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Should Black Immigrants Be Favored Over Black Hispanics and Black Multiracials in the Admissions Processes of Selective Higher Education Programs?

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Should Black Immigrants Be Favored Over Black Hispanics and Black Multiracials in the Admissions Processes of Selective Higher Education Programs?

KEVIN BROWN*

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INTRODUCTION

Since the origin of affirmative action, selective higher education institutions¹ have generally lumped all blacks² into a unified Black/African/African American category.³ However, this practice of treating all blacks alike has now changed. The Department of Education (“DOE”) issued the *Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the United States Department of Education* (“Guidance”) in October 2007, which had a final imple-

1. Not all higher education institutions use affirmative action. Many higher education institutions have open admissions policies, or they admit any student that meets their minimum academic criteria. The term “selective higher education programs” refers to those institutions that have selective admissions policies. As a result, they must make choices among qualified applicants in determining their student bodies.

2. The term “blacks” as used in this Article is used in its current and historical sense to apply to all people in the United States with some African descent.

3. For example, almost 350 public and private colleges accepted the Common Application form and almost eighty institutions accepted the Universal College Application form for the incoming 2009-2010 freshmen class. See *First Year Application*, THE COMMON APPLICATION, https://www.universalcollegeapp.com/Library/PrintPreview/Universal_College_Application.pdf (last visited Jan. 19, 2011) (lumping all black students into a single “Black or African American” category); THE COMMON APPLICATION FOR UNDERGRADUATE COLLEGE ADMISSION, <https://www.commonapp.org/CommonApp/default.aspx> (last visited Jan. 19, 2011) (lumping all black students into a single “Black or African American (including Africa and Caribbean)” category). For a list of the 346 institutions that accepted the Common Application for the 2009/10 academic year, see *Member College and Universities*, THE COMMON APPLICATION, <https://www.commonapp.org/CommonApp/Members.aspx?p=1> (last visited Jan. 19, 2011). For a list of the institutions that accepted The Universal College Application, see *Colleges, Membership*, UNIVERSAL COLLEGE APPLICATION, <https://www.universalcollegeapp.com/index.cfm?ACT=Display&APP=APPONLINE&DSP=CollegeMembership> (last visited Nov.19, 2008).

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mentation date for the reporting school year of 2010-2011.⁴ The Guidance marked the first time that the federal government dictated the procedures that educational institutions, including selective higher education programs, must follow when collecting data on the race and ethnicity of their students and reporting it to the DOE.⁵ Previous federal regulations, such as Title IV of the Higher Education Act, required colleges and universities to report such data, but the DOE did not specify the collection procedures.⁶ This practice left higher education programs free to gather information using different methods. Such flexibility was important because it allowed higher education programs to respond more efficiently to their various local needs for racial and ethnic data about their students.⁷

Beginning with the 2010-2011 academic year, educational institutions have been required to collect racial and ethnic data using a two-question format. Under the Guidance, all educational institutions are first required to ask respondents if they are Hispanic/Latino. Second, they must provide individuals with the ability to mark one or more of the following racial categories that apply to them: (1) American Indian or Alaska Native,⁸ (2) Asian,⁹ (3) Black or African American,¹⁰ (4) Native Hawaiian or Other Pacific Islander,¹¹ and/or (5) White.¹² The Guidance requires that educational institutions report individuals who indicate that their ethnicity is Hispanic/Latino to the DOE as Hispanic/Latino, regardless of the racial categories they may select.¹³ In addition, the Guidance requires educational institutions to report

4. Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the Department of Education, 72 Fed. Reg. 59,266, 59,267 (Oct. 19, 2007).

5. See C. Anthony Broh & Stephen D. Minicucci, Racial Identity and Government Classification: A Better Solution 1 (May 28, 2008) (unpublished manuscript) (on file with author), available at <http://www.airweb.org/webrecordings/forum2008/Broh%20and%20Minicucci%20II%20v6-1-1.pdf> (on file with the Ass'n for Institutional Research).

6. *Id.*

7. See *id.*

8. Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the Department of Education, 72 Fed. Reg. at 59,274 (“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.”).

9. *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.”).

10. *Id.* (“A person having origins in any of the black racial groups of Africa.”).

11. *Id.* (“A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.”).

12. *Id.* (“A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.”).

13. See *id.* at 59,274, 59,276-77.

as “Two or More Races” those non-Hispanic/Latinos who mark more than one of the racial categories.¹⁴ As a result, colleges and universities now report as Hispanic/Latinos those individuals who answer “yes” to the Hispanic/Latino question and check black as one of their racial categories (“Black Hispanics”).¹⁵ Colleges and universities also must report those non-Hispanic/Latino individuals who check black and at least one other racial box (“Black Multiracials”)¹⁶ in their counts of Two or More Races, along with all other multiracial individuals. Thus, for the first time in American history, higher education programs, including selective ones, are required to separate individuals who before they would have placed in the “Black/African/African American” category into, effectively, Black Hispanics, Black Multiracials, and Black/African Americans.

The Guidance does not dictate how selective higher education programs apply affirmative action admissions policies to Black Hispanic and Black Multiracial applicants. In *Grutter v. Bollinger*, the Supreme Court specified that when selective higher education programs use race and ethnic classifications for determining admissions, they must employ an individualized admissions process.¹⁷ Nevertheless, there is little doubt that admissions officials—at least in their minds—compare the standardized tests scores and grade point averages of a particular applicant from a given racial/ethnic group to the scores and grade point averages of other applicants of the same racial/ethnic group.¹⁸ The Guidance’s new categorization requirements raise the question of whether, in their mental comparisons, admissions officials of selective higher education programs should compare Black Hispanics and Black Multiracials with Black/African Americans? Alternatively, should admissions officials compare Black Hispanics to

14. *Id.*

15. In this Article, the term “Black Hispanics” includes individuals who indicate that they are of Hispanic/Latino and black ancestry. Since the designation of racial/ethnic ancestry on educational forms is a matter of self-identification, it is possible that a black person with Hispanic/Latino ancestry as well will decide only to check the Black/African American box or only indicate that they are Hispanic/Latino. Thus, there may not be a precise alignment between Black Hispanics and those blacks with Hispanic/Latino ancestry.

16. In this Article, the term “Black Multiracials” includes a person of black ancestry who also has a non-black parent. Since the designation of racial ancestry on educational forms is a matter of self-identification, it is possible that a black person with a non-black parent may decide only to check the Black/African American box. Thus, there may not be a precise alignment between Black Multiracials and those non-Hispanic/Latinos who designate black and at least one other racial box on educational forms.

17. See *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

18. This was one of the points that Chief Justice Rehnquist stressed in his dissenting opinion in *Grutter*. See *Grutter*, 539 U.S. at 382-86 (Rehnquist, C.J., dissenting).

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other applicants in the Hispanic/Latino category and Black Multiracials to others in the Two or More Race category? Or, should admissions officials at selective higher education programs employ a completely different method for treating the racial and ethnic identity of Black Hispanics and Black Multiracials?¹⁹

Focusing on the racial/ethnic standardized test score gaps on tests used for admissions purposes by higher education programs reveals the precarious situation the Guidance creates for both Black Hispanic and Black Multiracial applicants. The average combined SAT math, critical reading, and writing score of blacks in 2010 was 1277.²⁰ In contrast, the combined SAT scores for the various Hispanic/Latino groups were 1369 for Mexican Americans, 1363 for Puerto Ricans, and 1363 for other Latinos.²¹ American Indians and Alaskan Natives had an average combined SAT score of 1444; the average score for whites was 1580 and 1636 for Asian Americans.²² Significant racial/ethnic gaps also exist on standardized tests used to determine admissions to selective graduate programs like the GMAT, the GRE, the LSAT and the MCAT. For example, the average LSAT score for African Americans who took the test during the 2007-2008 academic year was 142.2, 146.3 for Hispanics, 148 for Mexican Americans, 148.1

19. The scope of this Article is limited to addressing the fact that the Guidance will lead to better treatment of Black Immigrants in the admissions process than that of Black Hispanics or Black Multiracials. I have argued that, due to the Guidance, now is the appropriate time for selective colleges and universities to change their admissions processes for applicants that indicate they have some black ancestry. For a detailed proposal of my recommendations, see Kevin Brown, *Change in Racial and Ethnic Classifications Is Here: Proposal to Address Race and Ethnic Ancestry of Blacks for Affirmative Action Admissions Purposes*, 31 *HAMLIN J. PUB. L. & POL'Y* 143, 149-51 (2009).

20. See COLLEGEBOARD, 2010 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 3 tbl.8 (2010), available at <http://professionals.collegeboard.com/profdownload/2010-total-group-profile-report-cbs.pdf>. The combined SAT scores for blacks was 1277 (critical reading: 429, math: 428, and writing: 420) out of 2400. See *id.*

21. *Id.* (stating that the combined SAT scores for Mexican Americans was 1369 (critical reading: 454, math: 467, and writing: 448); for Puerto Ricans was 1363 (critical reading: 454, math: 462, and writing: 447); and for other Latinos was 1363 (critical reading: 454, math: 462, and writing: 447)).

22. *Id.* (stating that the combined SAT scores for American Indians and Alaskan Natives was 1444 (critical reading: 485, math: 492, and writing: 467), for whites was 1580 (critical reading: 528, math: 536, and writing: 516), and for Asian Americans was 1636 (critical reading: 519, math: 591, and writing: 526)). On the ACT, blacks, graduating in the class of 2010, had a composite score of 16.9, compared to whites scoring 22.3, Asians scoring 23.4, Hispanics scoring 18.6, and Native Americans scoring 19.0. See ACT, THE CONDITION OF COLLEGE & CAREER READINESS 7 (2010), available at <http://www.act.org/research/policymakers/cccr10/pdf/ConditionofCollegeandCareerReadiness2010.pdf>.

for Native Americans, 152 for Asian Americans, and 152.6 for Caucasians.²³

Before the implementation of the Guidance, when admissions officials compared the applications of most Black Hispanics and Black Multiracials to others in their racial/ethnic group, they would have compared them to the applications in the Black/African American category. Because the test scores of those in the Black/African American category were lower than those in the various Hispanic/Latino or other racial categories, this comparison maximized the admissions prospects of Black Hispanics and, to a far greater extent, Black Multiracials. If admissions officials start to compare Black Hispanics to others in the Hispanic/Latino category, then such a comparison likely will have a negative effect on the admissions prospects of Black Hispanics when compared to pre-Guidance practices. However, a change in the comparison group of Black Multiracials may have a devastating impact on their admissions prospects to selective higher education institutions. White/Asian multiracials are likely to constitute a significant proportion of those in the Two or More Races category.²⁴ Thus, the Two or More Races applicants' average standardized test scores will be much higher than those of the Black/African American category.

The Guidance's potential impact on future admissions prospects of Black Hispanic and Black Multiracial applicants is only half of the story. The purpose of the Guidance is to "obtain more accurate information about the increasing number of students who identify with more than one race."²⁵ Therefore, the Guidance does not mandate the use by educational institutions of ethnic subcategories within the Hispanic/Latino or any of the five racial categories on forms used to gather racial and ethnic information.²⁶ As a result, by complying with the Guidance, selective higher education institutions will only gener-

23. SUSAN P. DALESSANDRO ET AL., LSAC, LSAC RESEARCH REPORT SERIES: LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL/ETHNIC BREAKDOWNS: 2001–2002 THROUGH 2007–2008 TESTING YEARS 13 (2008), available at <http://www.lsacnet.org/LSACResources/Research/TR/TR-08-03.pdf>. The standard deviations of the various racial/ethnic groups were 8.4, 9.3, 8.9, 9.1, 10, and 9, respectively. *Id.*

24. The largest groups of non-Hispanic/Latino multiracials on the 2000 Census were White/American Indian and Alaskan Native (1,082,683) and White/Asian (868,395). For a listing of the largest groups in the Two or More Races category on the 2000 Census, see *infra* note 187 and accompanying text.

25. Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the Department of Education, 72 Fed. Reg. 59,266, 59,267 (Oct. 19, 2007).

26. *Id.*

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ate internal data that allows them to separate Black Hispanics and Black Multiracials from Black/African Americans. They will not be able to determine the ethnic breakdown of blacks in the Black/African American category. In other words, the selective higher education institutions will not know how many of those included in their Black/African American category are foreign-born blacks²⁷ or United States-born blacks who have at least one foreign-born black parent. This Article refers to blacks who have at least one foreign-born black parent as “Black Immigrants.”

