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Change in Racial and Ethnic Classifications is Here: Proposal to Address Race and Ethnic Ancestry of Blacks for Affirmative Action Admissions Purposes

By Kevin Brown

On October 19, 2007, the Department of Education ("DOE") issued requirements for the collection and reporting of data on race and ethnicity that educational institutions must follow,
with a final implementation date for the reporting school year of 2010-11.\(^2\) The DOE entitled the requirements the "Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education" (hereinafter the Guidance). The DOE viewed the Guidance as necessary in order to implement the Office of Management and Budget's (OMB) 1997 Standards for the classifications of Federal Data on Race and Ethnicity (1997 OMB Standards).\(^3\)

Until now, the DOE allowed colleges and universities some flexibility in how they collected and reported racial and ethnic data of their students. Historically, colleges and universities embodied the notion that all blacks\(^4\) are alike. Thus, they did not typically distinguish between their black students based on racial or ethnic


\(^3\) See OMB, Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58, 781 (Oct. 30, 1997). From 1993 to 1997, the federal government conducted an extensive review of the racial categories for the 2000 census. (For a listing of the steps taken see Office of Management and Budget: Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity.) An Interagency Committee for the Review of Racial and Ethnic Standards that included representation from 30 agencies was created to make recommendations to OMB. There were numerous opportunities for public comment and public hearings were held around the nation at various stages of the review. The Interagency Committee examined various criticisms and suggestions regarding the current categories and developed a research agenda for some of the more significant issues. The Interagency Committee presented its report to OMB on July 9, 1997. With a few modifications, OMB adopted the recommendations and issued Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity (1997 OMB Revisions) on October 30, 1997. Id.

\(^4\) I will refer to the term "black" to include all individuals in the U.S. whose racial ancestry includes descendants from Africa. As a result, this term includes all of those blacks who are later defined in this article as Black Multiracials see definition infra page 146; Black Hispanics, see definition infra page 146; Black Immigrants, see definition infra page 151; Ascendants see definition infra page 153; and mix race blacks see definition infra page 146.
ancestry, but grouped them into a unified “Black/African/African-American” category.5

For the 2010-2011 academic year, however, educational institutions will be required to collect racial and ethnic data about their students using a two-step question process. The Guidance dictates that on application forms requiring racial or ethnic data, educational institutions raise an initial question about the individual’s ethnicity that requires them to respond to whether they are Hispanic/Latino.6 Then educational institutions must allow

5 For example, almost 350 public and private colleges accepted the Common Application form for the incoming 2009/10 freshmen class and almost 80 institutions accepted the Universal College Application form. Both of these forms lump all black students into a single “African-American/African/Black.” See The Common Application for Undergraduate College Admission, https://www.commonapp.org/CommonApp/default.aspx (last visited March 7, 2010) (login req’d) [hereinafter Common Application]. For a list of the 346 institutions that accept the common application, see Common Application—List of Members (2008), available at http://www.commonapp.org/CommonApp/Members.aspx (last visited March 7, 2010); The Universal College Application (2008), available at https://www.universalcollegeapp.com/Library/PrintPreview/Universal_College_Application.pdf (last visited March 7, 2010). For a list of these institutions see Universal College Application—College Membership, available at http://www.universalcollegeapp.com/index.cfm?ACT=Display&APP=APPONLINE&DSP=CollegeMembership (last visited March 7, 2010) (login req’d). Many colleges and universities also have race-conscious scholarship programs with limited resources that are used to attract the best, underrepresented minorities to their college campuses. Often these race-conscious scholarship programs will base their selection process on the same objective academic measures. Thus, this discussion is not just about admissions, but also about making college affordable to high-achieving black students.

6 The definition of Hispanic or Latino is “a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race.” Guidance, supra note 2, at 59, 274. The author further wants to note that both the words “Hispanic” and Latino” are used in this paper as English language words. “Latino” has its translation in the Spanish language and is masculine in gender and the feminine gender translation is “Latina.” English language nouns, however, do not have gender. Thus, for the English language Latino refers to both males and females while Spanish language data collection
applicants to “mark one or more” categories of the following racial
groups that applies to them: (1) American Indian or Alaska Native;7
(2) Asian American;8 (3) Black or African American;9 (4) Native
Hawaiian or Other Pacific Islander;10 and (5) White.11 For many
selective higher education programs, these questions are asked in a
manner that addresses an individual’s racial and ethnic self-
identification.

For purposes of reporting racial and ethnic data to the DOE, the Guidance makes the Hispanic/Latino ethnic category the
privileged category; therefore, it trumps all the racial categories.
Thus, educational institutions must report to the DOE as
Hispanic/Latino any individual who checks “yes” to the
Hispanic/Latino question, regardless of what racial groups they
designate. The Guidance requires that educational institutions
report non-Hispanic/Latinos who identify with more than one racial
category, as “Two or More Races.” As a result, higher education
programs must report Black/Latino students as Hispanic/Latino (I
will refer to these students as “Black Hispanics”) and Black/White,
Black/Asian and Black/American Indian students as “Two or More
Races.” I will refer to non-Hispanic/Latino students who check the
Black or African American racial box and at least one other racial
box as “Black Multiracials.” The specific racial designations of

should use the masculine (“Latino”) and feminine (“Latina”) nomenclature, such
as “Latino/a.”
7 A person having origins in any of the original peoples of North and South
America (including Central America), and who maintains tribal affiliation or
community attachment. See Guidance, supra note 2, at 59,274.
8 A person having origins in any of the original peoples of the Far East,
Southeast Asia, or the Indian subcontinent including, for example, Cambodia,
China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand,
and Vietnam. Id.
9 A person having origins in any of the black racial groups of Africa. Id.
10 A person having origins in any of the original peoples of Hawaii, Guam,
Samoa, or other Pacific Islands. Id.
11 A person having origins in any of the original peoples of Europe, the Middle
East, or North Africa. Id.
those in the Hispanic/Latino or the Two or More Race category are not reported to the DOE.

Implementation of the Guidance will sensitize selective higher education institutions to the percentage of their black students that are Black Hispanics or Black Multiracials. Even though the overwhelming majority of colleges and universities have not typically classified their black students based on their racial or ethnic ancestry, there is evidence that Black Multiracials, in particular, are significantly overrepresented among black students at selective higher education institutions. For example, a recent survey in Fall 2007 of college freshmen who entered the 31 elite colleges and universities comprising the Consortium on Financing Higher Education\(^\text{12}\) revealed that 19% of black students were Black Multiracials and an additional 4% were Black Hispanics.\(^\text{13}\) In

\(^{12}\) The 31 institutions that are part of COFHE are among the most prestigious in the country. They are Amherst College, Barnard College, Brown University, Bryn Mawr College, Carleton College, Columbia University, Cornell University, Dartmouth College, Duke University, Georgetown University, Harvard University, Johns Hopkins University, MIT, Mount Holyoke College, Northwestern University, Oberlin College, Pomona College, Princeton University, Rice University, Smith College, Stanford University, Swarthmore College, Trinity College, University of Chicago, University of Pennsylvania, University of Rochester, Washington University in St. Louis, Wellesley College, Wesleyan University, Williams College and Yale University. See Consortium on Financing Higher Education, http://web.mit.edu/cofhe/ (last visited March 7, 2010).

