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NOW IS THE APPROPRIATE TIME FOR SELECTIVE HIGHER EDUCATION PROGRAMS TO COLLECT RACIAL AND ETHNIC DATA ON ITS BLACK APPLICANTS AND STUDENTS

KEVIN BROWN*

In *Parents Involved in Community Schools v. Seattle School District No. 1*,¹ all of the Justices reaffirmed their commitment to the 2003 higher education affirmative action decision in *Grutter v. Bollinger*.² *Grutter* was clearly a victory for affirmative action in higher education. In *Grutter*, the Court concluded that the affirmative action policy contained in the admission plan of the University of Michigan Law School was narrowly tailored to a compelling state interest.³ Yet, at the end of her “narrowly tailored” analysis, Justice O’Connor’s opinion for the five-person majority of the Court turned to the issue of the time duration for the affirmative action plan. O’Connor concludes her opinion by stating, “We expect that twenty-five years from now, the use of racial preferences will no longer be

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1. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

2. *See id.* at 722-23 (Roberts, J., opinion, joined by Scalia, Thomas, and Alito, J.J.) (citing *Grutter v. Bollinger*, 539 U.S. 306 (2003), but ultimately deciding that it does not govern the instant case); *id.* at 788 (Kennedy, J., concurring) (citing *Grutter* for the proposition that schools may consider race in adopting policies to encourage diversity); *id.* at 864-66 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsberg, J.J.) (applying the test laid out in *Grutter*).

3. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (“We find that the Law School’s admissions program bears the hallmarks of a narrowly tailored plan.”).

necessary to further the interest approved today.”⁴ The precise implications of O’Connor’s twenty-five-year period are debatable. On one hand, it is an essential part of the holding of *Grutter*.⁵ As a result, affirmative action policies must end in twenty-five years. On the other hand, it is a time to reflect upon where higher education and American society are with respect to the continued need for affirmative action.⁶ Regardless of how someone views the 2028 deadline, one thing is clear: the twenty-five-year period has created an inevitable date with destiny for affirmative action programs. The closer American society gets to 2028, the greater the impetus will be for a renewed discussion about affirmative action and its continued beneficial effects. This comment is an effort to accelerate that discussion.

There is growing evidence that we are witnessing a historic change in the racial and ethnic ancestry of Blacks⁷ who are the beneficiaries of affirmative action. Increasing percentages of Blacks benefiting from affirmative action are foreign-born Black immigrants, their sons and/or daughters, and multiracial⁸ Blacks. For example, at a gathering of Harvard Black Alumni in 2003, Harvard professors Lani Guiner and Henry Louis Gates noted that the children of African and Caribbean immigrants and the children of biracial couples together comprised two-thirds of Harvard’s Black undergraduate population.⁹ Following the “Harvard Revelation,” an article written by Ronald Roach in *Diverse Issues in Higher Education* in 2004 pointed out that a report of the Black presence in twenty-eight

4. *Grutter*, 539 U.S. at 306, 343.

5. *See, e.g., id.* at 375 (Thomas, J., concurring in part and dissenting in part) (“The Court also holds that racial discrimination in admissions should be given another twenty-five years before it is deemed no longer narrowly tailored to the Law School’s fabricated compelling state interest.”).

6. *See id.* at 346 (Ginsburg, J., concurring) (“From today’s vantage point, one may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.”).

7. I use the terms “Negroes,” “Coloreds,” “Black,” “African Americans,” or “Black” in the historic and inclusive sense of referring to people in the United States who are of African descent. I will also be citing to various statistical reports and documents throughout this comment. They will employ different terminology for Blacks. When I do so, I will use the terms that were used in those reports and documents.

8. I will use the term “multiracial” to also include “biracial individuals.”

9. Ronald Roach, *Drawing Upon the Diaspora*, DIVERSE, Aug. 25, 2005, at 38, 39, available at http://www.diverseeducation.com/artman/publish/article_4558.shtml. Roach was talking about DOUGLAS S. MASSEY ET AL., *THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMAN AT AMERICA’S SELECTIVE COLLEGES AND UNIVERSITIES* (Princeton Univ. Press 2003). This study is discussed in more detail later in this article. *See infra* notes 87-88 and accompanying text.

selective colleges and universities revealed that forty-one percent of Black freshmen identified themselves as immigrants, children of immigrants or mixed race.¹⁰ In light of this historic change in the racial and ethnic make up of Blacks admitted to selective higher education programs, this comment seeks to urge selective colleges, universities and graduate programs to start collecting and reviewing relevant data about the racial and ethnic ancestry of its Black students. This is necessary in order to make sure that the future discussions by administrative and admission officials of selective higher education programs about the impact of affirmative action for Black students is fully informed by accurate information.

Now is a particularly auspicious time to urge education officials to begin documenting the racial and ethnic ancestry of its Black students. The Department of Education issued new requirements for the reporting of data on race and ethnicity that educational institutions must follow entitled the "Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the United States Department of Education" (hereinafter The Guidance).¹¹ For the 2010/2011 academic year, educational institutions will be required to collect and report data to the Department of Education about its students using a two-step question process.¹² The Guidance will require that educational institutions raise an initial question about the individuals' ethnicity that requires them to respond to whether they are Hispanic/Latino.¹³ Then educational institutions are required to allow students to "mark one or more" categories of the following racial groups

10. Roach, *supra* note 9.

11. Final Guidance on Maintaining, Collecting and Reporting Racial and Ethnic Data to the United States Department of Education, 72 Fed. Reg. 59,266 (Oct. 19, 2007) [hereinafter Guidance].

12. See C. ANTHONY BROH & STEPHEN D. MINICUCCI, RACIAL IDENTITY AND GOVERNMENT CLASSIFICATION: A BETTER SOLUTION 4 (2008), available at <http://www.airweb.org/webrecordings/forum2008/Broh%20and%20Minicucci%20II%20v6-1-1.pdf> (last visited Feb. 24, 2009). Prior to this time, colleges and universities had to report data about race and ethnicity, but the Department of Education did not specify how to collect that data. *Id.* at 1.

13. 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 11, at 59,266-79. 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 should use the masculine ("Latino") and feminine ("Latina") nomenclature, such as "Latino/a."

that applies to them: (1) American Indian or Alaska Native; (2) Asian; (3) Black or African American; (4) Native Hawaiian or Other Pacific Islander; and (5) White.¹⁴ The Guidance makes the Hispanic/Latino ethnic category trump over all the racial categories. Thus, higher educational programs must report to the Department of Education as Hispanic/Latino individuals who checked “yes” to the Hispanic/Latino question, regardless of what racial groups they designate.¹⁵ I will refer to individuals who self-identify as Hispanic/Latino and Black as “self-identified Black Hispanics.” The Guidance requires that educational institutions report students who checked “no” to the Hispanic/Latino ethnic question, but checked more than one racial category, as “Two or More Races.”¹⁶ As a result, the Guidance requires higher education programs to report self-identified Black Hispanic students as Hispanic/Latino and Black/White, Black/Asian, and Black/American Indian students as “Two or More Races.”¹⁷ I will use the term “self-identified Black Multiracials” to refer to non-Hispanic/Latino individuals who check the “Black or African American” box and at least one other racial box.

The Guidance does not dictate how selective higher education programs should treat self-identified Black Hispanics and self-identified Black Multiracials for admissions purposes. In addition, while educational institutions must use the categories required by the Guidance in their reporting to the Department of Education, they may collect additional information regarding sub-categories for their own purposes within these categories.¹⁸ Implementing the reporting requirements of the Guidance will require higher education program administrators and admissions personnel to address a number of issues that will touch upon the use of race and

14. The definitions in the Guidance are as follows: (1) American Indian or Alaska Native- 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; (2) Asian American-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; (3) Black or African American- A person having origins in any of the Black racial groups of Africa; (4) Native Hawaiian or Other Pacific Islander- A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands; and (5) White. A person having origins in any of the original peoples of Europe, the Middle East, or North Africa. Guidance, *supra* note 11, at 59,274.

15. *Id.* at 59,267.

16. *Id.*

17. *Id.*

18. *Id.* at 59,268.

ethnicity in the admissions process, including the racial ancestry of Blacks. Selective higher education programs will have to decide how much, if any, additional positive considerations self-identified Black Hispanics and self-identified Black Multiracials will receive in the admissions process. These programs will also have to determine whether they are going to use the Department of Education categories for their own internal use as well as for public purposes. Higher education programs generate a number of reports about the racial and ethnic make-up of their student bodies for such purposes such as student recruiting materials, solicitations for financial contributions, reports to alumni about the composition of the student body, reports to other public authorities, and information provided to media establishments.¹⁹ As a result, the implementation of the Guidance will compel higher education program officials to engage in substantial discussions about the racial and ethnic ancestries of their students. The Guidance will also require many higher education programs to change their admissions forms in order to comply with the reporting requirements of the Guidance.

Since complying with the reporting requirements of the Guidance will require all colleges, universities, and graduate programs, including selective ones, to gather information about the racial make up of its Black students, this comment will urge them also to gather information about the ethnic make-up of its Black students as well. Gathering such information is vital in order to determine the exact racial and ethnic ancestry of its Black students. Such a process could reveal that foreign-born Black immigrants and their sons and daughters (I will refer to anyone who has at least one Black foreign-born Black parent as a “Black Immigrant”),²⁰ Black Hispanics, and Black Multiracials constitute a much larger percentage of their Black students than these educational officials realize. This information may reveal the need for a given selective higher education program to consider additional changes to its admissions process in order to combat a much larger underrepresentation of “Ascendants” than is currently

19. Some higher education programs will have reporting requirements imposed upon them by state law or accrediting agencies that could impact their flexibility with regard to collecting additional information.

