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The Admission of Legacy Blacks

Angela Onwuachi-Willig

60 Vand. L. Rev. 1141 (2007)

Three years ago, the New York Times reported the results of a study that revealed that two-thirds of the black population at Harvard College consisted of first-generation black immigrant students in the United States, second-generation black American students, and mixed-race students with one black parent. Additional studies have confirmed that the same phenomenon exists at other elite institutions, which include schools such as Columbia, Duke, Georgetown, Northwestern, Oberlin, the University of California-Berkeley, the University of Michigan, the University of North Carolina-Chapel Hill, the University of Pennsylvania, Smith, Stanford, and Yale.

For many of those interested in how affirmative action advances social justice, this growing number of first- and second-generation black students and, to a lesser extent, mixed-race students has become a cause for concern. To those concerned, such rising numbers, especially those of first- and second-generation black students, indicate that affirmative-action programs are failing to reach those who are the original targets of the policy: native black Americans who descend from slaves in the United States, a group that I refer to as “legacy Blacks.” Commentators argue that affirmative action was created as a means of overcoming the effects of slavery and rampant discrimination against Blacks during Jim Crow, and the participation of first and second generation Blacks in affirmative action programs does not truly further such goals.

This Article explores the policy questions concerning which Blacks should be the beneficiaries of affirmative action at elite colleges and universities. In so doing, this Article explains why considerations of racial diversity are extremely important during the admission process at elite colleges and universities, but are not, on their own, sufficient to achieve true intraracial diversity among black students and advance affirmative action’s “goal” of social justice. In particular, this Article explicates why the ancestral heritage of black applicants should be considered along with their race as part of any school’s race-based affirmative action admission policy. At the same time, this Article highlights why the need to explore the ancestral heritage of black applicants during the

admissions process should not work to exclude first- and second-generation Blacks and mixed-race students from affirmative-action programs. Overall, this Article argues that, while certain findings suggest that general economic and educational differences between legacy Blacks and non-legacy Blacks warrant a consideration of ancestral heritage in racial preference programs, those findings do not require or merit an exclusion of first- and second-generation Blacks and mixed-race students from such programs; to the contrary, the inclusion of first- and second-generation Blacks and mixed-race students in these programs actually furthers both the diversity and social justice goals of affirmative action.

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Angela Onwuachi-Willig*

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INTRODUCTION

In June of 2006, the *Los Angeles Times* reported what it referred to as a “startling statistic at UCLA.”¹ According to the *Times* article, in the fall of 2006, only ninety-six of the 4852 entering first-year undergraduate students at UCLA—approximately two percent—were black, the lowest number of incoming black freshman since at least 1973.² The revelation of UCLA’s “startling statistic” caused a firestorm among students and academics, a number of whom expressed concerns about how the disparity of black student representation at UCLA could affect the quality of the educational experience.³ For some, the low numbers highlighted the importance of college and university affirmative action,⁴ a program that currently cannot be employed at any institution within the University of California system because of Proposition 209.⁵ For example, UCLA

1. Rebecca Trounson, *A Startling Statistic at UCLA*, L.A. TIMES, June 3, 2006, at A1.

2. *Id.*; see also Tamar Lewin, *Colleges Regroup After Voters Ban Race Preferences*, N.Y. TIMES, Jan. 26, 2007, at A6 (noting that “Hispanic representation at U.C.L.A. has dropped, too”).

3. Trounson, *supra* note 1, at A1 (referring to comments by Janina Montero, UCLA’s Vice Chancellor for Student Affairs, and Jenny Wood, then UCLA student body president).

4. By “affirmative action,” I refer to the act of considering the race of underrepresented racial minorities as a plus factor in admissions decisions and the expansion of the merit standards that are traditionally used to admit people into educational programs. Angela Onwuachi-Willig, *Using the Master’s Tool to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113, 114 n.2 (2005); see also Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 856 (1995) (“An affirmative action program seeks to remedy the significant underrepresentation of members of certain racial, ethnic, or other groups through measures that take group membership or identity into account.”); Anupam Chander, *Minorities, Shareholders, and Otherwise*, 113 YALE L.J. 119, 120 n.3 (2003) (defining it “as minority-mindfulness in decisionmaking resulting in either a preference or a disproportionate distribution of benefits”); Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 614 (1998) (stating that “affirmative action has come to mean any type of program or policy where race, national origin, or gender is taken into account”). Please note that Miranda Oshige is now Miranda McGowan.

5. Trounson, *supra* note 1, at A1. Proposition 209 is a voter initiative that has prohibited any consideration of race and gender in admissions and hiring within the state system since 1996. *Id.*; see also CAL. CONST. art. I, § 31 (codifying Proposition 209); cf. Cheryl I. Harris, *What the Supreme Court Did Not Hear in Grutter and Gratz*, 51 DRAKE L. REV. 697, 705-06 (2003) (describing the effects of Proposition 209 at UCLA’s law school, where in 2000 Professor Harris

Chancellor Albert Carnesale proclaimed that the university was “going to have to meet this crisis [of low black enrollment] by redoubling [its] efforts.”⁶ Others such as Darrell Hunt, a sociology professor at UCLA and the director of the Bunche Center for African American Studies, critiqued the university’s admissions process, which he argued was “linked more to socioeconomic privilege than academic merit.”⁷

What remained unacknowledged in this *Los Angeles Times* article and what is often ignored in discussions regarding racial diversity on college and university campuses is the actual ethnic backgrounds or ancestral heritages of those few black students who had successfully made their way into UCLA’s undergraduate program. While UCLA’s crisis of diversity with black students draws attention to the importance of continuing affirmative action on campuses across the country—a policy that *Grutter v. Bollinger*⁸ suggests should remain in place for at least twenty-one more years⁹—UCLA’s crisis also raises another critical question: whether this vital policy of affirmative action is effectively working to provide educational opportunities to a diverse body of black students across the nation.

Scholars have examined how the model minority myth, in particular the view of Asian-Americans as a monolithic group, may have a negative impact on affirmative action policies for Asian-American students, especially those who are of Cambodian, Hmong, Laotian, and Vietnamese descent.¹⁰ Much like students of Asian

taught “*Brown* to a Constitutional Law class that had no black students”); Adrien Katherine Wing, *Race-Based Affirmative Action in American Legal Education*, 51 J. LEGAL EDUC. 443, 446-47 (2001) (noting the immediate, damaging effects of Proposition 209 on black enrollment at the University of California-Berkeley); Laura E. Gómez, *The Legacy of Affirmative Action*, UCLA TODAY, Apr. 11, 2006, http://www.today.ucla.edu/2006/060411voices_legacy.html (discussing her sadness at the devastating effects that Proposition 209 has had on UCLA’s law school and the future development of minority leaders in California).

6. Trounson, *supra* note 1, at A1

7. *Id.*

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

9. *Id.* at 343 (suggesting, four years ago, that race-based affirmative action should come to an end in twenty-five years). See generally Kevin R. Johnson, *The Last Twenty-Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 179-90 (2004) (exploring the reality of a twenty-five-year limit on affirmative action).

10. See Harvey Gee, *From Bakke to Grutter and Beyond: Asian Americans and Diversity in America*, 9 TEX. J. C.L. & C.R. 129, 149-58 (2004) (discussing the model minority myth); Victoria Choy, Note, *Perpetuating the Exclusion of Asian-Americans from the Affirmative Action Debate: An Oversight of the Diversity Rationale in Grutter v. Bollinger*, 38 U.C. DAVIS L. REV. 545, 569 (2005) (“Thus, courts, including the United States Supreme Court, erroneously view Asian Americans as a uniform, successful group. If judges and courts do not distinguish between the ‘overrepresented’ and ‘underrepresented’ Asian Americans, they may continue overlooking the needs of Asian Americans in equal protection jurisprudence.”); Sumi Cho, *Misconceptions Harm Asian Americans*, CHI. TRIB., Apr. 30, 2004, at 25 (analyzing how Asian Americans are harmed by “stereotypes that characterize Asian Americans as an over-educated, over-achieving ‘model

descent, black students in the United States are not, ethnically speaking, a monolithic group. Increasingly, commentators are beginning to ask questions about affirmative-action programs as they relate to certain segments of the black community, not just concerning class—the upper-middle-class black student versus the working-class or poor black student¹¹—but also concerning culture, ethnic background, and history within the population of admitted black students at elite institutions of learning. As one *New York Times* article inquired, top colleges may be taking more Blacks,¹² “but which

minority’ group that does not suffer discrimination or does not deserve affirmative action”); see also Sumi Cho, *Multiple Consciousness and the Diversity Dilemma*, 68 U. COLO. L. REV. 1035, 1061 (1997) [hereinafter Cho, *Multiple Consciousness*] (asserting that the stereotype of “a uniformly successful, exemplary minority who do not face racial discrimination” is problematic); Deana K. Chuang, 8 ASIAN L.J. 31, 39 (2001) (“Notions of an essentialistic proclivity in all Asian Americans overlook the fact that the Asian American community is not monolithic and that many deserving Asian Americans should and do benefit from affirmative action in higher education. In certain fields of study . . . Asian Americans benefit from affirmative action in recruitment and diversity policies in hiring. Furthermore, Southeast Asian refugees from Vietnam, Laos, Cambodia, and Hmong communities experience economic, educational, and cultural hardships, debunking the model minority myth that all Asian Americans are successful and wealthy. In fact, 35 and approximately 70 percent of Vietnamese and Laotian Americans, respectively, live below the poverty level.”).

11. See, e.g., Lani Guinier, *Our Preference for the Privileged*, B. GLOBE, July 9, 2004, at A13 (describing how current admissions criteria advantage the wealthy); Jason B. Johnson, *Shades of Gray in Black Enrollment; Immigrants’ Rising Numbers a Concern to Some Activists*, S.F. CHRON., Feb. 22, 2005, at A1 (quoting Ward Connerly as asserting that “affirmative action programs . . . have not really benefited low-income blacks, those who were the descendants of slaves” but have instead “benefited middle- and upper-income blacks”). Along other lines, opponents of affirmative action have continued to pose the well-known hypothetical question concerning the debate of class versus race privilege—the inevitable question of whether the black neurosurgeon’s son or daughter should receive any preference over the son or daughter of a poor white sanitation worker. See Cho, *Multiple Consciousness*, *supra* note 10, at 1037 (“In rhetorical defense of such a compromise, stark juxtapositions are often made of the proverbial black ‘son of the Pittsburgh neurosurgeon’ to the ‘son of the white sanitation worker.’”); see also Gail Heriot, *Thoughts on Grutter v. Bollinger and Gratz v. Bollinger as Law and as Practical Politics*, 36 LOY. U. CHI. L.J. 137, 140 (2004) (discussing the merits of preferences to the sons and daughters of black bankers); William C. Kidder, *Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research*, 12 LA RAZA L.J. 173, 183 (2001) (noting that “the black daughter of bankers will be outscored by the white daughter of municipal employees by an average of 6 points, the difference between attending a competitive law school or none at all”); Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 967-97 (1997) (describing the economic disparities between black and white middle-class students); cf. Richard Delgado, *1998 Hugo Black Lecture: Ten Arguments Against Affirmative Action—How Valid?*, 50 ALA. L. REV. 135, 140-41 (1998) (maintaining that race is more indicative of disadvantage than class); Frederick A. Morton, Jr., Note, *Class-Based Affirmative Action: Another Illustration of America Denying the Impact of Race*, 45 RUTGERS L. REV. 1089, 1123-25 (1993) (noting how “affirmative action was never designed to combat indigence” but disadvantages due to race).

12. Throughout this Article, I capitalize the word “Black” or “White” when used as a noun to describe a racialized group. I do not capitalize these terms when I use them as adjectives.

As a general matter, when I am speaking of the entire community of people who may identify as black in the United States, citizen or non-citizen, I use the term “Blacks” instead of the term

ones?"¹³ For some, the answer to this question of who is gaining admission to the most selective colleges and universities is too many Blacks who do not descend from slaves in the United States and too many mixed-race individuals of African descent.¹⁴ As recent studies have revealed, a rising number of black students at elite colleges and universities are either mixed-race students or only first- or second-generation black Americans.¹⁵ For example, a *San Francisco Times*

"African-Americans" because it is more inclusive. See *Why "Black" and Not "African-American,"* 3 J. BLACKS HIGHER EDUC. 18, 18-19 (1994) (describing why the term "black" is a more inclusive term than "African-American"). I refer to people who may identify as black and for whom all four grandparents were born in and descended from slaves in the United States as "African-Americans," "the descendants," or "legacy Blacks." See *infra* notes 26-27 and accompanying text (providing an explanation for the terms "descendants" and "legacy Blacks"). Conversely, I refer to those Blacks who do not fit into this definition of legacy Blacks as "non-legacy Blacks."

Collectively, I refer to black students who are the first generation of their family in the United States (born outside of the United States but reside in this country) and who are the second generation of their family in the United States (born in the United States but have at least one parent who was born in another country) as "first- and/or second-generation Blacks," "first- and/or second-generation black students," "immigrant Blacks," or "students of direct Caribbean/African heritage." See *infra* note 23. At times, I refer to first-generation Blacks who immigrated to the United States with their parents and attended primary and/or secondary school in the United States as "resident immigrant Blacks" or "resident immigrant black students." See Diane L. Wolf, *There's No Place Like "Home": Emotional Transnationalism and the Struggles of Second-Generation Filipinos*, in *THE CHANGING FACE OF HOME: THE TRANSNATIONAL LIVES OF THE SECOND GENERATION* 255, 255 (Peggy Levitt & Mary C. Waters eds. 2002) (providing a slightly different definition in which "[c]hildren of immigrants, or 'second-generation' youth, are defined as children born here to immigrant parents and children born abroad who have emigrated at a very early age"). I also use the phrase "West Indians" or "Afro-Caribbeans" to refer to first- and second-generation Blacks from the Caribbean who are not Spanish-speaking.

Finally, I refer to mixed-race students, whom I define as students with one black parent, as either biracial students," "mixed-race students," "mixed-race students of African descent," or "multiracial students."

13. Sarah Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, But Which Ones?*, N.Y. TIMES, Jun. 24, 2004, at A1. Of course, race is not considered in the admissions decisions for many black students who attend colleges and universities with affirmative-action policies. However, for the sake of simplicity, I assume that admissions officers at schools with race-based affirmative-action programs at least acknowledge in their decision-making the race of all applicants who can be identified as black or part-black from their application forms.

14. *Id.* This debate has extended beyond the context of colleges and universities and into the arena of politics and racial identification in general. For example, some pundits have gone as far as to claim that United States Senator and presidential candidate Barack Obama is not black, stating that "[b]lack, in our political and social reality, means those descended from West African slaves." Debra J. Dickerson, *Colorblind*, SALON.COM, Jan. 22, 2007, <http://www.salon.com/opinion/feature/2007/01/22/obama/index.html>.

15. See, e.g., Aisha Cecilia Haynie, *Not 'Just Black' Policy Considerations: The Influence of Ethnicity on Pathways to Academic Success Amongst Black Undergraduates at Harvard University*, 13 J. PUB. INT'L AFF. 40, 43 (2002) (studying the trend at Harvard College); see also Belinda Edmondson, *The Myth of Black Immigrant Privilege*, 4 ANTHURIUM: CARIBBEAN STUDS. J. 1, 2-3 (2006), available at http://scholar.library.miami.edu/anthurium/volume_4/issue_1/edmondson-themyth.htm (noting that when she first started teaching at Rutgers University-Newark in the early 1990s, "the majority of students in [her] courses . . . were native-born African-Americans" but today, "the decisive majority of students in [her] class[es] [a]re

article described exactly this phenomenon at the University of California-Berkeley, where black students such as Obi Amajoyi, who was born in the United States but whose parents are from Nigeria, make up a significant percentage of the black population.¹⁶ Likewise, in a broad study of twenty-eight elite colleges and universities,¹⁷ researchers at Princeton University and the University of Pennsylvania found that forty-one percent of the black students at select campuses in the study—which included schools such as Bryn Mawr, Columbia, Miami University-Ohio, the University of North Carolina-Chapel Hill, Northwestern, Oberlin, the University of Pennsylvania, Smith, Washington University-St. Louis, and Yale—identified themselves as first- or second-generation Blacks.¹⁸ This year, these same scholars have updated the results from their book *The Source of the River: The Social Origins of Freshmen at America's Selective Colleges and Universities* with the use of newer data from the National Longitudinal Survey of Freshmen (“NLSF”). In so doing, these researchers revealed that first- and second-generation Blacks, although constituting only thirteen percent of all Blacks from age eighteen to nineteen, made up twenty-seven percent of the first-years at the twenty-eight selective colleges in the NLSF.¹⁹ They further

Caribbean or of Caribbean descent”). Haynie identified the phrase “black American” as excluding those Blacks of the first, second, and third generation. See Haynie, *supra* at 58 n.4. In this Article, I, like some other scholars, see *supra* note 12 and *infra* note 23, have defined “black American” such that it excludes Blacks of the first and second generations. For the sake of consistency, I still use the term first- and second-generation Blacks, see *infra* note 23, when I discuss Haynie’s paper, however.