Even though colleges and universities have not typically separated their black students into different racial/ethnic categories, scholars and commentators have recently pointed to a growing change in the racial and ethnic make-up of blacks enrolled in America’s selective higher education programs.²⁸ For example, at a gathering of the Harvard Black Alumni in 2003, two Harvard professors noted that Black Multiracials and Black Immigrants, together, comprised two-thirds of Harvard’s black undergraduate population.²⁹ Following the “Harvard Revelation,” a 2005 article written by Ronald Roach in *Diverse Issues in Higher Education* pointed to the findings of a study of the black presence that entered twenty-eight selective colleges and universities in 1999. The study revealed that 17% of those black freshmen were Black Multiracials and 41% were either Black Multiracials or Black Immigrants.³⁰ A follow-up to this study focused solely on the

27. One of the ways that foreign-born blacks come to the United States is on student visas. The Guidance also requires educational institutions to report individuals on student visas under a separate category of foreign students. See Broh & Minicucci, *supra* note 5, at 15. The average number of Blacks/Africans who were enrolled in higher education institutions who are also on student visas in the United States from 2001 to 2006 was approximately 33,100 per year. West Indians accounted for less than half of this number with an annual amount of 14,100. However, these statistics do not include the race of the students. Most, but not all are black. Census 2000 statistics suggest, for example, that many students studying in the United States from Kenya may be of South Asian origin. Thus, foreign-born blacks on student visas make up less than fifty thousand individuals on college campuses. See Mary Mederios Kent, *Immigration and America’s Black Population*, POPULATION BULL., Dec. 2007, at 10 tbl.5, available at <http://www.prb.org/pdf/07/62.4immigration.pdf>. These foreign-born black students may be included in the counts of Black Immigrants at colleges and universities. In contrast, there were nearly 2.5 million blacks enrolled in college in 2007. See U.S. CENSUS BUREAU, U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, at 180 tbl.279, available at <http://www.census.gov/compendia/statab/2011/tables>.

28. Joanna Walters, ‘Any Black Student Will Do’: A Disturbing Report Shows African Americans are Being Squeezed Out of the US University Population, THE GUARDIAN, May 29, 2007, at 12, available at <http://www.guardian.co.uk/education/2007/may/29/international-educationnews.highereducation>.

29. Ronald Roach, *Drawing Upon the Diaspora*, DIVERSEEDUCATION.COM (Aug. 25, 2005), <http://diverseeducation.com/article/4558/>.

30. *Id.*

presence of Black Immigrants. That study noted that even though Black Immigrants only constituted 13% of the black eighteen and nineteen year olds, they made up 27% of black freshmen at these institutions.³¹ The percentage of Black Immigrants was actually higher at the ten most selective schools in the study, constituting 35.6% of their student bodies.³² 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.³³ 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 U.S. born African-Americans might be closer to 3 [%].”³⁴ In addition, a survey of college freshmen who entered the thirty-one elite colleges and universities comprising the Consortium on Financing Higher Education in the Fall 2007, revealed that 19% of the black students were Black Multiracials and an additional 4% were Black Hispanics.³⁵ However, according to the 2000 Census counts, in 2007, only 6.3% of the black population between the ages of seventeen and twenty-one was multiracial.³⁶

While complying with the Guidance will generate data about the overrepresentation of Black Multiracials, and possibly Black Hispanics, among black students, it will not generate data about the dramatic increasing number of Black Immigrants in the student bodies of selective higher education institutions.³⁷ Yet, just like Black Multiracials, Black Immigrants are also likely to be overrepresented among black students at selective higher education programs. Like Black Multiracials, Black Immigrants tend to come from families with more parental education and higher family incomes than other blacks.³⁸ In addition, Black Immigrants, like Black Multiracials, also have at least one parent who is not a descendant from the group of blacks whose ancestral line experienced discrimination in the United States. Treat-

31. A 2006 article also discussed baseline data from the National Longitudinal Survey of Freshmen students who entered twenty-eight selective colleges and universities in 1999. See Douglas S. Massey et al., *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, 113 AM. J. EDUC. 243, 245-48 (2007).

32. *Id.*

33. *Id.*

34. Roach, *supra* note 29.

35. Brown, *supra* note 19, at 147-48.

36. *Id.*

37. See *infra* notes 250-62 and accompanying text.

38. Brown, *supra* note 19, at 153-54.

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ing all black applicants alike has obscured the possible substantial underrepresentation among the black students in the student bodies of selective higher education programs of traditional blacks, those that others have termed as “third generation” or “legacy” blacks.³⁹ This Article, however, will refer to individuals with two United States-born parents who were considered black when the applicant was born, “Ascendants.”⁴⁰

In brief, the implementation of the Guidance is likely to affect the admissions prospects of four different racial/ethnic groups of black applicants to selective higher education programs: Black Hispanics, Black Multiracials, Black Immigrants, and Ascendants.⁴¹ As the impact of the Guidance unfolds, the tendency of admissions committees to compare Black Hispanic applicants to other Hispanic/Latino applicants and Black Multiracials to other applicants in the Two or More Races category will increase. These reclassifications of Black Hispanics and Black Multiracials are likely to negatively impact the admissions prospects to selective higher education programs of these groups. While Ascendants should benefit from the implementation of

39. See Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1149 n.27 (2007). Onwuachi-Willig and others use the terms “Descendants” or “Legacy Blacks” to denote these blacks to make the connection between their ancestral lineage as descendants of blacks who were enslaved and/or segregated. *Id.*

40. This Article uses the term “Ascendants” in order to denote the historical connection between this group of blacks and the history of the ascendancy of blacks out of slavery and segregation. The ascendancy of this group of blacks not only helped to bring about affirmative action, but also made possible the dramatic increases in interracial cohabitation, mixed-race blacks, and the immigration of blacks to the United States that has occurred over the past forty-five years.

41. This Article addresses current applicants to selective higher education programs. Thus, this Article addresses a change in the racial and ethnic ancestry of blacks applying to selective higher education institutions that has occurred since the advent of affirmative action. As a result, I agree, wholeheartedly, with President Obama’s decision to indicate that he was Black/African American on his census form. See RAINIER SPENCER, *REPRODUCING RACE: THE PARADOX OF GENERATION MIX* 144 (2010). In 1961, when the President was born, interracial marriage between blacks and whites was still illegal in over twenty states and there were only fifty-one thousand black/white married couples in the country. See G. REGINALD DANIEL, *MORE THAN BLACK?: MULTIRACIAL IDENTITY AND THE NEW RACIAL ORDER* 98 (2002). The 1960 Decennial Census stated, “A person of mixed White and Negro blood was to be returned as Negro, no matter how small the percentage of Negro blood.” C. Matthew Snipp, *Racial Measurement in the American Census: Past Practices and Implications for the Future*, 29 ANN. REV. SOC. 563, 568 (2003). The use of the one-drop rule for census purposes reflected the general American ethos at the time; mixed-race black persons were not distinguishable from monoracial blacks. American society also did not distinguish foreign-born blacks, who constituted less than 1% of the black population, from native blacks. See Campbell J. Gibson & Emily Lennon, *Historical Census Statistics on the Foreign-Born Population of the United States: 1850-1990* tbl.8 (U.S. Census Bureau Population Div., Working Paper No. 29, 1999), available at <http://www.census.gov/population/www/documentation/twps0029/tab08.html> (excluding the 1960 population of Alaska and Hawaii).

the Guidance, Black Immigrants will likely benefit the most. Furthermore, the number and percentage of Black Immigrants among blacks approaching college age is likely to increase substantially in the coming years, given that the percentage of blacks that are foreign-born increased from 3.1% in 1980⁴² to 8% in 2007.⁴³ Accordingly, this Article discusses how selective higher education programs reached the situation where the implementation of the Guidance could lead to more favorable treatment of Black Immigrants than Black Hispanics and Black Multiracials. This Article also argues that admissions committees of selective higher education institutions should not provide more favorable treatment to Black Immigrants because the Guidance placed them in the Black/African American category than to Black Hispanics placed in the Hispanic/Latino category or Black Multiracials placed in the Two or More Races category.⁴⁴

Before 1970, the federal government did not attempt to standardize the collection and reporting of racial and ethnic data. However, due to changes in American discrimination law in the 1950s and 1960s, a number of federal agencies were involved in generating racial and ethnic data.⁴⁵ The need to develop consistency in the production of this data generated the first effort by the federal government to standardize the collection and reporting of this data in the 1970s. In 1978, this effort eventually produced *Statistical Policy Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting* ("Directive 15"). Part I of this Article discusses the federal government's efforts that led to the adoption of Directive 15.

Directive 15 provided the standards for collecting and reporting racial and ethnic data for the next twenty years. However, intense debate ensued about the categories and definitions of Directive 15, which caused the federal government to undertake a review of Direc-

42. Gibson & Lennon, *supra* note 41.

43. The Census Bureau estimated that there were 36,657,000 non-Hispanic blacks of which 2,785,000 were foreign born (or 7.6%). See ELIZABETH M. GRIECO, U.S. CENSUS BUREAU, RACE AND HISPANIC ORIGIN OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2007 AMERICAN COMMUNITY SURVEY REPORT 4 tbl.1 (2010), available at <http://www.census.gov/prod/2010pubs/acs-11.pdf>. In addition, 187,000 of the 677,000 Hispanic/Latinos who checked black as their only racial category were foreign-born. *Id.* Thus, the total of the single race black population, including Hispanic/Latinos, was 37,335,000 of which 2,972,000 or 7.96%. See *id.*

44. The scope of this Article is limited to discussing how the Guidance provides a competitive advantage to Black Immigrants over Black Hispanics and Black Multiracials. I have also argued that Ascendants should be treated better than Black Hispanics, Black Multiracials, and Black Immigrants in the admissions process of selective higher education institutions. See Brown, *supra* note 19, at 147-48.

45. See *infra* Part I.

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tive 15 from 1993 to 1997. In October 1997, the review culminated in the Office of Management and Budget's ("OMB") issuance of the *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity* ("1997 Revised Standards").⁴⁶ The collection and reporting of racial and ethnic data for the 2000 Census generally followed the 1997 Revised Standards. Part II of this Article discusses the adoption of the 1997 Revised Standards and concludes by reviewing the racial and ethnic data generated by the 2000 Census.

The 1997 Revised Standards required, after a transition period to review the data from the 2000 Census, that all federal programs adopt consistent standards. In accordance with this requirement, the DOE adopted the Guidance in October 2007. Data reported to the DOE pursuant to the Guidance deviates from the way the Census Bureau reported racial and ethnic data collected during the 2000 Census. The Census Bureau has the capacity to generate far more data about race and ethnicity of the American population than individual educational institutions have to generate such data about their students. The Census Bureau published data that not only included the separate racial counts of those in the Hispanic/Latino categories, but it also published counts for fifty-seven different racial combinations in the Two or More Races category. Thus, the 2000 Census data allowed for the separation of Black Hispanics from others in the Hispanic/Latino category and Black Multiracials from others in the Two or More Races category. When the DOE adopted the Guidance, however, it concluded that it was too administratively burdensome to have all educational institutions report the separate racial identities of those in the Hispanic/Latino and Two or More Races categories. Thus, educational institutions can generate internal data that provides separate counts of Black Hispanics from other Hispanic/Latinos and Black Multiracials from others in the Two or More Races category. However, in the data educational institutions report to the DOE it is not possible to obtain these separate counts. Thus, as the impact of the Guidance unfolds, selective higher education programs will tend to treat Black Hispanic applicants as Hispanic/Latinos and Black Multiracial applicants the same as it treats others in the Two or More Races category. Part III begins by discussing the process that the DOE went through and the decisions the DOE made that led to the specific pro-

46. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782 (Oct. 30, 1997), available at http://www.whitehouse.gov/omb/fedreg_1997_standards.

visions of the Guidance. It then highlights the Guidance's negative impact on the admissions prospects of Black Hispanics and Black Multiracials.

The Guidance does not require educational institutions to separate Black Immigrants from Ascendants in their counts of those in the Black/African American category. As a result, admissions committees will continue to compare Black Immigrants to applicants in the Black/African American category. This provides Black Immigrants with a competitive advantage in the admissions process of selective higher education programs when contrasted with Black Hispanics (who will be compared to other Hispanic/Latinos) and Black Multiracials (who will be compared to others in the Two or More Races category). Part IV argues that, given the justifications for the use of racial classifications in the admissions process, it is improper to provide this advantage to Black Immigrants.

I. EFFORTS TO STANDARDIZE THE COLLECTION OF
DATA ON RACE AND ETHNICITY IN THE 1970s:
ADOPTION OF DIRECTIVE 15

Until the 1960s, the primary uses of racial classifications and racial data were to exclude, segregate, and discriminate against individuals from minority groups. For example, public school officials identified black or colored schoolchildren and assigned them to separate and inferior schools. Employers and labor unions denied skilled employment to those considered black. Discriminatory practices by the real estate industry restricted blacks' residential choices. Many merchandise stores, hotels, and restaurant business operators refused to serve black customers. As late as 1960, interracial marriage between blacks and whites was still illegal in over twenty states.⁴⁷ In these states, racial classifications were used to prevent miscegenation. Proponents of these discriminatory practices used racial statistics to justify their actions. As a result, prior to the 1960s, many civil rights leaders opposed the collection of racial statistics.⁴⁸ Not surprisingly, minority groups did not participate in the decision-making processes

47. DANIEL, *supra* note 41, at 98.

48. Reynolds Farley, *Identifying with Multiple Races: A Social Movement that Succeeded But Failed?*, in *THE CHANGING TERRAIN OF RACE AND ETHNICITY* 126 (Maria Krysan & Amanda E. Lewis eds., 2004).