\(^{13}\) C. ANTHONY BROH AND STEPHEN D. MINICUCCI, RACIAL IDENTITY AND GOVERNMENT CLASSIFICATION: A BETTER SOLUTION 17, figure 2 (2008) available at http://www.airweb.org/webrecordings/forum2008/Broh%20and%20Minicucci%20II%20v6-1-1.pdf (last visited on February 22, 2010). Broh and Minicucci provided an alternative way for colleges and universities to maintain internal statistics on the racial and ethnic make-up of their students, even though these statistics differed from what these educational institutions are required to report to the Department of Education. Under their alternative approach, Broh and Minicucci classified any multiracial student who had indicated that they were Black as “Black” and not as Hispanic/Latino or “Two or More Races” as required by the Guidance. Id. at 23-4. From this, they calculated that 5.3% of the students were Black (self-reported as monoracial or multiracial) as opposed to 4.1% that
contrast, according to the 2000 census, only 6.3% of the black population between the ages of 17 and 21 in 2007 were multiracial.\textsuperscript{14} Further, the percentage of college-age blacks who are multiracial is set to skyrocket in the next five to ten years. Based on the 2000 census, the percentage of blacks who are now between the ages of 10 and 15 and who will start to enroll in college in the next two or three years has increased to 11.4% of the black population – an increase of over 80% over the 2007 figure.\textsuperscript{15}

\begin{footnotesize}
\begin{enumerate}
\item According to the 2000 Census, 210,794 of those between the ages of 10 and 14 reported that they were Black or African American in combination out of the 3,332,324 who reported that they were Black or African American or Black or African American in Combination. \textit{See Census 2000 PHC-T-8. Race and Hispanic or Latino Origin by Age and Sex for the United States: 2000}, Table 3, available at http://www.census.gov/population/www/cen2000/briefs/phc-t8/tables/tab03.pdf (last visited March 3, 2009). The term “blacks in combination” refers to a person who has one black parent and one non-Black parent. Since the adoption of the 1997 OMB Revisions, federal data collection has viewed the issue of whether a person is Hispanic/Latino as a question about ethnicity and not about race. Thus, a Hispanic/Latino person could be any of the five racial groups or a combination of the different racial groups. For purposes of many of the federal statistics referred to a person who is black in combination is someone who is reported as having checked the Black/African American box and another racial box. Thus, a black in combination with could indicate that their race was black and, say, white or Some Other Race. This person could also have indicated that they are Hispanic/Latino. Thus, some of the blacks in combination with are also Black Hispanics. As a result, they are not the same as Black Multiracial, who are non-Hispanic/Latinos.
\item According to the 2000 Census, 11.4% of blacks under the age of 5 were reported as mixed race. These individuals are now between the ages of 9 and 14 and will start coming to college campuses in three or four years. \textit{See id.}
\end{enumerate}
\end{footnotesize}
The large presence of Black Multiracials in selective higher education programs is not surprising given the fact that Black Multiracials, especially if their non-Black parent is white or Asian, will have less cultural discontinuities with school officials than other blacks. In addition, studies have pointed out that "black/white intermarriages tend to occur when the white spouse trades the privilege of racial status for the higher status of a better-educated black partner."\(^6\)

While only 17.9% of black alone children have at least one parent with at least a bachelor's degree, for black in combination only children\(^7\) the figure is 23.6%.\(^8\) Black Multiracials are also

\(^6\) Simon Cheng & Seena Mostafavipour, *The Differences and Similarities between Biracial and Monoracial Couples: A Sociodemographic Sketch Based on the Census 2000*, 6 (2005), http://www.allacademic.com/meta/p_mla_apa_research_citation/0/2/2/1/9/pages22192/p22192-1.php (last visited July 30, 2009). According to 1990 statistics from the United States Census Bureau, 10% of black males with some college education and 13% of black males with some graduate school education who were married were in interracial marriages. *See The Effect of Higher Education on Interracial Marriage*, 16 J. BLACKS HIGHER EDUC., June 1997, at 55. This contrasts with only 6% of high school dropouts and 7% of high school graduates. For black women, 4% of those with some college education, 5% of those who were college graduates and 6% of those with some graduate school education who were married were in interracial marriages. This contrasts with only 3% of those who were either high school dropouts or just high school graduates.

\(^7\) The term "blacks in combination only children" refers to a person who has one black parent and one non-Black parent. Since the adoption of the 1997 OMB Revisions, federal data collection has viewed the issue of whether a person is Hispanic/Latino as a question about ethnicity and not about race. Thus, a Hispanic/Latino person could be any of the five racial groups or a combination of the different racial groups. For purposes of many of the federal statistics referred to a person who is black in combination is someone who is reported as having checked the Black/African American box and another racial box. Thus, a black in combination with could indicate that their race was black and, say, white or Some Other Race. This person could also have indicated that they are Hispanic/Latino. Thus, some of the blacks in combination with are also Black Hispanics. As a result, black in combination only children are not the same as Black Multiracials, who are all non-Hispanic/Latinos.
In order to generate these figures it is necessary to do calculations from two different census tables: (1) U.S. Census Bureau, America’s Families and Living Arrangements: 2008, Table C5. Nativity Status of Children Under 18 Years /1 and Presence of Parents by Race, and Hispanic Origin /2 for Selected Characteristics: 2008 - Black alone, http://www.census.gov/population/www/socdemo/hh-fam/cps2008.html (hereinafter referred to as “Black Alone Table”) and (2) U.S. Census Bureau, America’s Families and Living Arrangements: 2008, Table C5. Nativity Status of Children Under 18 Years /1 and Presence of Parents by Race, and Hispanic Origin /2 for Selected Characteristics: 2008 - Black alone or in combination with one or more other races. http://www.census.gov/population/www/socdemo/hh-fam/cps2008.html (hereinafter referred to as “Black in Combination Table”). The figures reported in the Black in Combination Table are of all individuals who indicated that they were black, including those that indicated they were black and also indicated one or more additional racial groups. Thus, these figures include the counts from the Black Alone Table. In order to get the figures for black in combination only children it is necessary to subtract the figures in the Black in Combination Table from the figures in the Black Alone Table. The estimated percentage of black alone age 17 or younger living with a parent with at least a bachelor’s degree was 17.9% (add the number with a parent with a Bachelor’s degree of 1,377,000 to the number living with a parent with a professional or graduate degree of 653,000 and divide that figure by the total number of Black Alone children of 11,342,000). Figures from the Black Alone Table. The estimated percentage of black in combination only children age 17 or younger living with a parent with at least a bachelor’s degree was 23.6%. In order to calculate the black in combination only children figures it is necessary to subtract the reported Black in combination figures from the Black in Combination Table from the figures in the Black Alone Table. Thus, add the figures from the Black in Combination Table for living with a parent with at least a bachelor’s degree figure to the figure living with a professional or graduate degree. Then subtract from that total figures from the Black in Alone Table for living with a parent with at least a bachelor’s degree figure to the figure living with a professional or graduate degree. This sum is then divided over the total of black in combination only children which is arrived at by subtracting the figure for ALL CHILDREN in the Black in Combination Table from the figure for ALL CHILDREN from the Black Alone Table. ((1,555,000 + 731,000) - (1,377,000 + 653,000)) / (12,424,000 - 11,342,000) = 23.6%. Similarly, black alone children are 50% more likely to be born to parents, neither of which finished high school (13.5% compared to 20.3%) See Black Alone Table and Black in Combination Table to calculate percentages.
30% more likely to grow up in homes with both parents,\(^{19}\) as well as grow up in homes with greater incomes than other black children. According to the 2008 Census, black alone children are much less likely to live in families with incomes over $50,000 and $100,000 than black in combination only children. For black alone children, only 32.5% live in families with incomes over $50,000 and only 10.3% live in families with incomes over $100,000.\(^{20}\) In contrast, for black in combination only children, 41.7% live in families with incomes over $50,000 and 17% in families with incomes over $100,000.\(^{21}\) Finally, black alone children were almost 40% more likely not to be covered by health insurance.\(^{22}\)