20. I recognize that there are important differences between foreign-born Black immigrants and their sons or daughters who may have been born in the United States. Nevertheless, the “second-generation” Black immigrant will have as much ancestry that is not derived from the historic struggle against racial oppression in the United States as Black Biracials.

acknowledged.²¹ I use the term “Ascendants” to identify the Blacks who are not Black Hispanics, Black Multiracials, nor Black Immigrants.²² I use the term “Ascendants” to refer to these Blacks in order to make the link between their ancestry and that of Blacks’ ascendancy out of chattel slavery and/or segregation.²³ The significant increase in interracial marriages, the

21. See generally Kevin Brown & Jeannie 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. 1227 (2008). In another article, Jeannie Bell and I viewed affirmative action from the perspective of the long historical struggle by Blacks in the United States against their racial oppression. As a result, we argued that selective higher education programs should change their admissions process so that they can determine the race as well as ethnic ancestry of Black students. The admissions process should also allow an applicant who checks the “Black or African American” box to provide a separate optional supplemental statement that discusses how they either 1) experienced past discrimination based on skin color in the United States; or 2) identify with the historical struggle to eradicate racial oppression in the United States. If a given selective higher education program discovers that “Ascendant” (see definition *infra* note 23) Blacks are underrepresented in its admissions process, they should receive additional positive considerations as part of their holistic evaluation. Due to the ancestral connection of Ascendants to the historical struggle against racial oppression, they should receive positive considerations because they are descendants from people who have suffered from a history of discrimination in the United States. We also argued that admissions committees should also give additional positive considerations to anyone who checked the “African descent” box based upon their supplemental statements indicating that they have either 1) experienced past discrimination based on skin color in the United States, or 2) identify with the historical struggle to eradicate racial oppression in the United States. If either of these factors appears to be present in an individual applicant’s response, he or she has made a case for receiving additional positive considerations in the admissions process. Ascendants who indicate this on their supplemental statement would be eligible for what would amount to double positive considerations: one amount based on their racial ancestry and a second based on their supplemental statement.

22. According to the 2000 census, 89.9% of Blacks had native parentage that was defined as having two parents born in the United States. See UNITED STATES CENSUS BUREAU, PROFILE OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2000, CURRENT POPULATION REPORTS SERIES P-23-206, 25 fig.9-1 (2001), available at <http://www.census.gov/prod/2002pubs/p23-206.pdf>.

23. The term “Ascendants” is also used by African Americans 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 (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.

increase in Black Multiracials, along with immigration of foreign-born Blacks, would not have occurred without the ascendancy of this group of Blacks. The general goal of defining Blacks as “Ascendants” is to limit the term “Ascendants” to those Blacks applying to higher education programs who were born from parents that were considered descendants of Blacks who were enslaved and/or segregated at the time that affirmative action policies were first adopted in the 1960s. This definition of Ascendants is a product of viewing affirmative action from its inception from the perspective of the historical struggle undertaken by the Black community in the United States to overcome its racial oppression in the United States²⁴ Since this comment is focusing on the future of affirmative action, effectively, the term Ascendants applies to those Blacks born from two Black parents in the last twenty-five years or so.

When higher education programs first initiated affirmative action programs, the assumption was that the predominant ancestry of virtually all Blacks in the United States was derived from those victimized by the history of racial oppression of Blacks in the United States.²⁵ As a result, the Black beneficiaries of affirmative action were those Blacks whose predominant ancestry had its roots in slavery or segregation. This is no longer the case. Yet, there are many legitimate reasons to avoid a frank discussion about the racial and ethnic parentage of Blacks on affirmative action. The first section of this comment will note some of these formidable objections. Due to these objections, many higher education program administrators would avoid a discussion about the racial and ethnic heritage of their Black students and applicants without the impetus provided by the need to meet the requirements of the Guidance. The second section of this comment will discuss the implementation of the Guidance and some of the salient issues that higher education programs will have to confront due to complying with the reporting requirements of the Guidance. It will also discuss at some length the issues raised by the reclassification of self-identified Black Hispanics and self-identified Black Multiracials into either the Hispanic/Latino or “Two or More Race” categories. The point of discussing these issues is not to suggest how they should be resolved. Rather, it is to note that the Guidance will necessarily spark a great deal of discussion about the racial and ethnic make-up of students that is likely to

24. For a thorough discussion of why the distinction between Ascendants and foreign-born Blacks, their sons or daughters, or multiracial Blacks is relevant for affirmative action purposes see Brown & Bell, *supra* note 21, at 1252-73.

25. See *infra* and *supra* notes 21-28 and accompanying text.

last for a number of years. While the Guidance will require higher education programs to collect data on the racial ancestry of its Black students, it does not require them to do so for their ethnic ancestry. The third section will point to the dramatic increase in foreign-born Blacks in the United States since the creation of affirmative action programs, particularly over the past twenty years. It will also point to evidence about the overrepresentation of Black immigrants among the Black students on college campuses and in selective higher education programs.

I. THE GUIDANCE REQUIRES DISCUSSIONS OF RACIAL AND ETHNIC ANCESTRY OF BLACKS ON AFFIRMATIVE ACTION DESPITE OBSTACLES

Selective colleges, universities, and graduate programs first engaged in special efforts to recruit Black students in the 1960s. These programs were products of the civil rights movement of the 1960s. At that time, the racial and ethnic makeup of the United States was very different. According to the 1960 census, for example, Whites constituted 88.8% of Americans with an additional 10.6% classified as Black.²⁶ The 1960 census classified Latinos based on their ethnicity, not their race.²⁷ Thus, Blacks and Whites constituted over 99.4% of the American population.²⁸ As a result, many issues involving race and ethnicity appeared to have a simple Black/White dichotomy. Even in the 1970 census, over 83% of Americans were classified as “White, not of Hispanic origin” with an additional 11.1% classified as “Black.”²⁹

At the commencement of affirmative action admissions policies, American society thought of the overwhelming majority of Blacks as descendants of Blacks originally brought to the United States as chattel

26. See Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States*, at tbl.1 (United States Census Bureau, Working Paper Series No. 56, 2002), available at <http://www.census.gov/population/www/documentation/twps0056/twps0056.html#intro>.

27. See *id.*

28. See *id.*

29. *Id.* Because of the way that the counting of Hispanic/Latinos was resolved for the 1970 census, many scholars and activists suspected that the 1970 census seriously undercounted the Hispanic/Latino populations. C. Matthew Snipp, *Racial Measurement in the American Census: Past Practices and Implications for the Future*, 29 ANN. REV. SOC. 563, 572 (2003) available at <http://arjournals.annualreviews.org/doi/pdf/10.1146/annurev.soc.29.010202.100006?cookieSet=1>.

slaves. In 1960, for example, there were only 51,000 Black/white married couples.³⁰ Interracial marriage between Blacks and Whites was still illegal in over twenty states.³¹ The instructions for the 1960 census continued the 1930 change, which required that “[a] person of mixed White and Negro blood was to be returned as Negro, no matter how small the percentage of Negro blood.”³² The use of the “one-drop” rule for the compilation of census statistics reflected the general American ethos at the time that mixed-race Black persons were not distinguishable from monoracial Blacks. Also, historic hostility against the immigration of Blacks kept the percentage of foreign-born Blacks relatively small. In 1960, the percentage of foreign-born Blacks in the United States was less than one percent of the Black population, totaling just 125,322 individuals.³³

At the creation of affirmative action the general American attitude was that mixed-race Blacks and foreign-born Blacks were indistinguishable from monoracial or native-born Blacks, respectively. Thus, one of the assumptions upon which affirmative action admissions plans were developed was that the Black beneficiaries would overwhelmingly be descendants of two parents who, for their entire lives, experienced the embedded racism of American society derived from our history of slavery and segregation.

A frank conversation about the racial/ethnic parentage of Blacks on affirmative action requires the recognition and open discussion of the existence of various “Black” racial and ethnic groups. Discussing the changing racial and ethnic ancestry of Blacks on affirmative action would be a difficult discussion without the need for colleges and universities to

30. G. REGINALD DANIEL, *MORE THAN BLACK?: MULTIRACIAL IDENTITY AND THE NEW RACIAL ORDER* 98 (Temple Univ. Press 2001).

31. F. JAMES DAVIS, *WHO IS BLACK?* 68 (Univ. of Chi. Press 1991) (“Twenty-two states, including many Northern states, still had anti-miscegenation laws in the early 1960s.”).