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that determined how to collect national statistics on race and ethnicity.⁴⁹

Supreme Court rulings in the 1950s and 1960s outlawed racial and ethnic discrimination by governmental entities. Congress also passed civil rights legislation banning racial and ethnic discrimination in the 1960s, including the 1964 Civil Rights Act, the 1965 Voting Rights Act, and the 1968 Fair Housing Act.⁵⁰ Many of the social welfare programs enacted as part of President Johnson's Great Society sought to distribute federal funds based on population counts to improve living conditions and address the problems faced by disadvantaged minority groups.⁵¹ Due to these and other developments, the need and purpose of employing racial classifications and collecting racial and ethnic data changed. Governmental entities and private institutions began to employ racial and ethnic classifications to include, rather than exclude, individuals from those previously discriminated minority groups. Enforcement of federal, state, and local civil rights statutes required accurate racial and ethnic statistics to demonstrate the existence of illegal discrimination. In addition, the logic that motivated civil rights activists viewed racism as part of a much larger system of discrimination and oppression, not simply a product of isolated actions and decisions by individuals. Statistics on various social and economic differences based on race were crucial to demonstrate the systematic nature of racial oppression. Civil rights activists also used racial statistics as the basis for generating support for new laws and policies to address the impact of discrimination.⁵² Thus, as the 1960s unfolded, government, private institutions, and advocacy groups employed racial and ethnic classifications and used racial and ethnic statistics to benefit disadvantaged minority populations.

Before the 1970s, there were no federal standards for the collection of data on race and ethnicity that applied to all federal agencies.⁵³

49. See Alice Robbin, *The Politics of Representation in the U.S. National Statistical System: Origins of Minority Population Interest Group Participation*, 27 J. GOV'T INFO. 431, 433-34 (2000).

50. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 remain the primary reasons for governmental racial classifications. See RAINIER SPENCER, *SPURIOUS ISSUES: RACE AND MULTIRACIAL IDENTITY POLITICS IN THE UNITED STATES* 68 (1999).

51. See KIM WILLIAMS, *MARK ONE OR MORE: CIVIL RIGHTS IN MULTIRACIAL AMERICA* 25 (2008).

52. See Robbin, *supra* note 49, at 433-34.

53. See Katherine K. Wallman et al., *Measuring Our Nation's Diversity: Developing a Common Language for Data on Race/Ethnicity*, 90 AM. J. PUB. HEALTH 1704, 1704-07 (2000) (directing the review of the standards).

Largely because of civil rights laws enacted during the 1960s, by the early 1970s, several federal agencies began collecting racial data.⁵⁴ In 1976, Congress passed Public Law 94-311 in response to the undercount of Hispanic/Latinos on the 1970 Census. Public Law 94-311 required federal agencies to provide separate counts for the Hispanic/Latino population to remedy discrimination against those of Hispanic origin.⁵⁵ The driving force for the development of the federal standards on racial and ethnic classifications in the 1970s was “the need for comparable data to monitor equal access, in areas such as housing, education, mortgage lending, health care services, and employment opportunities, for population groups that historically had experienced discrimination and differential treatment because of race and ethnicity.”⁵⁶

The effort to standardize the collection and reporting of racial and ethnic data by the federal government originated in President Johnson’s Executive Order 11,185, issued in October 1964. The Order created the Federal Interagency Committee on Education (“FICE”).⁵⁷ The Commissioner of Education chaired the Committee and reported to the Secretary of the Department of Health, Education, and Welfare (“HEW”).

In April 1973, the FICE Subcommittee on Minority Education completed a report on higher education for Chicanos, Puerto Ricans, and American Indians. Secretary of HEW, Caspar Weinberger, was particularly interested in the part of the report pointing to the lack of useful data on racial and ethnic groups. Weinberger encouraged the implementation of two recommendations from the Subcommittee’s

54. *Id.*

55. See Joint Resolution Relating to the Publication of Economic and Social Statistics for Americans of Spanish Origin or Descent, Pub. L. No. 94-311, 90 Stat. 688 (1970); see also Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the Department of Education, 72 Fed. Reg. 59,266, 59,270 (Oct. 19, 2007).

56. See Wallman et al., *supra* note 53. In 2003, voters in California voted on Proposition 54, which sought to ban the state from classifying individuals based on race or ethnicity and thereby collecting racial and ethnic data, unless required by federal law, for medical research and for the California Department of Fair Employment and Housing through 2014. See Sonya M. Tafoya et al., *Who Chooses to Choose Two?*, in *THE AMERICAN PEOPLE: 2000 CENSUS 349 box 2* (Richard Farley & John Haaga eds., 2005) (describing Proposition 54, which was rejected on October 7, 2003). This was the first time that voters were asked to consider banning the collection of racial and ethnic data by the state. *Id.* The measure failed 64% to 36%. *Id.* Strikingly enough, under-represented minorities were less likely to vote in favor of the measure: Blacks: 13%, Latinos: 25%, Asians: 28%, and Whites: 36%. *Id.*

57. Exec. Order No. 11,185, 29 Fed. Reg. 14,399 (1964), *revoked* by Exec. Order No. 12,553, 51 Fed. Reg. 7,237 (1986), available at <http://www.archives.gov/federal-register/executive-orders/1964.html>.

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report: “ ‘(1) coordinate development of common definitions for racial and ethnic groups; (2) instruct the Federal agencies to collect racial and ethnic enrollment and other educational data on a compatible and nonduplicative basis.’ ”⁵⁸ In June 1974, FICE created the Ad Hoc Committee on Racial and Ethnic Definitions (“Ad Hoc Committee” or “Committee”) to implement these recommendations.⁵⁹

The Ad Hoc Committee developed terms and definitions to cover the major categories of race and ethnicity that all agencies could use to meet their particular data requirements. The Committee recommended the following categories and definitions: (1) American Indian or Alaskan Native (“A person having origins in any of the original peoples of North America”); (2) Asian or Pacific Islander (“A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippine Islands, and Samoa”); (3) Black/Negro (“A person having origins in any of the black racial groups of Africa”); (4) Caucasian/White (“A person having origins in any of the original peoples of Europe, North Africa, the Middle East, or the Indian subcontinent”); and (5) Hispanic (“A person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race”).⁶⁰ The Ad Hoc Committee included those from the Indian subcontinent in its definition of Caucasians as opposed to Asians.⁶¹ The Committee expressed its belief that the term Asian should refer more to East Asians and thereby limited to Orientals, as opposed to including West Asians.⁶² In addition, the Committee noted that while individuals from the Indian subcontinent were from Asia, and some were victims of discrimination, the discrimination they faced appeared to be concentrated in specific geographical and occupational areas.⁶³

The Ad Hoc Committee considered creating an “Other” category for use principally by individuals of mixed racial backgrounds.⁶⁴ However, a majority of the Committee members opposed this because it

58. See FED. INTERAGENCY COMM. ON EDUC., ED. 121-636, REPORT OF THE AD HOC COMMITTEE ON RACIAL AND ETHNIC DEFINITIONS OF THE FEDERAL INTERAGENCY COMMITTEE ON EDUCATION 8 (1975) [hereinafter RACIAL AND ETHNIC DEFINITIONS], available at <http://www.eric.ed.gov/PDFS/ED121636.pdf>.

59. *Id.*

60. *Id.* at 9-13.

61. *Id.* at 11-13.

62. *Id.* at 10.

63. *Id.* at 12.

64. *Id.* at 17.

would complicate the surveying and add to the costs of collecting data.⁶⁵ The Committee recognized the use of an “Other” category might be appropriate when entities collecting racial and ethnic data were using a self-identification approach.⁶⁶ If an “Other” category was used, however, the respondent would also be required to specify the group with which they identify. Thus, the Ad Hoc Committee sought to provide the means to edit the responses of those who chose the “Other” category.⁶⁷ This would help to minimize the numbers in the “Other” category. When an entity used an observer identification method⁶⁸ to gather data, however, the Ad Hoc Committee viewed the “Other” category as undesirable.⁶⁹

In the spring of 1975, OMB, HEW, the Equal Employment Opportunity Committee (“EEOC”), and the General Accounting Office (“GAO”) all agreed to use the racial and ethnic categories developed by the Ad Hoc Committee on a trial basis for at least a year.⁷⁰ After the trial period, representatives from a very broad group of federal agencies including, OMB, HEW, EEOC, GAO, the Department of Justice, the Department of Labor, the Department of Housing and Urban Development, and the Census Bureau discussed their experiences. After the meeting, OMB agreed to prepare a final draft of the definitions for comment by the various federal agencies. OMB made some revisions to the categories and definitions initially adopted by the Ad Hoc Committee and proposed them for agency comment.⁷¹ OMB made two major changes. First, OMB moved individuals with an ancestry from the Indian subcontinent to the Asian category and out of the Caucasian/White category. OMB then clarified that individuals who were in the American Indian or Alaskan Native category were individuals that maintained a cultural identification through tribal affiliation or community recognition. OMB made no provision for an “Other” category.

65. *Id.*

66. *Id.* at 18.

67. *Id.*

68. Observer identification method is where the person observing the subject determines the race of the subject. Sometimes self-identification of race is impossible, for example, when filling out death certificates. In these instances observer identification is necessary.

69. RACIAL AND ETHNIC DEFINITIONS, *supra* note 58, at 18.

70. SPENCER, *supra* note 50, at 68.

71. *Id.* at 42-43.

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On May 12, 1977, the *Race and Ethnic Standards for Federal Statistics and Administrative Reporting* (“Standards”) was adopted.⁷² Effective January 1, 1980, the Standards provided the “standard classifications for record keeping, collection, and presentation of data on race and ethnicity in Federal program administrative reporting and statistical activities.”⁷³ In 1978, the Standards went through a name change and were subsequently renamed the *Statistical Policy Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting* (“Directive 15”).⁷⁴ Directive 15 listed the following five racial/ethnic categories and definitions:

- (1) American Indian or Alaskan Native (“A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition.”);
- (2) Asian or Pacific Islander (“A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa.”);
- (3) Black (“A person having origins in any of the black racial groups of Africa.”);
- (4) Hispanic (“A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race.”); and
- (5) White (“A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.”).⁷⁵

Directive 15 noted that those who sought to comply with it should not construe it to limit the collection of data to its five categories. It permitted the use of subcategories within any of the basic racial/ethnic categories. However, those who used subcategories had to organize them in a way that allowed for the aggregation of the information into these basic racial/ethnic categories.⁷⁶ Directive 15 also concluded that it was preferable to collect data on race separate from ethnicity. However, it also provided a way to collect this information either separately in a two question format or in a combined one question format.

72. U.S. CENSUS BUREAU, DIRECTIVE NO. 15 RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTING (1977) [hereinafter DIRECTIVE 15], available at <http://wonder.cdc.gov/WONDER/help/populations/bridged-race/Directive15.html>.

73. *Id.*

74. See SPENCER, *supra* note 50, at 68 (providing additional information regarding the change of the name of Directive 15).

75. See DIRECTIVE 15, *supra* note 72.

76. *Id.*

If collected in a two question format, the minimum designations were: (1) Race, which included, “American Indian or Alaskan Native, Asian or Pacific Islander, Black, and White”; and (2) Ethnicity, which included “Hispanic origin and Not of Hispanic origin.” If collected in a one question format, then the minimum acceptable categories were as follows: “American Indian or Alaskan Native; Asian or Pacific Islander; Black, not of Hispanic origin; Hispanic; and White, not of Hispanic origin.”⁷⁷

II. ADOPTION OF THE 1997 REVISED STANDARDS

Directive 15 became the foundation of the process for collecting and reporting racial and ethnic data over the next twenty years. It not only altered the way the federal government collected and reported racial and ethnic data, but also affected the way state and local governments, as well as the private sector, collected and reported such data. However, intense debate existed about the categories and definitions of Directive 15.⁷⁸ This caused the federal government to undertake a review of Directive 15 from 1993 to 1997.⁷⁹ The review culminated in OMB issuing the 1997 Revised Standards in October 1997.⁸⁰ OMB also indicated that after a period to review the 2000 Census data, all federal programs must adopt consistent standards.⁸¹ The first section of this Part briefly discusses the need to revise Directive 15. The second section discusses the changes to the federal standards contained in the 1997 Revised Standards. The third section reviews the racial/ethnic data from the 2000 Census.