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\(^{19}\) The estimated percentage of black alone children under the age of 17 living with both parents is 37.5% \((3,195,000 + 901,000 + 151,000)/11,432,000)\). The estimates for black alone for 2010 living with both parents under the age of 17 for Native child and parent was 3,195 and for Native Child and foreign born parent is 901 and for foreign-born child and native parent is 151. Total number of black alone children under the age of 18 is 11,342,000. The same formula used to calculate the figures for black in combination only children with at least one parent with at least a bachelor’s degree used in footnote 17 is used here. Thus, the figures for black in combination only children is \((3,657 + 962 + 153) - (3,195,000 + 901,000 + 151,000))/(12,424,000 - 11,342,000)\) = 48.5%. In order to arrive at the increased probability of black in combination only children living with both parents in contrast with black only children (48.5% - 37.5%)/37.5% = 29.33%. See Black Alone Table and Black in Combination Table to calculate percentages.

\(^{20}\) To calculate percentage of black alone children living in families with incomes over $50,000 add figures from the Black Alone Table of incomes from $50,000 to $74,999 to figures of incomes from $75,000 to $99,999 and to figures with incomes over $100,000 and divide the sum of those three figures by the number of black alone children 17 or younger. \((1,504 + 1,015 + 1,163)/11,342,000\); for over $100,000 \((1,163/11,342,000)\) See figures from Black Alone Table.

\(^{21}\) The same formula used to calculate the figures for black in combination only children with at least one parent with at least a bachelor’s degree used in footnote 17 is used here. The corresponding figures from the Black in Alone Table and the Black in Combination Table for incomes over $50,000 are \(((1,666 + 1,120 + 1,347) - (1,504 + 1,015 + 1,163))/(12,424,000 - 11,342,000)\) = 41.7%. For incomes over $100,000 the figures are \((1,347 - 1163)/(12,424,000 - 11,342,000)\) = 17%. In addition, while 35.2% of black alone children live below the poverty
Next, the SAT scores for the various Hispanic/Latino groups were as follows: Mexican-Americans 1362, Puerto Ricans 1355 and Other Latinos at 1362. The gaps between the SAT & ACT scores of blacks, whites and Asians are much greater than the gaps between the scores of blacks and Hispanic/Latinos. With regard to graduate school admissions, one study of the 2000 census noted that 26% of black/white multiracial individuals between the ages of 25 and 54 had a bachelor's degree, compared to 16% of black only individuals.

In addition, significant gaps also exist on standardized tests used to determine admissions to selective graduate programs like the GRE, the MCAT, the GMAT and the LSAT. Admissions
decisions are based upon a holistic evaluation of a given applicant. Nevertheless, no doubt many admissions officials compare in their minds the standardized test scores of a particular applicant to the general test scores of other applicants in that applicant's racial or ethnic group, especially if the applicant is an underrepresented minority. As a result of these racial and ethnic differences on standardized tests and the probability that Black Multiracials are more likely to graduate from college, how a given selective higher education institution treats the racial and ethnic ancestry of Black Multiracials and Black Hispanics will effect their chances of admissions. It will do so by determining which racial and ethnic group admissions officials will have in mind when evaluating these students' academic credentials.

The purpose of the Guidance is to “obtain more accurate information about the increasing number of students who identify with more than one race.” As a result, the Guidance does not highlight the changing ethnic ancestry of blacks in education due to immigration, primarily from the Caribbean and Sub-Sahara Africa. The percentage of foreign-born blacks in the United States has risen over seven fold in the past 40 years from 1.1% in 1970, to 4.9% in 1990, to 6.1% in 2000, to 8% in 2005. Many of the same selection issues regarding affirmative action of Black Multiracials also apply to Black Immigrants (individuals with at least one foreign-born black parent). Like Black Multiracials, Black


26 Guidance, supra, note Guidance, supra note 2, at 59, 267.


28 Id.


Immigrants have at least one parent who is not a descendant from the group of blacks that engaged in the historic struggle by blacks in the United States against racial oppression.

In general, the children of foreign-born blacks also benefit from growing up in homes with greater family incomes and better educated parents than the children of native-born blacks. As with Black Multiracials, there is evidence that Black Immigrants also constitute a disproportionately large share of blacks attending selective higher education programs. According to Dr. Michael T.

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31 The 2000 Census revealed that immigrants from Africa averaged the highest percentage of college graduates of any group in the United States. See Clarence Page, Black Immigrants Collect Most Degrees, Chi. Trib., Mar. 18, 2007, at C7. The college graduate rate for African immigrants was 43.8% compared to 42.5% of Asian Americans, 28.9% for immigrants from Europe, Russia, and Canada, and 23.1% of the United States population as a whole. Id. There has also been a stunning increase in the number of African born blacks entering the country over the past decade. In 2005, forty-one percent of the foreign-born African immigrants came to the U.S. between 2000 and 2005. Mary Mederios Kent, Immigration and America’s Black Population, 62 Pop. Bull. 7 (2007) available at http://www.prb.org/pdf07/62.4immigration.pdf. However, the percentage of African born immigrants over the age of 25 with a college degree dropped to 38%. Id. at 9, Table 4. Further, the average educational attainment level of fourteen years for African immigrants is the highest among any immigrant group in the United States. The median household income of foreign-born black immigrants also exceeds that of native-born blacks. The median income of Africans is $42,900 and blacks from the Caribbean $43,650, in contrast to native-born blacks of $33,790. Abdi Kusow, Africa: East, in The New Americans: A Guide to Immigration Since 1965, 295, 298, 299 Table 2 (Mary C. Waters, Reed Ueda & Helen B. Marrow eds., 2007). Foreign-born blacks are also less likely to be unemployed (7.3% and 8.7%, respectively, compared to 11.2%) and live below the poverty level (22.1% and 18.8%, respectively, compared to 30.4%). Id.

32 One study found that in 2004, 20.9% of black undergraduates had at least one parent born outside of the United States and 27.4% of enrolled black graduate students had at least one foreign-born parent. A Solid Percentage of Black Students at U.S. Colleges and Universities Are Foreign Born, J. Blacks Higher Educ., 22 (Winter 2006/2007). A 2006 article also discussed baseline data from the National Longitudinal Survey of Freshmen students who entered twenty-eight selective colleges and universities in 1999. See generally Douglas S. Massey et al., Black Immigrants and Black Natives Attending Selective Colleges and
Nettles, Vice President for Policy Evaluation and Research at the Educational Testing Service, "[i]f Blacks are typically 5% and 6% of the population at elite colleges, then the representation of native United States born African-Americans might be closer to 3%."  

Given the increasing numbers of Black Multiracial and Black Immigrants attending selective higher education programs, we are witnessing a historic change in the racial and ethnic ancestry of blacks at selective higher education institutions. Further, with the significant numbers of Black Multiracials approaching college age and the continuing influx of foreign-born blacks of college age and the children of foreign born blacks approaching college age, if selective higher education programs continue their admissions process of treating all blacks alike, these changes in the racial and ethnic ancestry of blacks are likely to accelerate in the next few years. The consequence of doing nothing appears to be that in a short period, native-born blacks with two black parents whose predominant racial and ethnic heritage is derived from blacks victimized by slavery and/or segregation (I will refer to this group as "Ascendant") will no longer even make up a substantial percentage of the black students at these institutions.  