32. Snipp, *supra* note 29, at 568.

33. Campbell J. Gibson & Emily Lennon, *Historical Census Statistics on the Foreign-Born Population of the United States: 1850-1990*, at tbl.8 (United States Census Bureau, Working Paper Series No. 29, 1999),

<http://www.census.gov/population/www/documentation/twps0029/tab08.html> (excluding the 1960 population of Alaska and Hawaii). This rise in immigration to the United States was triggered by the independence of Caribbean countries and “the passage of the Hart-Cellar Act in 1965, which abolished the old country-of-origins quota, affirmed family connections as the principal basis for admission to permanent residence in the United States, and increased the total numbers of immigrants to be admitted to the United States.” *See also* Roger Waldinger, *Immigration and Urban Change*, 15 ANN. REV. SOC. 211, 212 (1989).

address these issues anyway.³⁴ Because of our history in the United States, distinctions of individuals based on ancestry are considered by their very nature to be “odious to a free people.”³⁵ This is true even when practiced for such laudable purposes as ensuring a diverse student body or attempting to right the wrongs of the past that are the result of such historical uses of ancestries. Many higher education program administrators would prefer to take their lead from Chief Justice John Roberts’ statement at the end of his summer 2007 opinion in *Parents Involved in Community Schools*: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”³⁶

In addition to discussions about the racial and ethnic ancestry of Blacks being uncomfortable, another legitimate concern is the possible implication of the loss of support for affirmative action that could occur because of these discussions. Affirmative action is one of the more controversial programs in our society. The Supreme Court has issued two opinions upholding considerations of race during the admissions process of selective higher education programs: *Regents of the University of California v. Bakke*³⁷ and *Grutter v. Bollinger*.³⁸ Both times the Court upheld affirmative action programs by the slimmest of margins: five to four.³⁹ Voters have already passed referenda to outlaw affirmative action in California (1996), Washington (1998), Michigan (2006), and Nebraska (2008).⁴⁰ Many people are not aware of the growing underrepresentation of Ascendants on affirmative action. The discussions about the changing racial and ethnic ancestry of Blacks on affirmative action could energize opponents of affirmative action by providing them with an additional argument.

34. Attorney General Eric Holder recently delivered remarks in which he said “Though this nation has proudly thought of itself as an ethnic melting pot, in things racial we have always been and continue to be, in too many ways, essentially a nation of cowards. Though race related issues continue to occupy a significant portion of our political discussion, and though there remain many unresolved racial issues in this nation, we, average Americans, simply do not talk enough with each other about race. It is an issue we have never been at ease with and given our nation’s history this is in some ways understandable.” See Eric Holder, Attorney General, Remarks at the Department of Justice African American History Month Program (Feb. 18, 2009), available at <http://www.usdoj.gov/ag/speeches/2009/ag-speech-090218.html> (last visited Mar. 5, 2009).

35. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

36. *Parents Involved in Cmty. Sch.*, 551 U.S. at 748.

37. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

38. *Grutter*, 539 U.S. 306.

39. *Bakke*, 438 U.S. at 265; *Grutter*, 539 U.S. at 306.

40. Scott Jaschik, *Nebraska Bars Use of Race in Admissions*, INSIDE HIGHER ED, Nov. 5, 2008, available at <http://www.insidehighered.com/news/2008/11/05/affirm>.

It is also possible that the most important consequence of a growing recognition of the decreasing percentages of Ascendants on affirmative action is the impact on supporters of affirmative action. The Supreme Court approved the University of Michigan Law School's affirmative action plan which sought to obtain a critical mass of underrepresented minorities with a history of discrimination in order to assure the educational benefits of a diverse student body.⁴¹ Thus, the Supreme Court simultaneously endorsed the benefits of a diverse student body and the inclusion of a critical mass of underrepresented minorities with a history of discrimination. With both increasing numbers of foreign students and Black immigrants, as well as increasing numbers of college age Multiracials, Hispanic/Latinos and Asian Americans, selective higher education programs can obtain a diverse student body without the inclusion of a meaningful number of Ascendants. However, many supporters of affirmative action view it principally in terms of the social justice rationale of helping American society overcome the negative consequences inflicted on individuals who are descendants of those who suffered from the discriminatory treatment their ancestors received throughout the long history of racial oppression of minority groups in American society. If selective higher education programs no longer obtain a meaningful number of Blacks whose predominant ancestry is descended from African slaves or Blacks victimized by segregation, how can one argue that affirmative action has the same persuasive force behind its social justice rationales that it did when it benefited this group as well? The president of Amherst College, Anthony W. Marx, captured this sentiment recently. He stated, "colleges should care about the ethnicity of Black students because in overlooking those with predominantly American roots, colleges are missing an 'opportunity to correct a past injustice' and depriving their campuses of voices that are particular to being African American, with all the historical disadvantages that that entails."⁴² These supporters of affirmative action are motivated—at least in part—by a desire to offset the negative social statistics about the African American community that is the result of America's historic discriminatory treatment. For supporters who see affirmative action with regard to these social justice considerations, the growing underrepresentation of Ascendants on affirmative action is likely

41. See *Grutter*, 539 U.S. at 316.

42. Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, But Which Ones?*, N.Y. TIMES, June 24, 2004, available at <http://www.nytimes.com/2004/06/24/us/top-colleges-take-more-Blacks-but-which-ones.html>.

to cause them to reevaluate their continued support. While these supporters may not become opponents, it may attenuate the level of their support. Thus, it is possible that the discussions about the changing racial and ethnic nature of Blacks on affirmative action could weaken support for affirmative action and become the proverbial “straw that breaks the camel’s back.”

Another reason why discussions about the changing racial and ethnic ancestry of Blacks on affirmative action is a difficult discussion is its implications for the Black community in the United States. The history of the dominant experience of Blacks in America is of a group of people united by the common trait of their race. Throughout its history, American society has treated Black people who were recent voluntary immigrants from Jamaica or Ghana as if they were descendants of those brought to the United States as slaves. Individuals with mixed Black ancestry, no matter how small the percentage of Black ancestry, were treated as if they were descendants of those brought to the United States as slaves. The need to talk about the changing racial and ethnic ancestry of Blacks on affirmative action reveals the fact that the Black community in the United States may have reached a critical juncture in its existence. It stands at a point in the collective struggle against racial subordination that may threaten its racial and ethnic solidarity forever. After all, to discuss the changing racial and ethnic ancestry of Blacks on affirmative action requires Blacks (and others) consciously to think about the racial and ethnic ancestry of Black people. Blacks are compelled to think about whether they should look at their Black brothers and sisters from the Mother Country, West Indies, or other parts of the world with different eyes and hearts than their brothers and sisters who come from families with many generations in the United States. They are required to think about whether to view their brothers and sisters of mixed parentage with different eyes and hearts than those with two parents who suffered as victims of the historic racial oppression in the United States their entire lives. As a result, a forthright and honest discussion of the changing racial and ethnic nature of Blacks on affirmative action cannot help but literally pit father against son, mother against daughter, half brother against half brother, half sister against half sister, and husband against wife.⁴³

43. I cannot help but note the irony of engaging in these discussions following the election of Barack Obama to the Office of the President of the United States. Obama is a self-proclaimed African American even though he has a Kenyan father and a white mother. In that sense, a discussion about the racial and ethnic ancestry of Blacks on affirmative action is a discussion that also centers around the racial and ethnic designation of individuals

Despite these formidable objections, the implementation of the Guidance requires that discussions about the racial ancestry of Blacks on affirmative action commence. Given the fact that discussions about the racial ancestry of Blacks must occur, colleges and universities should also begin discussions about the ethnic ancestry of Blacks on affirmative action as well. At stake in these discussions are coveted places of admission to the most selective colleges, universities, and graduate programs of our nation. Thus, the discussions are also about racial and ethnic ancestry of which Blacks will come to occupy the most prestigious social positions in American society in the next generation. These discussions are also about the next generation of Black role models and leaders.

II. IMPLEMENTATION OF THE GUIDANCE WILL GENERATE SIGNIFICANT DISCUSSIONS ABOUT THE RACIAL AND ETHNIC ANCESTRY OF COLLEGE STUDENTS

The Guidance imposes requirements for how educational institutions must report the racial and ethnic make-up of their student bodies to the Department of Education.⁴⁴ The Guidance, however, does not dictate how selective higher education programs should treat individuals in these categories for admissions purposes. The Guidance also allows educational institutions to collect additional racial and ethnic information beyond that necessary to satisfy reporting requirements of the Department of Education.⁴⁵ This flexibility ensures that higher education program administrators will have many conversations centering on the racial and ethnic make-up of individual applicants and its student body. This section will first discuss the implementation of the Guidance. Then, it will discuss some of the issues that higher education programs must address as they decide whether to use the racial and ethnic compilations of their student bodies derived from following the Guidance for their own internal uses and other public purposes. The final subsection will address issues related to the reclassifications of self-identified Black Hispanics and self-identified

like him. However, it also reveals a growing generational shift between those Blacks who grew up at time when all Blacks were deemed descendants of slaves regardless of immigrant status or percentage of non-Black ancestry and today where the country has so many Black immigrants and multiracial Blacks.

44. Guidance, *supra* note 11, at 59,278.

45. See *infra* notes 63-70 and accompanying text.

Black Multiracials as either Hispanic/Latino or “Two or More Races,” respectively. The point of the final two subsections is not to suggest how colleges and universities should resolve these issues, but to demonstrate that the implementation of the Guidance is likely to start a conversation about the racial and ethnic composition of the student bodies that will last a number of years.