16. Johnson, *supra* note 11, at A1. This same phenomenon is also occurring somewhat at schools outside the category of elite colleges and universities. See Mark Krikorian, *Affirmative Action and Immigration*, in *DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION* 300, 303 (Nicolaus Mills ed. 1994) (noting that “American-born students fell from 85 percent to 55 percent of total black enrollment in just ten years” at Miami-Dade Community College).

17. Among the schools included in the study were the following (in alphabetical order): Barnard College, Bryn Mawr College, Columbia University, Denison University, Duke University, Emory University, Georgetown University, Howard University, Kenyon College, Miami University-Oxford, Northwestern University, Oberlin College, Pennsylvania State University, Princeton University, Rice University, Smith College, Stanford University, Swarthmore College, Tufts University, Tulane University, the University of California-Berkeley, the University of Michigan, the University of North Carolina, the University of Notre Dame, the University of Pennsylvania, Washington University in St. Louis, Williams College, and Yale University. DOUGLAS S. MASSEY ET AL., *THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMEN AT AMERICA'S SELECTIVE COLLEGES AND UNIVERSITIES* 30-31 tbl 2.5 (2003). When I refer to elite colleges, I am referring to these colleges and universities and other comparable schools.

18. Johnson, *supra* note 11, at A1; see MASSEY ET AL., *supra* note 17, at 40-41 (noting that the study “asked the respondents to identify themselves in terms of race, national origin, birthplace, and religion”).

19. Douglas S. Massey et al., *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, 113 *AMER. J. EDUC.* 243, 245 (2007); see also *supra*

reported that the percentage of first- and second-generation black students increased as the selectivity of the twenty-eight colleges and universities went up. Specifically, they found that first- and second-generation Blacks made up 40.6 percent of the black population at Ivy League universities, 35.6 percent of the black population at the ten most selective schools in the survey, 23.8 percent of the black population at the ten least selective schools in the survey, and 23.1 percent of the black population at all public universities in the survey.²⁰

Finally, in a more directed study of students at Harvard College, Aisha Cecilia Haynie, an African-American Harvard College graduate, discovered that, out of all the black students there—who make up approximately eight percent of the undergraduate college's population—more than sixty percent of those students were either first-generation Caribbean or African immigrants who attended primary and/or secondary school in the United States, the American-born children of black immigrants, or mixed-race individuals.²¹ Specifically, Haynie found that black students of direct Caribbean heritage comprised 22.94 percent of black non-international students at Harvard College while mixed-race students and students of direct African heritage constituted 25.88 percent and 12.35 percent, respectively, of the black non-international student population at Harvard College.²² Haynie also discovered that black students who came from families in which all four of their grandparents descended

note 17 (identifying the twenty-eight schools in the study). First- and second-generation Asians and Latina/os were represented in high percentages, too, at ninety-seven percent and seventy-three percent respectively, but these percentages were proportionate to their proportions within the population of Asians and Latina/os from age eighteen to nineteen, at ninety-one percent and sixty-six percent, respectively. See Massey et al., *supra* at 245.

20. Massey et al., *supra* note 19, at 248 tbl.1. The most selective university in the study was Princeton University, with an acceptance rate of just eleven percent, and the least selective university was Miami-University-Ohio, with an acceptance rate of seventy-nine percent. See *id.* at 248. "Average combined math and verbal Scholastic Aptitude Test (SAT) scores ranged from 1105 at Howard University to 1450 at Princeton University." *Id.* First- and second-generation Blacks also were more heavily represented at private colleges and universities instead of public ones. *Id.* at 249. Interestingly, unlike white first-years who were equally divided between men and women, both African-Americans and first- and second-generation Blacks had a ratio of two women to every one man at these colleges. See *id.* at 254-55.

21. Haynie, *supra* note 15, at 41, 43. Haynie's study involved more than 170 non-international black students who attended Harvard College during the 1999-2000 academic year. According to Haynie, this group of subjects constituted a 71.4 percent response rate. *Id.* at 40, 42.

22. *Id.* at 43. Afro-Caribbeans or West Indians, which excludes Spanish-speaking Caribbeans, constitute approximately seventy percent of the 2.1 million people who make up the foreign-born black population in the United States. The remaining thirty percent is largely made up of Africans. Massey et al., *supra* note 19, at 245-46. Many of these immigrants, especially Jamaicans and Africans, are highly educated and part of the skilled middle class. See *id.* at 246; see also *infra* note 41 (discussing African and Caribbean immigrants).

from slaves in the United States were proportionately outnumbered at Harvard College relative to first- and second-generation²³ black students from the Caribbean and Africa. Specifically, first- and second-generation Blacks constituted more than thirty-five percent of the black students at Harvard College even though, as a whole, they made up less than ten percent of the total black population in the United States.²⁴ Only 37.65 percent, or slightly more than one third, of the black students at Harvard College were from families in which all four grandparents were born in the United States and the descendants of American slaves.²⁵ In fact, the absence of black

23. For the purposes of this Article, first-generation Blacks constitute those Blacks who are the first generation of their families to reside in the United States, whether citizen or non-citizen, and second-generation Blacks are the children born in the United States to at least one foreign-born parent. Matthijs Kalmijn, *The Socioeconomic Assimilation of Caribbean American Blacks*, 74 SOCIAL FORCES 911, 915 (1996); Xue Lan Rong & Frank Brown, *The Effects of Immigrant Generation and Ethnicity on Educational Attainment Among Young African and Caribbean Blacks in the United States*, 71 HARV. EDUC. REV. 536, 537, 546 (2001); cf. Elizabeth Chacko, *Identity and Assimilation Among Young Ethiopian Immigrants in Metropolitan Washington*, 93 GEOGRAPHICAL REV. 491, 491 (2003) (defining "persons who immigrated with their parents to the United States when they were less than twelve years of age" as the 1.5 generation); Rubén G. Rumbaut, *Severed or Sustained Attachments: Language, Identity, and Imagined Communities in the Post-Immigrant Generation*, in THE CHANGING FACE OF HOME, *supra* note 12, at 43, 49 (defining, unlike this paper and Haynie's paper, "persons born in the United States of one foreign-born parent and one U.S.-born parent" as the 2.5 generation).

24. Haynie, *supra* note 15, at 43. These statistics refer only to the percentages of first- and second-generation Blacks and do not include the percentages that relate to third-generation Blacks as Haynie generally does in her paper. First-generation Blacks at Harvard were eight percent of the black population at the school but only 6.1 percent of the black population in the United States in 2000, and second-generation Blacks at Harvard made up forty-one percent of the black population at the school but only 3.3 percent of the black population in the United States. *Id.* at 43. Caribbeans comprise approximately forty-three percent of first- and second-generation Blacks, while Africans make up around twenty-nine percent, and black Latina/os make up around seven percent of the first- and second-generation black population. Massey et al., *supra* note 19, at 249; see Kalmijn, *supra* note 23, at 915 ("[A]bout 6% of the black community 16 years or older is Caribbean American. Caribbean blacks come from a large number of islands but a few countries make up the bulk of the immigration flow: Jamaica (29%), Haiti (18%), the Dominican Republic (8%), and Trinidad-Tobago (8%)."); see also Rong & Brown, *supra* note 23, at 537 (acknowledging that Jamaicans and Haitians make up the largest number of the 1.6 million foreign born people of African origin living in the United States and that, while Nigerians and Ethiopians constitute the largest groups from Africa, "[n]o large ethnic community of Black immigrants from African nations currently exists in the United States"). The leading countries of origin for black immigrants are Jamaica at twenty-one percent, Nigeria at seventeen percent, Haiti at nine percent, Trinidad at seven percent, and Ghana at six percent. Massey et al, *supra* note 19, at 250.

25. Haynie, *supra* note 15, at 43. Of course, many immigrant Blacks descend from slaves in their own countries. See Leonard M. Baynes, *Who Is Black Enough for You: The Story of One Black Man and His Family's Pursuit of the American Dream*, 11 GEO. IMMIGR. L.J. 97, 128 (1996) ("The only difference is that our [black Caribbeans] slavery did not occur in the United States."); Camille A. Nelson, *Carriers of Globalization: Loss of Home and Self Within the African Diaspora*, 55 FLA. L. REV. 539, 573-74 (2003) (noting the slavery in colonial Jamaica); cf. Hope Lewis, *Lionheart Gals Facing the Dragon: The Human Rights of Inter/National Black Women in the United States*, 76 OR. L. REV. 567, 619 (1997) ("The impact of that history, along with the related

American students with long-term generational roots in the United States on both sides of their families was so noticeable that such black students began to refer to themselves as “the descendants,”²⁶ or whom I call “legacy Blacks.”²⁷

For many of those concerned about how affirmative action advances social justice,²⁸ the rising number of first- and second-

histories of global imperialism and neo-colonialism, continues to plague modern-day Blacks whether they are descended from slaves in the United States, Latin America, or the Caribbean . . .”).

26. Rimer & Arenson, *supra* note 13, at A1.

27. I thank Professor Derrick Bell of New York University School of Law for this term—“legacy Blacks.” Generally, legacy students are those students who receive a preference in the admissions process on the basis of their familial relationship to alumni of a particular college or university. See Carlton Larson, *Titles of Nobility, Hereditary Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions*, 85 WASH. U. L. REV. (forthcoming 2007); Daniel Golden, *Family Ties: Preference for Alumni Children in College Admissions Draws Fire*, WALL ST. J., Jan. 15, 2003, at A1; David B. Wilkins, *The Affirmative-Action President's Dilemma*, CHI. TRIB., Feb. 7, 2001, at 17. Legacy applicants enjoy admissions rates much higher than non-legacy applicants. For example, Harvard accepts forty percent of legacy applicants compared to eleven percent overall acceptance of applicants, Princeton accepts thirty-five percent of legacy applicants compared to eleven percent overall acceptance of applicants, and the University of Pennsylvania accepts forty-one percent of legacy applicants compared to twenty-one percent overall acceptance of applicants. See Golden, *supra* at A1. The vast majority of these students are white. For example, at Texas A&M in 2002, a school that has since abolished its legacy admissions policy, legacy preferences allowed for the enrollment of 321 white students who otherwise would not have been admitted, but only three Blacks and twenty-five Latina/os in this category. Todd Ackerman, *Legislators Slam A&M Over Legacy Admissions*, HOUSTON CHRON., Jan. 4, 2004, at A1; see also Texas A&M University, Office of the President, Statement on Legacy, Jan. 9, 2004, available at <http://www.tamu.edu/president/speeches/040109legacy.html> (containing a speech in which the President Robert Gates asserted that “Texas A&M will no longer award points for legacy in the admissions review process”); Chris Fortson, *A&M Decision Sparks Debate on Admissions Debate*, YALE DAILY NEWS, Jan. 16, 2004, available at <http://www.yaledailynews.com/Article.aspx?ArticleID=24525> (discussing A&M's decision to end legacy admissions). In fact, Blacks were not allowed to gain admission to Texas A&M University until 1963. Michael King, *Naked City: Texas A&M's Racial Legacy*, AUSTIN CHRON., Jan. 16, 2004, <http://www.austinchronicle.com/gyrobase/Issue/print?oid=oid%3A193354>. Likewise, one author reported that, at the University of Virginia, ninety-one percent of the legacy applicants who are accepted on an early-decision basis are white, but only 1.6 percent of such admits are black, 0.5 percent are Latina/o, and 1.6 percent are Asian-American. See Golden, *supra* at A1. Like those students whom we traditionally think of as being legacy students, the descendants—those African-Americans who come from families in which all four grandparents descend from black American slaves—are legacies to a tradition with colleges and universities, too. They are legacies to a tradition of exclusion from elite colleges and universities.

28. See Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1197 (2002) (defining the integrative rationale or what I consider to be similar to a social justice rationale “as a forward-looking remedy for segregation [that] dismantle[s] current barriers” by “proactively [using] race-conscious means to undo the continuing causes of unjust race-based disadvantage” (emphasis added)). The Supreme Court has rejected the use of affirmative action as a means of remedying societal discrimination. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (“This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.”).

generation black students and, to a lesser extent, mixed-race students has become a cause for concern. To these individuals, these increasing numbers, especially those of first- and second-generation black students, indicate that affirmative-action programs are failing to reach the original targets of the policy. Asserting that affirmative action was created as a means of overcoming the effects of slavery and rampant discrimination against Blacks for more than 100 years thereafter,²⁹ these critics argue that the participation of resident immigrant Blacks and their American-born children in racial preference programs does not truly further the goals of affirmative action. For example, Reverend Jesse Jackson has proclaimed, "Universities have to give weight to the African-American experience because that is for whom affirmative action was aimed in the first

Nevertheless, it is important to discuss and analyze the social justice rationale for affirmative action; while social justice—meaning the goal of eliminating the educational and wealth disparities and racial inequalities between underrepresented racial minorities and Whites in the United States and remedying general societal, racial discrimination against minorities in this country—is not an accepted legal basis for the policy, it certainly drives supporters' perceptions about the need for affirmative action. See Transcript, *Who Gets In?: The Quest for Diversity After Grutter*, 52 BUFF. L. REV. 531, 587 (2004) [hereinafter *Who Gets In*] (quoting David Chambers as stressing "the need for a broader vision of social justice" in affirmative action); Malamud, *supra* note 11, at 946-47 ("A judge will be more likely to read precedent as permitting a broader range of action if the judge is personally convinced there are good reasons to do so, even if those good reasons are reasons (like societal discrimination) that must go unstated. Thus, a justice faced with the question whether diversity as a justification for affirmative action survives strict scrutiny might well be influenced by her (unstated) views about why diversity cannot be achieved without affirmative action—which might well turn on the effects of societal discrimination."); Erwin Chemerinsky, *Guidelines for Affirmative Action Programs after Proposition 209*, 24-FEB L.A. LAWYER 16, 16 (Feb. 2002) ("For its supporters, affirmative action is essential to remedying past discrimination and advancing equality. They believe that today, at times, society must be color conscious if ever there will be a time when it can be color-blind."). For example, underlying Justice O'Connor's opinion in *Grutter* is the notion that many schools still need affirmative action in order to achieve the goal of racial diversity—that because of past and present disadvantages, racial diversity cannot be achieved fully without affirmative action. If this idea were not central to the opinion, Justice O'Connor would not have needed to discuss a potential twenty-five-year limit on affirmative action, as the benefits of diversity are forever. See Johnson, *supra* note 9, at 184 ("However, time limits are normally associated with affirmative action programs designed to remedy past discrimination, not those aimed at ensuring a diverse student body. . . . Thus, the Court's suggestion of a 25 year time limit seems peculiar because it justified the University of Michigan's affirmative action program on a diversity rationale, not as a way of remedying past discrimination by the University of Michigan. If a diverse student body is the justification for affirmative action, it is uncertain why the law would require a time limit. Durational limits on a university's affirmative action program make sense to any affirmative action program only if one believes, as many proponents do, that remedying past discrimination really is the true justification for affirmative action, notwithstanding the claim of public universities that they seek a diverse student body.").