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*Universities in the United States*, 113 AM. J. EDUC. 243, 245 (2006) (analyzing data from the National Longitudinal Survey of Freshman to study Black immigrants and native-born Blacks attending selective colleges and universities in the United States). The study revealed that while only 13% of Black eighteen- and nineteen-year-olds are first- or second-generation immigrants, they made up 27% of Black freshmen at these institutions. The percentage of first- and second-generation black immigrants was actually higher at the ten most selective schools in the study, constituting 35.6%. Id. at 248 Table 1. It was even higher at the four Ivy League schools (Columbia, Princeton, University of Pennsylvania, and Yale) in the survey where they made up 40.6% of the Black students enrolled. Id.  


34 The term "Ascendants" is used to denote the connection between this group of blacks and the history of the ascendancy of blacks out of slavery and segregation. It is the ascendancy of this group of blacks that it made it possible for the increase in interracial marriage, black multiracial children and immigration of blacks to the U.S. The term "Ascendants" is also used by African Americans
In this article, I want to propose that if (when) a given selective higher educational institution determines that Ascendants do not constitute “meaningful numbers” or “meaningful representation”\(^\text{3}\) in its student body, then it should alter its

who left America to repatriate in the Republic of Ghana. This term was first mentioned to me in the summer of 2007 by Seestah Imaakus and Brother El Shabazz, the owners and operators of Hotel One Africa located in the city of Cape Coast, Ghana. One Africa is a facility located between Cape Coast Castle (the main British administrative castle during the Tran-Atlantic Slave Trade) and Elmina Castle (the first permanent European structure built in Africa) on the Ghanaian coast. Their lifelong mission is to assist Ascendants as they come through the experience of going through those castles. I wish to also specifically acknowledge the insightful article written by Angela Onwuachi-Willig. See Angela Onwuachi-Willig, The Admission of Legacy Blacks, 60 Vand. L. Rev. 1141, 1149 n.27 (2007). She and others use the terms “Descendants” or “Legacy Blacks” to denote these Blacks to make the connection between their ancestral lineage as descended from Blacks who were enslaved and/or segregated. Id. at 1149 n.27.

\(^{3}\) Like the concepts of “meaningful numbers” or “meaningful representatives,” the concept of “substantial presence” is also vague. What constitutes a substantial presence will vary for different institutions, but it is also tied to the notion of breaking down stereotypes of Ascendants and ensuring that there are enough of them so that they do not feel isolated. Ascendants only make up a subset of those blacks sufficiently connected to the historic struggle of blacks to overcome racial oppression in the U.S. As a result, the concept of substantial presence is less than meaningful numbers, but it should reflect the fact that Ascendants make up a substantial percentage of the latter group.

\(^{36}\) The concepts of meaningful numbers” or “meaningful representatives” are taken from the pars of the testimony regarding the definition of critical mass that was mentioned by the Director of Admissions at the University of Michigan Law School and the Dean of the Law School quoted by the Supreme Court in Grutter v. Bollinger. See Grutter v. Bollinger, 539 U.S. 306, 318-9 (2003):

Erica Munzel, who succeeded Shields as Director of Admissions, testified that ‘critical mass’ means ‘meaningful numbers’ or ‘meaningful representation,’ which she understood to mean a number that encourages underrepresented minority students to participate in the classroom and not feel isolated. Munzel stated there is no number, percentage, or range of numbers or percentages that constitute critical mass. Munzel also asserted that she must
admissions process. Affirmative action has always been part of a strategy for combating racial oppression of blacks who suffered through the long history of racial oppression in the United States. Affirmative action advances this goal by attenuating the continuing effects of the history of racial oppression suffered by blacks in the U.S. in two ways.

First, affirmative action ensures that there are enough individuals connected to that history of racial oppression in the student body to assure that they are able to make their unique contributions to the character of the education that occurs. These students bring the perspective and experiences of those who have suffered because of America’s history of racial oppression to the educational process for the benefit of all students. These contributions include informing others of the impact that the history of racial oppression has had on groups long discriminated against in American society and how that experience has impacted the point of view of those groups. Second, it mitigates the impact of the history of slavery and segregation on those most effected by the history of racial discrimination in this country by ensuring that

consider the race of applicants because a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores. The current Dean of the Law School, Jeffrey Lehman, also testified. Like the other Law School witnesses, Lehman did not quantify critical mass in terms of numbers or percentages. He indicated that critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race. *Id.* at 318-19. I recognize that the terms “meaningful numbers” and “meaningful representation” are vague. The Supreme Court, however, has emphatically rejected quotas; therefore, it is inadvisable to assign a percentage to these concepts. The important thrust of this article is to sensitize readers about the need to abandon the concept of treating all blacks alike for purposes of admissions to selective higher education program. Doing so obscures the declining percentages of Ascendants that are actually in their student bodies.

*See Grutter,* 539 U.S. at 316 (quoting from the University of Michigan Law School admissions policy).
Ascendants exist in the student bodies of selective higher education programs in meaningful numbers.

In this article, I will lay out a proposal for changes in the admissions process to address the declining numbers of Ascendants in the student bodies of selective higher education institutions (the "Proposal"). The Proposal will first call upon these programs to change their admissions forms to add ethnic subcategories for the Black or African American racial box. These ethnic subcategories will allow selective higher education institutions to distinguish those I referred to as Ascendants from Black Immigrants that are in their application pool and student body. Then, this section will

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38 Racial/ethnic designations of applicants relies upon what a given individual applicant indicates on their admission form. This Proposal presumes that applicants who check the various racial and ethnic categories are describing their actual racial and ethnic heritages. As Harvard Law School professor, Lani Guinier, has pointed out, however, "[s]ome students' decisions to 'check the boxes' in order to gain admission under affirmative action is purely instrumental in that a small but growing number of these beneficiaries privately express disdain for the group with which they have temporarily identified." Lani Guinier, Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals, 117 Harv. L. Rev. 113, 155 n 166 (2003). I recognize that some individuals will designate their racial and ethnic categories motivated out of self-interest as opposed to self-identity. However, this is the limitation of an application system that relies on individuals checking racial or ethnic boxes. I am not prepared at this point to suggest some additional verification system in order for admissions officials to be certain that the racial and ethnic designations included on application forms matches the applicant's biological ancestry. However, the Guidelines define "American Indian and Alaskan Native" as "a person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment. See Guidance, supra note 2, at 59,274. To verify that affiliation sometimes American Indians submit tribal cards issued by the tribe in which they are a member with their admissions documents. At least under the Proposal, however, in order to receive the maximum amount of positive consideration for designating only Black or African American in the admissions process these individuals will also have to write a separate supplemental statement. These additional burdens could function as a disincentive for those who otherwise just have to check a box in order to receive positive considerations based on black ancestry.
discuss further changes to the admissions process and the application form that should occur if (when) a given selective higher education institution determines that Ascendants do not constitute meaningful numbers in their student body. After discussing the Proposal, the next section will discuss the implications of the Proposal for Black Multiracials, Black Immigrants and Black Hispanics. This Proposal seeks to respect the individual choices of those who check the Black or African American box regarding their willingness to identify with the historic struggle of blacks in the U.S. against racial oppression. This article will conclude by urging selective higher education institutions to act as quickly as possible to implement the changes to their admissions process suggested.