A. Implementation of the Guidance

The Department of Education published the Guidance on October 19, 2007 with a final implementation date for the reporting school year of 2010-11.⁴⁶ Prior to this time, previous regulations, such as Title IV of the Higher Education Act, required colleges and universities to report data about race and ethnicity to the Department of Education, but the Department did not specify how to collect that data.⁴⁷ Higher education programs were free to gather information using different methods from those used by the Federal Government, which allowed them to respond more efficiently to their various local needs for the data. The Guidance eliminates this flexibility in reporting racial and ethnic data to the Department of Education.⁴⁸

The Department of Education 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).⁴⁹ The purpose of the Guidance is to “obtain more accurate information about the increasing number of students who identify with more than one race.”⁵⁰ As a result, it does not require educational institutions to report ethnic data to the Department of Education about its Black students. The Guidance also sought to minimize the hardship on educational institutions by adopting the same reporting categories used by the Equal Employment Opportunity Commission so that educational institutions could use the same reporting categories for both staff and students.⁵¹

46. Guidance, *supra* note 11, at 59,267.

47. See BROH & MINICUCCI, *supra* note 12, at 1.

48. Guidance, *supra* note 11, at 59,278.

49. See OMB, Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg 58,781 (Oct. 30, 1997).

50. Guidance, *supra* note 11, at 59,267.

51. *Id.* at 59,274.

The Guidance traces back to the discussions regarding reporting race on the 2000 census. Groups like Project RACE (Reclassify All Children Equally) and the Association of MultiEthnic Americans spearheaded an effort to add a “multiracial” category to the 2000 census.⁵² The 1990 Census Bureau forms stated that individuals should check the one box that best described their race.⁵³ However, more than 500,000 people selected more than one racial category.⁵⁴ Multiracial advocates argued that mixed-race individuals viewed themselves as multiracial rather than belonging to a single racial or ethnic group.⁵⁵ A “multiracial” designation was, therefore, a better reflection of the true understanding of the 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.⁵⁶ While the 2000 census did not provide a multiracial category for individuals to select, it did allow them to check more than one box when describing their race. The result was that 6.8 million Americans, or about 2.4% of the population, described themselves as multiracial.⁵⁷ Approximately 2.8 million or four percent of those under the age of eighteen selected two or more races.⁵⁸

52. 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*]. The American MultiEthnic Association was the product of an effort to provide a multiracial option on official forms including census forms. For a comprehensive 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).

53. See United States Census Bureau, Appendix E: Facsimiles of Respondent Instructions and Questionnaire pages, (Sept. 21, 1992) <http://www.census.gov/prod/1/90dec/cph4/appdx.pdf>. The question asked was as follows: “Fill ONE circle for the race that the person considers himself/herself to be.”

54. Wendy D. Roth, *The End of the One-Drop Rule? Labeling of Multiracial Children in Black Intermarriages*, 20 SOC. F. 35, 38 (2005).

55. ROCKQUEMORE & BRUNSMA, *BEYOND BLACK*, *supra* note 52, at 1–17.

56. *Id.*

57. Jennifer Lee & Frank D. Bean, *America’s Changing Color Lines: Immigration, Race/Ethnicity, and Multiracial Identification*, 30 ANN. REV. SOC. 221, 229 (2004).

58. See NICHOLAS A. JONES & AMY S. SMITH, *THE TWO OR MORE RACES POPULATION: 2000*, at 9 (2001), <http://www.census.gov/prod/2001pubs/c2kbr01-6.pdf> (last visited Feb. 27, 2009).

There is an important distinction between the census forms filled out by individuals and educational institutions complying with the Guidance. Given the way the census statistics were reported, it was possible to tell the exact racial/ethnic makeup of multiracial individuals. Thus, we know that 32.3% of those who checked more than one race were White and "Some Other Race;" 15.9% were White and American Indian, 12.7% were White and Asian and 11.5% were White and Black.⁵⁹ Under the Guidance, however, the separate racial designations of those in the Hispanic/Latino category and the separate racial designations of those lumped into a unified "Two or More Race" category are not reported.⁶⁰ Thus, it will not be possible to generate statistics that tell precisely the racial and ethnic makeup of those who are Hispanic/Latino or reported in the "Two or More Race" category.

As indicated above, the Guidance requires that educational institutions use a two-step question process when seeking information about race and ethnicity from individuals. The Guidance requires educational institutions to report as Hispanic/Latino any individual who answers "yes" to the ethnic question of "Are you Hispanic/Latino?"⁶¹ Educational institutions will also be required to allow individuals to "mark one or more" of the following racial groups that applies to them: (1) American Indian or Alaska Native;⁶² (2) Asian American,⁶³ (3) Black or African American,⁶⁴ (4) Native Hawaiian or Other Pacific Islander;⁶⁵ and (5) White.⁶⁶

In reporting data to the Department of Education, the Hispanic/Latino category trumps all others. According to the Department of Education, this approach

59. See Censusscope.org, United States Multiracial Profile (2001), http://www.censusscope.org/us/print_chart_multi.html.

60. Guidance, *supra* note 11, at 59,270.

61. See Guidance, *supra* note 11, at 59,274. A person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race. The term, "Spanish origin," can be used in addition to "Hispanic or Latino."

62. *Id.* 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.

63. *Id.* 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.

64. *Id.* A person having origins in any of the Black racial groups of Africa.

65. *Id.* A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.

66. *Id.* A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.

will result in more accurate reporting of data on individuals who are Hispanic/Latino. The most frequent cases of an individual not reporting race occur for individuals who identify themselves as Hispanic/Latino. Research conducted by Federal agencies has shown that a two-part question typically results in more complete reporting of Hispanic/Latino ethnicity, provides flexibility, and helps to ensure data quality.⁶⁷

The Guidance requires that educational institutions report non-Hispanic/Latino students who check more than one race category as “Two or More Races.”⁶⁸ However, educational institutions must not use a “multiracial” category in collecting the data.⁶⁹ If a person with a Black and a Latino parent checks “yes” to the Hispanic/Latino question and marks the Black racial box, the educational institution must report this person as Hispanic/Latino.⁷⁰ Individuals who check the Black and White race boxes, Black and Asian boxes, and Black and American Indian or Alaskan Native boxes are reported as “Two or More Races.”⁷¹

B. Some Issues about the Racial and Ethnic Make-up of Student Bodies that Colleges and Universities must Address

While educational institutions must collect data using the two-question format and must use the categories required by the Guidance on their reporting to the Department of Education, they may collect additional information regarding sub-categories for their own purposes within these categories.⁷² According to researchers Anthony Broh and Stephen D. Minicucci, “prior to the Guidance, institutions of higher education almost universally exercised their discretion . . . and used one question to record race and ethnicity with ‘Hispanic’ listed as an item among the other race categories.”⁷³ For example, almost 350 public and private colleges accepted the Common Application form for the incoming 2009/10 freshmen class⁷⁴ and almost eighty institutions accepted the Universal College

67. Guidance, *supra* note 11, at 59,270. *But see* BROH & MINICUCCI, *supra* note 12.

68. Guidance, *supra* note 11, at 59,267.

69. *Id.*

70. *Id.*

71. Guidance, *supra* note 11, at 59,267.

72. *Id.* at 59,268.

73. *See* BROH & MINICUCCI, *supra* note 12, at 5 (arguing that this assumption was not tested).

74. The Common Application for Undergraduate College Admission (2008), *available at* https://www.commonapp.org/CommonApp/docs/downloadforms/CommonApp2008.pdf_Ap

Application form.⁷⁵ Both the Common Application and the Universal College Application forms used the one question format. Thus, many higher education programs will have to change their application forms from the “one question format” to the “two question format” required by the Guidance.

The Guidance may require many higher education programs also to change their application forms to comply with the requirement that students be allowed to check one or more of the racial categories. The Guidance, however, does not require educational institutions to collect data about the ethnic backgrounds of their Black students. Since many selective higher educational programs will have to change their application forms anyway, *I want to urge them to also change those forms so that they collect data about the ethnic background of their Black students as well.* Changing their admissions forms in order to collect the ethnic information about Black applicants will bring the practices of many higher education programs in line with what they already do for Hispanic/Latinos, Asians and American Indians, and Alaskan Natives. Both the Common Application and the Universal College Application forms lumped all Black students into a unified “African American, African, Black” category.⁷⁶ This contrasts with the abundance of information these forms provide with regard to the ethnic designations of Hispanic/Latinos, which include designations for Mexican American/Chicano, Puerto Rican, and the ability for other Hispanic/Latinos to designate their country of origin.⁷⁷ With regard to Asians and Asian

plication.pdf. [hereinafter Common Application] Under the Common Application this information is not mandated. Applicants are informed that the information supplied in this category is optional and that information that is provided will not be used in a discriminatory manner. 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>.

75. The Universal College Application (2008) [hereinafter Universal College Application], *available at* https://www.universalcollegeapp.com/Library/PrintPreview/Universal_College. Interestingly enough, the Universal College Application makes ethnicity the only information on the form that is optional. For a list of these institutions see the Universal College Application—Universal College Application—College Membership, *available at* <http://www.universalcollegeapp.com/index.cfm?ACT=Display&APP=APPONLINE&DSP=CollegeMembership> (last visited Nov. 19, 2008).

76. Common Application, *supra* note 74; Universal College Application, *supra* note 75.

77. The Common Application, *supra* note 74; Universal College Application, *supra* note 75 (Under the Common Application this information is not mandated. Applicants are informed that the information supplied in this category is optional and that information that is provided will not be used in a discriminatory manner. Interestingly enough, the Universal College Application makes ethnicity the only information on the form that is optional.).

