World*, MIGRATION INFO. SOURCE (June 2010), <http://www.migrationinformation.org/Profiles/display.cfm?ID=787>; see also See Zig Layton-Henry, *Great Britain, in EUROPEAN IMMIGRATION POLICY: A COMPARATIVE STUDY* 89, 92 (Tomas Hammar ed., 1985).

attractive than the United States to Caribbean blacks. By 1961, about 200,000 immigrants from the Caribbean region had settled in Britain, with half being from Jamaica.<sup>105</sup>

The third wave of immigration of blacks from the Caribbean began in 1967, when the Hart-Celler Act began to take effect (the Act went into full effect in 1968).<sup>106</sup> Hart-Celler demolished favoritism toward persons from Britain and other Northern European countries and put in place generous hemisphere-wide quotas.<sup>107</sup> In addition, during this time, immigration policy in Britain became more restrictive.<sup>108</sup> Black Caribbean immigrants once again regained interest in immigrating to the United States. After the passage of Hart-Celler, annual immigration of blacks from Caribbean countries from 1970 to 2004 fluctuated between 20,000 to 50,000 immigrants.<sup>109</sup> The number of black immigrants from the West Indies peaked around 1990 and declined thereafter. However, after 1970, the number of black immigrants per year from these countries would never fall below 20,000.<sup>110</sup>

From 1970 to 2004, black immigrants from Jamaica made up the largest share of immigrants from the West Indies annually.<sup>111</sup> Four countries collectively sent over three-quarters of West Indian immigrants: Barbados, Jamaica, Guyana, and Trinidad and

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105 Glennie, *supra* note 103.

106 MODEL, *supra* note 47, at 22; *see also* Lobo, *supra* note 60 (noting that the Act went into full effect in 1968).

107 MODEL, *supra* note 47, at 22.

108 Glennie, *supra* note 103.

109 MODEL, *supra* note 47, at 24.

110 *Id.*

111 *Id.* at 25–26.

Tobago.<sup>112</sup> Out of these four countries, Barbados consistently sends the fewest immigrants.<sup>113</sup>

In 2009, black immigrants in the United States from the Caribbean region numbered approximately 1.7 million, approximately 620,000 more than the total amount of black African immigrants.<sup>114</sup> Over the past decade, Caribbean immigration has slowed considerably. For instance, from 2000 to 2009, immigration among black immigrants from Caribbean countries grew by only nineteen percent.<sup>115</sup> In 2009, black immigrants from the Caribbean accounted for over half of the black immigrant population in the United States (there were 1.7 million black immigrants from the Caribbean and 3.2 million black immigrants in total).<sup>116</sup>

*C. Cultural Assimilation and Differing Perspectives of Being “Black”*

The different experiences and perspectives of black immigrants compared to that of native blacks can be analyzed by looking at how black immigrants and their children assimilate into American society and black American culture. Key cultural differences between black immigrants and native blacks derive in large part due to each group's status

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112 *Id.* at 25.

113 *Id.* at 25–26.

114 Capps et al., *supra* note 51, at 3. Contemporary Caribbean groups tend to concentrate themselves in a few cities, particularly New York City and Miami. Mary C. Waters, *Ethnic and Racial Identities of Second-Generation Black Immigrants in New York City*, 28 INT'L MIGRATION REV. 795, 796–97 (1994). In 2005, forty-two percent of black immigrants from the Caribbean region were living in the New York metropolitan area, while twenty percent were living in the Miami-Fort Lauderdale metropolitan area. Kent, *supra* note 69, at 12.

115 Capps et al., *supra* note 51, at 3.

116 *Id.*

as voluntary or involuntary immigrants, where native blacks are involuntary immigrants and black immigrants are voluntary immigrants.