29. Tom McNamee, *Who Really Benefits from Colleges' Affirmative Action?*, CHI. SUN-TIMES, Jul. 19, 2004, at 10 (noting that President Lyndon Johnson "called on Americans to make a special effort to counter the 'devastating heritage of long years of slavery' and 'a century of oppression, hatred and injustice'").

place. That intent must be honored.”³⁰ In addition, Ward Connerly, a stern opponent of affirmative action, argues that the inclusion of recent immigrant Blacks in such programs only demonstrates that all colleges and universities care about “is chalking up the numbers.”³¹

Others, including Professors Lani Guinier and Henry Louis Gates, assert that the rising number of first- and second-generation Blacks reveals a flaw in the criteria that are generally used to determine admission to elite colleges and universities.³² According to Professor Guinier, current admissions criteria, in many ways, reward and advantage those who are most privileged in society—by failing to acknowledge the class and race privileges that may enable certain people to achieve high traditional academic success on grades and test

30. *Id.* (quoting Jackson); see also *CBS Evening News: Questioning How Colleges Are Achieving a Diverse Student Population with Regard to Minorities* (CBS television broadcast July 3, 2004) (transcript available at LexisNexis Academic) (“‘We owe a debt, an obligation, to native born American blacks who can trace their history back to slavery and Jim Crow and continuing discrimination.’” (quoting college testing expert Anthony Carnevale)). Likewise, while discussing policy implications of her study on Harvard College, Haynie asserted, “The American ideal of equal opportunity appears to be undermined when it is found that black Americans, who endure not only present-day racism, but also the burden of dealing with the psychological disadvantages caused by discrimination, benefit the least from affirmative action relative to other blacks at selective institutions.” Haynie, *supra* note 15, at 54.

Others have described affirmative action as having broader goals than those asserted by Reverend Jackson. For example, former President Bill Clinton once remarked:

The purpose of affirmative action is to give our nation a way to finally address the systemic exclusion of individuals of talent on the basis of their gender or race from opportunities to develop, perform, achieve and contribute. Affirmative action is an effort to develop a systematic approach to open the doors of education, employment and business development opportunities to qualified individuals who happen to be members of groups that have experienced longstanding and persistent discrimination.

President William Jefferson Clinton, Remarks on Affirmative Action (July 19, 1995), available at http://www.dol.gov/esa/regs/cfr/41cfr/toc_Chapt60/60_2.10.htm. The Department of Labor has advanced the same view, providing:

§ 60-2.10 General purpose and contents of affirmative action programs.

(a) Purpose.

(1) An affirmative action program is a management tool designed to ensure equal employment opportunity. A central premise underlying affirmative action is that, absent discrimination, over time a contractor's workforce, generally, will reflect the gender, racial and ethnic profile of the labor pools from which the contractor recruits and selects.

41 C.F.R. § 60-2.10 (2007).

31. Johnson, *supra* note 11, at A1; cf. *Grutter v. Bollinger*, 539 U.S. 306, 369–70 (2003) (Thomas, J., concurring in part and dissenting in part) (“The Law School seeks only a façade—it is sufficient that the class looks right, even if it does not perform right.”).

32. Professor Guinier, who herself is of Jamaican-Caribbean ancestry, asserted that Haynie's discovery is “a window into the way ‘meritocracy’ has been destroyed by privilege and cumulative advantage. White students are also disproportionately privileged. It's about wealth, education, disposable assets, intergenerational wealth transfer.” *“Roots” and Rae*, HARV. MAG., Sept.-Oct. 2004, at 69 [hereinafter *Roots*], available at <http://harvardmagazine.com/online/090443.html>; see also Rimer & Arenson, *supra* note 13, at A1 (describing discussions surrounding the make-up of the black college student population at elite schools).

scores.³³ As a consequence, she argues, many colleges and universities fail to recognize the merit in the work of socioeconomically and racially disadvantaged students who are qualified to attend elite institutions but lack the access to privileges that could enable them to succeed at the admissions game.³⁴

To some extent, one could argue that first- and second-generation Blacks fall into this category of privilege because they tend to be more advantaged than African-Americans in the admissions process and even on the job market.³⁵ The claim here is that acculturation into American society is easier for immigrant Blacks because of positive images of hard-working immigrants, which stand in contrast to stereotypes of lazy black Americans. In addition, psychological advantages may derive from being a voluntary immigrant as opposed to an involuntary immigrant,³⁶ and such advantages include the self-assurances of coming from a majority black country with black leaders and role models as well as immigrant

33. See STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 80 (1991) (asserting that the real winners in admissions programs are “the country’s economically and educationally privileged”); see also Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1476-77 (2005) (“Parental income, education, and occupational status are the primary positive indicators of whether a student is likely to attend quality elementary and secondary schools and thus a selective university, or any institution of higher education, for that matter.”).

34. Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 145-50 (2003) [hereinafter Guinier, *Admissions Rituals*]; Guinier, *supra* note 11, at A13; Robert Paul Wolff & Tobias Barrington Wolff, *The Pimple on Adonis’s Nose: A Dialogue on the Concept of Merit in the Affirmative Action Debate*, 56 HASTINGS L.J. 379, 411-23 (2005); see also *Roots*, *supra* note 32, at 70 (quoting Harvard Professor Mary Waters as saying, “‘If it’s only skin color, that’s a very narrow definition of diversity. I would hate to see Harvard not reaching out to those African Americans who have been in the United States for generations. Are we not looking as hard as we should in Mississippi or Alabama for kids who would do well if they were recruited?’”).

35. See *infra* Part I (analyzing reasons for the disproportionate percentage of first- and second-generation Blacks on elite college campuses). *But see infra* Part II (detailing the ways in which this general privilege is relative only to legacy Blacks, not to Whites, and not existent for many first- and second-generation Blacks when compared to legacy Blacks).

36. A voluntary immigrant is one who was not forced to come to the United States, i.e., one who did not immigrate because they were fleeing from war and persecution. African-Americans who were brought to colonial America as part of the slave trade and their descendants are not voluntary immigrants. Also, as the late Professor John Ogbu explained, refugees are not voluntary minorities. “Refugees are defined as aliens who are outside of the U.S. and who cannot return to their country of nationality because of a well-founded fear of persecution.” Charles J. Ogletree, Jr., *America’s Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 765 n.57 (2000). “Immigrant or voluntary minorities are people who have moved more or less voluntarily to the United States or to any other society because they believe that this would lead to more economic well-being, better overall opportunities, and/or greater political freedom.” John U. Ogbu, *Differences in Cultural Frame of Reference*, 16 INT’L J. BEHAV. DEV. 483, 484 (1993). Of course, there is the question whether the immigration of “voluntary immigrants” is truly voluntary when based on a desire to leave impoverished countries in hope of economic betterment.

optimism about future opportunities in the United States.³⁷ Finally, work-related advantages may stem from higher educational backgrounds established in home countries by immigrant Blacks, many of whom were able to come to the United States precisely because of their education and skill level.³⁸ After the Immigration Act of 1965³⁹ repealed the Immigration Act of 1924, which previously had limited immigration quotas by nationality to just two percent of that

37. See Haynie, *supra* note 15, at 43-53 (discussing advantages of first- and second-generation Blacks); see also *infra* Part I.

38. Of course, the higher educational backgrounds of immigrant Blacks stem in part from immigration laws that favored those most educated and skilled within that group. See Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 HOW. L.J. 237, 240-42 (1994) (discussing employment categories); see also *infra* note 41 and accompanying text. Today, one group of black immigrants, African immigrants, is still severely underrepresented among the immigrant population. The Department of Homeland Security's 2005 Yearbook on Immigration Statistics detailed that only 1.2 percent of total non-immigrant admissions—meaning legal immigrants other than those who were granted permission to enter and stay in the country for a limited period of time—migrated from Africa, compared to forty percent for European immigrants and twenty-five percent for Asian immigrants. Office of Immigration Statistics, Department of Homeland Security, 2005 Yearbook of Immigration Statistics, at 6, 77 (2006), available at http://www.dhs.gov/xlibrary/assets/statistics/yearhook/2005/OIS_2005_Yearbook.pdf. Of all the 32,003,435 non-immigrant admissions in the 2005 fiscal year, only 395,654 migrated from Africa; however, 12,902,602 migrated from Europe, and 8,044,782 migrated from Asia. See *id.* at 77. Originally, Africans were not even eligible for the diversity program because it applied only to those “adversely affected” by the 1965 Amendments, see *infra* note 39, and reserved forty percent of the slots for Irish nationals; however, changes in 1990 enabled Africans to use the diversity program and has helped to increase the number of black immigrants to the United States. See Hing, *supra*, at 261.

39. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965). Although the Immigration Act of 1965 was more liberal than its predecessor in 1924, previous racial discrimination in immigration laws continued to keep the numbers of black immigrants, especially African immigrants, very low. For example, family reunification policies did not benefit African immigrants as much as European, Latina/o, and Asian immigrants because there was generally no family for Africans to be reunited with in the United States. See Hing, *supra* note 38, at 242 (noting that even in 1990, “no African country came close to its ceiling” of quotas for family preference, with the closest country, Egypt, having just 1768 immigrants with visas of the possible 20,000 visas per country); see also Ogletree, Jr., *supra* note 36, at 770 (stating that “racial biases still pervade the major avenues of legal immigration”). Andowah A. Newton, Note, *Injecting Diversity into U.S. Immigration Policy: The Diversity Visa Program and the Missing Discourse on Its Impact on African Immigration to the United States*, 38 CORNELL INT'L L.J. 1049, 1061-62 (2005) (asserting that, in 2003, African immigrants “received only 1.8% of the immigrant visas issued in the family preference category” while “immigrants from Asia received 44.1% and immigrants from Latin America received 49.5% of these visas”). The Immigration Act of 1924, which implemented nationality quotas based on a percentage of that nationality's population in the United States in 1890, reinforced the prior exclusion of Africans, who had immigrated to the United States in very small numbers prior to 1920. From 1820 to 1870, only 648 Africans *voluntarily* immigrated to the United States, which was certainly understandable given the system of race-based slavery in the southern part of the United States. See Newton, *supra*, at 1060. From 1870 to 1920, 17,136 Africans immigrated to the United States, which was only .06 percent of the total immigrant population. See *id.* Prior to 1965, African immigrants made up less than one percent of the total immigrant population. See Hing, *supra* note 38, at 240.

nationality's population in the United States in 1890,⁴⁰ there was a larger influx of black Caribbean and African immigrants; many of these immigrants were highly educated and came to the United States as exceptional professionals or as skilled workers in industries for which the domestic supply of labor was insufficient.⁴¹ Today, the children of these immigrants are disproportionately represented at the nation's most elite institutions.

Similarly, one could argue that mixed-race students of African descent tend to enjoy more advantages than do monoracial African-Americans in the admissions process. Like first- and second-generation Blacks, mixed-race students of African descent are more likely to have parents who possess a college degree.⁴² Additionally, like first- and second-generation Blacks, mixed-raced individuals (who tend to be light-skinned) may be perceived more favorably by the

40. Immigration Act of 1924, ch. 190, 43 Stat. 153, at § 11(a) (1924), *repealed by* Pub. L. No. 89-236, 29 Stat. 911 (1965); Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After "9/11?"*, 7 J. GENDER RACE & JUST. 315, 325 (2003); Enid Trucios-Haynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of the American National Identity*, 76 OR. L. REV. 369, 399 (1997). As noted above, African immigrants constituted a very small percentage—almost a non-existent percentage—of immigrants in the United States in 1890. *See supra* note 39.

41. *See* Kevin R. Johnson, *The End of "Civil Rights" As We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1484 (2000) ("The year 1965 thus marked the beginning of a much more diverse, far less European immigrant stream into this country."). These black immigrants primarily came from the Caribbean. *See* John A. Garcia, *Caribbean Migration to the Mainland: A Review of Adaptive Experiences*, 487 IMMIGR. & AMER. PUB. POLY 114, 115, 119, 121-23 (1986) (noting that the most significant influx of Caribbeans into the United States occurred after 1971); Milton Vickerman, *Jamaica, in THE NEW AMERICANS: A GUIDE TO IMMIGRATION SINCE 1965*, at 479, 479 (Mary C. Waters & Reed Ueda eds., 2007) [hereinafter *THE NEW AMERICANS*] (noting that around 570,000 Jamaicans arrived in the United States between 1971 and 2004); *see also* Marilyn Halter, *Africa: West, in THE NEW AMERICANS* 283, *supra*, at 290 (noting that during the period of the 1960s to the 1980s, "a significant portion of West African immigrants were highly skilled professionals, students, and exchange visitors" who did not return to their home countries largely because of political strife); Hing, *supra* note 38, at 242 ("Of the 7614 Africans who immigrated in 1990 in other relative and occupational categories subject to quotas, thirty percent entered in an occupational preference."). The Immigration Act of 1965 set an annual ceiling on immigration from the Eastern Hemisphere at 170,000. It also created a comprehensive preference system for such immigrants, providing that twenty percent of all visas would go to spouses and unmarried adult children of United States citizens, twenty percent would go to unmarried children of resident aliens, ten percent would go to exceptional professionals, scientists, and artists, ten percent would go to married children of United States citizens, twenty-four percent would go to siblings of United States citizens, ten percent would go to skilled and unskilled workers in industries for which the domestic supply of labor was insufficient, and six percent would go to refugees. DEBRA L. DELAET, *U.S. IMMIGRATION POLICY IN AN AGE OF RIGHTS* 125 (2000). There was no similar preference system for immigrants from the Western Hemisphere until more than ten years later in 1976. *See id.* (summarizing the 1976 Amendments to the Immigration and Nationality Act).

42. *See* RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE* 103 (2001) ("Blacks, whether male or female, who marry out are better educated than those who do not. In addition, white men who marry interracially are more likely to have a college education than those who marry within their race.").

dominant racial group, Whites, especially within the workplace.⁴³ For example, in a recent study, Matthew Harrison, a doctoral student at the University of Georgia, discovered that dark-skinned Blacks were at a significant disadvantage on the job market when compared to their lighter-skinned counterparts.⁴⁴ Harrison “found that a light-skinned black male can have only a bachelor’s degree and typical work experience and still be preferred over a dark-skinned black male with an MBA and past managerial positions.”⁴⁵ Indeed, Vanderbilt Professor Joni Hersch recently examined immigrant status and skin color along with worker incomes and found that light-skinned immigrants in the United States earned an average of eight to fifteen percent more than similar immigrants with darker skin.⁴⁶ With both

43. See Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1514 (2000) (noting that lighter-skinned Blacks fare better occupationally than darker-skinned Blacks); see also *infra* notes 76-80, 113-14 and accompanying text (discussing this trend).

44. Shilpa Banerji, *Study: Dark-Skinned Black Job Applicants Hit More Obstacles*, DIVERSE ISSUES HIGHER EDUC. Aug. 31, 2006, http://www.diverseeducation.com/artman/publish/article_6306.shtml (discussing Harrison’s study “Colorism in the Job Selection Process: Are There Preferential Differences Within the Black Race?,” which was presented at the annual meeting of the Academy of Management in 2005).

45. *Id.* (quoting Harrison who cited one reason for these findings as being “because expectations of the light-skinned black male are much higher, and he doesn’t appear as ‘menacing’ as the darker-skinned male applicant”). During the study, students rated, on a scale of 1-7, the likelihood that they would hire the person whose résumé and picture they reviewed. A rating of 1 meant that they were “not at all” likely to hire the person, and a rating of 7 meant that they “definitely” would hire the person.

For the light-skinned male with only a bachelor’s degree, the average rating was 5.35. For the dark-skinned Black male with an MBA, the average rating was 4.5.

Id.

46. Joni Hersch, *Profiling the New Immigrant Worker: The Effects of Skin Color and Height*, (Vanderbilt Law and Economics Research Paper, No. 07-02 Jan. 19, 2007), available at <http://ssrn.com/abstract=927038>; see also Travis Loller, *Study Says Skin Tone Affects Earnings*, CBS NEWS, Jan. 26, 2007, <http://www.cbsnews.com/stories/2007/01/26/ap/national/mainD8MT8F882.shtml> (quoting Hersch as stating that “[o]n average, being one shade lighter has about the same effect as having an additional year of education”); accord Arthur H. Goldsmith et al., *Shades of Discrimination: Skin Tone and Wages*, 96 AMER. ECON. REV. 242, 243-45 (2006) (finding results that comport with those of Hersch, which was that dark-skinned to medium-skinned Blacks suffered a discriminatory penalty in wages of ten percent to fifteen percent relative to Whites); Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI. 383, 384 (2006). Professor Eberhardt and her colleagues used the data set from a 1998 study by Professor David Baldus et al., David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998), to conduct a study of racial stereotypicality in the application of the death penalty to black defendants accused of killing a white victim. She and her cohort found that

defendants whose appearance was perceived as more stereotypically Black were more likely to receive a death sentence than defendants whose appearance was perceived as less stereotypically Black. In fact, 24.4% of those Black defendants who fell in the lower half of the stereotypicality distribution received a death sentence, whereas 57.5% of those Black defendants who fell in the upper half received a death sentence.

higher incomes and greater education, then, it is no real surprise that mixed-race students, who also tend to be light-skinned, are disproportionately represented among black students at elite institutions.