Americans, these forms provide a space for the applicants to designate their country of origin.⁷⁸ For American Indians and Alaskan Natives both of these forms allow a space for an applicant to designate their tribal affiliation.⁷⁹

In addition, many colleges and universities do not classify their students who have some underrepresented minority background in the way that the Guidance requires. Many colleges and universities would treat a self-identified Black Hispanic as “Black,” not Hispanic/Latino.⁸⁰ They would also count as “Black” self-identified Black Multiracials, not as “Two or More Races.”⁸¹ Thus, if colleges and universities wish to employ the Department of Education statistics for their own internal use and other external uses, they are likely to see a drop in the number of Black students that they are reporting as self-identified Black Hispanics and self-identified Black Multiracials are reclassified into either the Hispanic/Latino or “Two or More Race” categories, respectively.⁸²

The flexibility of the Guidance allows higher education programs to create different racial and ethnic classification schemes for their own uses. Regardless of whether higher education programs decide to collect information about the ethnic identities of its Black students, administrators will have to address a number of issues regarding the racial and ethnic

78. Universal College Application, *supra* note 75.

79. *Id.*

80. BROH & MINICUCCI, *supra* note 12, at 15. For example, in 2004, the Consortium on Financing Higher Education (COFHE) admission officers whose colleges or universities allowed applicants to designate more than one racial/ethnic category, were asked how they classified individuals who responded to both “Latino” and “Black” on their applications. “The response of the Deans and Directors of admission was nearly unanimous that these students are counted as Black.” *Id.* at 22. COFHE is an institutionally supported organization of thirty-one private colleges and universities. The thirty-one 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 Feb. 24, 2009).

81. BROH & MINICUCCI, *supra* note 12, at 15.

82. They are also likely to see a significant drop in the other non-Hispanic/Latino underrepresented minority groups as the students who check more than one racial box are reallocated to “Two or More Races.”

classifications of their students as they adjust to the reporting requirements of the Guidance. Higher education programs publicize the racial and ethnic make-up of their student bodies to a number of different audiences for a number of different reasons. Higher education programs produce promotional literature used to recruit students to their campus. The racial and ethnic make-up of the student body will influence the choices of some applicants and/or their parents or guardians regarding whether to attend a particular higher education program. Higher education programs will use racial and ethnic statistics in some of their efforts to raise funds from alumni and other donors. The reported racial and ethnic make-up of the student body could influence the decisions by potential corporate recruiters of students for internships and permanent jobs to recruit at a given college campus.

The first issue that the higher education programs, including selective ones, must address is whether to adopt the definitions of the Guidance for their internal use as well as for external use. A key question in determining whether to follow the Guidance is how to deal with students classified as “Two or More Races.” It is likely that a significant percentage of those classified as “Two or More Races” are those non-Hispanic/Latinos who checked only the Asian and White race boxes. On the 2000 census there were 868,395 Asian and White individuals compared to 1,082,683 White and American Indians, 784,764 White and Black, 182,494 Black and American Indian, and 106,782 Black and Asian.⁸³ Thus, the “Two or More Races” category will include a significant percentage of groups who have a part of their heritage from the underrepresented minority groups of Black and Native American.⁸⁴ However, it will also include a significant

83. On the 2000 census there were over 6.8 million Americans who checked more than two races, of which 93.2% or 6,368,075 checked only two boxes. Of those who checked only two boxes there were 2,206,251 White and Some Other Race, 417,249 Black and Some Other Race, 249,108 Asian and Some Other Race and 93,842 American Indian and Some Other Race and 35,108 Hawaiian or Other Pacific Islander and Some Other Race. *CensusScope.org*, United States Multiracial Profile (2001), http://www.censuscope.org/us/print_chart_multi.html. “Nearly all SORs also identified as Hispanic, but not all Hispanics identified as SOR.” See SHARON M. LEE & BARRY EDMONSTON, *NEW MARRIAGES, NEW FAMILIES: U.S. RACIAL AND HISPANIC INTERMARRIAGE, POPULATION REFERENCE BUREAU 12 tbl.2* (2005), available at <http://www.prb.org/pdf05/60.2NewMarriages.pdf>.

84. Many selective higher education programs and minority scholarship programs only include Native Americans with a tribal card or significant tribal affiliation in their count of Native American students. Thus, many Native American multiracial students would not receive positive considerations in the admissions process due to being from an underrepresented group with a history of discrimination.

percentage of White and Asians students that higher education programs do not generally regard as underrepresented minority groups.⁸⁵

Higher education programs, arguably, could include the “Two or More Race” students, along with their Hispanic/Latino, American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, in their calculation of diverse students. If an educational institution follows this path, it will probably show a healthy percentage of its students from diverse racial backgrounds due to the inclusion not only of Asians, but also of the White/Asian students. Thus, those higher education institutions primarily concerned about reporting the percentage of their students from diverse backgrounds could opt for this approach. However, without reallocating the “Two or More Races” students who are White and Asian, higher education programs could not include the “Two or More Race” students in a compilation of underrepresented minority students.

Using the Guidance is also likely to reveal a significant decrease in the number of American Indians or Alaskan Natives and Hawaiian or Other Pacific Islanders students. Many of these students are multiracial and higher education programs will have to classify them as “Two or More Races.” For example, the 2000 census reported that there were 4,119,000 individuals who checked the census box indicating that they were American Indians.⁸⁶ However, almost forty percent, 1,643,000, checked another racial box as well.⁸⁷ In addition, over half of the 874,000 who checked Native Hawaiian and Other Pacific Islanders also checked another racial box.⁸⁸ According to the 2000 census, a very large percentage of both American Indians and Native Hawaiians are married to spouses of another race.⁸⁹ More than half, 56.7%, of American Indians and 45.6% of Hawaiians who were married, reported being married to a person of another race.⁹⁰ There

85. The University of Michigan Law School’s affirmative action plan approved by the Supreme Court only sought to ensure a critical mass of underrepresented minorities with history of discrimination. Those groups were African-Americans, Hispanics, and Native Americans. *See Grutter*, 539 U.S. at 316. The Law School noted that while Asians had experienced discrimination, they were not underrepresented among its enrolled law students; *id.* at 319.

86. NICHOLAS A. JONES & AMY S. SMITH, UNITED STATES CENSUS BUREAU, THE TWO OR MORE RACES POPULATION: 2000 7 tbl.5 (2001), <http://www.censusbureau.biz/prod/2001pubs/c2kbr01-6.pdf> (last visited Feb. 25, 2009).

87. *Id.*

88. *Id.*

89. *See* LEE & EDMONSTON, *supra* note 83, at 21-22.

90. *See id.* at 12 tbl.2.

is also a separate issue regarding comparing pre-Guidance numbers of both the Asian and the Native Hawaiian or Other Pacific Islanders categories with the post-Guidance categories. In the pre-Guidance racial categories, Other Pacific Islanders were included with Asians, not Hawaiians.⁹¹

C. Guidance Implications for a Decrease in Black Students as Self-identified Black Hispanics and Self-identified Black Multiracials are Reclassified

Using the racial classifications of the Guidance is likely to produce a significant decrease in many selective higher education programs reported numbers of Black or African American students because self-identified Black Hispanics and self-identified Black Multiracial students are reclassified to the Hispanic/Latino and “Two or More Races” categories, respectively. The greater social acceptance of interracial marriages has increased the population of Blacks with mixed racial ancestry. Without question, this is a very positive development in American society and reflects a weakening of racism and traditional racial boundaries. We are finally witnessing the melting of the Blacks in the American pot.

In 1990, the percentage of married Blacks who were married to a spouse of another race had risen to about 4.1% from the 1980 percentage of 2.4% and the 1970 percentage of 1.1%.⁹² The 2000 census showed that the percentage of Blacks married to a spouse of a different race continued to increase over the 1990 figures with 9.7% of married Black men (in contrast to 5.8%) and 4.1% of married Black women (in contrast to 2.3%) reporting having a spouse of another race.⁹³ A recent study comparing census data from 1990 to that of 2000 of couples between the ages of twenty and thirty-four showed that younger Blacks are even more likely to marry or co-habit with a person of a different race.⁹⁴ Native-born African Americans between the studied ages experienced increases in interracial marriages, as well as interracial cohabitation.⁹⁵ The 1990 and 2000 comparison of interracial

91. See Guidance, *supra* note 11, at 59,270.

92. See LEE & EDMONSTON, *supra* note 83.

93. See *id.* at 3.

94. See Zhenchao Qian & Daniel T. Lichter, *Social Boundaries and Marital Assimilation: Interpreting Trends in Racial and Ethnic Intermarriage*, 72 AMER. SOC. REV. 68, 76 fig.1 (2007).