A. Need to Revise Directive 15

For the next fifteen years following the adoption of Directive 15, intense debate existed about its categories and definitions. The criticisms were the result of logical flaws in the categories and definitions,

77. *Id.*

78. *See id.*

79. *See generally* Recommendations from the Interagency Committee for the Review of the Racial and Ethnic Standards to the Office of Management and Budget Concerning Changes to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 36,874 (July 9, 1997) (indicating that since the 1990 Census, the standards established in Directive 15 no longer reflect the increasing diversity of our nation’s population that has resulted from immigration and interracial marriages).

80. *See* Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782 (Oct. 30, 1997).

81. *See, e.g.*, Proposed Guidance on Maintaining, Collecting, and Reporting Data on Race and Ethnicity to the U.S. Department of Education, 71 Fed. Reg. 44,866 (Aug. 7, 2006).

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the rapidly changing nature of the American population, and the growing recognition that racial and ethnic categories were social constructs.⁸² Those who pointed to the logical flaws noted that some of the categories were racial, some were geographic, and some were cultural.⁸³ Many individuals also complained that they could not locate themselves within any of the racial and ethnic categories. The parents of some multiracial children protested against the requirement to select only one race for their children.⁸⁴ The 1990 Census generated sufficient evidence of this latter complaint. The instructions for designating race on the 1990 Census forms required individuals to check the one box that best described their race.⁸⁵ Despite these instructions, however, more than five hundred thousand people selected more than one racial category.⁸⁶

From 1993 to 1997, the federal government conducted an extensive review of the racial categories specified in Directive 15.⁸⁷ Various federal agencies created an Interagency Committee for the Review of Racial and Ethnic Standards (“Interagency Committee”) to make recommendations to OMB.⁸⁸ The Interagency Committee included representation from thirty federal agencies.⁸⁹ Numerous opportunities for public comment and public hearings were provided around the nation at various stages of the review of Directive 15.⁹⁰ The public comments helped to identify several areas of concern for the Interagency Committee to address, including the following:

Should “Hispanic” be a response option to the race question?
Should data on race and ethnicity be gathered via 2 separate questions? If yes, then what should be the sequence of these questions?
Or should data on race and ethnicity be gathered in a single question? [How should data on individuals of multiple racial heritages be classified?] Should data on Native Hawaiians continue to be classified in the Asian or Pacific Islander category? Should the min-

82. See SPENCER, *supra* note 50, at 70-73.

83. NAT'L RESEARCH COUNCIL, SPOTLIGHT ON HETEROGENEITY: THE FEDERAL STANDARDS FOR RACIAL AND ETHNIC CLASSIFICATION 37 (Barry Edmonston et al. eds., 1996) [hereinafter SPOTLIGHT], available at http://www.nap.edu/openbook.php?record_id=9060&page=R1.

84. Wallman et al., *supra* note 53, at 1704.

85. U.S. CENSUS BUREAU, MEASURING AMERICA: THE DECENNIAL CENSUSES FROM 1790-2000, at 91 (2002), available at <http://www.census.gov/prod/2002pubs/pol02marv.pdf>.

86. Wendy D. Roth, *The End of the One-Drop Rule?: Labeling of Multiracial Children in Black Inter marriages*, 20 Soc. F. 35, 38 (2005).

87. For a listing of the steps taken, see Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,783-84 (Oct. 30, 1997).

88. *Id.* at 58,782.

89. *Id.*

90. See Wallman et al., *supra* note 53, at 1705.

imum set of categories for data on race and ethnicity be expanded to include other population groups?⁹¹

B. 1997 Revised Standards

After the Interagency Committee conducted an extensive evaluation of the Directive 15 categories, the Committee presented its report to OMB on July 9, 1997.⁹² With a few modifications, OMB adopted the Committee's recommendations and issued the 1997 Revised Standards.⁹³ OMB also agreed that self-identification is the preferred means of obtaining race and ethnic data.⁹⁴ However, in some situations, observer identification is more practical (e.g., completing a death certificate).⁹⁵

1. Hispanic/Latino Ethnicity Question and the Two Question Format

OMB decided to use the term "Hispanic or Latino" as opposed to "Hispanic."⁹⁶ OMB indicated that there were regional differences in the terms used.⁹⁷ In the eastern portion of the country, "Hispanic" was the commonly used term, but in the western portion "Latino" was the term commonly used.⁹⁸ OMB also adopted the following definition for "Hispanic or Latino": persons who trace their origin or descent to Mexico, Puerto Rico, Cuba, Central and South America, and other Spanish cultures.⁹⁹

The research conducted under the auspices of the Interagency Committee found that the best way to produce the most complete and accurate data on Hispanic/Latinos was to separate the Hispanic/Latino ethnic origin question from the question about race.¹⁰⁰ When respondents were asked both questions, the research indicated that it

91. *See id.*

92. *Id.* at 1708.

93. *See* Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. at 58,786 (announcing that OMB adopted the recommendations of the Interagency Committee).

94. Wallman et al., *supra* note 53, at 1707.

95. *See id.*

96. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. at 58,786.

97. *Id.*

98. *Id.*

99. *Id.* at 58,789.

100. *See* Wallman et al., *supra* note 53, at 1705.

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was best to ask the Hispanic/Latino origin question first.¹⁰¹ OMB followed the conclusions of this research.¹⁰²

The main reason given for gathering data using the two question format with the Hispanic/Latino ethnicity question first, was that Hispanic/Latinos do not always identify with the American racial categories.¹⁰³ There was plenty of proof of this in the 2000 Census data. While the 1997 Revised Standards did not allow for the use of a “Some Other Race” category, the Census Bureau obtained an exemption to permit its use for the 2000 Census. The Bureau believed that many Hispanic/Latinos would mark it.¹⁰⁴ Slightly more than thirty-five million people indicated that they were Hispanic/Latino.¹⁰⁵ About 47.9% checked only the white racial box and an additional 42.2% checked only the “Some Other Race” Category.¹⁰⁶ Of those who checked the Some Other Race box on the 2000 Census, over 95% also identified themselves as Hispanic/Latino.¹⁰⁷ “Thus it is clear that reporting of [Some Other Race] is highly related to how Hispanics report in race.”¹⁰⁸

2. How to Collect Data on Individuals with Multiple Racial Heritages?

According to OMB, the most controversial and sensitive issue during discussions about revising Directive 15 dealt with how to address the classifications of individuals with parents of different races.¹⁰⁹ Groups like the Association of MultiEthnic Americans (“AMEA”), Project RACE (Reclassify All Children Equally), and A

101. *See id.*

102. *See* Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. at 58,789-90.

103. *See* Wallman et al., *supra* note 53, at 1705.

104. *See* Farley, *supra* note 48, at 134 (stating that approximately one-third of those who identified with more than one race wrote their second race in a Spanish term).

105. U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: CENSUS BRIEF 3 tbl.1 (2001), available at <http://www.census.gov/prod/2001pubs/cenbr01-1.pdf>.

106. JORGE DEL PINAL ET AL., U.S. CENSUS BUREAU, OVERVIEW OF RESULTS OF NEW RACE AND HISPANIC ORIGIN QUESTIONS IN CENSUS 2000, at 4 (2007), available at <http://www.census.gov/srd/papers/pdf/rsm2007-05.pdf>.

107. *Id.* (noting that about 15.4 million respondents checked just the “Some Other Race” (“SOR”) category, and 3.2 million checked SOR along with another racial category on the 2000 Census, approximately 97% of those who just checked only SOR also responded that they were Hispanic or Latino, and over 90% of those who checked SOR and another racial category also indicated that they were Hispanic or Latino); *see also* Sharon M. Lee & Barry Edmonston, *New Marriages, New Families: U.S. Racial and Hispanic Inter-marriage*, POPULATION BULL., June 2005, at 10, available at <http://www.prb.org/pdf05/60.2NewMarriages.pdf>.

108. PINAL ET AL., *supra* note 106.

109. *See* Wallman et al., *supra* note 53, at 1704.

Place for Us (“APFU”) spearheaded efforts to add a “multiracial” option to the collection of data for the 2000 Census.¹¹⁰ According to Kim Williams—who extensively studied the movement to alter the federal forms to allow individuals to mark one or more boxes—there were about thirty-five hundred adult members, excluding student groups, spread throughout the country at the height of the multiracial movement.¹¹¹ In addition, only about twenty leaders of the multiracial movement were responsible for the effort to add a multiracial category to the 2000 Census.¹¹² Williams went on to state,

Unexpectedly, I found that white, liberal, and suburban-based middle-class women (married to black men) held the leadership roles in most multiracial organizations. These white women helped to set an optimistic tone for multiracial activism; many believed that American racial polarization could be overcome by their example. Most of these women were looking for community—not for a census designation. Movement spokespeople reversed these priorities somewhat, although they parted ways after the OMB decision of 1997.¹¹³

In 1988, a number of local multiracial organizations came together to create AMEA.¹¹⁴ AMEA sought respect and recognition for multiracial and multiethnic individuals and advocated for the addition of a multiracial category on all government forms.¹¹⁵ In its first year, AMEA tried to convince the federal government to add a new category, “Other,” to the Directive 15 categories for use principally by multiracial individuals. Civil rights forces, including the EEOC and the Civil Rights Division of the Department of Justice, opposed this effort.¹¹⁶ OMB decided not to take any action and concluded that it needed to conduct or authorize more testing before it could institute such a change.¹¹⁷

110. See KERRY ANN ROCKOUEMORE & DAVID BRUNSMA, *BEYOND BLACK: BIRACIAL IDENTITY IN AMERICA* 1–2 (2d ed. 2008); see also WILLIAMS, *supra* note 51, at 7, 9.

111. WILLIAMS, *supra* note 51, at 15.

112. *Id.*

113. *Id.* at 112.

114. See *AMEA’s History*, AM. MULTIETHNIC ASS’N, <http://www.ameasite.org/history.asp> (last visited Jan. 21, 2011) (stating that AMEA 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).

115. Mezey, *supra* note 114, at 1749.

116. *Id.*

117. SPENCER, *supra* note 50, at 126.

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Susan Graham, a white woman from Marietta, Georgia, founded Project RACE in 1991.¹¹⁸ The objective of Project RACE was to get a multiracial classification on all school, employment, state, federal, local, census, and medical forms that required racial data.¹¹⁹ Susan's husband, Gordon Graham, was a black news anchor for CNN who helped to publicize the efforts of Project RACE.¹²⁰ Susan started Project RACE after she tried to find out from the Census Bureau how to report her son on the 1990 Census form.¹²¹ The Census Bureau's practice for the 1970 Census was to assign the racial identity of the father to the biracial child.¹²² The Bureau changed this practice for the 1980 and 1990 Censuses and instead shifted to a formula that ascribed the mother's racial identity to biracial individuals.¹²³ Eventually, a Census Bureau official told Susan to use her race " '[b]ecause in cases like these, we always know who the mother is and not the father.'"¹²⁴

Steve and Ruth Bryant White created APFU in 1984.¹²⁵ They created the organization after Steve, who was white, asked his minister to marry them.¹²⁶ However, since Ruth was black, the minister refused.¹²⁷ One of Steve's friends also provided him with a list of reasons for why he should not marry Ruth.¹²⁸ At the top of the list was the fact that Ruth was black.¹²⁹ The Whites started APFU to support and encourage interaction involving interracial relationships.¹³⁰ In 1990, APFU revised its mission statement to include, as a goal, working with other multiracial groups to establish a multiracial category on official forms until the elimination of all racial categories on these forms.¹³¹

Multiracial advocates generally argued that mixed-race individuals viewed themselves as multiracial rather than belonging to a single

118. WILLIAMS, *supra* note 51, at 12.

119. *Id.*

120. *Id.* at 12-13.

121. *Id.* at 12.

122. *See id.*

123. *See* DANIEL, *supra* note 41, at 290.

124. *See* WILLIAMS, *supra* note 51, at 12.

125. *History, A PLACE FOR US NAT'L*, <http://www.aplaceforusnational.com/history.html> (last visited July 18, 2009) [hereinafter *History*].