John Ogbu attempted to explain the different outcomes in educational performance of minority groups compared to their immigrant counterparts in a way that sheds light on the key differences between black immigrants and native blacks.<sup>117</sup> In his theory as to why the minority immigrant groups may in many circumstances outperform, Ogbu separated immigrant minority groups and native minority groups into two statuses—voluntary and involuntary.<sup>118</sup> Voluntary minorities are minorities who have willingly migrated to the United States due to opportunity for advancement.<sup>119</sup> Involuntary minorities, on the other hand, are people who were conquered, colonized, or enslaved.<sup>120</sup>

Ogbu created an exception for voluntary status when descendants of immigrants assimilated into the culture of involuntary minorities. In this case, such minorities would move from the voluntary minority category to involuntary.<sup>121</sup> For instance, a black immigrant could become an involuntary minority if that immigrant assimilated into the black subculture. Ogbu made this distinction because he observed that white Americans

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117 John U. Ogbu & Herbert D. Simons, *Voluntary and Involuntary Minorities: A Cultural-Ecological Theory of School Performance with Some Implications for Education*, 29 ANTHROPOLOGY & EDUC. Q. 155 (1998).

118 *Id.* at 164.

119 *Id.*

120 *Id.* at 165.

121 *Id.* at 166.

treat these blacks as part of the non-immigrant blacks, or what he calls the “Black American[s].”<sup>122</sup>

Ogbu argued that voluntary and involuntary minorities actually develop different cultural models of United States society.<sup>123</sup> Under this theory, black immigrants, as voluntary minorities, would interpret American society and societal racism much differently than native blacks. Voluntary minorities compare their current situation to that of their country of origin.<sup>124</sup> They often see their situation in the United States as better than their situation in their home country or better than the lives of their family back home.<sup>125</sup> This motivates them to work harder to succeed.<sup>126</sup> Although children of immigrants may not have a direct connection to their country of origin, they remain connected through their parents or other adults in their community.<sup>127</sup>

Involuntary minorities compare their social and economic status in the United States to that of middle-class whites.<sup>128</sup> These minorities do not see America as a land of great opportunity, and because discrimination has persisted for many generations, involuntary minorities see discrimination as a more permanent fixture in American society.<sup>129</sup>

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122 *Id.*

123 *Id.* at 169.

124 *Id.* at 170.

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.* at 171.

129 *Id.*

Involuntary minorities see obtaining an education and participating in the dominant culture as a betrayal of group loyalty and a threat to their cultural identity.<sup>130</sup>

Under another assimilation theory, the segmented assimilation theory, ethnic minorities who have strong ethnic communities in the United States remain tied to those communities and this connection insulates them from negative outside influences.<sup>131</sup> Without this protection, second-generation immigrants could develop the “adversarial stance,” or oppositional culture, prevalent among native blacks and directed toward the dominant white culture.<sup>132</sup> The segmented assimilation theory predicts that immigrants that assimilate into the broader African American culture will have a higher probability of a negative economic outcome.<sup>133</sup> This prediction is in line with Ogbu’s theory, where he argues that voluntary minorities who assimilate into the culture of involuntary minorities become almost indistinguishable from minorities in the involuntary minority group. The basic tenets of the segmented assimilation theory are not only academic; black immigrant

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130 DOUGLAS S. MASSEY, CAMILLE Z. CHARLES, GARVEY F. LUNDY, MARY J. FISCHER, *THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMEN AT AMERICA’S SELECTIVE COLLEGES AND UNIVERSITIES* 8 (2003).

131 CAROLINE L. FAULKNER, *ECONOMIC MOBILITY AND CULTURAL ASSIMILATION AMONG CHILDREN OF IMMIGRANTS* 39 (2011).

132 *See Waters, supra* note 113, at 801; *see also* Philip Kasinitz, Juan Battle & Inés Miyares, *Fade to Black? The Children of West Indian Immigrants in Southern Florida*, in *ETHNICITIES: CHILDREN OF IMMIGRANTS IN AMERICA* 267, 269-70 (Rubén G. Rumbaut & Alejandro Portes eds., 2001) (discussing segment-assimilation argument that proposes that acculturation of immigrants into the black American subculture leads to a higher probability of negative outcomes).

133 FAULKNER, *supra* note 130.

parents are aware of the potential effect of assimilation of their youth.<sup>134</sup> They see black American culture in a negative light and as something that can corrupt their youth, which in turn affects how black immigrants relate to native blacks.