But, for those in the camp of Professors Gates and Guinier, the problem is not the inclusion of first- and second-generation Blacks and mixed-race students in affirmative-action programs. Rather, the trouble lies in the way in which Blacks with long-term historical roots in the United States are being left behind, due in part to the failures of colleges and universities to find and recruit legacy Blacks who could succeed at elite colleges and universities but who are not finding their way to these institutions.⁴⁷ Additionally, the Gates and Guinier camp find it problematic that a number of first- and second-generation black and mixed-race students on elite campuses are not self-identifying as black outside of checking the appropriate box on their applications. Consequently, they argue, box checking, at least as it relates to race-influenced diversity of opinion in the classroom, has arguably become an inadequate way "of capturing the merit of 'race.'"⁴⁸

One fact is clear: colleges and universities must begin to examine more closely the admission, or rather the growing exclusion, of legacy Blacks on their campuses. They must ask: to what extent, if any, should ancestral heritage play a role in the implementation of affirmative action policies at their institutions? If relevant, how should it be considered? For example, should ancestral heritage be evaluated in a way that may work to exclude completely first- and second-generation Blacks and mixed-race students from affirmative-action programs?⁴⁹

Id.

47. See Haynie, *supra* note 15, at 43-53 (discussing the absence of these Black students at Harvard College). Some commentators, however, have argued that affirmative action policies should not include immigrants at all, even those who have grown up in the United States. See RICHARD D. KAHLBERG, *THE REMEDY* 74-80, 114 (1996) (arguing against the inclusion of primarily non-black immigrants in affirmative-action programs that are designed to address discrimination against African-Americans). Others have argued that African-Americans are disadvantaged on the job market when immigrants are included in affirmative-action programs. See Krikorian, *supra* note 16, at 300-03 (arguing that "it is immoral to allow large-scale immigration of covered ethnic groups" in race-based affirmative-action programs); Peter H. Schuck, *Alien Ruminations*, 105 *YALE L.J.* 663, 2000-04 (1996) (reviewing PETER BRIMELOW, *ALIEN NATION: COMMONSENSE ABOUT AMERICA'S IMMIGRATION DISASTER* (1995)) (asserting that immigrants should not be eligible for affirmative action because they have not endured the history of discrimination that African-Americans have).

48. Email from Lani Guinier, Bennett Boskey Professor of Law, Harvard Law School, to Angela Onwuachi-Willig, Professor of Law, University of Iowa College of Law (Jan. 22, 2007) (on file with the author).

49. See Lolita K. Buckner Inniss, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 *DEPAUL L. REV.* 85, 88-89 (1999) (noting that "[m]any have argued that recent black entrants are not due any redress because they and their ancestors have not experienced

This Article explores these policy questions concerning which Blacks should be the beneficiaries of affirmative-action programs and specifically tackles the issue of how such programs may be restructured so that they can begin to reach more legacy Blacks. In so doing, this Article does not contest the need to consider race as a factor in the admissions process at colleges and universities. Undoubtedly, race deeply affects the perceptions, experiences, consciousness, and opportunities of all Blacks, regardless of their ancestry and class status; thus, race is a valuable indicator to use in determining whether an individual may bring a perspective to the campus or classroom that is currently underrepresented.⁵⁰ Yet, relying on findings from studies that suggest general educational, economic, and cultural differences between legacy Blacks and non-legacy Blacks,

the full measure of American white racism”); Clarence Page, *Black Americans Could Use Some Immigrant Optimism*, KANSAS CITY STAR, Jul. 8, 2004, at B7 (“But if [affirmative action’s] goal is to address historical racial inequalities in American life, Harvard may have to take black ethnicity into account in the same way that some institutions have argued over which nationalities should be counted as ‘Hispanic.’ ”); *see also infra* Part III (considering procedural changes to enable consideration of ancestral and ethnic heritage). If we assume that the percentage of Blacks at elite institutions will remain roughly the same, an increase in the number of legacy Blacks necessarily entails that at least some first- and second-generation Blacks will be excluded from affirmative-action programs.

50. *See* Thomas J. Durant, Jr. & Kathleen H. Sparrow, *Race and Class Consciousness Among Lower-and Middle-Class Blacks*, 27 J. BLACK STUDS. 334, 342-43, 347 (1997) (defining “middle class” as “those individuals with at least some college education and with an income of \$16,000 or more” and finding in a study of lower- and middle-class Blacks that “both groups express a similar degree of race consciousness” and that “regardless of social class, Blacks feel that race is still a dominant factor that influences life chances and opportunities”); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 961 (2001) (“Students of color who are privileged by class or educational background nonetheless experience subordination by ubiquitous societal racism. They bring to the classroom and to the larger intellectual discourse an understanding of subordination that those privileged by white supremacy do not necessarily share. This knowledge is critical to the educational enterprise if the academy is to fulfill a moral commitment to anti-racism.”); *see also* Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 827-56 (1991) (discussing particularly negative stereotypes of Blacks as compared to other minorities and discussing the way in which Blacks are discriminated against outside of regulated areas like housing and employment, such as when purchasing goods or services—here, cars); Malamud, *supra* note 11, at 967, 996 (“There is strong evidence that race is a factor in black middle-class economic status in the crucial areas of housing, work, income security, education, wealth accumulation, and the intergenerational transmission of middle-class status. . . . I do not think that there is any stratum of the black middle-class that is free of the social, psychological, and economic pressures of race.”); Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1420-23 (2006) (discussing particularly negative stereotypes of Blacks as compared to other minorities); *infra* Part II (discussing the benefits of race as it relates to diversity of perspective on campus and explicating how Blacks in general face discrimination based on racial stereotypes regardless of their ancestral background and socioeconomic status). For the purposes of this Article, “[r]ace consciousness is defined as one’s awareness of his racial identity and group membership, as reflected by attitudinal expressions of identity, devotion, unity, pride, culture, status, behavior, and iniquities.” Durant & Sparrow, *supra* at 340.

this Article explains why considerations of racial diversity alone may not be sufficient to effectuate the intent of affirmative action laws during the admissions process, and why considerations of ancestral heritage should be a part of any school's racial preference admission policy. At the same time, however, the Article examines why the need to explore the ethnic backgrounds of black applicants should not work to exclude first- and second-generation Blacks and mixed-race students from affirmative-action programs.⁵¹ In effect, this Article argues that, while statistical studies suggest that economic, educational, and cultural differences between legacy Blacks and non-legacy Blacks warrant a consideration of ancestral heritage in affirmative action programs, an exclusion of first- and second-generation Blacks and mixed-race students from such programs is unwarranted. To the contrary, the inclusion of first- and second-generation Blacks and mixed-race students in these programs actually furthers both the diversity and social justice goals of affirmative action.⁵² More importantly, this Article contends that this entire debate about whether first-generation Blacks, second-generation Blacks, and mixed-race students should be eligible for affirmative action helps to expose the flaws of an admissions system that focuses solely on the endpoint of students in their academic career rather than measuring the distance between where the students started their lives in terms of (dis)advantage and the point to which they were able to climb in their academic journeys. Finally, this Article stresses the importance of re-evaluating traditional admissions standards at elite

51. This Article primarily focuses on the intersection of race and status as a first- and second-generation Black in this affirmative-action debate. Although mixed-race students are also disproportionately represented in elite institutions of higher education, they have not been a primary focus in this discussion of race and inclusion in affirmative-action programs, in part because many of them descend from people who were enslaved in the United States. Where appropriate, however, this Article will also highlight important points concerning the intersection of race, color, privilege, and education as they relate to mixed-race students.

Personally, I approach this debate at the intersection of the experiences of both first- and second-generation Blacks and African-Americans. I am a second-generation Nigerian American; however, I grew up in the South in poor apartment complexes surrounded by African-Americans or legacy Blacks. It is my hope that my position at this intersection provides me with a unique lens from which to review, analyze, and discuss this debate regarding affirmative action, legacy Blacks, and first- and second-generation Blacks.

52. This Article does not address the remedial justification for affirmative action, as that rationale is limited to remedying only the discrimination of any particular institution in question. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986) (discussing how the remedial justification is applied). Given the disincentives for any school to admit its past discrimination, difficulties in receiving "compensation" through the use of affirmative action exist even for legacy Blacks or the descendants. See Evan Caminker, *Post-Admissions Educational Programming in a Post-Grutter World: A Response to Professor Brown*, 43 HOUS. L. REV. 37, 42 (2006) ("The remedial rationale is backward-looking, arguing that affirmative action is necessary to redress prior discrimination against minorities in admissions decisions.").

colleges and universities, an act that can aid schools in the admission of legacy Blacks and other disadvantaged students.

Part I of this Article first highlights the importance of maintaining a social justice component to affirmative-action programs, which has essentially been dismantled at institutions of higher education,⁵³ and stresses the need for redoubled efforts in working to ensure that legacy Blacks are not left behind in college admissions. Thereafter, Part I explores the various ethnic, cultural, and economic differences that help to explain the disproportionate percentage of first- and second-generation Blacks and mixed-race students on elite college campuses, and examines why it is necessary to restructure racial preference programs in a way that can reach more legacy Blacks. Part II argues that the differences between legacy and non-legacy Blacks should not work to exclude first- and second-generation black students and mixed-race students from affirmative-action programs. This Part analyzes two purposes of affirmative action, diversity and social justice, and then justifies the inclusion of both legacy and non-legacy Blacks under each of these purposes.⁵⁴ It also examines the damage to other minority groups that could result from the elimination of first- and second-generation Blacks from affirmative-action programs. Part III explores potential methods for considering the ancestral heritage of black applicants during the admissions process at elite colleges and universities. In so doing, it first highlights the importance of having real ethnic diversity within racial groups on campus and applies the principles in *Grutter* to explain why such interethnic diversity is critical to achieving any school's mission regarding diversity, specifically as it relates to legacy Blacks. Thereafter, this Part explicates why further policing of racial identification on college applications is needed, apart from just the desire to keep track of the admission and enrollment of severely underrepresented racial minorities on campuses. Lastly, Part IV proposes two procedural changes that may enable elite colleges and universities to satisfy their mission of diversity with considerations of both race and ancestral heritage in their admissions process. The Article then concludes by arguing that traditional views of merit

53. See Massey et al., *supra* note 19, at 244 (The "broadening of the scope of civil rights coincided with a remarkable upsurge in immigration from Asia and Latin America, and over time the moral justification for affirmative action shifted subtly from restitution for a legacy of racism to the representation of diversity for its own sake."); see also Guinier, *supra* note 11, at A13 ("Gone is the larger role of higher education in correcting for historical injustice, reaching out to those who are materially disadvantaged, encouraging publicly spirited innovators, or training a representative group of future leaders of all races.").

54. See *supra* note 52 (explaining why this Article does not address the remedial justification for affirmative action).

during the college admissions process should be expanded and details how such changes can help to satisfy the goals of affirmative action through increased representation of students from racially and socioeconomically disadvantaged backgrounds, such as legacy Blacks.

I. RACE, CULTURE, CLASS, AND A MODEL BLACK MINORITY?

Blacks are generally represented at elite colleges and universities in numbers that are too small to truly have discussions about excluding particular groups of black domestic students from affirmative action programs.⁵⁵ However, the disproportionate percentage of first- and second-generation Blacks and mixed-race students on these campuses (relative to legacy Blacks) must be acknowledged and addressed, particularly by schools that include both diversity and social justice as part of their institutional mission.⁵⁶ This Part examines why it is critical for schools with race-based affirmative-action programs to acknowledge and consider the

55. For example, although Blacks make up thirteen percent of the population in the United States, as Haynie notes, the black students at Harvard comprise approximately eight percent of the student body, a percentage that is actually higher than most schools. Haynie, *supra* note 15, at 43. For instance, Blacks make up only six percent of the population of students at Oberlin College, a highly progressive college with a wonderful history of openness and diversity for Blacks. See Oberlin Online, Oberlin by the Numbers, Profile of the Total Student Body, <http://www.oberlin.edu/coladm/about/stats.html> (last visited Apr. 10, 2007).

56. Professor Guinier has noted that there are many ways to define merit and that “merit is contextual and a function of institutional mission.” Guinier, *Admissions Rituals*, *supra* note 34, at 134 n.87. With this point in mind, it becomes important for schools that identify diversity and social justice as part of their mission to evaluate individual applicants in a manner that examines not only how a student’s admission may advance the diversity mission of the school but also how the student may help the school achieve its goals related to social justice and action. Vassar College in New York has a particularly strong mission statement. In its mission statement, Vassar identifies, among many other things, the following three items as part of its goals: (1) “[t]o develop a well-qualified, diverse student body which, in the aggregate, reflects cultural pluralism, and to foster in those students a respect for difference and a commitment to common purposes,” (2) “[t]o promote [through curricular offerings] gender and racial equality and a global perspective,” and (3) “to nurture not only pleasure in learning but also an informed and active concern for the well-being of society.” Vassar College, Academic Life, Mission Statement, *available at* <http://catalogue.vassar.edu/academiclife.html> (last visited Apr. 10, 2007). Likewise, Grinnell College in Iowa includes both a commitment to diversity and social responsibility in its goals. Grinnell College cites three of its goals as being excellence in education for students in the liberal arts, a diverse community, and social responsibility, and it includes in its core values “a wide diversity of people and perspectives” and a “strong tradition of social responsibility and action.” Grinnell College, Core Values, *available at* <http://www.grinnell.edu/offices/president/missionstatement/core/> (last visited Apr. 10, 2007); see also Lee Bollinger, Columbia University, Diversity Mission Statement, *available at* http://www.columbia.edu/cu/vpdi/diversity_mission_statement.html (last visited Apr. 10, 2007) (“Both to prepare our students for citizenship in a pluralistic world and to keep Columbia at the forefront of knowledge, the University seeks to recognize and draw upon the talents of a diverse range of outstanding faculty, staff, and students and to foster the free exploration and expression of differing ideas, beliefs, and perspectives. . . .”).

ancestral heritages of their black applicants during the admissions process. Part I.A explicates the social justice rationale for affirmative action; thereafter, it analyzes how changing forms of race discrimination that work to designate certain groups of Blacks as “good” or “bad” when compared to each other⁵⁷ mandate a re-evaluation of general admissions procedures so that they will better comport with the social justice goal of affirmative action. Part I.B details and explores the various ethnic, cultural, and socioeconomic differences that may explain the disproportionate percentage of first- and second-generation Blacks and mixed-race students (as compared to legacy Blacks) in institutions of higher education and that can be used to support arguments that the ancestral heritage of black applicants should be considered during the admissions process.

A. *Understanding the Meaning of Social Justice in Affirmative Action*

The basis of the social justice rationale was most eloquently stated by President Lyndon B. Johnson, who announced the following in a speech to the graduating class of Howard University in 1965:

You do not wipe away the scars of centuries by saying: “Now, you are free to go where you want, do as you desire, and choose the leaders you please.” You do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of a race, saying, “you are free to compete with all the others,” and still justly believe you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity—not just legal equity but human ability—not just equality as a right and a theory, but equality as a fact and as a result.⁵⁸

57. See, e.g., KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 22 (2006) (“We are at a transitional moment in how Americans discriminate. . . [I]ndividuals no longer need[] to be white, male, straight, Protestant, and able-bodied; they need[] only to act white, male, straight, Protestant, and able-bodied.”); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262-63 (2000) (“Racial conduct discrimination derives, not simply from the fact that an employee is, for example, phenotypically Asian American . . . but also from how she performs her Asian-American identity in the workplace.”); see also Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 853, 859-70, 874-88 (2006) (analyzing how middle-class heterosexual black men—who are caught between the bind of the socially constructed images of the assimilationist “Good Black Man” and the dangerous “Bad Black Man”—receive incentives to perform their identity in a way that fits the assimilationist ideal of the “The Good Black Man”); Angela Onwuachi-Willig, *Undercover Other*, 94 CALIF. L. REV. 873, 885-94 (2006) (explaining that in the post-Civil Rights era, how one performs his or her racial identity matters almost as much as how one looks).

58. Lyndon B. Johnson, *The Howard University Address, June 4, 1965: “To Fulfill These Rights,”* in LEE RAINWATER & WILLIAM L. YANCEY, *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY* 125, 126 (1967).