95. *Id.* at 81. While many individuals will get married, an alternative to marriage is cohabitation. Cohabitation is normally a short-term marriage-like arrangement. It has contributed to a reduction in marriage rates in early adulthood and an increase in the average

marriage and interracial cohabitation is complicated by the fact that in the 1990 census, individuals were only allowed to identify themselves in a single race category, but in the 2000 census, they were able to check all racial categories that applied.⁹⁶ Thus, in the 1990 census, the native-born Black category included those individuals who self-identified as both single-race Blacks and multiracial Blacks in the 2000 census.⁹⁷ Interracial marriages increased for both groups of Blacks in 2000 over what it was for native-born Blacks in 1990.⁹⁸ The percentage of native-born Black men between the ages of twenty and thirty-four who had married outside of their race increased from the 1990 figure of 8.3% to 14.2% for single-race Black men, and if multiracial Black men are included, then the percentage goes to 15.4%.⁹⁹ For native-born Black women, the increases were from the 1990 figure of 3.3% to 5% for single-race Black women, and 6% if multiracial Black women are included.¹⁰⁰ With regard to cohabitation, the study found that the percentage of native-born Black males cohabiting with a woman outside their race went from 14.7% in 1990 to 21.9% in 2000, and for native-born Black females from 5.6% to 6.2%.¹⁰¹

The data demonstrating increasing interracial marriages and cohabitation strongly suggests that the percentage of Black Multiracial students on college campuses is likely to continue to substantially increase for the foreseeable future. There is clear evidence from the 2000 Census that demonstrates over the next ten years the percentage of Black Multiracials will significantly increase. According to the 2000 Census, 11.4% of Blacks under the age of 5 were reported as mixed race.¹⁰² These individuals are

age of first marriage. See Renata Forste, *Prelude to Marriage or Alternative to Marriage?: A Social Demographic Look at Cohabitation in the U.S.*, 4 J.L. & FAM. STUD. 91, 91 (2002).

96. Qian, *supra* note 94, at 77.

97. *Id.*

98. *Id.* at 79 tbl.2.

99. *Id.*

100. Qian, *supra* note 94, at 79 tbl.2. The percentage of native-born African American men who identified as multiracial White who were in interracial marriages was 14.9% and the percentage of those who identified as multiracial minority who were in interracial marriages was 15.4%. *Id.*

101. *Id.* This 2000 census data counts Black/white biracials as white. *Id.* at 78. A full twelve percent of Blacks under the age of thirty who are married are in interracial marriages compared with only eight percent between the ages of thirty and forty-four and six percent between the ages of forty-five and fifty-nine. See LEE & EDMONSTON, *supra* note 83, at 16 fig.3.

102. See UNITED STATES CENSUS BUREAU, CENSUS 2000 PHC-T-8, RACE AND HISPANIC OR LATINO ORIGIN BY AGE AND SEX FOR THE UNITED STATES: 2000 tbl.3 (2002),

now between the ages of 9 and 14 and will start coming to college campuses in three or four years. This is in contrast to the current cohort of Black students on college campuses of which, according to the 2000 Census, only 6.3% were multiracial.¹⁰³

There is evidence that interracial marriages increase as both Black men and women obtain higher levels of education. According to 1990 statistics from the Census Bureau on Black men aged twenty-five to thirty-four, ten percent of married Black males with some college and thirteen percent of married Black males with some graduate school were in interracial marriages.¹⁰⁴ This compares to only six percent of high school dropouts and seven percent of those who are only high school graduates in interracial marriages for the same group.¹⁰⁵ For Black women in the same age range, four percent of those with some college, five percent of those who were college graduates, and six percent of those with some graduate school education were in interracial marriages—this compares with only three percent intermarriage rate for those who were only either high school graduates or dropouts.¹⁰⁶ In the 2000 census, nine percent of Blacks with a bachelors degree or higher had a spouse of another race in contrast with only six percent with a high school education or with some college and five percent who had less than a high school education.¹⁰⁷

There is also data establishing the fact that Black/White Biracials have higher levels of educational attainment than other Blacks do. While 28.2% of the Black population over the age of twenty-five had attained some college or an associates degree, the percentage of Black/Whites is 33.3%.¹⁰⁸ While only 14.3% of the Black population has obtained a bachelors degree or higher, 23.8% of Black/White multiracials and 24.1% of Black/Asian multiracials have done so.¹⁰⁹

<http://www.census.gov/population/www/cen2000/briefs/phc-t8/tables/tab03.pdf> (last visited Mar. 3, 2009).

103. *Id.* According to the 2000 census 6.3% of Blacks between the ages of ten and fourteen who are now between the ages of eighteen and twenty-two were multiracial.

104. See JBHE Foundation, *The Effect of Higher Education on Interracial Marriage*, 16 J. BLACKS HIGHER EDUC. 55, 55 (1997).

105. *Id.*

106. JBHE Foundation, *supra* note 104.

107. See LEE & EDMONSTON, *supra* note 83, at 16 fig.4.

108. See UNITED STATES CENSUS BUREAU, CENSUS 2000 SUMMARY FILE 4 (SF 4)—SAMPLE DATA, PCT 64 (2002), available at http://factfinder.census.gov/servlet/DCharIternationServlet?_ts=242392126329. The percentage for Black/Asians is 33.5%.

109. *Id.*

Evidence also exists pointing to the probability that mix race Blacks are disproportionately represented among the Black students at selective higher education institutions. A 2003 study of data from the National Longitudinal Survey of Freshmen who entered twenty-eight selective colleges and universities in 1999 revealed some startling information about the racial heritage of Blacks at these institutions.¹¹⁰ The study revealed that seventeen percent of the Black students reported themselves to be of mixed-race ancestry.¹¹¹ In contrast, according to the 2000 census, only 5.3% of Blacks in this age group were Black Multiracials.¹¹² In addition, researchers

110. See generally DOUGLAS S. MASSEY ET AL., *THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMAN AT AMERICA'S SELECTIVE COLLEGES AND UNIVERSITIES* (Princeton Univ. Press 2003) [hereinafter MASSEY ET AL., *THE SOURCE OF THE RIVER*]. The twenty-eight colleges and universities in the study were Barnard College, Bryn Mawr College, Columbia University, Denison University, Emory University, Georgetown University, Howard University, Kenyon College, Miami University, Northwestern University, Oberlin College, Pennsylvania State University-University Park, Princeton University, Rice University, Smith College, Stanford University, Swarthmore College, Tufts University, Tulane University, the University of California-Berkeley, the University of Michigan-Ann Arbor, the University of North Carolina-Chapel Hill, the University of Notre Dame, the University of Pennsylvania, Washington University in St. Louis, Wesleyan University, Williams College, and Yale University. Duke University, Hamilton College, Morehouse College, Spelman College, Vanderbilt University, Wellesley College, and Xavier University were included in the initial sampling plan for the study, but declined to participate. *Id.* at 30–31 tbl.2.5. All of the twenty-eight schools are selective in the sense that only a subset of those who apply are selected. The least selective of the institutions was Miami University with a seventy-nine percent acceptance rate and the most selective was Princeton University with an eleven percent acceptance rate. *Id.* at 32–33 tbl.2.6. See also Douglas S. Massey et al., *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, 113 AM. J. EDUC. 243, 248 (2006).

The twenty-eight colleges and universities chosen for the study by Massey et al. are essentially the same institutions studied by William G. Bowen and Derek Bok in their influential book *THE SHAPE OF THE RIVER*. See MASSEY ET AL., *THE SOURCE OF THE RIVER*, *supra*, at 3 (citing WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 291 n.2, 292 tbl.A.1 (1998)). The difference is that Massey et al. substituted Georgetown University, Howard University, Notre Dame University, and the University of California-Berkeley in the place of Duke University, Hamilton College, Vanderbilt University, Wellesley College and Wesleyan University for the purposes of their study. Compare MASSEY ET AL., *THE SOURCE OF THE RIVER*, *supra* note 110 at 30–31 table 2.5 (setting forth the institutional data file for the Massey et al. study) with BOWEN & BOK, *THE SHAPE OF THE RIVER*, *supra* note 110, at 291 & n.2, 292 table A.1 (setting forth the institutional data file for the Bowen & Bok study).

111. MASSEY ET AL., *THE SOURCE OF THE RIVER*, *supra* note 110, at 39 tbl.2.9, 40.

112. According to the 2000 census, of the 3,093,824 individuals between the ages of fifteen and nineteen who were classified as Black or African American or Black or African American in Combination, 164,271 were classified as Black or African American in combination (164,271/3,093,824=5.3%). See UNITED STATES CENSUS BUREAU, CENSUS 2000 PHC-T-8. RACE AND HISPANIC OR LATINO ORIGIN BY AGE AND SEX FOR THE UNITED

Anthony Broh and Stephen D. Minicucci recently published the results of a study addressing the impact of the change in federal reporting of the race and ethnicity of students required by the Guidance.¹¹³ In the article, they tallied the 2007 reports from the Consortium on Financing Higher Education (COFHE) Enrolled Student Survey.¹¹⁴ COFHE is an institutionally supported organization of thirty-one private colleges and universities.¹¹⁵ 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.¹¹⁶ From this, they calculated that 5.3% of the students were Black (self-reported as monoracial or multiracial) as opposed to 4.1% that would be reported as Black under the Guidance.¹¹⁷ Thus, some twenty-three of the Black students will therefore be classified as either Hispanic/Latino or “Two or More Races.” Almost two thirds of these Black students were Black/white students.¹¹⁸

STATES: 2000 tbl.3 (2002), <http://www.census.gov/population/www/cen2000/briefs/phct8/tables/tab03.pdf> (last visited Mar. 3, 2009).

113. BROH & MINICUCCI, *supra* note 12, at 17, fig.2.

114. *Id.* at 16.

115. The thirty-one 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. COFHE was initially formed in 1971 with nine colleges. These nine were joined by twenty-two other colleges and universities in 1974 to form the current membership. The original criteria for establishing the COFHE membership were that each institution: 1) be private, 2) attract a national undergraduate applicant pool, 3) be willing and able to participate actively in the various projects of the Consortium, and 4) have characteristics enough in common with the other members to permit each school's inclusion in various cooperative studies. See Consortium on Financing Higher Education at <http://web.mit.edu/cofhe/> (last visited Feb. 24, 2009).