The immigrant optimism hypothesis can help to explain why the voluntary and involuntary distinction and the segmented assimilation theories may lead to better outcomes among black immigrants. The immigrant optimism hypothesis is grounded in the idea that immigrants are positively selected to integrate into a society to which they immigrate.<sup>135</sup> This theory rests on the belief that the difference between native-born parents and immigrant parents is the controlling factor in how their youth perform.<sup>136</sup> Immigration itself is a selective process where those with the motivation and the means actually migrate from their home countries.<sup>137</sup>

Immigrant parents are generally more optimistic about their chances of success and hold high expectations for their children.<sup>138</sup> Black immigrant parents, due to their voluntary status, likely provide more emotional and other types of support. The immigrant optimism theory predicts that such support would lead to immigrants' youth outperforming the native-born population.<sup>139</sup> Such views provide a huge advantage for black immigrants over native

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134 See, e.g., Alex Stepick, Carol Dutton Stepick, Emmanuel Eugene, Deborah Teed, & Yves Labissiere, *Shifting Identities and Intergenerational Conflict: Growing Up Haitian in Miami*, in *ETHNICITIES: CHILDREN OF IMMIGRANTS IN AMERICA* 229, 253 (noting concern of Haitian leaders).

135 FAULKNER, *supra* note 130.

136 *Id.*

137 Bennett, *supra* note 21, at 73.

138 FAULKNER, *supra* note 130.

139 *Id.*

blacks who may hold a more oppositional view of American society and may receive mixed messages from their parents about the chances of their success due to perceived racism in American society. As a result, blacks who immigrate to the United States or who are born to immigrant parents, have more of an optimistic view of American society instead of the oppositional view that many native blacks hold.

III. AFFIRMATIVE ACTION AND THE IMPORTANCE OF DIVERSITY OF STUDENT  
EXPERIENCES

*A. History of Affirmative Action: From Racial Justice to Diversity of Experience*

Prior to the civil rights era of the 1960s, elite colleges and universities largely excluded students of African origin through a combination of de jure and de facto segregation.<sup>140</sup> Affirmative action based on race can be traced back to the post-Civil War Reconstruction era with the establishment of the Fourteenth Amendment.<sup>141</sup> During Reconstruction, Congress created the Freedman's Bureau, which administered race-conscious programs that assisted recently freed blacks, providing things such as food, medical care, and educational benefits.<sup>142</sup> The term "affirmative action" had not yet been put into use at this time. Even so, the detractors of the above programs during this period

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<sup>140</sup> See LEITER., *supra* note 32 at 158. Leiter and Leiter discuss creation of historical black colleges and universities by Congressional action in 1890 as a response to de jure segregation. *Id.* This type of de jure segregation in higher education was later declared unconstitutional by the Supreme Court in *Brown v. Board of Education*. 347 U.S. 483, 495 (1954).

<sup>141</sup> GIRARDEAU A. SPANN, *THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES* 3 (2000).

<sup>142</sup> *Id.*

shared with contemporary affirmative action detractors the skepticism that race-neutral measures alone would not sufficiently aid racial minorities who had suffered a long history of slavery and discrimination.<sup>143</sup>

Modern-day affirmative action arose in the 1960s as a means to help disadvantaged minorities in education, work, and voting opportunities.<sup>144</sup> The first use of the term affirmative action is attributed to an executive order by President Kennedy in 1961 that would later become part of the Civil Rights Act of 1964.<sup>145</sup> This executive order prohibited discrimination by contractors in employment on the basis of race or ethnicity.<sup>146</sup> At the time that the Civil Rights Act passed, liberals who supported the legislation believed that if racial barriers were removed and an equal playing field created, blacks would thrive under their own impetus.<sup>147</sup> It later became clear, however, that simply removing racial barriers would not completely eliminate the effects of past discrimination.<sup>148</sup> In the context of higher education, the Civil Rights Act of 1964 tied federal funds to the meeting of diversity benchmarks. The potential loss of funding and the upheaval of the civil rights movement of

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143 *Id.* at 4.