As described by President Johnson, affirmative action was intended to assist a people who had been severely disadvantaged because of race to overcome the devastating effects of slavery and Jim Crow segregation in the United States.⁵⁹ Additionally, as Professors Paul Brest and Miranda McGowan have highlighted, affirmative action was intended to produce benefits such as a greater number of role models for young children from disadvantaged racial groups and the donation of services by those who had benefited from affirmative action to underprivileged communities.⁶⁰

Based on this understanding of the social justice rationale, if legacy Blacks are not finding their way into elite college and university campuses,⁶¹ then these institutions, assuming their missions include the goal of an enhanced educational experience as a result of diversity and a commitment to the public or social justice,⁶² should begin to re-evaluate their admissions procedures and criteria. After all, admissions to colleges and universities should not solely be about creating “an aesthetic student body”⁶³ that looks racially

59. *Id.* at 125-30; Harry J. Holzer, *Affirmative Action After Grutter: Still Worth Preserving?*, 14 GEO. MASON U. CIV. RTS. L.J. 217, 219 (2004); *see also* Luke Charles Harris & Uma Narayan, *Affirmative Action and The Myth of Preferential Treatment: A Transformative Critique of the Terms of Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1, 8 (1994) (reciting statistics that show that affirmative action has helped to pave the way for Blacks in employment and schooling); Krikorian, *supra* note 16, at 300 (asserting that affirmative action was “intended to compensate for historical discrimination”).

60. Brest & Oshige, *supra* note 4, at 865-73 (analyzing corrective justice as a rationale for affirmative action); *see also* Paul Brest, *Some Comments on Grutter v. Bollinger*, 51 DRAKE L. REV. 683, 683-86 (2003) (stating that individuals tend to give to organizations that support “groups with which they identify on the basis of characteristics such as race, ethnicity, and religion”); Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L.J. 309, 328-31 (2006) (discussing various rationales for affirmative action including corrective justice).

61. *See Roots*, *supra* note 32, at 70 (quoting Guinier who has criticized the failure by colleges and universities to reach native Blacks with long term roots in the United States); *cf.* Hing, *supra* note 38, at 278-79 (“[T]hose who are skeptical about this nation’s commitment to addressing the plight of unemployed African Americans could look at the Immigration Act of 1990 and conclude that the nation is now beginning to use immigration to avoid improving the situation of native unemployed and under-skilled workers. A reasonable conclusion is that United States’ leaders are either deliberately or subconsciously searching for a way to continue to avoid repairing the desperate situation of people whom they and the rest of the power structure have abandoned.”).

62. *See supra* note 56 and accompanying text (discussing the missions and goals of Columbia University, Grinnell College, and Vassar College).

63. *See Grutter v. Bollinger*, 539 U.S. 306, 369-70 (2003) (Thomas, J., concurring in part and dissenting in part) (arguing that “law schools continue to use the test [the LSAT] and then attempt to ‘correct’ for black underperformance by using racial discrimination in admissions so as to obtain their aesthetic student body”). Dean Frank Wu has explained that one danger of diversity is that a school can create a racially diverse classroom without achieving full integration or addressing the issues that face poor minorities, especially poor Blacks, in the educational pipeline. For example, he asserted, “We could have diversity by admitting a large

diverse. As Justice O'Connor acknowledged in the *Grutter* decision, admissions policies should also attempt to create an environment where students from differing backgrounds genuinely learn from and gain from each other's experiences inside and outside of the classroom.⁶⁴ Finally, as President Johnson's 1965 speech suggests, admissions offices at elite schools should make an effort to expand opportunities for education to people from all walks of life, especially those who come from racially and socioeconomically disadvantaged backgrounds.⁶⁵ Extending these opportunities to qualified Blacks of varying backgrounds is critical because statistics show that Blacks who graduate from elite colleges and universities earn twice as much or more than their same-race peers who graduate from non-elite schools; studies also indicate that Blacks who graduate from elite schools are much more likely to become leaders in their communities.⁶⁶ As Haynie proclaimed, "if certain ethnic groups have greater access than others to . . . selective institutions, and thus more opportunities for economic success and the advantages of leading to civic participation, then there will be an ever-widening gap in the long-range economic success of these groups."⁶⁷ For this reason, elite colleges and universities must re-evaluate and re-tool their admissions procedures in a way that will more effectively reach legacy Blacks. By so doing, these institutions will bring themselves closer to achieving their goals to enrich intellectual exchange between a diverse group of students, both interracial and intra-racially, and will expand opportunities of education and leadership to a broader cross-segment of society.

number of Caribbean students, Haitians, Africans, and others who would not identify themselves nor perhaps be identified by others, as African-Americans." *Who Gets In*, *supra* note 28, at 533.

64. *Grutter*, 539 U.S. at 330.

65. See Johnson, *supra* note 58, at 126; see also Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C.R. & C.L. 171, 179 (2005) ("While a racially diverse student body benefits everyone, what is really being sought through these admissions policies is access for racial minorities to institutions from which they have been and still are systematically and disproportionately excluded because of racism. Thus, the real problem is historical and contemporary racism. Lack of diversity is its consequence."); Charles R. Lawrence III, *Each Other's Harvest Diversity's Deeper Meaning*, 312 U.S.F. L. REV. 757, 765 (1997) ("[W]e seek racial diversity in our student bodies and faculties because a central mission of the university must be an eradication of America's racism. We cannot pursue that mission without the collaboration of significant numbers of those who have experienced and continue to experience racial subordination.")

66. See DEREK BOK & WILLIAM BOWEN, *THE SHAPE OF THE RIVER* 258 (1998) (finding that black male graduates of elite colleges earned twice as much as black men with non-elite degrees and that black female graduates of elite colleges earned eighty percent more than black women with non-elite degrees).

67. Haynie, *supra* note 15, at 54.

The fact is that the practice of affirmative action at many colleges and universities has not necessarily caught up with practice of race in this country.⁶⁸ As Professor Kevin Johnson has generally noted, “[t]he changing demographics of immigration since 1965 has contributed to new civil rights challenges in the United States.”⁶⁹ Today, in our post-Civil Rights era, race and racism are practiced by the dominant racial group and by racial minorities in a way that enables the labeling of certain groups of Blacks, those who assimilate or who are the least threatening, as “good Blacks” and those who do not conform or are more threatening as “bad Blacks.”⁷⁰ In turn, “good Blacks” may practice their race such that they can maintain their designation as “good” by performing their identity in a way that both comforts Whites and distances themselves from the Blacks who are labeled as “bad.”⁷¹ In other words, while all Blacks, regardless of class or ancestral heritage, are disadvantaged by racism and subject to discrimination in the United States in ways that may affect their admission to colleges and universities,⁷² there is, at times, a hierarchy among different groups of Blacks within the dominant society that can work to enable greater access to goods, such as education, for those Blacks who are “favored.”⁷³

68. See *supra* note 57 and accompanying text (discussing the ways in which race is as much about performance as it is about physical markers such as skin color); see also *infra* notes 70-73.

69. Johnson, *supra* note 41, at 1492; see also Haynie, *supra* note 15, at 41 (“[T]he post-1965 mass immigration from countries in the Caribbean and Africa has added complexity to the definition of ‘African-American.’”).

70. See *supra* note 57 and accompanying text; see also Massey et al., *supra* note 19, at 252 (“To white observers, black immigrants seem more polite, less hostile, more solicitous, and ‘easier’ to get along with. Native blacks are perceived in precisely the opposite fashion.”); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name? On Being “Regarded As” Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1340-41 n.242 (hinting that Africans and Caribbeans may be viewed as distinct from African-Americans in a way that makes them model black minorities).

71. See Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895, 1907-27 (2007) (discussing the ways in which Blacks have incentives to perform an assimilationist or accommodating identity and to distance themselves from those Blacks who do not exhibit conforming behavior); Onwuachi-Willig & Barnes, *supra* note 70, at 1308 n.101 (asserting that racial identity performance by Blacks who wish to be included in the mainstream “carries with it [also] the need to . . . distance one’s self from persons who can challenge one’s identity performance”).

72. See *infra* Part II.B; see also Berta Esperanza Hernández-Truyol & Shelbi D. Day, *Property, Wealth, Inequality and Human Rights: A Formula for Reform*, 34 IND. L. REV. 1213, 1224 (2001) (“Although racism and its most harmful effects occurred during the early part of U.S. history, they endure today. Harms of the past are felt at present, exacerbated by the new, more sophisticated and nuanced trappings of bigotry that are inflicted on Blacks today. To make a bad situation worse, the impact falls largely upon those who are at the bottom of the socio-economic ladder, as ‘the accumulation of disadvantages . . . pass[es] from generation to generation.’”).

73. Devon Carbado and Mitu Gulati have written about the work that people of color do to counter harmful stereotypes of minority identities that operate in employment environments and have also more generally addressed the notion of race as a “performative identity,” in particular

B. The Model Black Minority?

In the same way that scholars have highlighted the advantages of white students from high socioeconomic classes in the admissions process, others have pinpointed various historical and social privileges that can enable mixed-race students and first- and second-generation Blacks to have greater access to elite institutions of higher education.⁷⁴ This Section briefly examines the ways in which both mixed-race individuals and first- and second-generation Blacks may be relatively advantaged to legacy Blacks in terms of gaining the background qualities and skills that can help students in earning admission to elite college and universities and achieving their educational and career goals.

Two of the advantages that mixed-race individuals may have over legacy Blacks in the admissions game and in life in general are greater likelihoods of college-educated parents and middle-class income. The fact is that “children born to socioeconomically privileged families tend to fare better in education than children born to poorer families.”⁷⁵ Historically, light-skinned Blacks, many of whom may be biracial or multiracial or perceived as such, are more likely to belong to a higher socioeconomic class and are generally more educated than

how such performative work can render some Blacks as acceptable and others as unacceptable. See Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1658 (2004) (asserting that businesses prefer to hire Blacks “who are phenotypically but unconventionally black—that is to say, people who ‘look’ but do not ‘act’ black”); Carbado & Gulati, *supra* note 57, at 1279-1308 (describing how women and people of color attempt to alter their racial identities in order to prevent discrimination and preempt stereotyping in the workplace); Devon W. Carbado & Mitu Gulati, *The Fifth Black Women*, 11 J. CONTEMP. LEGAL ISSUES 701, 719-20 (2001) (describing how performance identity can work to explain discrimination against a fifth black woman in a company where four other black women have been promoted); see also Cooper, *supra* note 57, at 874-95 (discussing the implications of fitting into or not fitting into the roles of the assimilationist “Good Black Man” and the dangerous “Bad Black Man”); Rogelio A. Lasso, *Some Potential Casualties of Moving Beyond the Black/White Paradigm to Build Racial Coalitions*, 12 WASH. & LEE J. C.R. & SOC. JUST. 81, 82-83 (2005) (noting that he learned as a teenage student that because he was a “foreigner [black Panamanian], [he] was not considered Black . . . [that] [s]ince [he] was from another country, [he] was considered an honorary white”); Onwuachi-Willig & Barnes, *supra* note 70, at 1340-41 n.242 (inquiring whether “the social construction of African or Caribbean identity [may be] something separate and different from that of constructions for blackness as embodied by African Americans”).

74. See McNamee, *supra* note 29, at 10 (referring to such comments by Lani Guinier).

75. Haynie, *supra* note 15, at 47; Brown-Nagin, *supra* note 33, at 1477 (“According to a 2003 report by The Century Foundation, seventy-four percent of students admitted to America’s 146 most competitive colleges in 1995 ‘came from the top quarter of the nation’s social and economic strata.’ Less than ten percent came from the bottom half of the socioeconomic strata, and only three percent from the bottom quartile.”).

dark-skinned Blacks.⁷⁶ For example, studies have shown that “[f]or every 72 cents a dark-skinned Black [makes], a light-skinned Black earn[s] a dollar.”⁷⁷ Additionally, in the early 1900s, many historically black colleges and universities (“HBCUs”), such as Howard University in Washington, D.C., Hampton University in Virginia, and Spelman College in Georgia, catered primarily to light-skinned Blacks and required their applicants to allegedly pass a color test—a paper bag test⁷⁸—to earn admission.⁷⁹ In fact, as recently as 1916, approximately eighty percent of the student body at these schools, which were essentially the only institutions open to Blacks at the time, were light-skinned or of multiracial ancestry.⁸⁰ Consequently, in light of past color discrimination at HBCUs and the ways in which colorism has influenced and continues to influence marital choices by people of African descent,⁸¹ light-skinned Blacks, many of whom are multiracial, are more likely than their dark-skinned counterparts to come from college-educated and socioeconomically privileged homes, exactly the kind of homes that are most likely to send children to elite institutions of higher education. Additionally, given recent statistics that show that black men, black women, and white men are all more likely to marry interracially if they possess a college degree,⁸² mixed-

76. See KATHY RUSSELL ET AL., *COLOR COMPLEX: THE POLITICS OF SKIN COLOR AMONG AFRICAN AMERICANS* 38, 77 (1992) (noting that light-skinned Blacks fare better educationally and economically than dark-skinned Blacks); see also *supra* notes 45-46 and accompanying text (discussing various studies that reveal color bias).

77. RUSSELL ET AL., *supra* note 76, at 38; see also Kimberly Jade Norwood, *The Virulence of BlackThink and How Its Threat of Ostracism Threatens Those Not Deemed Black Enough*, 93 KY. L.J. 143, 170 n.75 (2004/2005) (“W.E.B. DuBois’ ‘Talented Tenth,’ who would serve and guide the masses, was composed—with one exception—of light-skinned mulattoes. We see the same results a century later. Light-skinned Blacks are better educated, earn more money, have better jobs and careers, and have greater opportunities for achievement and success than their darker brothers and sisters.”).

78. To pass the paper bag test, one had to be lighter than the color of a paper bag. See Leonard M. Baynes, *Blinded by the Light, But Now I See*, 20 W. NEW ENG. L. REV. 491, 492 (1998).

79. See RUSSELL ET AL., *supra* note 76, at 28 (“At some of the most prestigious of the schools, including Spelman, applicants were allegedly required to pass a color test before being admitted.”).

80. See RUSSELL ET AL., *supra* note 76, at 28-29 (“Many academic administrators considered it a waste of time to train dark-skinned Negroes for paths in life that would be closed to them. . . . Denied a liberal arts education, dark-skinned students began turning to schools like Tuskegee Institute of Alabama, founded in 1881 by Booker T. Washington.”); see also Mikyong Minsun Kim, *Historically Black vs. White Institutions: Academic Development Among Black Students*, 25 REV. HIGHER EDUC. 385, 386 (2002) (“Until the U.S. Supreme Court’s landmark *Brown v. Board of Education* decision in 1954 . . . over 90% of African American college graduates were educated by historically Black institutions.”).

81. See RUSSELL ET AL., *supra* note 76, at 107-23 (discussing the color complex in “dating and mating”). See generally Jones, *supra* note 43.

82. See *supra* note 42; see also RUSSELL ET AL., *supra* note 76, at 107-23 (discussing the color complex in “dating and mating”).

race individuals of African descent are also more likely today to possess the background qualities that tend to open doors to elite universities, again such as parents with college degrees or households with more economic resources.

Like mixed-race individuals, first- and second-generation Blacks, especially those of British Caribbean descent, also tend to possess an advantage over legacy Blacks in the admission process due to higher education and incomes. Generally speaking, because of past immigration laws that favored educated and highly skilled black immigrants,⁸³ first- and second-generation Blacks are more likely than legacy Blacks to come from families with higher incomes and educational backgrounds and to have parents who are employed in professions.⁸⁴ For example, in her study of Harvard College, Haynie found that 29.09 percent of the fathers of first- and second-generation Caribbean students had a college degree as compared to 14.86 percent of the fathers of African-American students and 9.09 percent of the fathers of first- and second-generation African students.⁸⁵ Furthermore, despite finding that a greater percentage of fathers of African-American students possessed graduate or professional degrees (45.95 percent) than the fathers of black Caribbean students (41.82 percent), Haynie discovered that the children of African fathers at Harvard were the most likely to possess graduate or professional degrees at 90.91 percent.⁸⁶ With respect to professions, Haynie

83. See *supra* note 38 and accompanying text (noting how immigration laws favored minority immigrants who were educated).