I. PROPOSAL FOR CHANGES IN THE ADMISSIONS PROCESS

The primary concern of this Proposal is not that Black Multiracials, Black Hispanics or Black Immigrants receive positive considerations for their racial/ethnic ancestry in the admissions process. Nor is the primary worry that Black Multiracials or Black Immigrants, and, maybe Black Hispanics, are somewhat overrepresented among black students that attend selective higher education programs. Instead, the primary motivations for this Proposal are twofold. One, black students who identify with and are committed to engaging in the historic struggle to overcome racial oppression of blacks in America will not be members of the student bodies of many (most) selective higher education programs in any meaningful number. Two, if the current admissions practices of treating all blacks alike continues, thenAscendants will constitute a decreasing minority of black students at most selective higher education institutions, even though they represent a substantial majority of the black population in the U.S.

The Guidance requires all educational institutions to allow students to address whether they are Hispanic/Latino and to check all racial boxes that apply. On many applications for selective
higher education programs, an individual’s Hispanic/Latino or racial identification is a matter of personal choice. For example, on both the Common Application and the Universal Application for the 2010/2011 academic year, the question about ethnicity asked is, "[a]re you Hispanic/Latino." With regard to racial identification, the Common Application asks, "please select one or more of the following ethnicities that best describe you;" and the Universal Application asks, "[h]ow would you describe your racial background? (select one or more of the following categories)." Complying with the Guidance will provide selective higher education programs with information not only about which applicants are Black Multiracial and Black Hispanic, but also the ability to determine their number and percentage among their application pool and student body.

Beyond reporting the race and ethnicity to the DOE, the Guidance allows educational institutions to collect additional information regarding ethnic sub-categories for both those who check "yes" to the Hispanic/Latino question and each of the racial categories for their own purposes. Selective higher education programs should change their application forms and include ethnic subcategories in the Black or African American category. This will allow selective higher education institutions to know which of those


42 Guidance, supra note 2, at 59, 268.
who checked the Black or African American category are Black Immigrants. The subcategories might look something like this: 43
Black or African American (please specify one or more below)

- Native-born Blacks (both parents born in the U. S.)
- African Ancestry ____________________(specify country e.g. Ghana, Nigeria, Ethiopia, Liberia)
- Caribbean Ancestry ____________________(specify country e.g. Jamaica, Haiti, Trinidad and Brazil)
- Other non-U.S. Ancestry ____________________
  (specify country e.g. Canada, France, the United Kingdom) 44

Collecting this data will allow a selective higher education program to obtain accurate information not only about the race of all those who check the Black or African American box, but also about their ethnicities. This data will allow a given selective higher

43 Selective higher education institutions may also want to add additional ethnic subcategories for its Hispanic/Latino, Asian, and Native Hawaiian or Other Pacific Islander. Applications typically ask for applicants who want to check the American Indian or Alaska Native box to include their tribe. The definitions under the Guidance for this box says “[a] person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment.” See Guidance, supra note 2, at 59,274. Thus, educational institutions must gather tribal information about those in the American Indian or Alaska Native box.
44 The reason I suggested these categories is that according to a December 2007 Population Reference Bureau report in 2005, “two-thirds of the 2.8 million foreign-born blacks were born in the Caribbean or another Latin America country and nearly one-third were born in Africa. Another 4 percent (about 113,000) were born in Europe, Canada, or elsewhere.” See MARY MEDERIOS KENT, IMMIGRATION AND AMERICA’S BLACK POPULATION 4 (2007), available at http://www.prb.org/pdf07/62.4immigration.pdf last visited March 7, 2010.)
education program to determine whether, and to what degree, Ascendants constitute either meaningful numbers or substantial representation among the students in its institution.\footnote{As indicated earlier, the concept of “meaningful numbers” refers to obtaining a critical mass of black students who are sufficiently connected to the history of racial oppression of blacks in the U.S. to influence the educational process. Blacks who make up the meaningful numbers come from two groups: 1) all Ascendants and 2) those who checked the Black or African American racial box and submitted a supplemental statement indicating a connection to the historic struggle by blacks to overcome their racial oppression. This Proposal calls upon selective higher education institutions to include a “Substantial representation” of Ascendants in its student body. Since all Ascendants are counted in determining “meaningful numbers” the number or percentage that it takes to achieve “substantial representation” is smaller than the number or percentage need for “meaningful representation.”}

If (when) a selective higher education program determines that Ascendants may not approach meaningful numbers in their student body, then that program should consider altering its admissions process. A purely biological approach to determine positive considerations in the admissions process is inadvisable. Limiting positive considerations to just Ascendants would ignore the tremendous contributions that those blacks with mixed heritage or foreign-born blacks and their children have made over the centuries to the collective struggle against racial oppression in the United States. This Proposal suggests a hybrid approach.

First, the admissions officials should give additional positive considerations to Ascendants as part of their holistic evaluation. This is due to the ancestral connection of Ascendants to the historical struggle against racial oppression in the United States. After all, these are the individuals with the strongest claim to represent members of an underrepresented minority group with a history of discrimination in the U.S.

In addition, any individual who checks the Black or African American box, including Black Hispanics, should also be provided with the option to write a separate supplemental statement that discusses their contributions to advance the historic struggle to eradicate racial oppression of blacks in the United States. The
applicant in the statement should also discuss what they envision they will do in the future to assist in that struggle. Admissions committees should also give additional positive considerations to applicants based upon this supplemental statement. The greater the demonstrated contribution and expressed commitment, the more positive consideration admissions committees should award. Ascendants that supply this supplemental statement would be eligible for what amounts to double positive considerations: one amount based on their racial ancestry and a second based on their supplemental statement.

As with any holistic evaluation of a particular candidate, I do not attempt to quantify the amount of positive considerations. Each admissions committee must determine that issue as they grapple with each individual black applicant. However, the general goal of this revised admissions process is two fold. First, it aims to ensure that meaningful numbers of individuals sufficiently connected to the history of racial oppression in the U.S. are included in the student body. This, in turn, will ensure those students' ability to make their unique contributions to the character of the education that occurs. This group includes all Ascendants – regardless of whether they submit a supplemental statement – and all those who check the Black or African American racial box and submit a supplemental statement. The second goal is to assure a substantial presence of Ascendants in the student body.

This Proposal does not mean that Black Multiracials or Black Immigrants that do not submit a supplemental statement should not receive any additional positive considerations in the admissions process. Rather, depending on the racial characteristics of the student body of a given selective higher education institution, some of these individuals could add to the

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46 See Gratz, 135 F.Supp.2d 790 (E.D. Mich. 2001) (striking down a system that provided numerical points in the admissions process based on race and ethnicity because it failed to preclude admissions counselors from conducting the type of individualized consideration described in the Court's opinion in Grutter).

47 The treatment of Black Hispanics who do not submit a supplemental statement is addressed later in this comment. See infra notes 70-74 and accompanying text.
diversity of student body. They do not contribute to the effort of a
selective higher education institution to obtain a critical mass of
underrepresented minorities with a history of discrimination or
assist in obtaining a meaningful number of blacks connected to the
history of discrimination in the U.S. in order “to ensure their ability
to make unique contributions to the character of the Law School.”

II. HOW THE PROPOSAL APPLIES TO VARIOUS
BLACK RACIAL/ETHNIC GROUPS

The origins of the Guidance’s adoption stem from efforts of
multiracial groups to add a separate multiracial category on the
2000 census. Many of the individuals in this movement were either
blacks with mixed ancestry or individuals involved in black/white
interracial marriages or relationships. Their principal arguments

48 In Grutter the Supreme Court approved the University of Michigan Law
School’s admissions policy. This statement comes from the affirmative action
admissions policy of the University of Michigan Law School that was approved
by the Supreme Court in Grutter. The policy
reaffirm[s] the Law School’s longstanding commitment to one
particular type of diversity, that is, racial and ethnic diversity
with special reference to the inclusion of students from groups
which have been historically discriminated against, like
African Americans, Hispanics and Native Americans, who
without this commitment might not be represented in our
student body in meaningful numbers. By enrolling a ‘critical
mass’ of underrepresented minority students, the Law School
seeks to ensure their ability to make unique contributions to
the character of the Law School.