144 LEITER, *supra* note 32, at 23.

145 CARL COHEN & JAMES P. STERBA, *AFFIRMATIVE ACTION AND RACIAL PREFERENCE* 191 (2003). Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

146 SPANN, *supra* note 140, at 4.

147 COHEN, *supra* note 144, at 191.

148 *See* Keith Liddle, *Affirmative Action for Certain Non-Black Minorities and Recent Immigrants—“Mend It or End It?”* 11 *GEO. IMMIGR. L.J.* 835, 842 (1997) (discussing affirmative action measures put in place after prohibition of discrimination alone was insufficient in leading to more equal results).

the 1960s led many educational institutions to consider race and ethnicity in their admissions process.<sup>149</sup>

In 1977, in *Regents of University of California v. Bakke*, the Supreme Court limited the justifications for affirmative action in higher education to diversifying student bodies, excluding the use of affirmative action to remedy effects of past societal discrimination as a justification.<sup>150</sup> The Court in *Bakke* concluded that diversity continued to be a compelling issue under the Equal Protection Clause; however, the Court also concluded that assisting particular races or ethnicities because they are perceived as victims of societal discrimination was not a permissible purpose.<sup>151</sup> Instead, the Court in *Bakke* settled on allowing colleges and universities to use race and ethnicity as plus factors in admissions toward the goal of diversifying their student bodies.<sup>152</sup>

In *Grutter v. Bollinger*, the Court reiterated the permissibility of using race as a plus factor in admissions decisions, but in this case, the Court further elaborated on the reasons why such diversity posed a compelling interest.<sup>153</sup> The Court held that the narrowly tailored use of race in admissions furthered a compelling interest of creating a diverse student body, which had educational benefits.<sup>154</sup> The Court not only recognized the importance of the impact that diversity could have on the learning experience in the classroom, but also the

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149 LEITER, *supra* note 32, at 138.

150 438 U.S. 265, 309–10 (1978).

151 *Id.* at 310, 311–14, 320.

152 *Id.* at 317.

153 539 U.S. 306, 333–34 (2003).

154 *Id.* at 332–34.

potential implications of that education after graduation. The Court stated that “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”<sup>155</sup>

More importantly, the Court in *Grutter* emphasized the importance of a diversity of experiences in a student body in the dispelling of imbedded societal stereotypes of certain minorities. The Court contended that institutions of higher education could not accomplish this goal with only token numbers of minority students.<sup>156</sup> The Court’s reasoning on this issue can be extended to apply within particular minority groups, such as with native blacks and black immigrants. As the Supreme Court pointed out in *Grutter*, “[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”<sup>157</sup>

*B. The Effects of Admitting Black Immigrants over Native Blacks on the Diversity Experience: How Black Immigrants Relate to Native Blacks*

1. Black Immigrant Advantage: How the Pooling of Native Blacks and Black Immigrants Can Lead to an Overrepresentation of Black Immigrants

When selective colleges and universities pool native blacks and black immigrants into the same admissions category, black immigrants generally look better than native

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<sup>155</sup> *Id.* at 332.

<sup>156</sup> *Id.* at 333.

<sup>157</sup> *Id.*

blacks on paper. Notably, black immigrants can have more compelling stories, which could appear to admissions officers as adding even more diversity to a student body.<sup>158</sup> Conversely, the story of native blacks seems familiar and commonplace.<sup>159</sup>

In addition, black immigrant families have advantages in education and in other important sociological factors,<sup>160</sup> which can show in the application process. The differences in backgrounds between native blacks and black immigrants not only makes black immigrants more preferred in the admissions process, but these differences indicate that the perspectives of these black immigrants also differ significantly from native blacks.<sup>161</sup>

In general, black immigrants have more education and higher incomes compared to native blacks.<sup>162</sup> Black Africans are one of the most educated immigrant groups in the United States.<sup>163</sup> In 2005, statistics showed that twenty-seven percent of the foreign-born United States population for those aged twenty-five or older had a college degree or higher compared to thirty-eight percent of black African immigrants in the same age category.<sup>164</sup> Black African immigrants from Nigeria, Cameroon, Uganda, Tanzania, and Zimbabwe are

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158 Walters, *supra* note 1.