84. See F. Nii-Amoo Dodoo, *Assimilation Differences Among Africans in America*, 76 SOC. FORCES 527, 527-28 (1997) (noting the British Caribbean occupational advantage over native black Americans). See generally Barry R. Chiswick, *Sons of Immigrants: Are They at an Earnings Disadvantage?*, 67 AM. ECON. REV. 376 (1977). At the same time, scholars have found that either this income gap between black Caribbeans and African-Americans is closing or does not exist. See Kalmijn, *supra* note 23, at 912, 928 (noting that the gap between Caribbean and African-Americans has narrowed, is limited to the British Caribbean, and "the British advantage is limited to the occupational domain and is not as spectacular in magnitude as is commonly believed"); Kristin F. Butcher, *Black Immigrants to the United States: A Comparison with Native Blacks and Other Immigrants*, 47 INDUS. & LAB. REL. REV. 265 (1994) (finding that Caribbean immigrants were more likely to be employed in professional or managerial positions but finding no differences in earnings); Suzanne Model, *Caribbean Immigrants: A Black Success Story?*, 25 INT'L MIGRATION REV. 248, 248 (1991) (same).

85. Haynie, *supra* note 15, at 48 tbl.5; see also Massey et al., *supra* note 19, at 256 (reporting similar statistics in which "70 percent of the fathers [of black freshmen of immigrant origins] were college graduates, and 44 percent held advanced degrees, compared with figures of 55 percent and 25 percent among natives").

86. Haynie, *supra* note 15, at 48 tbl.5. A study in 1997 found that African immigrants are the nation's most highly educated group. In terms of education, they outperformed all immigrant groups, including those immigrants from Europe, Canada, and Asia and even white Americans. The study revealed that 48.9 percent of all African immigrants who lived in the United States had a bachelor's degree, either from the United States or outside of the United States. This number was compared to 44.6 percent of Asian immigrants, 24.6 percent of white Americans,

discovered that only 65.67 percent of fathers of African-American students were occupied in managerial, administrative, professional, or paraprofessional occupations as opposed to 76.47 percent of Caribbean fathers and 100 percent of African fathers.⁸⁷ “[P]arents who are highly-educated and have greater knowledge or access to knowledge about good schools and educational opportunities, are more likely [to have children who] achieve academically high standards.”⁸⁸ Thus, in light of the higher educational and occupational attainment of the parents of first- and second-generation students in Haynie’s study and in other studies, it must follow that first- and second-generation Blacks generally have a greater chance than legacy Blacks of being admitted into and enrolling into programs at elite colleges and universities.⁸⁹

Second, along with both higher education and income, first- and second-generation Blacks may also possess advantages relating to their immigrant status that can enable them to succeed in schools at greater rates than legacy Blacks and thus develop the records that generally earn admission to elite colleges and universities. For example, the late Professor John Ogbu has explained that, unlike involuntary immigrants such as legacy Blacks, voluntary immigrant Blacks, which may include many first- and second-generation

and 13.3 percent of African-Americans. *See African Immigrants in the United States Are the Nation’s Most Highly Educated Group*, 26 J. BLACKS IN HIGHER EDUC. 60, 60 (1999-2000) [hereinafter *African Immigrants*] (noting that there were no definite statistics regarding how many of these African immigrants were white, but estimating that “70 to 75 percent of the African immigrants to the United States are black”); *see also* DAVID M. REIMERS, OTHER IMMIGRANTS: THE GLOBAL ORIGINS OF THE AMERICAN PEOPLE 246 (2005) (stating that the 1990 census revealed that eighty-eight percent of African immigrants finished high school and nearly half had a college degree). The study also found, however, that despite higher levels of education, African immigrants earn significantly less than other racial and ethnic groups. For example, Asian immigrants had a median household income that was thirty-seven percent higher than that of African immigrants, and white Americans had a median household income that was thirty-six percent higher than that of African immigrants. *Id.* at 60-61; Dodoo, *supra* note 84, at 533-41 (revealing the results of his research that showed that “African immigrants, despite their high levels of schooling, are rewarded least for their college education”); Hersch, *supra* note 46, at 5 (“This paper demonstrates that post-1965 immigrants have an additional source of disadvantage: personal characteristics such as darker skin color and shorter stature that may be stigmatized in the U.S. labor market.”); *see also infra* Part II.B (detailing why the relative advantages in education by first- and second-generation Blacks may not warrant their exclusion from affirmative-action programs, especially when they, immigrant Blacks, are disadvantaged when compared to Whites and do not receive the same rewards for their education).

87. Haynie, *supra* note 15, at 48 tbl.6; *see also* Malcolm Gladwell, *Black Like Them*, NEW YORKER, Apr. 29, 1996, available at http://www.gladwell.com/1996/1996_04_29_a_black.htm (describing the phenomenon in which West Indians in New York make more money than American Blacks). *But see* Massey et al., *supra* note 19, at 256 (stating that “[w]ith the exception of parental education, none of the measures of socioeconomic background [employment rates, income, and wealth] differ by immigrant status”).

88. Massey et al., *supra* note 19, at 256.

89. Haynie, *supra* note 15, at 47.

individuals, generally are able to take significant advantage of educational opportunities before them, because they have not formed an oppositional culture in which one rejects characteristics that are deemed “white” as a means of resistance.⁹⁰ According to the theory of oppositional culture, involuntary immigrants view participation in the dominant culture as a threat to their identity; consequently, rather than viewing conformity that can lead to traditional success as a laudable goal, involuntary immigrants may view such culturally accepted conduct as a betrayal to their racial group.⁹¹ For example, among high school students, black students in integrated environments who perform well academically, use standard English, or have primarily white friends may often be referred to by their peers as “acting white” or as “Oreos.”⁹² On the other hand, voluntary immigrants are likely to view cultural differences from the dominant white racial group as mere obstacles that they must overcome, not practices they must resist.⁹³ To that end, first- and second-generation Blacks are more likely to believe that it is possible to achieve the

90. John U. Ogbu & Herbert D. Simons, *Voluntary and Involuntary Minorities: A Cultural-Ecological Theory of School Performance with Some Implications for Education*, 29 ANTHROPOLOGY & EDUC. Q. 155, 155-88 (1998); John U. Ogbu, *Understanding Cultural Diversity and Learning*, 21 CULTURAL RESEARCHER 5, 5-14 (1992); see also Kimberly Jade Norwood, *BlackThink's 'Acting White' Stigma in Education & How It Fosters Academic Paralysis in Black Youth*, 50 HOW. L.J. (forthcoming 2007) (manuscript at 18-19, 26-31, on file with author) (discussing how high academic performance may be perceived by some peers as “acting white”); Rong & Brown, *supra* note 23, at 540 (analyzing Ogbu’s theories); cf. CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS 129 (1992) (“In order to become fully assimilated into white America blacks must to some extent identify with people who have humiliated and oppressed them for three hundred years. Under these circumstances ‘assimilation’ is likely to be extraordinarily difficult.”). *But see* Massey et al., *supra* note 19, at 263, 268 (maintaining that “for black students placed in elite schools, susceptibility to peer influence turned out to be a good thing”); see also *infra* note 92 (citing to critiques of Ogbu’s theory of oppositional culture).

91. See also MASSEY ET AL., *supra* note 17, at 8 (describing Ogbu’s theories); Rong & Brown, *supra* note 23, at 540 (same).

92. MASSEY ET AL., *supra* note 17, at 8; Ogbu, *supra* note 90, at 5-14. An “Oreo” is defined as one who is black on the outside but white on the inside. See Norwood, *supra* note 77, at 148 n.10. Ogbu’s theories are highly contested. See PRUDENCE L. CARTER, KEEPIN’ IT REAL: SCHOOL SUCCESS BEYOND BLACK AND WHITE 53, 58 (2005) (explaining that “resistance to ‘acting white’ for many African American students is about maintaining cultural identity, not about embracing or rejecting the dominant standards of achievement”); THERESA PERRY, CLAUDE STEELE, & ASA G. HILLIARD III, YOUNG, GIFTED, AND BLACK: PROMOTING HIGH ACHIEVEMENT AMONG AFRICAN-AMERICAN STUDENTS 62-63 (2003) [hereinafter YOUNG, GIFTED, AND BLACK] (critiquing Ogbu’s theories). Some critics point to the successes of Caribbean Blacks to contend that the situation of many African-Americans is a result of black American culture, not racism. However, as indicated by the experience of second- and third-generation black Caribbeans and Africans in Canada, who have the same status in Canada as legacy Blacks have in the United States, and of the second-generation of black West Indians in the United States, much more is at work here than culture; racism plays a big role. See *infra* Part II and notes 187, 199-201 and accompanying text.

93. MASSEY ET AL., *supra* note 17, at 8.

American dream if they work hard enough. Indeed, instead of comparing themselves to members of the dominant culture in terms of advantage and disadvantage, voluntary immigrants tend to compare themselves to the citizens in their own countries of origin. As a result, voluntary immigrants often view themselves as more privileged than their compatriots in their home countries.⁹⁴ On the other hand, legacy Blacks, many of whom view discrimination and subordination as a permanent part of American society, generally do not share this optimism of the newly arrived and feel deeply oppressed by the dominant racial group in the United States.⁹⁵ In sum, combined with a freedom from “oppositional culture” and a world perspective that enables them to see themselves as more privileged in the United States than they would be in their own home countries, first- and second-generation Blacks may not be burdened as much as legacy Blacks by psychological worries and baggage that not only may affect school performance but also may influence critical attitudes about assimilation and work.

Third, first- and second-generation Blacks—in particular, second-generation Blacks—may possess an advantage over legacy Blacks in terms of their approach to achieving traditional standards of success in schools and within the workplace. Many first- and second-generation Blacks take the general approach of viewing each opportunity in the United States as one that cannot be wasted because of sacrifices that were made to come to the country. Specifically, because of the sacrifices that their parents made to immigrate to the United States (especially if the immigration was for economic reasons),⁹⁶ many second-generation Blacks are exceptionally motivated to perform well by traditional standards in order to ensure that their parents’ sacrifices were not in vain.⁹⁷ This motivation by first- and second-generation Blacks to fulfill the American dream of greater economic success, coupled with the higher skill levels and abilities of the first- generation adults that may have enabled them to

94. *Id.*; see also Garcia, *supra* note 41, at 123 (“West Indians . . . see life in the United States as better than in their homeland.”).

95. Gladwell, *supra* note 87; see also Inniss, *supra* note 49, at 123 (asserting that West Indians’ “hopefulness . . . fueled a move into the middle class”).

96. See Suzanne Model, *West Indian Prosperity: Fact or Fiction?*, 42 SOC. PROBS. 535, 538 (1995) (“Another qualification to traditional selectivity is that achievement motivation is less marked in persons who relocate for non-economic reasons, such as to escape political oppression or to reunite family members.”). Many second-generation Blacks grow up with an awareness of the sacrifices their parents made to leave their home countries and seek a better education and standard of living in the United States. See Chacko, *supra* note 23, at 500 (describing how cultural continuity is transmitted from the first to the second generation).

97. Haynie, *supra* note 15, at 50-51; Model, *supra* note 96, at 538.

migrate to the United States,⁹⁸ can make for a very powerful formula for high academic and career achievement. In other words, not only do first- and second-generation Blacks arrive in the United States with an immense drive to succeed by traditional standards but also usually with the educational and job skills that can enable that success. In fact, some have likened the successes of the children of black immigrant parents to the successes of those children of African-Americans who migrated from the South to the North during the early 1900s to the 1960s, a group that tended to have the skills and education that enabled a better transition to the North.⁹⁹

Fourth, many first- and second-generation black Americans, especially first-generation Blacks, have had an advantage over African-Americans in terms of being exposed to same-race role models. Exposure to same-race role models is a distinct advantage because the availability of role models can critically affect the success rates of

98. See Hing, *supra* note 38, at 240-42; see also *supra* note 39 and accompanying text. Bill Hing has written the following about the disproportionate percentage of Africans who have entered the United States under an occupational preference:

Of the 7614 Africans who immigrated in 1990 in other relative and occupational categories subject to quotas, thirty percent entered in an occupational preference. By way of comparison, the total quota immigrants from Mexico, 19,986, mainland China, 19,795, the Philippines, 19,588, India, 19,157, Korea, 18,624, and Vietnam, 8829, each outnumbered the sum of quota immigrants from the entire continent of Africa. The highest proportion of occupational visas in any of those countries was 17.1 percent for Korea. Mexico was under ten percent.

Hing, *supra* note 38, at 242; see also Kalmijn, *supra* note 23, at 914; *Roots*, *supra* note 32, at 70 (quoting sociologist Mary Waters as stating that “[a]n immigrant population will do better as compared with a native population, because with immigrants, you have a selected group”). As my colleague David Baldus wisely pointed out, the distinction between voluntary and involuntary immigrants also applies to white Americans and African-Americans or legacy Blacks. He asserted,

[T]he voluntary and involuntary immigrant theme . . . relates to a distinction I have always drawn between what appears to have been a random involuntary sample of an entire population, which slavery represented, and the voluntary self selected sample of European immigrants. Given the energy and resourcefulness it took to be a voluntary immigrant, it should come as no surprise that over time, the descendents of European immigrants might, on average, out perform the descendents of African slaves at some levels.

E-mail from David C. Baldus, Joseph B. Tye Professor of Law, University of Iowa College of Law, to Angela Onwuachi-Willig, Associate Professor of Law, University of Iowa College of Law (June 11, 2007, 6:48 P.M. CST).

99. Page, *supra* note 49, at B7 (“That immigrant optimism is not unknown to black folks born right here in the USA. Many of us saw it drive our parents or grandparents in their desperate migrations from the rural South to the urban industrial North during the last century.”); M. Patricia Fernandez-Kelly & Richard Schaufler, *Divided Fates: Immigrant Children in a Restructured U.S. Economy*, 28 INT’L MIGRATION REV. 662 (1994) (noting that during the first half of the twentieth century, African-American migrants from the North to South “shared commonalities in profile and expectations with migrants from lands afar”); see also Model, *supra* note 96, at 538 (referring to studies that show that “southern-born African Americans residing in the North had higher incomes and lower rates of unemployment and welfare dependency than the northern born”).

young individuals. As some scholars have explained, young children from socially disadvantaged groups are more likely to have low career aspirations because they do not often see people who look like them and share their background in positions of high achievement.¹⁰⁰ In this respect, first- and second-generation Blacks have an advantage over legacy Blacks because they generally come from majority black countries and have seen in their home countries firsthand examples of high black achievement.¹⁰¹ In essence, to the extent that first- and second-generation Blacks have or have had visible models of success before them—and legacy Blacks have not—first- and second-generation black students should be in a better position to convince themselves that educational and occupational success in the United States is attainable.¹⁰² For example, one Jamaican immigrant who worked as a teacher explained the following about the differences she sees between West Indians and African-Americans and the importance of seeing black leaders as a young child:

I grew up seeing blacks in charge; that was my experience so I expect to be in charge. That's my frame of reference. American blacks, because of what was done to them they don't quite see it like that. Those who see it like that are those who have escaped and have been educated, but even though they have been educated, something was done to them. . . .¹⁰³

As shown through this Jamaican woman's words, then, access to same-race role models presents a benefit to first- and second-generation Blacks not only because such models can show a person what he or she can become, but also because such models can create an expectation in a person that he or she will achieve the same standard of success.

100. See Angela Onwuachi-Willig, *supra* note 4, at 157-58; see also Brest & Oshige, *supra* note 4, at 869 (stating that young members of an intractably disadvantaged group often come to believe that "regardless of their efforts, group members simply cannot succeed"); Sarah Stroud, *The Aim of Affirmative Action*, 25 SOC. THEORY & PRAC. 385, 386-92 (1999) (arguing that affirmative action can "expand people's sense of what is possible for them, so that they can subject the full range of options to the kind of individualized scrutiny that is appropriate to career decisions and goals"). Prior to the Civil Rights era, the problem of role modeling was not as dramatic because residential segregation ensured that poor black Americans also lived next to middle-class and upper-class black Americans, resulting in the availability of role models for poor as well as privileged black children within their own communities. See Olati Johnson, Book Note, *Integrating the "Underclass": Confronting America's Enduring Apartheid*, 47 STAN. L. REV. 787, 807-08 (1995) (reviewing DOUGLAS A. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1995)).