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *See* WILLIAMS, *supra* note 51, at 12.

racial or ethnic group.¹³² A “multiracial” designation was, therefore, a better reflection of the true understanding of the multiracial person’s racial identity. These groups noted the psychological problems created for biracial children who were forced to identify with one parent more than the other.¹³³ Multiracial advocates also argued that the “one-drop rule,”¹³⁴ long-used to classify any person with any black blood as black, was inherently racist,¹³⁵ does not apply to any other racial or ethnic group in the United States, and appears to exist only in the United States.¹³⁶ The author of *The Clansman*, Thomas F. Dixon, Jr., expressed the longstanding justification for the one-drop rule.¹³⁷ In his best-selling fictional novel *The Leopard’s Spots*, Dixon wrote, “One drop of Negro blood . . . kinks the hair, flattens the nose, thickens the lip, puts out the light of intellect, and lights the fires of brutal passions.”¹³⁸

Opponents of the inclusion of a multiracial category on federal forms raised several objections. A multiracial category could confuse many respondents.¹³⁹ Lots of Americans are of mixed ancestry, including most blacks. Because of centuries of interracial mixing in the United States, experts estimate that between 75% and 90% of America’s black population have some white genes.¹⁴⁰ They place the over-all white gene frequencies of American blacks at somewhere between one-fifth and one-fourth.¹⁴¹ If respondents identified their ancestries going back many generations, then the multiracial category could prove to be very large and destabilizing. Another problem with including a multiracial category on federal forms is the potential variability of a person’s racial identity over time. Individuals who identify themselves as multiracial at one stage in life may later identify themselves in a single race or ethnic category.

132. See ROCKQUEMORE & BRUNSMAN, *supra* note 110, at 3.

133. See *id.* at 19-20.

134. In sociological circles, this “One Drop Rule” is referred to as “hypodescent.” See F. JAMES DAVIS, WHO IS BLACK?: ONE NATION’S DEFINITION 56 (1991).

135. ROCKQUEMORE & BRUNSMAN, *supra* note 110, at 1-17.

136. See DAVIS, *supra* note 134, at 13.

137. See THOMAS DIXON, JR. & C.D. WILLIAMS, THE CLANSMAN: AN HISTORICAL ROMANCE OF THE KU KLUX KLAN (Univ. Press of Kentucky 1970) (1905). *The Clansman* was the basis for the 1915 silent movie *Birth of a Nation*. See generally THE BIRTH OF A NATION (Epoch Film Co. 1915).

138. THOMAS DIXON, JR., THE LEOPARD’S SPOTS: A ROMANCE OF THE WHITE MAN’S BURDEN: 1865 TO 1900, at 244 (1906).

139. SPOTLIGHT, *supra* note 83, at 37-40.

140. See DAVIS, *supra* note 134, at 21.

141. *Id.*

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Another problem stems from the primary reason for racial and ethnic classifications by the federal government. Since the driving force behind the racial and ethnic classifications was the need to combat discrimination and differential treatment experienced by historically discriminated population groups,¹⁴² how should current civil rights legislation treat multiracial individuals? This concern generated other issues. Should the multiracial category be a protected class with the same legal rights to representation as the current minority categories or should all multiracial individuals be reclassified into the existing five categories? If they were reallocated, then there were other objections related to the potential controversies and difficulties associated with their reallocation.¹⁴³ If the reason to allow individuals the option of selecting a multiracial category was respect for individual self-identification, then reallocation would violate that principle. Further, if reallocation is to occur, what method should institutions employ? For example, the Tabulation Working Group of the Interagency Committee came up with eleven different ways to reallocate multiracials.¹⁴⁴ A solution to the reallocation issue would be to reject the multiracial category and allow multiracial individuals to check all the racial categories that apply. This was the solution eventually adopted.¹⁴⁵ However, if no reallocation occurred, then there would be a very large number of categories that reflected all of the different multiracial combinations, many of which with very few individuals. This would not only create a large administrative burden, but it would also create very difficult sampling issues. Categories with small numbers are far more vulnerable to inaccuracies from sampling errors than are categories with large numbers.

Beyond the above problems created by the addition of a “multiracial” category, black civil rights leaders, including Jesse Jackson, Kweisi Mfume for the Congressional Black Caucus, and the National Association for the Advancement of Colored People (“NAACP”), opposed the addition of a multiracial category.¹⁴⁶ Among the concerns black leaders expressed was that many blacks would designate them-

142. See Wallman et al., *supra* note 53, at 1704.

143. *Id.* at 1705.

144. See OFFICE OF MGMT. & BUDGET, PROVISIONAL GUIDANCE ON THE IMPLEMENTATION OF THE 1997 STANDARDS FOR FEDERAL DATA ON RACE AND ETHNICITY 90 (2001), available at <http://www.ofm.wa.gov/pop/race/omb.pdf>.

145. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,786 (Oct. 30, 1997).

146. ROCKUEMORE & BRUNSMA, *supra* note 110, at 2.

selves as multiracial in order to escape the social stigma of our society that occurs if individuals identify themselves as Black/African American.¹⁴⁷ They were also concerned about the impact on efforts to dismantle racial discrimination that would result if a multiracial category were included because the number of blacks would decrease.¹⁴⁸ They also argued that while the “one-drop rule” was a product of racism, it had become a means of mobilizing communities of color to organize against white race privilege.¹⁴⁹ Over the long centuries of struggle against racial oppression, many of the most significant leaders of the black struggle were biracial/multiracial individuals including Crispus Attucks, Halle Berry, Frederick Douglass, Lani Guiner, Prince Hall, Pinckney Benton Stewart Pinchback, Robert Smalls, Bishop Henry McNeal Turner, Booker T. Washington, and Walter White.¹⁵⁰ A number of civil rights groups, including the NAACP, the National Urban League, the Lawyer’s Committee on Civil Rights under the Law, and the Joint Center for Political and Economic Studies, signed onto the 1994 Coalition Statement (“Statement”).¹⁵¹ The Statement noted that a multiracial category may have unanticipated adverse consequences for blacks.¹⁵² The Statement went on to oppose any action by OMB that would disaggregate the current black population.¹⁵³

Multiracial organizations were undaunted by the administrative concerns created by the multiracial category and by opposition from civil rights groups. In 1994, Charles Michael Byrd, of black, white and Cherokee heritage, launched an internet website called *Interracial Voice*.¹⁵⁴ Though not a member of any established multiracial association, he organized the first multiracial solidarity march held on the Mall in Washington D.C., in July of 1996.¹⁵⁵ The stated objective of the march was to petition the federal government for a multiracial

147. *See id.*

148. *Id.*

149. *See* DANIEL, *supra* note 41, at 291; *see also* Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1162, 1188 (1997).

150. Kevin Brown, *Foreword: President Barack Obama Law & Policy Symposium*, 35 T. MARSHALL L. REV. 1, 7 (2009).

151. WILLIAMS, *supra* note 51, at 47.

152. *Id.*

153. *Id.*

154. *See* Charles Michael Byrd, *Archived Editorials*, INTERRACIAL VOICE, <http://www.interracialvoice.com> (last visited Dec. 27, 2010); *see also* Charles Michael Byrd, *About*, CHARLES MICHAEL BYRD (CHARUKRISHNA)’S BLOG, http://backintyme.com/cmbyrd/?page_id=2 (last visited Jan. 21, 2011).

155. WILLIAMS, *supra* note 51, at 68.

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category on the 2000 Census.¹⁵⁶ In 1995, multiracial activists were able to get legislation introduced in eleven different states to require the addition of a multiracial category on administrative or educational forms.¹⁵⁷ By the end of 1996, five states—Ohio, Illinois, Georgia, Indiana, and Michigan—had enacted such laws.¹⁵⁸ In the early part of 1997, Susan Graham was able to talk with Newt Gingrich, the Speaker of the House of Representatives.¹⁵⁹ Graham resided in Gingrich's congressional district and Gingrich knew of Graham because she had been instrumental in the successful effort to get a multiracial category added to Georgia state forms.¹⁶⁰ During the meeting, Gingrich embraced the effort to get a multiracial category on the census.¹⁶¹ Gingrich felt that the multiracial option was a step toward the eventual elimination of racial and ethnic categories.¹⁶²

In the end, OMB rejected a multiracial category for individuals to select.¹⁶³ However, OMB decided that when self-identification is used, those who collect racial and ethnic data for federal programs should employ a method that allows individuals to check more than one race category from a list of races provided to the respondent.¹⁶⁴ Thus, with the adoption of the 1997 Revised Standards, the federal government agreed to allow individuals to designate more than one racial category.¹⁶⁵ Not all multiracial group advocates, however, agreed that this was a significant step forward. AMEA accepted the decision to allow individuals to choose more than one racial category, but Susan Graham of Project RACE felt that this was not enough.¹⁶⁶

156. *Id.*

157. Alice Robbin, *Classifying Racial and Ethnic Group Data in the United States: The Politics of Negotiation and Accommodation*, 27 J. GOV'T INFO. 129, 142 (2000).

158. See WILLIAMS, *supra* note 51, at 68 (discussing multiracial category legislation in states).

159. Jennifer Hochschild & Traci Burch, *Contingent Public Policies and Racial Hierarchy: Lessons from Immigration and Census Policies*, in *POLITICAL CONTINGENCY: STUDYING THE UNEXPECTED, THE ACCIDENTAL, AND THE UNFORESEEN* 158-59 (Ian Shapiro & Sonu Bedi eds., 2007).

160. *Id.*

161. *Id.*

162. *Id.*

163. After the 1990 Census, experts generally estimated the multiracial population at between 4% and 6% with the highest estimate at 6.6%. See Tafoya et al., *supra* note 56, at 332. OMB's research, however, showed that less than two percent of the population would select two or more races, but the percentage of multiracials was growing. See *id.*

164. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,789 (Oct. 30, 1997).

165. *Id.*

166. See *History*, *supra* note 125; see also PROJECT RACE, <http://www.projectrace.com> (last visited Jan. 5, 2011).

Ruth and Steve White and Charles Byrd returned to their original positions of trying to get beyond racial categories altogether.¹⁶⁷

3. Modifications for the Racial Categories

The 1997 Revised Standards included five racial categories, which replaced the previous four contained in Directive 15.¹⁶⁸ A number of critics, witnesses, and groups sought to extend the categories beyond those included in Directive 15. Categories suggested included Middle Easterners/Arabs, Cape Verdeans, European Americans, German Americans and Creoles.¹⁶⁹ However, in the end, OMB agreed only to alter the “Asian and Pacific Islanders” category by removing the Pacific Islanders and combining them into a new category with Native Hawaiians.¹⁷⁰

During the Congressional testimony in 1993, Senator Daniel Akaka of Hawaii asserted on behalf of the entire Hawaii congressional delegation, Hawaii’s Governor John Waihee, Native Hawaiian organizations, and the National Coalition for an Accurate Count of Asians and Pacific Islanders that they sought a separate classification for Native Hawaiians.¹⁷¹ Akaka argued that Native Hawaiians fell through the cracks between being defined as Native Americans in many federal laws and being classified as Asians or Pacific Islanders on federal forms.¹⁷²

In addition to creating a new combined category for “Native Hawaiian or Other Pacific Islanders,” OMB made one other significant change to the definitions of the categories from those in Directive 15. OMB changed the definition of “American Indian or Alaska Native” by adding to it the “original peoples from South and Central

167. See WILLIAMS, *supra* note 51, at 93. Charles Byrd later wrote a book asserting that Krishna Consciousness was a way to get beyond the American fixation on race. See generally CHARLES MICHAEL BYRD, *THE BHAGAVAD-GITA IN BLACK AND WHITE: FROM MULATTO PRIDE TO KRISHNA CONSCIOUSNESS* (2007) (discussing how Krishna Consciousness will help Americans transcend their focus on race).

168. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. at 58,789 (Oct. 30, 1997).

169. Recommendations from the Interagency Committee for the Review of the Racial and Ethnic Standards to the Office of Management and Budget Concerning Changes to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 36,874, 36,880 (July 9, 1997).

170. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. at 58,787.

171. WILLIAMS, *supra* note 51, at 93.

172. *Id.*

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America.”¹⁷³ Thus, the five racial categories and their definitions contained in the 1997 Revised Standards 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 (“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.”).¹⁷⁴

C. Results of the 2000 Census

The 2000 Census form generally followed the 1997 Revised Standards. However, while the 1997 Revised Standards did not allow for the use of a “Some Other Race” category, the Census Bureau obtained an exemption to permit its use for the 2000 Census.¹⁷⁵ Thus, the 2000 Census form included the five racial categories set out in the 1997 Revised Standards as well as a Some Other Race category.¹⁷⁶ It also treated the Hispanic/Latino ethnicity question separate from the question about race.¹⁷⁷

The Census Bureau compiled data in two different ways. It compiled data based solely on the Hispanic/Latino ethnicity question and solely on the question of race.¹⁷⁸ Thus, the 2000 Census counted:

Total population	281,421,906	(100.0)
Not Hispanic or Latino	246,116,088	(87.5)
Hispanic or Latino	35,305,818	(12.5) ¹⁷⁹

173. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. at 58,787.

174. *Id.* at 58,789.

175. See GRIECO, *supra* note 43.

176. *Id.*

177. *Id.* at 1.

178. *Id.* at 2.