116. See BROH & MINICUCCI, *supra* note 12, at 23-24.

117. *Id.* at 17 fig.2.

118. *Id.* According to Broh and Minicucci monoracial Black students only constituted 77% (4.1%/5.3%) of the Black students. Black/white students comprised 14.7%

Beyond the evidence presented above, I also address this issue fortified by personal experience with the growing underrepresentation of Ascendants on selective higher education programs. From August 2004 to August 2008, I was the director of the Hudson & Holland Scholars Program (HHSP).¹¹⁹ HHSP is responsible for recruiting high achieving underrepresented minorities to Indiana University's Bloomington (main) campus.¹²⁰ There were approximately 570 students spread through four undergraduate years enrolled in HHSP.¹²¹ HHSP had approximately twenty percent of the Black and Hispanic/Latino undergraduate students on the Bloomington campus.¹²² As the director of HHSP, I reviewed over 1,600 applications from underrepresented minorities throughout the United States. The associate director for recruiting and myself made all admissions decisions. After my first year as director, we changed our application so

(0.78%/5.3%) of the Black students. Another 4% were Black/Latino, 2% were Black/Asian, and 1.9% as Black and Native American.

119. According to the program's website, "The mission of the Hudson & Holland Scholars Program (HHSP) is to recruit, retain and prepare students with outstanding records of academic achievement, strong leadership experiences, and a commitment to social justice . . ." Hudson & Holland Scholars Program Home Page (HHSP), <http://www.indiana.edu/~hhsp/> (last visited Feb. 17, 2009). The specific policies and procedures designed and implemented for this Program are done "with the express goal to ensure scholars take full advantage of the opportunities provided [at Indiana University], in order to better prepare them for successful careers upon separation from the university" and to assure that they contribute to an improvement in the overall academic environment of the Bloomington campus. *Id.* This Program is an integral part of Indiana University's efforts to "foster benefits of educational diversity by assuring the obtainment of a critical mass of students from underrepresented minority backgrounds with a history of discrimination." HHSP, *supra*. As such, during the application process "[p]ositive consideration for admission is given to [students from underrepresented minority backgrounds] and students whose presence will enhance the learning environment through increased diversity at Indiana University-Bloomington." HHSP, *supra*.

120. *See id.*

121. *See* HHSP, <http://www.indiana.edu/~hhsp/future/benefits.html> (last visited Sept.8, 2009) (stating the number of scholars is 566).

122. There were 1,665 black students and 962 Hispanic students on the Bloomington campus for the 2007/8 academic year, which was the last year that I was Director. Thus, black and Hispanics constituted 2,627 students on the Bloomington campus. *See* Indiana University Factbook 2007/8, http://www.iu.edu/~upira/reports/standard/doc/fact%20book/fact_book_0708.pdf. On HHSP, about ninety-five of our 566 students were black or Hispanic which means that there were approximately 538 (566 x 95%) black and Hispanic students in the Program. For a report of the total number of students on HHSP see HHSP, <http://www.indiana.edu/~hhsp/future/benefits.html> (last visited Sept.8, 2009) (stating the number of scholars is 566). Thus, approximately twenty percent of the black and Hispanic students on the Bloomington campus were on the Program (538/2627).

that we could determine the race and ethnicity of all our students, including our Black ones.

Our admissions process treated foreign-born Black immigrants (as long as they were permanent residents), their sons and/or daughters, self-identified Black Hispanics and self-identified Black Multiracials the same as who appeared to be Ascendants for admissions purposes. While HHSP is not an affirmative action admissions program, it is a selective race-conscious scholarship program. As such, we encountered all of the issues that admissions committee members at selective colleges, universities, and graduate programs encounter when trying to decide which underrepresented minorities to admit. While we also employed a holistic approach in evaluating which applicants we selected for HHSP, academic achievement as defined by ACT or SAT score, high school grade point averages, and high school class rank were very important considerations.¹²³ HHSP instructed potential applicants that their selection generally depended upon obtaining at least a combined SAT score on the critical reading and math sections of 1000 or a composite score on the ACT of twenty-four; a 3.0 cumulative high school GPA; and a high school class rank in the top twenty percent.¹²⁴

It is from my experience of reviewing these applications and making the selections for these students that I became aware of the growing underrepresentation of Ascendants among Blacks in selective higher education programs. Over seventy-five percent of the students selected for HHSP were residents of the State of Indiana.¹²⁵ There are many places in the country where interracial marriages and Black immigrants are far more common than they are in Indiana.¹²⁶ Yet, during my four years as director, there was a definite trend of increasing self-identified Black Multiracials on the HHSP. According to the 2000 census, only 27,981 or 5.5% of the

123. See HHSP, Eligibility Requirements, <http://www.indiana.edu/~hhsp/future/eligibility.html> (last visited Sept. 8, 2009).

124. See HHSP, *supra* note 123. The current stated academic requirements are now 1100 on the SAT, 24 on ACT, and 3.2 GPA. These are higher requirements than when I was Director. *See id.*

125. This is information that we generated from our internal HHSP reports while I was the director of HHSP. There are no published university reports that would allow for a verification of this percentage.

126. For example, according to a 1997 article in the JOURNAL OF BLACKS IN HIGHER EDUCATION, some thirty-two percent of Black men in the Pacific Northwest, twenty percent in California, thirty percent in the Rocky Mountain States and nineteen percent in New England states married outside of their race. JBHE Foundation, *supra* note 104, at 55-56.

510,034 Blacks in Indiana indicated that they were more than one race.¹²⁷ This contrasts with the 4.8% percent of Blacks who reported themselves to be “Two or More Races” nationwide.¹²⁸ On the 2000 census, 6.3% of Blacks between the ages of 10 and 14 (these individuals would be between 18 and 22 today and also the age group of students I admitted to HHSP) were reported as “Two or More Races.”¹²⁹ If we assume that the percentage of Blacks in that age category in Indiana was slightly more than that percentage, say around 8%, then the percentage of self-identified Black Hispanics and self-identified Black Multiracials in HHSP was several times that percentage.

One result seems clear for many selective higher education programs from the implementation of the reporting requirements of the Guidance; their percentage of Blacks is going to drop with the new reporting requirements. In addition, the percentage of Blacks in comparison to Hispanic/Latinos is also likely to decline as self-identified Black Hispanics are reallocated to the Hispanic/Latino category and the non Hispanic/Latino Blacks who designate another racial category are reclassified as “Two or More Races.” In responding to concerns raised by commentators that the reporting requirements of the Guidance could lead to a significant reduction in the Black student population, the Guidance stated, “in most instances, the Department anticipates that the size of the “Two or More Races” category will not be large enough to cause significant shifts in students demographics.”¹³⁰ Based on the statistics reported above,¹³¹ this response seems inadequate.

127. See JESSE MCKINNON, UNITED STATES CENSUS BUREAU, THE BLACK POPULATION: 2000 4 table 2 (2001), <http://usa.ipums.org/usa/voliii/pubdocs/2000/c2kbr01-5.pdf>.

128. *Id.* The number who indicated that they were Black or African American in combination on the 2000 census was 1,761,244 out of a total of 36,419,434 who indicated that they were Black or African American alone or in combination.

129. According to the 2000 Census, 210,794 of those between the ages of ten and fourteen 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. See UNITED STATES CENSUS BUREAU, CENSUS 2000 PHC-T-8. RACE AND HISPANIC OR LATINO ORIGIN BY AGE AND SEX FOR THE UNITED STATES: 2000 tbl.3 (2002), <http://www.census.gov/population/www/cen2000/briefs/phc-t8/tables/tab03.pdf> (last visited Mar. 3, 2009).

130. Guidance, *supra* note 11, at 59,270.

131. See *supra* notes 108-09 and accompanying text.

III. INCREASE IN FOREIGN-BORN BLACK IMMIGRANTS IN THE UNITED STATES AND THE IMPACT ON THE ETHNIC MAKE-UP OF BLACKS IN HIGHER EDUCATION PROGRAMS, INCLUDING SELECTIVE ONES

The new reporting requirements will allow higher education programs to collect data on self-identified Black Hispanics and self-identified Black Multiracials. However, the Guidance does not mandate the collection or reporting of data regarding the ethnicity of Blacks. This is not surprising since the Department of Education promulgated the Guidance out of a concern for the growing multiracial population in the United States, not the changing ethnic ancestry of Blacks in the United States. Some commentators on the Guidance urged the addition of other racial/ethnic reporting categories, including Middle Eastern, Southeast Asian and African (as different from African American), Indian/Pakistani (as a different category from Asian), Filipino and Cape Verdean (as different from African American), but the Department of Education rejected these additions.¹³² The discussion about this topic in the Guidance noted that these categories were rejected during the discussions that lead to the 1997 OMB Standards.¹³³ From the comments discussing the adoption of the 1997 OMB Standards, there does not appear to have been much additional discussion about separating Africans from African Americans or West Indians from African Americans.¹³⁴

In some sense, the failure to adequately address the issue of the ethnic make-up of Blacks reflects the fact that significant immigration of foreign-born Blacks in the United States is such a recent phenomenon. In 1960, the percentage of foreign-born Blacks in the United States was less than one percent of the Black population, totaling just 125,322 individuals.¹³⁵ By

132. Guidance, *supra* note 11, at 59,268.

133. *See id.*

134. *See* OMB, Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,781 (Oct. 30, 1997), *available at* <http://www.whitehouse.gov/omb/fedreg/1997standards.html> (there was no discussion in the comments about separating Africans from African Americans or West Indians from African Americans, although there the separation of Cape Verdeans from African Americans was specifically rejected).