159 *See id.*

160 *See infra* notes 161–73 and accompanying text.

161 *See infra* notes 179–83, 193 and accompanying text.

162 Kent, *supra* note 69, at 3. Data from 2005 showed that for blacks aged 25 or over and born in the United States, only sixteen percent held a college degree, while 26 percent of blacks born outside of the United States held a college degree. *Id.* at 9. Data showed that 38 percent of African blacks and 20 percent of Caribbean born blacks held college degrees. *Id.*

163 *Id.* at 9.

164 *Id.*

among the most educated, with a majority of black immigrants from these countries having at least a college degree.<sup>165</sup> In comparison to native blacks in the 2010 Census, less than eighteen percent of those persons reporting they were “Black” or “African American alone” held a college degree or higher.<sup>166</sup>

Part of the reason black Africans are more educated as a group is that many black Africans entered the United States through diversity visa programs, which required its recipients to have at least a high school degree or experience in an occupation that requires two years of training.<sup>167</sup> Moreover, the geographic distance of Africa to the United States and the cost to travel that distance prevents many less educated Africans, who are therefore less likely to be well-off economically, from migrating to the United States.<sup>168</sup>

Caribbean blacks in the United States also do well in comparison to native blacks. As with black Africans, Caribbean blacks have more education than native blacks.<sup>169</sup> More Caribbean blacks report being in two-parent homes than native blacks.<sup>170</sup> Caribbean blacks also perform better economically in comparison to native blacks.<sup>171</sup> In addition, data

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165 Capps et al., *supra* note 51, at 12.

166 *See* U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES, SEX BY EDUCATIONAL ATTAINMENT FOR THE POPULATION 25 YEARS AND OVER (BLACK OR AFRICAN AMERICAN ALONE) (2010); *see also* Kent, *supra* note 69, at 9 (analyzing American Community Survey data and finding that only 16 percent of blacks born in the United States held a college degree or higher).

167 Capps et al., *supra* note 51, at 12.

168 *Id.*

169 MODEL, *supra* note 47, at 31–34.

170 *Id.*

171 *Id.* at 36. One area where native blacks do slightly better is with employment rates. *Id.* at 31-34.

Caribbean blacks report slightly higher unemployment rates relative to native blacks. *Id.*

suggests that these advantages over native blacks persist into later generations of West Indians born in the United States, particularly the second generation.<sup>172</sup>

As a group, black immigrants are less likely to be unemployed or in poverty.<sup>173</sup> For black immigrant students, the education and cultural capital of their parents provide them with an inherent advantage, as children with parents who have high educational levels are much more likely to do well in school themselves.<sup>174</sup> This human and cultural capital likely leads to black immigrants having better admissions numbers than native blacks.

For black students who enroll in college, the socioeconomic background of the parents of black immigrants and native blacks does not differ significantly. However, black immigrants in this category hold several key advantages over native blacks.<sup>175</sup> Black immigrants are more likely to come from two-parent homes.<sup>176</sup> The parents of black immigrants are more educated, especially with regard to the father's education.<sup>177</sup> Black

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<sup>172</sup> *Id.* at 82-83.

<sup>173</sup> Kent, *supra* note 69, at 3.

<sup>174</sup> Stepick et al., *supra* note 133, at 233.

<sup>175</sup> See Bennett, *supra* note 21, at 77-78. Bennett and Lutz conducted a research study using National Education Longitudinal Survey (NELS) data from 1988 to 1994. *Id.* at 75. The data from their study is discussed in greater length in this research study.

<sup>176</sup> *Id.* at 74 (finding that 56.9 percent of immigrant black freshman came from two-parent homes versus 51.4 percent for native blacks).