179. See ELIZABETH M. GRIECO & RACHEL C. CASSIDY, U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN 2000: CENSUS 2000 BRIEF 10 tbl.10 (2001) available at <http://www.census.gov/prod/2001pubs/cenbr01-1.pdf>.

Race	Hispanic or Latino			Not Hispanic or Latino		
	Number	Percent of Hispanic population	Percent of total population	Number	Percent of non-Hispanic population	Percent of total population
Total	35,305,818	100.0	12.5	246,116,088	100.0	87.5
One Race	33,081,736	93.7	11.8	241,513,942	98.1	85.8
White	16,907,852	47.9	6.0	194,552,774	79.1	69.1
Black or African American	710,353	2.0	0.3	33,947,837	13.8	12.1
American Indian and Alaska Native	407,073	1.2	0.1	2,068,883	0.8	0.7
Asian	119,829	0.3	.	10,123,169	4.1	3.6
Native Hawaiian and Other Pacific Islander	45,326	0.1	.	353,509	0.1	0.1
Some Other Race	14,891,303	42.2	5.3	467,770	0.2	0.2
Two or More Races	2,224,082	6.3	0.8	4,602,146	1.9	1.6

The Two or More Races count included individuals who checked more than one of the broad five racial categories plus the “Some Other Race” category.¹⁸⁰ The result was that 6.8 million Americans, or about 2.4% of the population, described themselves as multiracial.¹⁸¹ However, approximately 2.8 million or 4% of those under the age of eighteen selected two or more races.¹⁸² With the five racial categories and the “Some Other Race” category, the Census Bureau reported population figures in fifty-seven different multiracial subcategories in the Two or More Races category.¹⁸³ There were fifteen unique biracial combinations, twenty three-race combinations, fifteen four-race combinations, six five-race combinations, and one combination with all six-race combinations.¹⁸⁴ The largest groups numerically were:

1. White and Some Other Race, 2,206,251 (0.78% of the total United States population and 32.32% of those who checked more than one race);
2. White and American Indian and Alaska Native 1,082,683 (0.38%, 15.86%, respectively);
3. White and Asian 868,395 (0.31%, 12.72%, respectively);
4. White and Black 784,764 (0.28%, 11.5%, respectively); and

180. NICHOLAS A. JONES & AMY SYMENS SMITH, U.S. CENSUS BUREAU, THE TWO OR MORE RACES POPULATION: 2000, CENSUS 2000 BRIEF 1 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-6.pdf>.

181. See *id.*

182. See *id.* at 9.

183. For a listing of the fifty-seven categories and their populations, see *United States Multi-racial Profile*, CENSUSSCOPE.ORG, http://www.census.gov/2000census/2000scope/us/print_chart_multi.html (last visited Dec. 27, 2010) [hereinafter CENSUSSCOPE].

184. See *id.*

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5. Black and Some Other Race 417,249 (0.15% 6.11%, respectively).¹⁸⁵

Fifteen of the subcategories of those who checked more than one racial box contained less than one thousand people.¹⁸⁶

III. THE GUIDANCE AND ITS IMPACT ON THE
ADMISSIONS PROSPECTS OF BLACK
HISPANICS AND BLACK MULTIRACIALS

Not only do educational institutions have to report the race and ethnicity of their student bodies to the DOE, but they also have to report the race and ethnicity of their employees to the EEOC.¹⁸⁷ The DOE repeatedly received comments from educational institutions stating they preferred that the “various Federal agencies involved in data collection all use the same aggregate categories so that the burden of implementing changes is minimized and educational institutions are not forced to provide different and/or inconsistent data on race and ethnicity to federal agencies.”¹⁸⁸ Therefore, the DOE decided to wait for the EEOC to announce its final implementation plan for complying with the reporting requirements of the 1997 Revised Standards before publishing its proposed changes.¹⁸⁹ The EEOC announced its final implementation plan in November 2005.¹⁹⁰ Subsequently the DOE published the *Proposed Guidance, on Maintaining, Collecting, and Reporting Data on Racial and Ethnicity to the U.S. Department of Education* (“Proposed Guidance”) for comment on July 31, 2006.¹⁹¹ After reviewing comments, the DOE issued the Guidance in October 2007.

In promulgating the Guidance, the DOE decided to adopt the same reporting categories for the race and ethnicity of students, which the EEOC had adopted. To have a more detailed understanding of certain reporting decisions that the DOE included in the Guidance, the first section of this Part will look at how the EEOC resolved sev-

185. *Id.*

186. *See id.*

187. *Id.* at 59,274.

188. Proposed Guidance on Maintaining, Collecting, and Reporting Data on Race and Ethnicity to the U.S. Department of Education, 71 Fed. Reg. 44,866, 44,868 (Aug. 7, 2006).

189. *Id.*

190. *See* Agency Information Collection Activities, Notice of Submission for OMB Review; Final Comment Request to the Equal Employment Opportunity Commission, 70 Fed. Reg. 71,294 (Nov. 28, 2005), available at <http://edocket.access.gpo.gov/2005/pdf/05-23359.pdf>.

191. Proposed Guidance on Maintaining, Collecting and Reporting Data on Race and Ethnicity to the U.S. Department of Education, 71 Fed. Reg. at 44,871.

eral important reporting issues. The second section of this Part will discuss the Guidance's decision not to require educational institutions to report the separate races of those in the Hispanic/Latino and Two or More Races categories. This is the key decision that will lead admissions officials to treating Black Hispanic applicants as Hispanic/Latinos and comparing Black Multiracial applicants to those in the Two or More Races category. The third section discusses the impact of the Guidance on the admissions prospects to selective higher education programs of Black Hispanics and Black Multiracials.

A. The Racial and Ethnic Reporting Standards Adopted by the EEOC

Since the late 1960s, certain private employers have had to file an annual report, called the EEO-1 report, with the EEOC. The EEOC and the Office of Federal Contract Compliance Programs ("OFCCP") jointly adopted the EEO-1 report in 1966.¹⁹² Data requested on the EEO-1 report tracks employees by race, ethnicity, sex, and job classification.¹⁹³ The EEOC uses the data to support enforcement of federal anti-discrimination laws and to analyze employment patterns.¹⁹⁴ Private employers with at least one hundred employees and federal government contractors with at least fifty employees and a contract of at least \$50,000 are required to submit an EEO-1 report to the Joint Reporting Committee, consisting of the EEOC and OFCCP, by September 30th of each year.¹⁹⁵

The EEOC published its draft revisions to the EEO-1 report for comment on June 11, 2003.¹⁹⁶ Those revisions included the EEOC's decision not to require the separate reporting of races for either the Hispanic/Latino or Two or More Races categories.¹⁹⁷ During the comment period, civil rights groups including the Mexican American Legal Defense and Education Fund, RainbowPUSH Coalition ("RainbowPUSH") and the National Asian Pacific American Legal Consortium, urged the EEOC to change its initial position and require

192. Agency Information Collection Activities, Notice of Submission for OMB Review; Final Comment Request to the Equal Employment Opportunity Commission, 70 Fed. Reg. 71,295 (Nov. 28, 2005).

193. *Id.*

194. *Id.*

195. See *EEO-1 Who Must File*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/employers/eeo1survey/whomustfile.cfm> (last visited Dec. 22, 2010).

196. Agency Information Collection Activities, Notice of Submission for OMB Review; Final Comment Request to the Equal Employment Opportunity Commission, 70 Fed. Reg. at 71,295.

197. *Id.* at 72,296-97.

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employers to report the race of Hispanic/Latino employees.¹⁹⁸ RainbowPUSH asserted that Hispanic/Latinos of mixed heritage with African ancestry were more likely to face discrimination than Hispanic/Latinos not of mixed heritage and without African ancestry.¹⁹⁹ Other groups noted that the EEOC's procedures would artificially inflate the number of Hispanic/Latino employees since none of them are included in the Two or More Races category and deflate the number in the other racial groups.²⁰⁰

The EEOC rejected these concerns. It noted that only a small percentage of those over the age of eighteen indicated on the 2000 Census form that they were both Hispanic/Latino and a member of a racial minority group.²⁰¹ Thus, requiring employers to report the race of Hispanic/Latino employees would provide little benefit. Such reporting would also create problems for OFCCP's system for targeting contractors for compliance review.²⁰² The EEOC also noted that it was not clear that Hispanic/Latinos willingly or accurately self-identify using American racial categories when asked to do so.²⁰³

Civil rights groups also urged the EEOC to adopt more detailed reporting requirements for those in the Two or More Races category.²⁰⁴ For instance, Reverend Jesse L. Jackson, Jr. of RainbowPUSH noted that the Two or More Races category would not be meaningful for affirmative action purposes.²⁰⁵ In response to these concerns, the EEOC concluded that requiring employers to report the separate races of those in the Two or More Races category on the EEO-1 report would result in only a marginal improvement in the utility of the data. Such marginal improvement did not justify the added burden to employers and the government.²⁰⁶ The EEOC noted that only 2.4% of the respondents selected the Two or More Races category on the 2000 Census.²⁰⁷ Additionally, the EEOC indicated that adopting the Two or More Races category supported the OFCCP's use of the EEO-1 report data, since the OFCCP's statistical model for selecting contractors for compliance reviews uses aggre-

198. *Id.* at 71,296, 71,298.

199. *Id.* at 71,297.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *See id.* at 71,296.

205. *Id.*

206. *Id.*

207. *Id.*

gated “minority” and “nonminority” categories.²⁰⁸ OFCCP can simply incorporate the counts of those in the Two or More Races category into its minority counts and continue using its current methodology with minor adjustments.²⁰⁹

The EEOC submitted its revisions to the EEO-1 report to the OMB in November 2005.²¹⁰ OMB approved the revised EEO-1 report and employers began to use the revised survey for the reporting period beginning September 30, 2007.²¹¹

B. The Guidance Rejection of Reporting Specific Races in the Hispanic/Latino and Two More Races Category

The DOE published the Proposed Guidance for comment on July 31, 2006. After analyzing the responses received during the comment period, the DOE issued the Guidance. The DOE followed the lead of the EEOC and did not require the reporting of the specific races of those in either the Hispanic/Latino or Two or More Races category.²¹² By doing so, the DOE adopted categories identical to those used by the EEOC.

During the comment period, a number of commentators expressed concern about these decisions of the DOE. The DOE’s response to these concerns, however, sounded as if the matter was a *fait accompli*.²¹³ At least one commentator noted that the DOE should not follow the same approach as the EEOC, because their objectives for collecting data were different.²¹⁴ In response, the DOE noted that educational institutions and other recipients repeatedly indicated their preference that the various federal agencies use the same aggregate categories in order to minimize the administrative burden.²¹⁵ The DOE also stated that it was too administratively burdensome to have educational institutions throughout the country report the separate racial identities of those in the Hispanic/Latino category.²¹⁶ The DOE

208. *Id.*

209. Agency Information Collection Activities, Notice of Submission for OMB Review; Final Comment Request to the Equal Employment Opportunity Commission, 70 Fed. Reg. 71,294, 71,296 (Nov. 28, 2005).

210. *Id.* at 71,294.

211. *Id.* at 71,300.

212. Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the Department of Education, 72 Fed. Reg. 59,266, 59,267 (Oct. 19, 2007).

213. *Id.* at 59,270-71.

214. *Id.* at 59,271.

215. *Id.*

216. *Id.* at 59,267.

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noted that if it required the reporting of racial data for the Hispanic/Latino category, then the report would require six additional categories.²¹⁷ Racial categories are often cross-tabulated with other relevant information such as an individual's sex, disability category, or educational placement, thereby increasing the categories of information even more.²¹⁸ The DOE followed similar reasoning when it rejected a suggestion that educational institutions should report all or some of the separate racial identities of those in the Two or More Races category.²¹⁹

Some commentators expressed concern that the reporting requirements of the Guidance regarding the Two or More Races category, could lead to a significant reduction in the black student population.²²⁰ The DOE responded to these concerns by stating, “[I]n most instances, the Department anticipates that the size of the [T]wo or [M]ore [R]aces category will not be large enough to cause significant shifts in student demographics.”²²¹ The DOE noted in the background information that “[i]n the 2000 Census, 2.4% of the total population (or 6.8 million people) identified themselves as belonging to two or more racial groups. For the population under [eighteen] years old, 4.0% (or 2.8 million children) selected two or more races.”²²²

The problem with these national statistics is that the small percentage of non-Hispanic whites that are multiracial (2%)²²³ obscures the much higher percentage of multiracials among the minority racial groups.²²⁴ In the 2000 Census, 4.8% of those who checked the Black category also checked another category, twice the percentage of the American population as a whole.²²⁵ In addition, as the DOE noted, the younger the person the greater the chance they are multiracial.²²⁶ Thus, from the 2000 Census, the percentage of blacks between the ages of fifteen and nineteen who were reported as Black Multiracial

217. *Id.* at 59,277.