Grutter, 539 U.S. at 316.
Thus, according to the Law School’s affirmative action policy, the purpose of
taking account of race and ethnicity for African Americans, Hispanics and Native
Americans is to ensure that individuals from groups which have been historically
discriminated against are able to make their unique contributions to the character
of the Law School. Thus, the Court did not specifically approve the use of racial
categories for other purposes in Grutter.

49 As Kim Williams (who extensively studied the multiracial movement to alter
the federal forms to allow individuals to mark one or more boxes) stated
stemmed from a belief that classifying mixed race blacks as black denied them the ability to choose their own racial identity. The first part of this section discusses how the Proposal respects the ability of Black Multiracials to indicate how important their black racial identity is to their self-definition.

The Guidance requires educational institutions to use the two-question format when gathering racial and ethnic information. This requires educational institutions to separate the question of Hispanic/Latino ethnicity from the question about racial identity. Prior to the Guidance, however, many—if not most—educational institutions combined these into a one question format. The one question format required individuals to choose between identifying themselves as Black or as Hispanic/Latino. The two question format, however, means that Hispanic/Latinos who identify more with being black than being Hispanic/Latino will be reported to the DOE as Hispanic/Latino. The Proposal allows selective higher educational institutions to learn which Black Hispanics strongly identify with their race as opposed to their ethnicity. In so doing, it provides Black Hispanics the ability to inform admissions officials about the importance of their racial identity. The second part of this

[u]nexpectedly, I found that white, liberal, and suburban-based middle-class women (married to black men) held the leadership roles in most multiracial organizations. These white women helped to set an optimistic tone for multiracial activism; many believed that American racial polarization could be overcome by their example. Most of these women were looking for community—not for a census designation. Movement spokespeople reversed these priorities somewhat, although they parted ways after the OMB decision in 1997.


section discusses how the Proposal respects the ability of Black Hispanics to indicate how important their racial identity is to them in comparison to their Hispanic/Latino identity.

Under current application forms, many selective higher education programs do not have a way of easily distinguishing those who check the Black or African American racial box who are Black Immigrants from other blacks. Thus, many admissions officials are not even aware that they are treating Black Immigrants as if they are native blacks, regardless of whether the Black Immigrants want to identify with native blacks. The third part of this section discusses how the Proposal allows Black Immigrants the ability to both inform admission committees of their self-identified ethnic group and indicate whether they identify with the historic struggle by blacks in the U.S. against racial oppression.

A. PROPOSAL RESPECTS THE CHOICE OF BLACK MULTIRACIALS TO DETERMINE THEIR RACIAL IDENTITY

The requirement of the Guidelines to allow individuals to mark one or more racial categories that applies to them traces back to efforts by multiracial groups to add a multiracial category on the 2000 census.\(^{51}\) Multiracial advocates argued that mixed-race individuals viewed themselves as multiracial rather than belonging to a single racial or ethnic group. A “multiracial” designation was, therefore, a better reflection of the true understanding of the

\(^{51}\) This effort was originally opposed by Black civil rights leaders such as Jesse Jackson, Kweisi Mfume (representing the Congressional Black Caucus), and representatives of the NAACP. Civil rights groups were concerned that the addition of a multiracial category would increase the difficulty for collecting accurate data on the effects of discrimination and thereby undercut enforcement of discrimination laws. KERRY ANN ROCKQUEMORE & DAVID BRUNSMA, BEYOND BLACK: BIRACIAL IDENTITY IN AMERICA 1-2 (Sage Publications, Inc. 2002) [hereinafter ROCKQUEMORE & BRUNSMA, BEYOND BLACK]. For a brief history of the movement, see Naomi Mezey, Erasure and Recognition: The Census, Race and the National Imagination, 97 NW. U. L. REV. 1701, 1749-52 (2003).
multiracial person's racial identity. They also noted that the "one-drop rule" used so long to classify any person with any black blood, as black, was inherently racist.\textsuperscript{52} The one-drop rule does not apply to any other racial or ethnic group in the U.S. and appears to exist only in America.\textsuperscript{53} These groups also noted the psychological problems created for biracial children who are forced to identify with one parent more than the other.

The multiracial movement thus sought to assert a racial identity different from that of Black or African-Americans. Increasingly biracial and multiracial individuals or their parents are identifying these individuals in a way that reflects a desire to embrace their multiple racial heritages.\textsuperscript{54} As one multiracial person put it "We multiracial people have the right to make an individual choice about our racial identity. Just because it, at the same time, may threaten many blacks because of ongoing historical issues doesn't mean we should deny our white or other ancestries."\textsuperscript{55} The issue about how to treat Black Multiracials for purposes of affirmative action is a necessary outgrowth of this effort to assert a separate identity from blacks.

One of the most persuasive points argued by multiracial groups about classifying Black Multiracials as black is the inherent racism embedded in the one-drop rule. The one-drop rule was a product of racism. It was intended to say, "if you have any black blood, you shall be considered black." Thomas F. Dixon, Jr., author of The Clansman, expressed the view about one drop of black blood accepted by mainstream American society for much of

\textsuperscript{52} See ROCKQUEMORE & BRUNSMA, supra note 57, at 1-17.
\textsuperscript{54} Tiger Woods is a prominent example of a mixed-race Black individual who openly considers himself "Biracial" or "Multiracial" as opposed to "Black." Woods's mother is of Thai, Chinese and Dutch ancestry and his father is a mixture of ancestry, namely African American, Chinese and Native American. Woods publicly refused the label of Black and created the term "Cablinasian" to reflect his Caucasian, Native American, Black, and Asian ancestry. See JOHN STREGE, TIGER: A BIOGRAPHY OF TIGER WOODS (1997).
the 20th Century. In his best-selling fictional novel *The Leopard's Spots*, Dixon wrote, "One drop of Negro blood... kinks the hair, flattens the nose, thickens the lip, puts out the light of intellect, and lights the fires of brutal passions." There are actually two different aspects of racism involved in the one-drop rule. On the one hand, the one-drop rule represents a firm rejection of the notion that a person with a single drop of black blood could be "white." Thus, one form of racism embodied in the one-drop rule is the notion that any black blood would corrupt the purity of a person's whiteness. However, the one-drop rule also denies the Black Community any say in determining who should be thought of as black by declaring that an individual with any black blood is black, regardless of their identification with the Black Community in the U.S. or their commitment to the continuing struggle against racial oppression of blacks in the U.S.

Against the historical background of racism in American society, the choice by mix race black individuals to identify with both racial groups is not exercised in a vacuum. For some Black Multiracials, choosing to identify with all of their racial groups may reflect a positive desire to embrace their entire heritage, for some, however, it may also represent the negative desire to partially reject being considered black. The Proposal provides Black Multiracials a choice about whether they want to identify with the historic struggle by blacks in the U.S. to overcome the effects of the history of their racial oppression. Many multiracial blacks have been leaders in the struggle against racial oppression in the U.S. throughout the centuries including Crispus Attucks, Frederick Douglass, Prince Hall, Pickney Benton Stewart Pinchback, Robert Smalls, Bishop Henry McNeal Turner, Booker T. Washington, and, of course, Barack Obama. If they choose not to do so by not submitting an additional statement, then their choice should be respected.