101. Kalmijn, *supra* note 23, at 914; Rong & Brown, *supra* note 23, at 555-56; Mary C. Waters, *The Role of Lineage in Identity Formation Among Black Americans*, 14 QUALITATIVE SOC. 57, 69-73 (1991).

102. See Brest & Oshige, *supra* note 4, at 869 (describing the importance of same-race role models); Stroud, *supra* note 100, at 386-92 (same).

103. MARY C. WATERS, *BLACK IDENTITIES: WEST INDIAN IMMIGRANT DREAMS AND AMERICAN REALITIES* 71 (1999).

Fifth, findings from studies suggest that mixed-race students and first- and second-generation Blacks may be better positioned to be admitted to and survive elite college and university environments because of the relative ease (compared to legacy Blacks) with which they can integrate and assimilate into white circles. As an initial matter, the residential patterns of first- and second-generation Blacks make it easier for them to interact with Whites both in schools and in the workplace. On average, first- and second-generation Blacks grow up in less segregated residential areas than legacy Blacks.¹⁰⁴ Specifically, cross-racial, social interactions occur more frequently for first- and second-generation Africans, who are “typically locat[ed] in areas where nearly 50 percent of residents are white.”¹⁰⁵ The same relative ease of social integration applies equally for mixed-race students, whose parents because of their interraciality, especially black-white couples, are more likely to seek out and live in integrated neighborhoods.¹⁰⁶ Additionally, in her study of black Harvard College students, Haynie discovered that first- and second-generation black students were generally better positioned to adjust to predominantly white environments because they tended to “associate[] with a more diverse group of friends in high school than black Americans” and thus were less likely to find interactions across racial lines to be foreign and alienating on campus.¹⁰⁷ Furthermore, as Haynie revealed

104. Massey et al., *supra* note 19, at 258.

105. See *id.* at 246. First- and second-generation West Indians and African-Americans tend to live in more segregated environments than do first- and second-generation Africans. *Id.*

106. HEATHER M. DALMAGE, TRIPPING ON THE COLOR LINE: BLACK-WHITE MULTIRACIAL FAMILIES IN A RACIALLY DIVIDED WORLD 95 (2000) (asserting that black-white mixed-race families “desire racially mixed neighborhoods because there they can have a sense of safety and comfort and not face repeated acts of border patrolling and racism”); Steven R. Holloway et al., *Partnering ‘Out’ and Fitting In: Residential Segregation and the Neighbourhood Contexts of Mixed-Race Households*, 11 POPULATION, SPACE & PLACE 299, 319-20 (2005) (“All mixed-race household types are more likely to live in diverse neighbourhood settings than same-race households. . . . [M]ixed-race households tend to experience higher levels of neighbourhood racial diversity than white same-race households, but lower levels than non-white same-race households. *Black-white pairings are an exception—they live in more diverse neighbourhoods than the black population in general.*” (emphasis added)); Barbara Pement, *Mixed Messages: Get Personal About Interracial Marriage*, CORNERSTONEMAG.COM, at <http://www.cornerstonemag.com/features/iss111/mixed.htm> (referring to a black-white couple, which indicated that it was important to them that there was “some ethnic diversity among inhabitants” in their neighborhood). These articles resonate with my own personal experience. As an interracial couple, my husband and I, where possible, seek out diverse neighborhoods in which to live. Indeed, a search on informational websites about cities is certain to reveal questions from interracial couples asking about the diversity of an area and openness to interracial couples. See, e.g., *Philly for Interracial Couples?*, Feb. 26, 2007, at <http://www.citay-data.com/forum/philadelphia/48988-philly-interracial-couples-2.html>.

107. Haynie, *supra* note 15, at 44; see also Chacko, *supra* note 23, at 500 (describing the same diversity of friends among youth of recent Ethiopian descent in the United States); Massey et al., *supra* note 19, at 261 (noting that first- and second-generation Blacks have a more

in her study, many first- and second-generation Blacks had participated in high school preparatory programs or attended private schools, where they were more likely to be in the minority and thus were able to develop some comforts with socializing and working with white students during high school.¹⁰⁸ Finally, as Haynie noted about mixed-race students on campus, having one white parent in the family certainly made it more likely that mixed-race students of black-white heritage would also feel comfortable interacting with white students and students of other non-black ethnic groups.¹⁰⁹ Indeed, as one author noted, “[b]ecause of the rarity of their circumstance, it can be inferred that interracial contact is a normative experience for interracial families and their biracial offspring.”¹¹⁰ Overall, this type of familiarity with students of diverse cultures by mixed-race students and first- and second-generation Blacks may enable these groups to prepare college applications that are perceived by majority reviewers to be “more ‘likable’” and “less hostile” than those of legacy Blacks. As researchers from Princeton University and the University of Pennsylvania have highlighted, studies show that Whites experience “greater comfort level” when interacting with first- and second-generation Blacks as opposed to African-Americans, and “[s]uch subjective evaluations are likely to reflect unconscious stereotyping as well as actual differences in behavior” during the admissions process.¹¹¹ Overall, factors such as living in integrated neighborhoods, attending integrated schools and programs, and having a diverse group of friends in high school may present an advantage for mixed-race individuals and first- and second-generation Blacks because they allow for greater familiarity with integrated environments and allow for the opportunity of an easier transition for these students in predominantly white college environments, which studies have repeatedly shown can be alienating for students of color.¹¹²

heterogeneous group of friends); cf. Chalsa M. Loo & Gary Rolison, *Alienation of Ethnic Minority Students at a Predominantly White University*, 57 J. HIGHER EDUC. 58, 65-72 (1986) (reporting their findings “that the sociocultural alienation of minority students in a predominantly white university is greater than that of white students and that feelings of cultural domination and ethnic isolation are the forms in which this alienation is experienced”).

108. Haynie, *supra* note 15, at 46.

109. *Id.* at 44.

110. KERRY ANN ROCKQUEMORE & DAVID L. BRUNSMAN, *BEYOND BLACK: BIRACIAL IDENTITY IN AMERICA* 60 (2002).

111. Massey et al., *supra* note 19, at 252.

112. See, e.g., Walter R. Allen & Daniel Solorzano, *Affirmative Action, Educational Equity and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 LA RAZA L.J. 237, 275-303 (2001) (describing how the findings of one such study supports this conclusion). See generally Richard D. Shingles, *College as a Source of Black Alienation*, 9 J. BLACK STUDS. 267 (1979) (listing the results of several studies); Brian D. Smedley et al., *Minority-Status*

Sixth, mixed-race students and first- and second-generation Blacks may have an edge over legacy Blacks in how they are treated by and accepted by Whites in social, educational, and work environments. Numerous studies suggest that light-skinned Blacks, of whom many may be mixed-race, are viewed more favorably on the job market and in the workplace.¹¹³ For example, one study indicated that dark-skinned Blacks generally experience more discrimination than light-skinned blacks; specifically, it revealed that dark-skinned Blacks were eleven times more likely to experience frequent racial discrimination than light skinned Blacks.¹¹⁴ Similarly, studies indicate that Whites generally perceive first- and second-generation Blacks, in particular those of black Caribbean descent, more favorably than legacy Blacks; accordingly, first- and second-generation Blacks arguably do not suffer the same racial stigma and disadvantage that the descendants have endured for generations.¹¹⁵ For example, past research has shown that, in the employment context, immigrant Blacks are identified as the “good Blacks” or the “model black minority”¹¹⁶ when compared to legacy Blacks.¹¹⁷ In particular, West

Stresses and the College Adjustment of Ethnic Minority Freshmen, 64 J. HIGHER EDUC. 434, 434-49 (1993) (describing how the findings of one such study support this conclusion).

113. See *supra* notes 43-45 and accompanying text.

114. Elizabeth A. Klonoff & Hope Landrine, *Is Skin Color a Marker for Racial Discrimination?: Explaining the Skin Color-Hypertension Relationship*, 23 J. BEHAV. MED. 329, 336 (2000).

115. Inniss, *supra* note 49, at 125 (referring to this phenomenon as the “Colin Powell Syndrome”). Professor Lani Guinier has claimed that “[t]hose from abroad ‘have a different understanding of what it means to be black’” and “they are less vulnerable to being viewed through the lens of a negative stereotype.” *Roots*, *supra* note 32, at 70. Nathan Hare, founder of the very first ethnic studies program, which was at San Francisco State University, proclaimed:

I have nothing against immigrants, but there are sociological realities we have to look at. . . . They don’t have the stereotypes of them being lazy and so on. . . . We [African-Americans] are the ex-slaves and inhabitants of the slums. They (immigrants) are coming in without that (baggage).

Johnson, *supra* note 11, at A1.

116. The term “model minority” is usually used in reference to Asian Americans. “The model minority stereotype posits Asian-Americans as uniquely successful among minority groups. They work hard, save money, and achieve material success, while their children study equally hard and earn high marks in school.” Jean Shin, *The Asian American Closet*, 11 ASIAN L.J. 1, 3 (2004); see also Frank H. Wu, *Changing America, Three Arguments About Asian Americans and the Law*, 45 AM. U. L. REV. 811, 813-14 (1996) (challenging the myth of the model minority). The model minority myth can be very damaging to those people of color who fall both within it and outside of it. As Professor Berta Esperanza Hernández-Truyol explained about the negative effects of this myth on some Asian Americans, Blacks, and Latina/os:

Asians generally are given this model minority label that has been used to create a wedge between Asian communities and other communities of color—Black and Latina/o. The affirmative action debate suggests that Asians will be harmed by being denied jobs or admission to schools so as to accept other “less qualified” minorities. That divisive label, thinly veiled as a compliment, also has been used to refer to Cubans with the unsavory consequences of creating a wedge between Cubans, on the one hand, and other Latinas/os and Blacks on the other. Such “model minority”

Indian immigrants are often described by employers who hire a significant number of black workers as hard-working and reliable.¹¹⁸ For example, in comparing West Indian Blacks to African-Americans, one white manager explained what he saw as the differences between the two groups:

They [West Indians] tend to shy away from doing all of the illegal things because they have such strict rules down in their countries and jails. And they're nothing like here [African-Americans]. So like, they're really paranoid to do something wrong. They seem to be very, very conscious of it. No matter what they have to do, if they have to try and work three jobs, they do. They won't go into drugs or anything like that.¹¹⁹

In fact, the tale of Caribbean success is so widely accepted as a story of the model black minority that the successes of first- and second-generation Blacks are often used to blame legacy Blacks for any educational and occupational failures.¹²⁰ Specifically, commentators point to Caribbean success as proof that it is not racism, but instead African-American culture, that is to blame for the plight of legacy Blacks in this country.¹²¹ As one author astutely noted, "The implication is that the key factor in understanding racial prejudice is not the behavior and attitudes of whites but the behavior and attitudes of blacks—not white discrimination but black

labeling has the negative and deleterious effects of denying the reality of discrimination against Asian/Pacific Americans and Cubans and simultaneously legitimizing the oppression of other persons of color. For example, the myth detracts attention from segments of the Asian community that have serious economic and educational disadvantages, like the Hmong peoples. Moreover, this divisiveness allows the race-conscious normativos/as to claim a type of moral high ground by wrapping their nativist sentiments in the blanket of Asian/Pacific American and Cuban worries and concerns. This also hurts other communities of color who are "blamed" for their own impoverishment—economic, educational, and moral, for their lack of skills attainment, and for not being as successful as others. This situation, of course, translates to some communities not being hard-working enough, or not intelligent enough, or not trying hard enough, or some other mythical pretext that becomes transmogrified into the master narrative's (and popular culture's) incontrovertible, factual truth.

Berta Esperanza Hernández-Truyol, *Building Bridges III—Personal Narratives, Incoherent Paradigms, and Plural Citizens*, 19 CHICANO-LATINO L. REV. 303, 327-28 (1998); see also Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243, 1264 (1993) ("In addition to hurting Asian Americans, the model minority myth works a dual harm by hurting other racial minorities and poor whites who are blamed for not being successful like Asian Americans.").

117. WATERS, *supra* note 103, at 116-23.

118. Model, *supra* note 96, at 537.

119. Gladwell, *supra* note 87 (citing a study by Professor Mary Waters of Harvard University).

120. *Id.* ("The example of West Indians as 'good' blacks makes the old blanket prejudice against American blacks all the easier to express."); Thomas Sowell, *Three Black Histories*, in *ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS* 7, 49 (Thomas Sowell ed., 1978) (arguing that the relative success of Caribbeans in the United States "undermines the explanatory power of current white discrimination as a cause of current black poverty").

121. Sowell, *supra* note 120, at 43-49.

culture.”¹²² To the extent that Whites view mixed-race individuals and first- and second-generation Blacks as “good Blacks,” and not “bad Blacks,” they may receive better treatment than legacy Blacks in the public generally and in private environments such as elite private universities. In this sense, these two disproportionately represented groups of blacks students arguably gain the added, intangible benefit of feeling more included in the dominant society when they are in their communities and schools—that is, relative to legacy Blacks.

Finally, to the extent that there are positive stereotypes about black immigrants and mixed-race people, such perceptions may transform into psychological benefits that enable a certain kind of psychic freedom from the racial stigma and disadvantage that legacy Blacks may have a harder time obtaining because of pervasive, negative stereotypes about African-Americans. In fact, some first- and second-generation Blacks work hard to ensure that distinctions are made between them and legacy Blacks in order to avoid the full stigma and disadvantages of American blackness.¹²³ For example, one woman of Jamaican descent, who believed that Whites would treat her better if they knew that she was not a native black American, had her mother teach her a Jamaican accent to use when she applied for jobs or places of residence.¹²⁴ In short, what may be a greater freedom from racial stigma and disadvantage is another benefit that first- and

122. Gladwell, *supra* note 87.

123. WATERS, *supra* note 103, at 5, 64-76; see Gladwell, *supra* note 87 (“Their advantage depends on their remaining outsiders, on remaining unfamiliar, on being distinct by custom, culture, and language from the American blacks they would otherwise resemble.”); see also Fernandez-Kelly & Schaufler, *supra* note 99, at 675 (noting that the success of study subjects, including second-generation black students with roots in Haiti, was “rooted in deliberate attempts [by the students] to disassociate themselves from the stigma imposed upon black populations in the United States through an affirmation of their national identity and their religious fervor”).

Malcolm Gladwell has explained that “West Indians cannot escape the fact that their success has come, to some extent, at the expense of American blacks, and that as they have noisily differentiated themselves from African-Americans—promoting the stereotype of themselves as the good blacks—they have made it easier for whites to join in.” Gladwell, *supra* note 87; see also Chacko, *supra* note 23, at 494 (noting that “[f]irst-generation Black immigrants overwhelmingly emphasized their ethnic identities and national origins, underplaying the more generic identification as Black”); Fernandez-Kelly & Schaufler, *supra* note 99, at 682 (noting the same actions among Nicaraguan students who hold fast to their separate immigrant collective identity in order to protect themselves from negative stereotypes of other Latina/o groups). As Professor Mary Waters of Harvard University asserted, in some instances, it is immigrant Blacks who “voice some of the worst stereotypes and negative perceptions of American blacks imaginable.” Waters, *supra* note 101, at 69; see also WATERS, *supra* note 103, at 64-76 (quoting a series of negative comments about African-Americans by West Indians in New York).

124. Waters, *supra* note 101, at 70; see also Dodoo, *supra* note 84, at 531 (noting that “there is evidence that black immigrants emphasize their foreign origins because they perceive that it conveys an advantage”).

second-generation Blacks may use to gain acceptance to and succeed in schools at greater rates than legacy Blacks.

Related to the comparatively greater freedom from racial stigmas and burdens upon legacy Blacks, first- and second-generation Blacks may also find themselves able to escape the negative consequences of proven psychological burdens for African-Americans such as stereotype threat. According to Professor Claude Steele, black students' fear that poor performances will confirm negative racial stereotypes undermines the actual performance of black students on standardized tests and in school.¹²⁵ Specifically, Professor Steele discovered from his research that black students, although comparable in ability to their white counterparts, performed worse on examinations when they were told specifically that their ability was being tested; on the other hand, when Professor Steele tested a different group of comparable black and white students and told them that the test was not a test of ability but was a problem-solving task, the African-American students' performance matched that of their white counterparts.¹²⁶ Professor Lani Guinier contends that "many first- and second-generation immigrants of color test well because they retain a national identity free of America's racial caste system and enjoy material and cultural advantages, including professional or well-educated parents."¹²⁷ In other words, she maintains that first- and second-generation Blacks may not suffer the full effects of American stereotypes. In fact, studies show that first-generation West Indian immigrants are much less affected by stereotype threat than legacy Blacks because first-generation students are able to "turn to a positive image of their group in the face of diagnostic pressure and to distance

125. Claude Steele, *Stereotype Threat and African-American Student Achievement*, in YOUNG, GIFTED, AND BLACK, *supra* note 92, at 109-30; Claude Steele, *Expert Report, Reports Submitted on Behalf of the University of Michigan*, 5 MICH. J. RACE & L. 439, 440, 444-46 (1999) [hereinafter *Expert*].