<sup>177</sup> See Massey et al., *supra* note 1, at 256-57. Massey found that seventy percent of fathers of students of immigrant origin held a college degree compared to 55.2 percent of fathers of students of native origin. *Id.* at 257. Looking at fathers with advanced degrees, the respective difference between black immigrants and native blacks is 43.6 percent compared to 25.3 percent. *Id.* However, with mothers of black immigrant students, Massey did not find a statistically significant difference between education levels at the  $p < .05$  level. See *id.*

immigrants also tend to score higher on standardized tests compared to native blacks.<sup>178</sup>

Black immigrants are more than fifty percent more likely to have attended a private school, which leads to better learning environments and ultimately better educational outcomes, such as higher college enrollment rates.<sup>179</sup>

In addition to holding certain sociological and economic advantages, black immigrants also enjoy a more favorable perception in American society than native blacks. Black immigrants are seen more favorably than native blacks due to societal perception of black immigrants as less hostile and more easy going.<sup>180</sup> Non-blacks may perceive black immigrants as being more relaxed around them, not as angry, without a chip on their shoulders, and less likely to believe that society owes them something.<sup>181</sup> The dominant American culture may also perceive black immigrants as having such desirable qualities as being harder workers and more reliable.<sup>182</sup> Native blacks, on the contrary, are often perceived in the opposite fashion.<sup>183</sup> Native blacks, as involuntary minorities, perceive racism as a constant irritant and something that cannot be overcome through hard work and

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178 *Id.* at 260. The authors found that black immigrants scored higher on the SAT, and the difference in SAT scores was statistically significant at  $p < .05$ . *Id.* Black immigrants on average scored 1250, while native blacks scored 1193. *Id.*

179 Bennett, *supra* note 21, at 78; Massey et al., *supra* note 1, at 260.

180 See MODEL, *supra* note 47, at 64.

181 *Id.*

182 *Id.* at 121. The author illustrates this point by describing interviews conducted of whites and blacks at a large New York catering firm. *Id.* The research revealed that white employers favored hiring West Indians to native blacks. *Id.* The employers became aware of the differences between native blacks and foreign-born blacks after foreign-born blacks pointed out such differences. *Id.*

183 Walters, *supra* note 1.

determination. As a result, some native blacks react to whites and the institutions dominated by whites in an oppositional manner.<sup>184</sup>

Admissions officers seeking to create a more diverse student body as a general principle seem to overlook a key purpose of having such diversity, which is to dispel common stereotypes. When admissions policies pool the applications of black immigrants and native blacks, the advantages that black immigrants have over native blacks shine brighter relative to those of native blacks. Furthermore, immigrants may seem to have a more compelling story to tell that is inherently different from that of native blacks, whose story admissions officials may see as familiar and less interesting.<sup>185</sup>

## 2. Inadequacy of the “Black” Label

American culture has historically been racially polarized.<sup>186</sup> One manifestation of this polarization came with the use of the “one-drop rule,” where American society classified a person with any indication of African ancestry as “black.”<sup>187</sup> Although native blacks, African blacks, and Caribbean blacks in the United States differ greatly in terms of

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184 MODEL, *supra* note 47, at 65.

185 Walters, *supra* note 1. In this article Dr. Camille Charles, a sociology professor at University of Pennsylvania describes how a black immigrant family moving from a place like Nigeria or Haiti may present a more compelling narrative than a native black overcoming obstacles growing up in an inner city environment. *Id.*

186 Baffour K. Takyi & Kwame Safo Boate, *Location and Settlement Patterns of African Immigrants in the U.S.*, in *THE NEW AFRICAN DIASPORA IN NORTH AMERICA* 50, 51 (Kwado Konadu-Agyemang, Baffour K. Takyi, & John A. Arthur eds., 2006).

187 CAMILLE Z. CHARLES, MARY J. FISCHER, MARGARITA A. MOONEY, DOUGLAS S. MASSEY, *TAMING THE RIVER: NEGOTIATING THE ACADEMIC, FINANCIAL, AND SOCIAL CURRENTS IN SELECTIVE COLLEGES AND UNIVERSITIES* 6 (2009). For an example of the codification of the “one-drop” rule, see 1924 Va. Acts 534, 535 § 5. Also see Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1187 (1997) for discussion on legislation surrounding the one-drop rule.

their culture and experiences, these groups historically have often been grouped together by the dominant culture and labeled “black.”<sup>188</sup>

After years of the “one-drop rule,” race in American society has become a “master status,” where diversity among subgroups within the black population has been largely invisible to whites.<sup>189</sup> In other words, many black immigrants from Africa and the Caribbean are seen as “invisible in a sea of native-born blacks.”<sup>190</sup> As a result, black immigrants and native blacks may be seen by larger society, particularly among whites, as holding similar perspectives or views, when in fact native blacks and black immigrants hold starkly different views about their experience in American society and of each other.