135. Gibson & Lennon, *supra* note 33 (excluding the 1960 population of Alaska and Hawaii). This rise in immigration to the United States was triggered by the independence of Caribbean countries and “the passage of the Hart-Cellar Act in 1965, which abolished the old country-of-origins quota, affirmed family connections as the principal basis for admission to permanent residence in the United States, and increased the total numbers of

1980 that percentage increased to 3.1% and the numbers increased by 650% to 815,000.¹³⁶ According to the 2000 census, however, there were almost 2,100,000 foreign-born Blacks in the United States, constituting approximately 6.1% of the Black population.¹³⁷ As of 2000, 41.4% of foreign-born Blacks entered the United States between 1990 and 2000; 31.9% entered between 1980 and 1989; and 26.7% before 1980.¹³⁸ The percentage of foreign-born Blacks has continued to grow since 2000. By 2005, the number of foreign-born Blacks increased to 2.8 million, approaching almost 8% of the Black population.¹³⁹ The increase in African-born Blacks is particularly astounding. Forty-one percent of the foreign-born African immigrants in the United States in 2005 came between 2000 and 2005!¹⁴⁰ The striking increase in African-born immigrants is due in large measure to Africans getting a significant percentage of the diversity visas awarded by the United States that were included in 1990 Immigration Act.¹⁴¹

The increase in foreign-born Black immigrants and their children is also reflected in America's educational institutions. Using Census Bureau statistics, one study of K-12 schools found that 3.7% of the Black children were born outside of the country and 13.3% had at least one parent born in a foreign country.¹⁴² Both of these percentages are approximately double the rate for Whites.¹⁴³ The percentage of Blacks who are foreign-born rises significantly when we examine enrollments at the college and graduate school level. More than twelve percent of all Black undergraduate students

immigrants to be admitted to the United States.” See also Roger Waldinger, *Immigration and Urban Change*, 15 ANN. REV. SOC. 211, 212 (1989).

136. Gibson & Lennon, *supra* note 33.

137. JESSE D. MCKINNON & CLAUDETTE E. BENNETT, UNITED STATES CENSUS BUREAU, WE THE PEOPLE: BLACKS IN THE UNITED STATES 7 fig.5 (2005), <http://www.census.gov/prod/2005pubs/censr-25.pdf>. For figures related to the number of foreign-born Blacks, see table 2 on page 17. In 2000, 84% of all foreign-born Blacks were from two regions—the Caribbean (59.6%) and Africa (24.4%). *Id.* The 6.1% of Blacks that are foreign born also contrasts with 11.1% of the total United States population being foreign born. *Id.* at 7 fig.5.

138. *Id.* at 8 fig.6.

139. MARY MEDERIOS KENT, POPULATION REFERENCE BUREAU, IMMIGRATION AND AMERICA'S BLACK POPULATION 4 (2007), available at <http://www.prb.org/pdf07/62.4immigration.pdf>.

140. MCKINNON, *supra* note 137, at 5.

141. MCKINNON, *supra* note 137, at 6.

142. JBHE Foundation, *A Solid Percentage of Black Students at U.S. Colleges and Universities are Foreign Born*, 54 J. BLACKS HIGHER EDUC. 22, 22 (2007).

143. *Id.*

enrolled at United States colleges and universities were born outside of the United States—this is nearly four times the rate for Whites.¹⁴⁴ In 2004, 20.9% of Black undergraduates had at least one parent born outside of the United States.¹⁴⁵ For enrolled Black graduate students, 18.7%, or one of every six, were born outside the United States.¹⁴⁶ This compares with only 6.3% for White students.¹⁴⁷ In addition, 27.4% of the Black graduate students had at least one foreign-born parent.¹⁴⁸

The 2000 census revealed that Black immigrants from Africa averaged the highest percentage of college graduates of any group in the United States.¹⁴⁹ The college graduate rate for African immigrants was 43.8%¹⁵⁰ 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.¹⁵¹ Further, the average educational attainment level of fourteen years for African immigrants is the highest among any immigrant group in the United States.¹⁵² 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 \$33,790.¹⁵³ Black immigrants are also less likely to be unemployed (7.3% and 8.7%, respectively, compared to 11.2%)¹⁵⁴ and live below the poverty level (22.1% and 18.8%, respectively, compared to 30.4%).¹⁵⁵

There is also evidence that Black immigrants represent a disproportionately large percentage of the Black students attending selective

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. JBHE Foundation, *supra* note 142.

149. Clarence Page, *Black Immigrants Collect Most Degrees*, CHICAGO TRIBUNE, Mar. 18, 2007, at C7.

150. *Id.* There has been a stunning increase in the number of African born foreign Blacks entering the country over the past decade. In 2005, forty-one percent of the foreign born African immigrants came to the United States between 2000 and 2005. KENT, *supra* note 137, at 5, the percentage of African born immigrants over the age of twenty-five with a college degree dropped to thirty-eight percent. *Id.* at 9 tbl.4.

151. Page, *supra* note 149.

152. Abdi Kusow, *Africa: East*, in THE NEW AMERICANS: A GUIDE TO IMMIGRATION SINCE 1965 295, 298-299 tbl.2 (Mary C. Waters, Reed Ueda, Helen B. Marrow eds., Harvard Univ. Press 2007).

153. Kusow, *supra* note 120.

154. *Id.*

155. *Id.*

higher education programs. A 2006 article discussing baseline data from the 2003 study of data from the National Longitudinal Survey of Freshmen of students who entered twenty-eight selective colleges and universities in 1999 discussed earlier,¹⁵⁶ revealed that twenty-seven percent of Black freshmen at these institutions were first- or second-generation immigrants.¹⁵⁷ The percentage of first- and second-generation Black immigrants was actually higher at the ten most selective schools in the study, constituting 35.6%.¹⁵⁸ 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.¹⁵⁹ As Professor Guinier wrote in a *Boston Globe* column, “Like their wealthier White counterparts, many first- and second-generation immigrants of color test well because they retain a national identity free of America’s racial caste system and enjoy material and cultural advantages, including professional or well-educated parents.”¹⁶⁰ According to Dr. Michael T. Nettles, vice president for Policy Evaluation and Research at the Educational Testing Service, “If 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%.”¹⁶¹

IV. CONCLUSION

Justice O’Connor’s opinion for the Court in *Grutter v. Bollinger* guarantees that as we approach the end of the twenty-five-year time period in 2028, discussions about the continued role, purpose, and benefits of affirmative action will increase. In the meantime, we are witnessing a historic change in the racial and ethnic ancestry of Blacks who are the beneficiaries of affirmative action. Increasing percentages of Blacks benefiting from affirmative action are Black immigrants and Black

156. See *supra* notes 110-18 and accompanying text.

157. See generally Massey et al., *supra* note 110, at 245 (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).

158. *Id.* at 248 tbl.1.

159. *Id.*

160. Roach, *supra* note 9, at 39, 40 (quoting Lani Guinier, *Our Preference for the Privileged*, BOSTON GLOBE, July 9, 2004, at A13).

161. *Id.* at 38, 40.

Multiracials. This is leading to a corresponding decrease in the numbers and percentages of Ascendants on affirmative action.

In light of this historic change in the racial and ethnic make up of Blacks admitted to selective higher education programs, this comment seeks to accelerate the discussions about affirmative action and urge admissions programs of selective higher education programs to start collecting relevant data about the racial and ethnic ancestry of its Black students. This is necessary in order to make sure that the future discussions by administrative and admission officials of selective higher education programs about the impact of affirmative action for Black students is fully informed by accurate information about the student body.

This is an appropriate time to urge educational officials of selective higher education programs to begin to document the racial and ethnic ancestry of their Black students. The Department of Education has issued new requirements for the reporting of data on race and ethnicity that all educational institutions must follow. By fall of 2010, higher education programs will be required to collect and report data to the Department of Education in compliance with the reporting requirements of the Guidance. The Guidance will require education institutions to classify self-identified Black Hispanics and self-identified Black Multiracials as either Hispanic/Latino or "Two or More Races," respectively. While educational institutions must use the categories required by the Guidance in their reporting to the Department of Education, they may collect additional information regarding sub-categories for their own purposes within these categories.¹⁶²

The general practice of higher education programs before responding to the requirements of the Guidance, was to lump all Blacks into a unified "African American, African, Black" category. The purpose of the Guidance is to "obtain more accurate information about the increasing number of students who identify with more than one race."¹⁶³ Since complying with the reporting requirements of the Guidance will require all educational institutions, including selective higher education programs, to gather information about the racial make up of its Black students, this comment urges them also to gather information about the ethnic make-up of its Black students. Gathering such information is vital in order to determine the exact racial and ethnic ancestry of its Black students. Such a process

162. Guidance, *supra* note 11, at 59,268.

163. Guidance, *supra* note 11, at 59,267.

could reveal that Black immigrants and Black Multiracials constitute a much larger percentage of their Black students than these educational officials realize. This information may reveal a need for a given selective higher education program to consider additional changes to its admissions process in order to increase the number and percentage of Ascendants they enroll.¹⁶⁴

164. *See supra* note 21.