Walter White, the Executive Secretary of the NAACP from 1931 to 1955, provides an excellent example of a person with black heritage who was light enough to pass as white, but not only

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consciously choose to identify as black, he became one of Black America's greatest champions for racial justice.\textsuperscript{57} White stated in his autobiography:

I am a Negro. My skin is white, my eyes are blue, my hair is blond. The traits of my race are nowhere visible upon me. . . . I am not white. There is nothing within my mind and heart which tempts me to think that I am. Yet I realize acutely that the only characteristics which matters to either the white or the colored race—the appearance of whiteness—is mine.\textsuperscript{58}

There would be little doubt that Black Multiracials like Walter White would gladly submit a supplemental statement discussing their contributions to advance the historic struggle to eradicate racial oppression of blacks in the United States and what they envision doing in the future to assist in that struggle.

No doubt, many admissions officials of selective higher education programs will be tempted to treat Black Multiracials as Black or African Americans. They would effectively ignore the racial information about Black Multiracials provided by complying with the Guidance. I want to urge them to resist this practice. Treating a Black Multiracial who self-identifies as belonging to more than one racial group as if they were Black or African American amounts to a tremendous infringement of the Black Multiracial individual's ability to determine their own racial identity. Admissions officials who do this are assigning a Black

\textsuperscript{57} I do not want to suggest that such a choice is ever freely made. For a black individual to pass as white—assuming their physical appearance would allow them to do so—still requires that they are willing to accept the huge costs in abandoning their former identity, the comfort of kin and familiar surroundings.

Multiracial individual a racial identity, despite their self-professed desire for admissions officials not to view them as just a Black or African American individual. It also involves a blatant application of the "one-drop" rule with both aspects of the embedded racism that concept implies. Furthermore, such a reclassification provides a benefit to a person of mixed black ancestry who does not seek that benefit. It may also come at the expense of someone who is not only willing to identify with the historic struggle against racial oppression, but also prepared to assist in that struggle in the future.

Treating a Black Multiracial as if they were a Black or African American for admissions purposes also contrasts with research addressing the creation of identity among Black Multiracials. Research exploring the identity formation of biracial individuals suggests that many of them may understand their racial identity in a variety of ways. In addition to a singular identity (either exclusively Black or exclusively white), which some research subjects chose, other options include a border identity (exclusively biracial), a protean identity (sometimes Black, sometimes white, sometimes biracial) and a transcendent identity (no racial identity). Research suggests that individuals choose one (or several) identity(ies) based on social networks or appearance.

Biracial students need not especially choose a single ethnic identity because they have several.

Due to the increasing prevalence of Black Multiracials in American society, it is important that many of them are included in the student body of selective higher education programs. This Proposal allows Black Multiracials who submit a supplemental statement to receive positive considerations based upon their

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60 See Rockquemore, supra note 59, at 338-340.

61 See, e.g., David Kaufman, *Biracial Experiences in the United States*, INTERRACE 15, 19 (Apr. 1994) (quoting a Multiracial college student as saying that ethnic identity and cultural awareness are very important, but that a single ethnic identity is not necessary: "Who are you if you are not the sum total of your physical, mental and environmental beings?").
connection to the historic struggle to eradicate racial oppression in the United States. For Black Multiracials who chose not to submit a supplemental statement, some will have academic records that will justify their admissions regardless of their racial heritage. In addition, depending on the student body of a given selective higher education institution, Black Multiracials may be underrepresented. Thus, some of the Black Multiracials who chose not to submit a supplemental statement could add to the diversity of student body because they are of the few Black Multiracials who do not identify with the collective struggle of the black community that admissions officials deem qualified for admittance. Thus, a given selective higher education institution might award some form of positive considerations to certain Black Multiracials based on purely diversity considerations. Black Multiracials who refuse to submit a supplemental statement, however, do not contribute to the effort of a selective higher education institution to obtain a critical mass of underrepresented minorities with a history of discrimination or assist in obtaining a meaningful number of blacks connected to the history of discrimination in the U.S.

B. BLACK HISPANICS

The Guidance requires the use of the two-question format for collecting data on race and ethnicity. The first question that educational institutions must ask is, “Are you Hispanic/Latino?” In reporting racial and ethnic data to the DOE, the Hispanic/Latino category trumps all others. The Guidance follows the lead of the 1997 OMB Standards which concluded that to ensure flexibility and data quality, separate questions be used for reporting race and Hispanic/Latino ethnicity whenever possible. When entities use separate questions they should ask the Hispanic/Latino ethnicity question first.62 The research conducted prior to OMB adopting the

62 OFFICE OF MANAGEMENT & BUDGET: Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity Federal Register Notice, at 4, October 30, 1997,
1997 OMB Standards found that the best way to produce the most complete data on Hispanics was to ask the Hispanic origin question separately from the question about race and ask the Hispanic origin question first.\textsuperscript{63}

OMB stated that the two-question format was adopted because it would produce the most accurate count of Hispanic/Latinos. Hispanic/Latinos do not always identify with the American racial categories. There was plenty of proof of this on the 2000 census. Slightly more than 35 million people indicated that they were Hispanic/Latino. About 47.9\% checked only the white racial box and an additional 42.2\% checked Some Other Race Category. Of those who checked the Some Other Race box on the 2000 census, over 90\% of them also indicated that they were also Hispanic/Latino.\textsuperscript{64} “Thus it is clear that reporting of [Some Other Race] is highly related to how Hispanics report race.”\textsuperscript{65}

For the purpose of reporting race and ethnicity to the DOE, the \textit{Guidance} requires educational institutions to report Black Hispanics as Hispanic/Latino. However, this means that educational institutions must count those Black Hispanics who identify more with their race than with their ethnicity as Hispanic/Latino, not as Black or African American. In so doing, the \textit{Guidance} actually treats Hispanic/Latinos the way educational institutions use to treat mix raced blacks. Now a modified one-drop

\textsuperscript{63} See Katherine K. Wallman, Suzann Evinger and Susan Schechter, \textit{Measuring Our Nation’s Diversity: Developing a Common Language for Data on Race/Ethnicity} 90 \textit{Am. J. Pub. Health} 1704, 1705 (2000). \textit{But see BROH \\& MINICUCCI, supra note 50 (arguing that this assumption was not tested).}


rule applies to Hispanic/Latinos, only the justification is accuracy of count as opposed to racism.

Prior to the Guidance many, if not most, educational institutions used the one question format for collecting racial and ethnic information.\textsuperscript{66} This format required Black Hispanics to choose between designating their racial/ethnic category as Black or as Hispanic/Latino. Using the one question format, therefore, did not create the problem of classifying someone as Hispanic/Latino who identified more with their race than their ethnicity. In addition, the common practice of many educational institutions that allowed individuals to check more than one racial/ethnic box was to classify students who indicated that they were both black and Hispanic/Latino as black.\textsuperscript{67}

Selective higher education institutions should treat Black Hispanic applicants who include a separate supplemental statement in their application as Black or African American not as Hispanic/Latino. Black Hispanics who submit a supplemental statement are choosing to identify with the historic struggle to eradicate racial oppression of blacks. Therefore, admissions committees should view these individuals as expressing a preference for their race over their Hispanic/Latino ethnicity and treat them as such in the admissions process. Thus, Black Hispanics who submit a supplemental statement should not only receive positive considerations because of their supplemental statement, but admissions officials should also evaluate them as if they were Black or African American as opposed to Hispanic/Latino. This could make a difference in their admissions prospects because Hispanic/Latinos often score higher on


\textsuperscript{67} Broh & Minicucci, \textit{supra} note 66 at 15; see also, Broh, Letter, \textit{supra} note 66.
standardized tests used to determine admissions to selective higher education programs than blacks. 68

Selective higher education institutions should treat Black Hispanics that do not submit a supplemental statement as Hispanic/Latino for admissions purposes. These individuals are not demonstrating that their racial identify is more important than their Hispanic/Latino identity. By treating Black Hispanics in this way, the Proposal restores some of the ability to self-identify that Black Hispanics had before the Guidance.