The experience of native blacks, due to their involuntary status and the history of American racism, is one of a constant struggle between black and white, between the dominant culture and subculture.<sup>191</sup> Being born and raised in a culture where race sometimes seems paramount, native blacks have developed a deep distrust of the dominant white culture. Since native blacks perceive education and participation in the dominant culture as giving in to the dominant culture, native black children feel more pressure to

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188 Takyi, *supra* note 185.

189 CHARLES ET AL., *supra* note 186 (citing Everett Hughes, *Dilemmas and Contradictions of Status*, 50 AM. J. SOC. 353 (1945)).

190 Takyi, *supra* note 185; *see also* Waters, *supra* note 113, at 796.

191 *See* MASSEY ET AL., *supra* note 129.

oppose being a part of the dominant culture.<sup>192</sup> Native blacks who participate in the dominant culture risk alienation from peers and risk being labeled as “acting white.”<sup>193</sup>

Native black children often receive mixed signals from their parents.<sup>194</sup> Black parents, for example, tell their children that school is important and that they can go on to achieve great things. The same parents, conversely, attempt to shield their children from the reality of racial discrimination.<sup>195</sup> While the parents of native blacks may encourage their children to obtain an education in an attempt to motivate them, these same parents simultaneously express doubt in the fairness of society to look past race and express doubt in an education system to provide a quality education for their children.<sup>196</sup>

Black immigrants in the United States are put in a unique position in comparison with the broader immigrant population. First-generation black immigrants come to the United States with an immigrant mentality geared toward achievement; however, a clear racial hierarchy exists within the United States.<sup>197</sup> These immigrants likely come from a country where they were in the majority, so they are not as psychologically stymied by

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192 *See id.*

193 *Id.*

194 *Id.*

195 *Id.*

196 *See id.* (discussing how native black parents communicate mixed messages to their children regarding education, which could affect educational outcomes of native black children).

197 Bennett, *supra* note 21, at 72.

racial stigma.<sup>198</sup> Consequently, black immigrants have a fundamentally different perspective than that of native blacks.

When black immigrants arrive in the United States, those immigrants and their children have to choose whether they will identify and assimilate with native black culture or maintain their cultural and ethnic identities.<sup>199</sup> Looking at first-generation black immigrants and native blacks, there is a large amount of tension between the two groups. Black immigrants, especially first-generation immigrants, have internalized many of the negative stereotypes of native blacks held by many in the United States. Black immigrants often see native blacks as lazy, obsessed with racism, and apathetic toward the raising of family.<sup>200</sup> First-generation black immigrants are more likely to stress differences between themselves and native blacks.<sup>201</sup> On the other hand, native blacks have an equally negative view of black immigrants, often describing them as arrogant, oblivious to the racism prevalent in American society, and unwilling to have a relationship with native blacks.<sup>202</sup> These opposing views greatly affect the way that each group views their position in the United States and how they relate to each other.

The path of second-generation black immigrants and foreign-born black immigrants who migrate at a very young age is more nuanced. These immigrants face multiple and

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198 See Rimer, *supra* note 8. In this article, Mary Waters, the chairman of the sociology department at Harvard University, discusses why black immigrants perform better than native blacks.

199 See Waters, *supra* note 113, at 796.

200 *Id.* at 797.

201 *Id.* at 800.

202 *Id.* at 797.

contradictory paths. Many second-generation immigrants do not have the accent that their parents have and may face more pressure to conform to the larger black American culture.<sup>203</sup> Some black immigrants raise their second-generation children to see American black culture in a negative light and as something to avoid.<sup>204</sup>

Second-generation black immigrants and first-generation black immigrants who immigrate to the United States at a very young age internalize racism and discrimination very differently than native blacks because they have to deal with racism while growing up in America.<sup>205</sup> These black immigrants, however, continue to interpret their experiences, in terms of discrimination and racism, in the United States much differently than native blacks. Native blacks tend to see racism in more circumstances than their immigrant counterparts.<sup>206</sup> Nonetheless, for young first-generation black immigrants and second-generation black immigrants, socioeconomic class and their relative closeness to the American black culture can affect their voluntary status. Young black immigrants who are economically disadvantaged may be more likely to assimilate into the black American subculture.<sup>207</sup>

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203 *See id.* at 800.