218. *Id.*

219. *Id.* at 59,271.

220. *Id.* at 59,270.

221. *Id.*

222. *Id.* at 59,274.

223. *See* Tafoya et al., *supra* note 56, at 349.

224. *Id.*

225. *See* CENSUSSCOPE, *supra* note 183.

226. *See generally supra* text accompanying note 222.

was only 5.3%.²²⁷ However, for blacks between the ages of ten and fourteen it increased to 6.3%, for those between the ages of five and nine to 8.1%, and for those five and under it was 11.4%.²²⁸ Thus, by the time the Guidance went into effect, ten years after the 2000 Census counts, a minimum of 8.1% of blacks under the age of eighteen identified with more than one race.²²⁹

Because of the DOE's decision not to require the separate reporting of the races for those in the Hispanic/Latino or Two or More Races category, considerable information about race and ethnicity of students is lost. Unlike the 2000 Census, which generated a tabulation based on responses to the Hispanic/Latino ethnicity question and another based on responses from the race question, the Guidance does not provide the data for doing such calculations.²³⁰ In addition, since all racial combinations of Hispanic/Latinos are lumped together, it is not possible to separate the number of Black Hispanics from that of the Hispanic/Latino counts that educational institutions are required to report to the DOE. Nor is it possible to separate out Black Multiracials from all other non-Hispanic/Latino multiracials in the Two or More Races category.

C. Impact of the Guidance on Admissions Prospects of Black Hispanics and Black Multiracials

Admissions officials at selective higher education programs will have to decide if, during the admissions process, they should continue to treat Black Hispanics and Black Multiracials as Black/African Americans. I suspect that in the first few years of the implementation of the Guidance, many admissions officials may continue to treat Black Hispanics as Black/African Americans when evaluating their applications. They may also continue to compare Black Multiracial applicants to Black/African American applicants. During this initial

227. See U.S. CENSUS BUREAU, BLACK OR AFRICAN AMERICAN POPULATION, BY AGE AND SEX FOR THE UNITED STATES: 2000 tbl.3 (2002), available at <http://www.census.gov/population/www/cen2000/briefs/phc-t8/tables/tab03.pdf>. 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%).

228. For ages ten to fourteen the corresponding figures were 210,794, 3,332,324 (210,794/3,332,324=6.3%); for ages five to nine the corresponding figures were 285,205, 3,490,717 (285,205/3,490,717=8.1%); for under the age of five the corresponding figures were 362,073, 3,166,859 (362,073/3,166,859=11.4%). *Id.*

229. *Id.*

230. See Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the Department of Education, 72 Fed. Reg. 59,266 (Oct. 19, 2007).

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period, when admissions officials are questioned about how many black students are enrolled in their particular educational program, they may also report the number of Black Hispanic and Black Multiracial students along with the number of Black/African American students. Thus, they may respond by saying, “We have enrolled sixteen black students, of which one is also Hispanic/Latino and four are also multiracial.”

Regardless of how admissions decisions for Black Hispanics and Black Multiracials are treated over the next few years, as time passes from the effective date of the Guidance, the tendency of admissions officials to compare Black Hispanics to others in the Hispanic/Latino category will likely increase. The tendency to compare Black Multiracials to others in the Two or More Races category will also likely increase. Scholars have long understood the concept that race is socially constructed.²³¹ Having changed the definition of all the major racial/ethnic categories, the Guidance will provide an unfolding example of the workings of this concept. As the years pass, educational institutions will become increasingly familiar with addressing the racial/ethnic reporting categories of the Guidance. In addition, the national statistics about the educational situation of various racial/ethnic groups, including high school graduation rates and college attendance rates, will be compiled from data reported to the DOE, which places Black Hispanics in the Hispanic/Latino counts and Black Multiracials in the Two or More Races counts.²³² As admissions officials come to understand that Black Hispanics and Black Multiracials no longer increase the numbers of Black/African American students, the educational institutions may come to look at these two groups in a different light.

For admissions officials to continue to treat Black Hispanics and Black Multiracials as if they were Black/African Americans would constitute a blatant application of the one-drop rule. Admissions officials would treat individuals as black even though they have expressed a different racial/ethnic identity in the admissions process. Doing this would also invoke a certain irony, particularly regarding Black Multiracials. One of the principal motivations for the adoption of the 1997 Revised Standards, which prompted the issuance of the Guidance, was the desire of multiracial groups to avoid the classification

231. *See supra* note 286-87 and accompanying text.

232. *See supra* notes 15-16 and accompanying text.

of Black Multiracials as black.²³³ Thus, if admissions officials treat Black Multiracials as Black/African American, this practice would run counter to one of the main reasons the Guidance required the reclassification of Black Multiracials into the Two or More Races category.

Admissions officials will also have to decide whether it is fair to admit a particular Black Hispanic that was compared with Black/African American applicants, because the Black Hispanic's admission could come at the expense of another Hispanic/Latino who may have higher standardized test scores. The same holds true—but to a far greater extent—for Black Multiracial applicants. Their admission could come at the expense of other multiracials reported in the Two or More Races category who could very well have standardized tests scores that are significantly higher than those of Black Multiracial applicants admitted.

As the impact of the Guidance unfolds, it will tend to standardize the redistribution of Black Hispanics and Black Multiracials into the categories it prescribes. Consequently, it will reduce the admissions prospects of Black Hispanics to selective higher educational institutions as admissions committees compare their academic credentials to others in the Hispanic/Latino category, instead of the Black/African American category. However, the unfolding of the Guidance is potentially devastating to the admissions prospects of Black Multiracials as admissions officials change their comparative group from Black/African Americans to those in the Two or More Races category.

IV. BLACK IMMIGRANTS SHOULD NOT BE TREATED BETTER THAN BLACK HISPANICS AND BLACK MULTIRACIALS

While some commentators on the Proposed Guidance suggested the addition of several other categories, including a category for “Africans” that would be different from “African American,” the DOE largely treated the issue of categories as resolved by the 1997 Revised Standards.²³⁴ As a result, by complying with the Guidance, selective higher education institutions will only generate internal data that allows them to separate Black Hispanics and Black Multiracials

233. *See supra* Part II.B.2.

234. Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the Department of Education, 72 Fed. Reg. 59,266, 59,268 (Oct. 19, 2007) (“The issues raised by these commentators concerning additional categories or clarifications of existing categories were previously addressed by OMB when it announced its [1997 Revised Standards] . . .”).

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from Black/African Americans. However, they will not be able to determine the ethnic breakdown of blacks in the Black/African American category.

Since Black Immigrants will be counted in the Black/African American category, admissions officials of selective higher education programs will continue to compare their academic credentials to those in the Black/African American category. This provides Black Immigrants with a competitive advantage in the admissions process over both Black Hispanics and Black Multiracials. As a result, the unfolding of the Guidance will reduce the admissions prospects of Black Hispanics and Black Multiracials and, at the same time, improve the admissions prospects of Black Immigrants. Yet, as the statistics in the introduction demonstrate, both Black Multiracials and Black Immigrants are overrepresented among blacks in colleges and universities in general, but particularly in selective higher education institutions. Census Bureau statistics indicate that the socioeconomic status of Black Hispanic students is similar to that of other African American students.²³⁵ However, like Black Multiracials, Black Immigrants tend to come from families with more parental education and higher family incomes than other blacks.²³⁶ Black Immigrants and Black Multiracials also have at least one parent who is not a descendant from the group of blacks whose ancestral line is that of blacks who experienced the history of discrimination of blacks in the United States.²³⁷ Thus, this raises the issue of whether it is right to treat Black Immigrants better than Black Hispanics and Black Multiracials in the admissions process of selective higher education institutions.

When affirmative action admissions policies began in the 1960s,²³⁸ there were only 125,000 foreign-born blacks in the country, making up only 0.7% of the black population.²³⁹ This percentage, however, has risen over eleven fold in the past fifty years, to 1.1% in 1970,²⁴⁰ to 3.1% in 1980,²⁴¹ to 4.9% in 1990,²⁴² to 6.1% in 2000,²⁴³ and

235. See JOHN R. LOGAN, HOW RACE COUNTS FOR HISPANIC AMERICANS 3-4 (2003), available at <http://mumford.albany.edu/census/BlackLatinoReport/BlackLatinoReport.pdf>.

236. Brown, *supra* note 19, at 153-54.

237. *Id.*

238. William Bowen and Derek Bok in their groundbreaking book, *The Shape of the River*, noted, "It is probably safe to say . . . that prior to 1960, no selective college or university was making determined efforts to seek out and admit substantial numbers of African Americans." WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 4 (1998).

239. Gibson & Lennon, *supra* note 41, at tbl.8.

240. *Id.*

to 8% in 2007.²⁴⁴ Over this period, the number of foreign-born blacks in the United States has also increased nearly twenty-four fold to almost three million.²⁴⁵ The impact of the foreign-born black population on blacks in the United States is likely to further increase in the future because foreign-born black women bore approximately one out of every six black children in 2004.²⁴⁶

In order to assert that it is wrong to favor Black Immigrants over Black Hispanics and Black Multiracials in the admissions process of selective higher education institutions, it is necessary to articulate an overarching justification of which black applicants deserve positive consideration in the admissions process and why. The starting point has to be the Supreme Court's opinion in *Grutter v. Bollinger*,²⁴⁷ since this is the decision that justifies the use of racial classifications in the admissions process. Justice O'Connor's majority opinion for the Court points to the experience of growing up as an underrepresented minority with a history of discrimination as the basis for the consideration of race and ethnicity in the admissions process.²⁴⁸ When compared to Black Hispanics or Black Multiracials, it is difficult to assert that Black Immigrants have more experience with the historical discrimination of blacks in the United States. The first section of this Part addresses the justifications for the use of racial classification in the admissions process. The second section of this Part discusses why it is wrong to provide Black Immigrants with a competitive advantage in the admissions process over Black Hispanics and Black Multiracials.

241. *Id.*

242. *Id.*

243. JESSE D. MCKINNON & CLAUDETTE E. BENNETT, U.S. CENSUS BUREAU, WE THE PEOPLE: BLACKS IN THE UNITED STATES 7 fig.5 (2005), available at <http://www.census.gov/prod/2005pubs/censf-25.pdf>.

244. See GRIECO, *supra* note 43. The Census Bureau estimated that there were 36,657,000 non-Hispanic Blacks of which 2,785,000 were foreign born (or 7.6%). In addition, 187,000 of the 677,000 Hispanic/Latinos who checked black as their only racial category were foreign-born. Thus, the total of the single race black population, including Hispanic/Latinos, was 37,334,000 of which 2,972,000 or 7.96%. *Id.*

245. See GRIECO, *supra* note 43, at 7.

246. Kent, *supra* note 27, at 4 (asserting that the figure drops to just 13% of black children if only non-Hispanic Blacks are considered).

247. 539 U.S. 306 (2003).

248. See *id.* at 337-39.

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A. Justification for the Use of Racial Classifications in the Admissions Process

In *Grutter v. Bollinger*,²⁴⁹ the Supreme Court upheld the affirmative action admissions policy of the University of Michigan Law School. The policy reaffirmed

the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers."²⁵⁰

Professor Richard Lempert chaired the faculty committee of the Law School, which drafted the affirmative action policy upheld in *Grutter*.²⁵¹ In his testimony during the District Court trial, Lempert noted that the policy "did not purport to remedy past discrimination, but rather to include students who may bring to the Law School a perspective different from that of members of groups which have not been the victims of such discrimination."²⁵² In the majority opinion, Justice O'Connor noted, "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."²⁵³ She also pointed out that the University of Michigan Law School did not premise the need for a critical mass of underrepresented minority students on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue."²⁵⁴ Thus, the opinion endorses the use of racial classifications in the admissions process for the selection of underrepresented minorities that have *experienced* the impact of being a member of a historically discriminated group.²⁵⁵

The legacy of North American and European slavery and American foreign policy over the years had negative consequences for a

249. *Id.* at 343-44.

250. *Id.* at 316 (internal citations omitted) (quoting the University of Michigan Law School's admissions policy).

251. *Id.* at 319.

252. *Id.*

253. *Id.* at 333.

254. *Id.* (quoting Response to the Petition for Certiorari by Respondents at 30, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241)).