C. BLACK IMMIGRANTS

Currently, many selective higher education programs do not have a way of easily distinguishing those who check the Black or African American racial box who are Black Immigrants from other blacks. As a result, Black Immigrants are treated as if they identify with native blacks, regardless of whether they actually do. The Proposal allows Black Immigrants the ability to let admissions officials know what their ethnic identity is and whether they identify with the historic struggle of blacks in the United States.

Black Immigrants would be treated in the admissions process like Black Multiracials. Many black individuals with foreign-born black parents have been leaders in the historical struggle against racial oppression of blacks in the United States. Readily recognized black leaders with foreign-born black parent(s) in the struggle against racial oppression in the United States would include Marcus Garvey, Malcolm X, Shirley Chisholm, Harry Belafonte, Colin Powell and Barack Obama. These individuals identified with the historic struggle of blacks against racial oppression in the United States. They added their voices, commitments, motivations and talents to the collective struggle against racial oppression in the United States. Thus, any attempt to discuss the changing racial and ethnic nature of blacks on affirmative action must be sensitive to the reality that the success to

68 See supra notes 16-18 and accompanying discussion.
date in that struggle is also due to the large contributions of blacks
with mix race heritage as well as with black foreign-born parents.

By providing positive considerations for Black Immigrants
who indicate a demonstrated commitment or desire to further the
eradication of racial oppression in the United States, selective
higher education programs can make certain that many Black
Immigrants are included in their student body. As with Black
Multiracials, application of the Proposal does not mean that Black
Immigrants who do not choose to write a separate statement about
their connection to the historic struggle of blacks against racial
oppression in the United States are not to be admitted. Some of
Black Immigrants will have academic records that will justify their
admissions regardless of their racial heritage. Others may express
other individual factors that make them valued members of the
student body of a particular selective higher education program.
Like Black Multiracials, Black Immigrants who do not submit a
supplemental statement should not be viewed as contributing to the
effort of a selective higher education institution to obtain a critical
mass of underrepresented minorities with a history of
discrimination or assist in obtaining a meaningful number of blacks
connected to their history of discrimination in the U.S.

III. CONCLUSION

The DOE’s new guidelines on collecting and reporting
racial and ethnic data have a final implementation date of the
reporting school year of 2010/11. All colleges and universities that
had not previously reviewed and revised their application forms to
comply with the Guidance did so this past summer in preparation
for receiving applications for next fall’s admissions class.
Implementation of the Guidance will sensitize selective higher
education institutions to the percentage of their black students that
are Black Hispanics or Black Multiracials. While colleges and
universities previously did not typically classify their black students
based on their racial or ethnic ancestry, there is evidence that Black
Multiracials in particular are significantly overrepresented among black students at selective higher education institutions. This is not surprising given the fact that Black Multiracials, especially if their non-Black parent is white, will have less cultural discontinuities with school officials than other blacks. In addition, Black Multiracials are more likely to live with both parents, live in families with higher incomes, live with families that own their own home and have parents with more education than other blacks. Thus, as selective higher education institutions become aware of the probable overrepresentation of Black Multiracials among black students, they are also likely to become aware of a very troubling and uncomfortable reality: the creation of an educational racial hierarchy within the Black Community that mirrors that of American society in general. Black Multiracials, including Black/White and Black/Asian Multiracials, occupy the upper echelons while Black/Hispanics and Black/African Americans occupy the lower levels.

The recognition of a racial hierarchy within the Black Community mirroring that of American society is only part of the story. The Guidance does not highlight the changing ethnic ancestry of blacks attending selective higher education programs that is occurring because of immigration of blacks from other parts of the world. Like Black Multiracials, there is evidence that they are also significantly overrepresented among black students at selective higher education programs. Like Black Multiracials, they also come from families that on average have better socio-economic indicators than native blacks.

Though the Guidelines tell educational institutions how they must report Black Hispanics and Black Multiracial students to the DOE, they do not tell them how to treat these individuals for purposes of affirmative action policies. In this article, I have proposed that selective higher education programs change their application forms so that they can track the applicants who are Black Immigrants. If a given selective higher education program determines that Ascendents are no longer represented among its
student body in meaningful numbers, the institution should alter its admissions process.

This altered process would give additional positive considerations to Ascendants as part of their holistic evaluation. This is due to the ancestral connection of Ascendants to the historical struggle against racial oppression. After all, Ascendants have the strongest claim to be included when a selective higher education program seeks to enroll a critical mass of individuals from “groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.”

69 From the University of Michigan Law School affirmative action plan approved by the Supreme Court in *Grutter*.

In addition, any non-Hispanic/Latino who checks the “Black/African American” box should also be provided with the option to write a separate supplemental statement that discusses their contributions to advance the historic struggle to eradicate racial oppression of blacks in the United States and what they envision they will do in the future in regard to that struggle. Admissions committees should also give additional positive considerations to applicants based upon this supplemental statement. The greater the demonstrated contribution and expressed commitment, the more positive consideration admissions committees should provide. Ascendants that supply this supplemental statement would be eligible for what amounts to double positive considerations: one amount based on their racial and ethnic ancestry and a second based on their supplemental statement.

As with any holistic evaluation of a particular candidate, I do not attempt to quantify the amount of positive considerations. Each admissions committee must determine that as they grapple

70 See *Gratz v Bollinger*, 539 U.S. 244 (2003) (striking down a system that provided numerical points in the admissions process based on race and ethnicity because it failed to precluded admissions counselors from conducting the type of individualized consideration the Court’s opinion in *Grutter*).
with each individual black applicant. However, the general goal of this revised admissions process is to assure that “meaningful numbers or meaningful representation”\textsuperscript{71} of Ascendants are included in the student body so that they do not feel isolated.\textsuperscript{72} In addition, admissions officials should also ensure that there are enough individuals sufficiently connected to the history of racial oppression in the U.S. to ensure the ability of African Americans to make unique contributions to the character of the education that occurs. Selective higher education programs should treat the application of Black Hispanics in the same way that they treat applications of other Hispanic/Latinos.

I want to conclude this article by urging admissions officials of selective higher education programs to act quickly. There is evidence to suggest that Ascendants may already constitute less than half of the black students at many of the nation’s selective higher education programs. In addition, with the increases in foreign-born blacks in the last thirty years and the rising percentage of mix race blacks who are approaching college age in the next few years, the declining percentage of Ascendants among black students in selective higher education will accelerate. If current admissions practices treating all blacks alike do not change, then we may have arrived at a time in American society where we need to tell Ascendants that if they want their children to have any significant chance of admission to a selective higher education program they must select a partner who is either non-black or a foreign-born black person.

\textsuperscript{71}Grutter, 539 U.S. at 318 (discussing the testimony at trial of Erica Munzel, Director of Admissions of the University of Michigan Law School).

\textsuperscript{72}Id. at 319 (discussing testimony at trial of Dean of the University of Michigan Law School, Jeffrey Lehman).