204 *See* Stepick et al., *supra* note 133. The author describes how Haitian leaders in Miami in the early 1990s feared that Haitian youth were assimilating into the oppositional youth culture of native blacks. *Id.*

205 *See* Waters, *supra* note 113, at 800.

206 Nancy Krieger, Anna Kosheleva, Pamela D. Waterman, Jarvis T. Chen, & Karestan Koenen, *Racial Discrimination, Psychological Distress, and Self-Rated Health Among US-Born and Foreign-Born Black Americans*, 101 AM. J. OF PUB. HEALTH 1704, 1705 (2011). For instance, in one psychological study on the effects of racial discrimination on psychological health, black immigrants were twice as likely to report having never experienced racism when compared to native blacks. *Id.*

207 *See* Waters, *supra* note 113, at 801.

## CONCLUSION

The experiences and perspectives of black immigrants differ greatly from those of native blacks, many times with the views of black immigrants being contrary to those of native blacks. The differing perspectives of native blacks and black immigrants combined with the overrepresentation of black immigrants at many colleges and universities suggest that black immigrants should not receive the benefit of affirmative action in college admissions.

Arguing that first and second-generation black immigrants should not receive the benefit of affirmative action may at first seem like exclusion; however, this is how affirmative action was intended to work. Proponents of black immigrants receiving the benefit of affirmative action argue that the voice of black immigrants is an important one and that this justifies black immigrants receiving the benefit of affirmative action.<sup>208</sup> This Note in no way seeks to devalue the potential importance of the black immigrant perspective in the diversity experience; nevertheless, administrators must recognize that perspectives of black immigrants can be drastically different from those of native black students. This is critically important when black immigrants continue to be a significantly overrepresented segment within black student populations at many colleges and universities.<sup>209</sup>

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<sup>208</sup> See, e.g., Onwuachi-Willig, *supra* note 1, at 1158.

<sup>209</sup> See *supra* text accompanying notes 19–23.

Administrators at colleges and universities should closely examine their admissions policies to ensure that an important voice, that of African Americans who are the descendants of those who have experienced a long history of racial discrimination and oppression in the United States, continues to be heard on their campuses. Many colleges may not be aware that black immigrants now constitute large percentages of their black student populations. The distinct nature of the voices of black immigrants as compared to native blacks cannot be judged based on students' skin color or a checkbox labeled "Black or African-American" on an admissions application. Better methods of tracking the ancestry of black students in admissions are needed to obtain more detailed information.<sup>210</sup>

Pooling native blacks and black immigrants into one category in the admissions process works against the heart of the diversity rationale in *Grutter v. Bollinger*, which reiterated the importance of diversity of student experiences. The failure of colleges to recognize that a key perspective is missing or being diluted on their campuses could come at a great detriment to those that affirmative action was initially created to benefit. This undercuts the interest the Court in *Grutter* pointed to as a significant interest in creating a diverse student body, which is to diminish the force of stereotypes and to present unique experiences of being a racial minority in American society.<sup>211</sup> The overrepresentation of black immigrants among black student populations diminishes a countervailing perspective

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<sup>210</sup> See Kevin Brown, *Now Is the Appropriate Time for Selective Higher Education Programs to Collect Racial and Ethnic Data on Its Black Applicants and Students*, 34 T. MARSHALL L. REV. 287 (2009) (arguing that education officials should begin collecting ancestral and ethnic data on their black students).

<sup>211</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

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and cultural experience. The consequences of such a trend are even more significant in relation to selective institutions because they train many of the nation's future leaders. Colleges and universities should not be complacent about maintaining or increasing their black student bodies with the enrollment of black immigrants.