255. *Id.*

number of countries where a majority of the population was black, including countries of origin of many foreign-born blacks.²⁵⁶ Nevertheless, from the very inception of affirmative action admissions policies, it was always clear that the history of discrimination that concerned proponents of affirmative action was the history that took place in the United States. After all, no one seriously contended that affirmative action in the United States was created to target the effects of oppression caused in other parts of the world, including for example, the exploitation of Koreans in Japan, the negative effects of untouchability on Dalits in India, the remnants of French Colonialism in the Caribbean, or the aftermath of British imperialism in Africa or the New World. Thus, when the University of Michigan Law School mentioned that blacks and other groups have suffered from a history of discrimination, that history related to the treatment of blacks in the United States, not the rest of the world.²⁵⁷

In order to determine which black applicants have experienced the impact of being a member of a historically discriminated group in the United States, it is necessary to understand the historical experience of discrimination of African Americans. The central feature in the historical experience of blacks in the United States is race. However, there are two different aspects of the historical discrimination against blacks. One aspect involves the victimization of race, which occurs when blacks experience discrimination and subjugation because of their race.²⁵⁸ For much of history, dominant American society viewed blacks as inferior to whites. This view helped to make the subjugation of blacks appear to be part of the normal order of things.²⁵⁹ Thus, one aspect of the experience of historical discrimination for African Americans is the experience of what it means to be

256. See Lewis R. Gordon, *Thinking Through Identities: Black Peoples, Race Labels, and Ethnic Consciousness*, in *THE OTHER AFRICAN AMERICANS: CONTEMPORARY AFRICAN AND CARIBBEAN IMMIGRANTS IN THE UNITED STATES* 83 (Yoku Shaw-Taylor & Steven A. Tuch eds., 2007) (arguing that concern about the underrepresentation of Ascendants benefitting from affirmative action is xenophobic and under appreciates the impact of the legacy of slavery on other blacks and how American foreign policy has harmed the development of Caribbean countries).

257. *Grutter v. Bollinger*, 539 U.S. 306, 319 (2003).

258. See, e.g., Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 *TUL. L. REV.* 597, 625-38 (1993) (outlining, in the context of reparations, the victimization of the African-American consciousness, due to the subjugation of blacks because of their race).

259. For a brief description of this history, see KEVIN BROWN, *RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA: FOUR PERSPECTIVES ON DESEGREGATION AND RESEGREGATION* 41-72 (2005).

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“raced” or branded as inferior.²⁶⁰ However, against the background of racial domination in the United States, the descendants of the sons and daughters of the soil of Africa developed a counter-discourse to how mainstream American society normally viewed and treated them. From this point of view, race was also the central characteristic that united blacks. This counter historical experience of being black involved the active engagement in a collective struggle against white supremacy, not the acceptance of black racial inferiority.²⁶¹ Consequently, the experience of the history of discrimination of black people in the United States is like a two-sided coin. On one side, race was—and is—the basis of the subjugation of blacks. On the other side, race was—and is—the immutable characteristic that bound blacks as a people in a constant struggle against their racial oppression. Black applicants who should receive positive consideration in the admissions process of selective higher education programs are those connected to and have experience with, both aspects of discrimination that blacks have suffered in the United States.

B. It Is Wrong to Treat Black Immigrants Better than Black Hispanics or Black Multiracials

If there is a reason to justify treating Black Immigrants better than Black Hispanics and Black Multiracials, it has to be based on the belief that Black Immigrants have a better connection with the historical discrimination of blacks in the United States. But, how can that be? With respect to foreign-born blacks who immigrate to the United States as adults (Adult Black Immigrants), it is clear that they do not have the same experience with racial discrimination in the United States as Black Hispanics or Black Multiracials that grew up in the United States. Adult Black Immigrants would have grown up in their native countries. Thus, they did not experience growing up in the United States. Even if Adult Black Immigrants know about American racism, they are not likely to be as emotionally aware of it when

260. See, e.g., MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 53, 61 (1993); D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L. J. 437, 439-40 (1993) (arguing that racial categories are neither objective nor natural, but ideological and constructed, by which race is not so much a category but a practice: people are raced); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 443 n.52 (1990) (citing Kendall Thomas's Comments at the Frontiers of Legal Thought Conference at Duke Law School, arguing that the status quo of institutionalized white supremacy remains even after deliberate racist actions subside).

261. For a brief description of this history, see BROWN, *supra* note 259, at 81-101.

they arrive, because there is no counterpart for it in most of their native countries.²⁶² As Eugene Robinson states in his book *Disintegration: The Splintering of Black America*, “For black immigrants from Africa and the Caribbean, the United States may be judged guilty of modern sins, but not the ancient kind that fester in the blood.”²⁶³ In addition, as John Ogbu—the Nigerian born American educated scholar—asserts, many voluntary immigrants who encounter discrimination in their chosen country may attribute the discrimination to their status as an immigrant, rather than to their race.²⁶⁴ As a result, they may discount their experience of racial discrimination and emphasize it as a product of being an immigrant.

Many in American society may also view foreign-born blacks as separate and distinct from native blacks.²⁶⁵ Some Americans may see foreign-born blacks as more polite, less hostile, more solicitous, and easier to get along with than native-born blacks.²⁶⁶ As a result, these foreign-born blacks experience less of the reality that accompanies the history of racial oppression of blacks in the United States.

Adult Black Immigrants also may not possess the same desire to fight against racism in the United States that is instilled in blacks in the United States as they grow up. These Adult Black Immigrants are likely to be more concerned with the conditions of their relatives, friends, and other people in the countries that they left, rather than the history of discrimination endured by the blacks in the United States. Thus, they may be more interested in assisting those they care about in their country of origin. There is ample proof of this concern on the part of foreign-born blacks. One of the major sources of income for many developing nations in Africa is remittances from natives living abroad.²⁶⁷ Thus, Adult Black Immigrants are far less likely to spend as much of their time engaged in the collective struggle against racial oppression in the United States than native blacks who do not share these international concerns.

262. See EUGENE ROBINSON, *DISINTEGRATION: THE SPLINTERING OF BLACK AMERICA* 188 (2010).

263. *Id.*

264. See John U. Ogbu, *Immigrant and Involuntary Minorities in Comparative Perspective*, in *MINORITY STATUS AND SCHOOLING: A COMPARATIVE STUDY OF IMMIGRANT AND INVOLUNTARY MINORITIES* 37-61 (Margaret A. Gibson & John Ogbu eds., 1991).

265. See, e.g., Malcolm Gladwell, *Black Like Them*, *NEW YORKER*, Apr. 29, 1996, at 74 (explaining why West Indians and American blacks are perceived differently).

266. *Id.*

267. See generally Devesh Kapur & John McHale, *Globalization at Work: Migration's New Payoff*, *FOREIGN POL'Y*, Nov. 1, 2003, at 48.

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Many Adult Black Immigrants come to the United States for the very same reasons that other voluntary immigrants come to America. These reasons reflect a desire to improve one's social, economic, or educational standing. As Mary Waters, in her study of West Indians in the United States pointed out, "They wanted to make a better life for themselves, and they realized they could make more money in the United States than they could back home."²⁶⁸ Thus, what justifies their sacrifice of leaving the life they knew behind is success in obtaining economic and educational advancement, not helping to overcome racial oppression in the United States.

I can also speak on the differences between foreign-born blacks and native blacks from my own experiences of traveling through the Republic of South Africa many times.²⁶⁹ In South Africa, I was a foreign-born black in a country with a history of race discrimination against blacks. While I understood the history of discrimination that black South Africans experience and sympathized with their plight, their history was not my history. The experience of their discrimination did not touch me in the deep and meaningful ways that the history of my ancestors' discrimination in the United States touches me. In the end, since black South Africans were not my people, I remained far more concerned about racism in the United States than racism in South Africa.²⁷⁰

The term "Black Immigrants" refers to both first- and second-generational blacks. There are important differences between these two generations. However, as Professor Leonard Baynes, who was born and raised in the United States by two West Indian parents, noted:

Since I grew up in this culture, I do not speak with an accent, and most people do not know that I am of Caribbean ancestry unless I tell them. However, at times, culturally I do not feel American. This should be no surprise since I am a child of immigrants. Like many other people whose parents may have emigrated here from

268. MARY C. WATERS, *BLACK IDENTITIES: WEST INDIAN IMMIGRANT DREAMS AND AMERICAN REALITIES* 331 (1999).

269. In the summer of 1997, I spent seven weeks traveling through South Africa. In the summer of 1998, I spent three weeks with the Law Faculty of the University of Witwatersrand and four weeks with the Law Faculty of the University of Capetown. In the summer of 1999 and 2000, I spent ten days on each visit, mostly in Johannesburg.

270. For a movie that portrays the experiences of African Americans who have immigrated to South Africa, see *BLACKS WITHOUT BORDERS: CHASING THE AMERICAN DREAM IN SOUTH AFRICA* (Stafford Bailey 2008), available at <http://www.blackswithoutborders.net/home.html>.

other countries, I feel that I sometimes straddle the cultures of my parents and that of their adopted home.²⁷¹

For the Black Immigrants who come of age in the United States, their experience of the history of racial discrimination is likely to be more acute than that of Adult Black Immigrants. However, like Black Multiracials, they also have at least as much ancestry that does not result from the history of discrimination of blacks in the United States as ancestry that does.

CONCLUSION

Since the origin of affirmative action, selective higher education institutions have generally lumped all blacks into a unified Black/African/African American category.²⁷² However, due to the DOE's promulgation of the Guidance, that has changed. The Guidance marks the first time that the federal government has specified how all educational institutions must collect and report data about the race and ethnicity of their students to the DOE.²⁷³ The Guidance, effectively, requires educational institutions to separate individuals who before would have been placed in the "Black/African/African American" category into the Black Hispanic, Black Multiracial, or Black/African American category.²⁷⁴ Under the Guidance, educational institutions include Black Hispanics in their counts of Hispanic/Latinos and Black Multiracials in their counts of Two or More Races.²⁷⁵ In the data reported to the DOE, Black Hispanics cannot be broken out of the totals in the Hispanic/Latino category and Black Multiracials cannot be separated from others in the Two or More Races category.²⁷⁶

Before the implementation of the Guidance, when admissions officials compared the applications of most Black Hispanics and Black Multiracials to others in their racial/ethnic group, they would have compared them to applicants in the Black/African American category. Because the scores on standardized tests used for admissions to selective higher education programs of those in the Black/African American category were lower than those in most of the various Hispanic/Latino categories or the other racial categories, this maximized the

271. See Leonard M. Baynes, *Who Is Black Enough For You? The Stories of One Black Man and His Family's Pursuit of the American Dream*, 11 GEO. IMMIGR. L.J. 97, 124 (1996).

272. See *supra* notes 1-3 and accompanying text.

273. See *supra* note 5 and accompanying text.

274. See *supra* notes 15-16 and accompanying text.

275. See *supra* notes 15-16, 20 and accompanying text.

276. See *supra* Part II.B.

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admissions prospects of Black Hispanics and, to a far greater extent, Black Multiracials. However, as admissions officials adjust to the implementation of the Guidance, they are likely to start to compare Black Hispanics to others in the Hispanic/Latino category. Such a comparison will likely have a negative effect on the admissions prospects of Black Hispanics in comparison to what they were before the implementation of the Guidance. For Black Multiracials, however, the potential impact on their admissions prospects to selective higher education institutions created by a change in their comparison group, could be devastating. Admissions officials will compare them with other multiracials in the Two or More Races category, the largest numbers of which will be White/Asian and White/Native American multiracials.

The impact that the Guidance will have on the future admissions prospects of Black Hispanic and Black Multiracial applicants is only half of the story. The Guidance does not mandate that educational institutions use ethnic subcategories.²⁷⁷ As a result, by complying with the Guidance, selective higher education institutions will not be able to determine the ethnic breakdown of blacks in the Black/African American category. In other words, they will not know how many of those included in their Black/African American category are Black Immigrants.

Even though colleges and universities have not typically divided their black students into different racial/ethnic categories, scholars and commentators have recently pointed to a growing overrepresentation of both Black Multiracials and Black Immigrants among the black students enrolled in America's selective higher education programs.²⁷⁸ Like Black Multiracials, Black Immigrants tend to come from families with more parental education and higher family incomes than other blacks. In addition, Black Immigrants, like Black Multiracials, also have at least one parent who is not a descendant from the group of blacks whose ancestral line is that of blacks that experienced the history of discrimination of blacks in the United States.

As selective higher education institutions come to grips with the reclassification by the Guidance of Black Hispanics and Black Multiracials, Black Immigrants are the ones likely to benefit the most. What is more, the number and percentage of Black Immigrants

277. See *supra* text accompanying note 26.

278. See *supra* notes 29-36 and accompanying text.

among the black student age population is likely to increase substantially for some time to come, because the percentage of foreign-blacks among the black population increased from 3.1% in 1980 to 8% in 2007.²⁷⁹ Yet, given the justifications for use of racial classifications in the admissions process articulated by the Supreme Court in its opinion in *Grutter*, admissions committees of selective higher education institutions should not provide treatment that is more favorable to Black Immigrant applicants than to Black Hispanic or Black Multiracial applicants.

279. *See supra* notes 238-44 and accompanying text.