126. See Steele, *Expert*, *supra* note 125, at 445, 447 (also noting that "Black students performing a cognitive task under stereotype had elevated blood pressure"); see also *id.* at 114 (reporting that "Blacks performed a full standard deviation lower than Whites under the stereotype threat of the test being 'diagnostic' of their intellectual ability"). By changing the function of the test, Professor Steele "changed the meaning of the situation. It told Black participants that the racial stereotype about their ability was irrelevant to their performance on this particular task." *Id.* at 445; see also *id.* at 117 (describing the same effects of stereotype threat on white male students—who were not expected to have a sense of group inferiority—when they were given a difficult math ability test with a comment that Asian-American students generally performed better than white students on the test).

127. McNamee, *supra* note 29, at 10 (quoting Lani Guinier, *Our Preference for the Privileged*, BOSTON GLOBE, July 9, 2004, at A13); see also Rong & Brown, *supra* note 23, at 556 ("Black immigrants tend to see themselves as immigrants first, and thus may feel their immigrant nationality protects them from many negative stereotypes of Blacks in the United States and helps their children from becoming members of less educationally motivated groups in school" and "reject an undistinguished Black identity.").

themselves more effectively from the negative stereotypes associated with Black performance in the United States,” at the same time, however, these studies show that “[s]econd-generation students show a pattern of performance that is similar to that reported previously for African American students.”¹²⁸ In light of these findings, questions are certainly raised as to how racial preferences that were designed to overcome disadvantages due to race should apply to *first-generation* black students. These questions may even be relevant to mixed-race students of African descent, who from case to case may or may not identify with the group to which the stereotypes are attached, here monoracial African-Americans.

In sum, there are some potentially influential, educational, economic, and even cultural and social differences that exist between legacy and non-legacy Blacks in terms of education, occupation, income, cultural norms and approaches, role modeling, public perception, and effects of psychological burdens.¹²⁹ Keeping these factors in mind, it makes sense to at least question whether colleges and universities should consider the ancestral heritage of black students in their affirmative-action programs¹³⁰ and should evaluate the role that such students’ ethnic heritages may have played or not played in their educational trajectories.

128. Kay Deaux et al., *Becoming American: Stereotype Threat Effects in Black Immigrant Groups* 22, 25-26 (unpublished manuscript, on file with author) (finding that first-generation West Indian immigrants are much less affected by stereotype threat because “first-generation students are more positive in their appraisal, believing others to view West Indians more favorably than do the second-generation students”). Because stereotype threat is “cued by the mere recognition that a negative group stereotype could apply to oneself in a given situation,” it generally has no effect on first-generation Blacks, meaning those who tend not to identify with the stereotype-relevant domain—here, African-Americans. See Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, in PROMISE AND DILEMMA: PERSPECTIVES ON RACIAL DIVERSITY AND HIGHER EDUCATION 101-03 (Eugene Y. Lowe, Jr. ed. 1999). *But see id.* at 114 (noting a similar effect with stereotype threat with West Indians in Great Britain). Kay Deaux, *A Nation of Immigrants: Living Our Legacy*, 62 J. SOC. ISSUES 633, 646 (2006) (reporting that while stereotype threat seemed to have less of an effect on first-generation Blacks, “second-generation [West Indian] students showed a significant performance decrement” when “the test stressed academic ability and presumably made stereotypes salient”).

129. *Cf.* Massey et al., *supra* note 19, at 262 (noting that “differences . . . detected between black freshmen of immigrant and native origins have been few and relatively modest”).

130. Some schools already consider the ethnic backgrounds of student applicants, but those schools consider such background for only Asian-American and Latina/o students. For example, the University of Washington-Seattle asks for ancestral background information related to nine different Latina/o ethnicities, fifteen different Asian ethnicities, and nine different Pacific Islander ethnicities.

II. UNPACKING THE MYTHS OF THE MODEL BLACK MINORITY

While colleges and universities should consider restructuring their affirmative action and admissions programs in ways that will reach out to more legacy Blacks, they also must be careful not to organize their programs to exclude first- and second-generation Blacks and mixed-race students because such exclusion could actually undermine the goals of affirmative action.¹³¹ In other words, efforts to ensure that more legacy Blacks find their way to elite institutions should not transform, change, or push us away from the full ambit of goals of affirmative action. This Part of the Article will demonstrate that, when viewed through a race, class, and discrimination lens, the participation of first- and second-generation Blacks and mixed-race students in affirmative-action programs furthers both the diversity and social justice rationales of the policy. After all, as Professors Massey, Mooney, Torres, and Charles have noted, “the differences . . . detected between black freshmen of immigrant and native origins have been few and relatively modest.”¹³² Part II.A discusses the manner in which the inclusion of first- and second-generation Blacks and mixed-race students furthers the interest of diversity in higher education, and Part II.B addresses how such inclusion also enhances the social justice goals of affirmative action. Lastly, Part II.C explains why the objective of maintaining first- and second-generation Blacks as part of schools’ affirmative-action programs is consistent with affirmative-action ambitions for other racial minority groups, such as Latina/os and Asians in the United States, groups for whom recent immigrants are among the least advantaged in terms of schooling and education.

131. While discussing policy implications of her study on Harvard College, former Harvard student Haynie argued in her paper that “[b]ecause all black students applying to [elite] schools are in essence competing for the same limited number of places,” colleges and universities should begin to take the ethnic heritages of each of their black applicants into account. Haynie, *supra* note 15, at 55. Haynie is correct to note that, as a general matter, spots for students of all races are limited at selective colleges and universities. These schools cannot accept and enroll all qualified students because of limited class spots. Furthermore, while I agree with Haynie that colleges must do more to reach out to legacy Blacks, *see supra* Part I, I note that her statement about competition among Blacks is problematic in itself because it accepts the fact that the “spots” for Blacks are limited in the first place without challenging the low representation of Blacks on college and university campuses. *Accord* Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream That Is America*, 23 HASTINGS CONST. L.Q. 1115, 1127 (1996) (“Asian Americans are pitted against Blacks and Hispanics as if there are only a certain number of seats available for minority students. This is true only if a certain number of seats are reserved for white students.”).

132. Massey et al., *supra* note 19, at 262.

A. Enhancing Diversity

Including mixed-race students and first- and second-generation Blacks in affirmative-action programs advances the diversity rationale of affirmative action in a number of ways. The Supreme Court first recognized the benefits of racial diversity on college campuses in *Regents of University of California v. Bakke*¹³³ holding that schools could use race as one factor in working to ensure campus diversity that would enhance the educational environment.¹³⁴ Twenty-five years later in *Grutter*, the Supreme Court, in an opinion written by Justice O'Connor, endorsed *Bakke's* earlier pronouncements on the advantages of diversity. The Court explained that "just as growing up in a particular region or having particular professional experience is likely to affect an individual's views, so too is one's own, unique, experience of being a racial minority in a society . . . in which race unfortunately still matters."¹³⁵ The Court then highlighted the various ways in which a university may benefit from having a racially diverse student body: through enhanced learning among participants of differing backgrounds because of exposure to diverse perspectives, through increased ability by students to work and live with people from different cultures, and through the destruction of racial stereotypes about the intellectual capacity and viewpoints of both minority and majority members.¹³⁶ According to the decision, diversity in classrooms is an integral part of promoting cross-racial understanding among students because it helps to ensure meaningful representation of people who may bring perspectives that individuals outside of their group may not hold and helps to prepare students for

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

134. *Id.* at 314-15.

135. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003); see Brest, *supra* note 60, at 684-85 (describing how black students "brought an important 'reality' check to discussions of employment and housing discrimination and racial profiling by the police" in the classroom); Devon W. Carbado & Mitu Gulati, *What Exactly Is Racial Diversity?*, 91 CAL. L. REV. 1149, 1158-61 (2003) (detailing how a person's viewpoint is influenced by racial identity and how diversity may shape the content of discussions); Chemerinsky, *supra* note 28, at 17 ("The reality is that race matters enormously in the classroom. A person's race powerfully affects how he or she experiences the world. A discussion of race in a political science class is vastly different in an all-white classroom than it is in a racially diverse classroom.").

136. *Grutter*, 539 U.S. at 329-36; see also Dorothy A. Brown, *Taking Grutter Seriously: Getting Beyond the Numbers*, 43 HOUS. L. REV. 1, 18-20, 28-30 (2006) (discussing the benefits of true dialogue and interaction among diverse groups of students and arguing, under a diversity rationale, that Critical Race Theory should be integrated into all aspects of the curriculum at law schools); Jones, *supra* note 65, at 209 (noting how Justice O'Connor "accept[ed] that homogeneity does not produce the best learning experiences and that solely admitting persons with the strongest intellectual capacities or the best records of scholarly achievement will not create the most intellectually stimulating and rigorous environments").

work and leadership in an increasingly global market and economy.¹³⁷ Diversity also increases the possibility that all students will learn to appreciate and accept their similarities to and differences¹³⁸ from each other and learn to communicate and work across racial lines.¹³⁹ Finally, the Court accepted the University of Michigan Law School's argument that meaningful diversity assists in breaking down racial stereotypes because it forces people to learn that there is no singular "minority viewpoint" but rather a variety of viewpoints among minorities.¹⁴⁰ Essentially, classroom diversity is a critical component towards the process of eliminating racial and gender stereotypes.¹⁴¹

The enrollment of first- and second-generation black and mixed-race students at colleges and universities advances each of these stated goals. First, having a population of first- and second-generation black students and mixed-race students at institutions of higher education helps to ensure that Blacks, as a group, maintain *some* representation within the campus community and participate in the community in a way that enhances both their learning and that of other students. For example, immigrant Blacks help to enrich these college environments with their presence by adding their host of experiences and viewpoints to those that African-Americans and mixed-race students of African descent generally bring to these campuses. Additionally, the existence of a critical mass of first- and second-generation black and mixed-race students on college and university campuses enhances the possibility of having majority members learn to appreciate their similarities to and differences from Blacks, as well as learn to appreciate the various differences among Blacks themselves, ethnically, culturally, socially, and personally. In this sense, the participation of mixed-race and first- and second-generation black students in affirmative-action programs helps to

137. *Grutter*, 539 U.S. at 319-20, 329-33.

138. *See id.* at 329-36; *see also* Brest & Oshige, *supra* note 4, at 862 (asserting that "the opportunity to encounter people from different backgrounds and cultures allows students to explore the nature of those differences and to learn to communicate across the boundaries they create").

139. *See Grutter*, 539 U.S. at 329-36; *see also* Brest & Oshige, *supra* note 4, at 862 (exploring how diversity benefits cross-racial communication).

140. *Grutter*, 539 U.S. at 319-20 (quoting Dean Kent Syverud of Washington University in St. Louis School of Law); *see also* Jones, *supra* note 65, at 181 ("The presence of individuals from historically disadvantaged groups is critical to equality efforts because the experience and viewpoints of these groups can assist in overcoming structures of domination in the U.S. and to accomplish many of the other goals of substantive diversity.").

141. Onwuachi-Willig, *supra* note 4, at 128; *see also* Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 10 ASIAN L.J. 127, 134 (2003) ("A further harm of segregation and underrepresentation is the perpetuation of detrimental stereotypes, continuing the myth that certain groups are inherently incapable of attaining certain accomplishments or performing certain jobs."); Carbado & Gulati, *supra* note 135, at 1155 (same).

facilitate diversity's benefit of enhancing cross-racial and cross-cultural understanding through a robust exchange of ideas and viewpoints not just between black students and students of other races but also between differing ethnic groups of black students.

Second, the continuing existence of a critical mass of first- and second-generation Blacks at elite colleges and universities enables better understanding and feelings between blacks of direct Caribbean and African heritage and African-Americans or legacy Blacks. Often, black and mixed-race students on predominantly white campuses form strong bonds with each other simply because of their low numbers. As one student at the University of California-Berkeley explained, "Because our numbers are so low, just being black on campus brings you together. The first thing is you're black."¹⁴² Thus, regardless of general culture differences between legacy and non-legacy Blacks and even attempts by non-legacy Blacks, in some instances, to distinguish themselves from legacy Blacks, the experience of racism by these groups on campus makes them the same in those terms and thus brings them together in many circumstances. In this sense, and to the extent that a greater number or critical mass of Blacks on campus helps to alleviate feelings of alienation and isolation by black students, the presence of first- and second-generation black and mixed-race students only helps to increase the chances of retention for all black students, including legacy Blacks, at colleges and universities.¹⁴³

Finally, the inclusion of various minority groups within one minority makes it all the more likely that there will be a diverse range

142. Johnson, *supra* note 11, at A1. See generally BEVERLY DANIEL TATUM, WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA? AND OTHER CONVERSATIONS ABOUT RACE (1997) (explaining why minority students of the same race form bonds with each other on predominantly white campuses).

143. See Brown, *supra* note 136, at 29 (noting that "studies show that underrepresented racial and ethnic minorities 'find the college environment more comfortable, experience less stereotyping, and are able to achieve progress when they are adequately represented on college campuses' in numbers enabling them to move beyond their token status"); Erwin Chemerinsky, *What Would Be the Impact of Eliminating Affirmative Action?*, 27 GOLDEN GATE U. L. REV. 313, 320 (1997) (noting that "African-American students choose to go elsewhere where there's more of a group for them to be a part of"). It is important to note that, in some circumstances, disproportionate percentages of first- and second-generation Blacks and mixed-race students on campus can actually add to the feelings of alienation on campus by legacy Blacks. For example, Aisha Haynie recounted that such disproportionate representations made her, at times, feel more alienated at Harvard College because so many people assumed that she was of Caribbean or African descent. In essence, the assumption by many was that a Black at Harvard College—one who could reach that level of educational attainment—could not be a descendant or legacy Black, but instead must be a first- or second-generation Black. Specifically, Haynie explained that her research was prompted by the reaction from her black classmates, who, when she told them that she was not from the West Indies or Africa, but instead from the Carolinas, would say, "No, where are you really from?" *Roots*, *supra* note 32, at 70.

of views among that larger minority group throughout the entire campus community. Just as the experience of being a black American who descends from slaves in North Carolina may influence the perspective or views of a student, so too does the experience of being a mixed-race student or a second-generation black American. Including students who have one black parent and one white parent or students who are second-generation black Americans, descend from Caribbean slaves, and grew up in New York City (with the task of navigating one's way between two very different worlds, such as a world of a strong Jamaican culture and another of urban African-American culture) adds important diversity to the minority community.¹⁴⁴ In fact, to the extent that cultural difference may shape different views on politics and other issues of concern, the inclusion of a broad group of Blacks, whether first- or second-generation or multiracial, can actually help to break down stereotypes about what are perceived to be commonly held minority viewpoints.¹⁴⁵ Furthermore, it can assist in creating an environment in which students of color on majority-white campuses do not feel as if they are speaking for their race. As one African-American student at Northwestern University in Chicago explained about the benefits of intraracial diversity among black students on her campus: "[T]he rich ethnic mix among black students—with all their differing points of view—gives me a sense of greater intellectual freedom. When I make a point in a classroom discussion, I don't worry as much that it might be taken as 'the black ideal or black statement.'" ¹⁴⁶

In sum, there is no all-encompassing black reality, and campuses will be better off in the long-run if they work to ensure the inclusion of differing representations of black experiences. Therefore, in structuring affirmative-action programs to more frequently include legacy Blacks (as this Article suggests), schools should not at the same time exclude groups such as first- and second-generation Blacks and mixed-race students from these programs because doing so could have a deleterious effect on Blacks' entire representation on college campuses, including through declining retention rates for black students within these environments.

At the same time, however, while representation of mixed-race and first- and second-generation black students on campus can result in many positives for college and university communities, their

144. See *supra* note 136 and accompanying text.

145. *Grutter*, 539 U.S. at 320 (declaring that one benefit of diversity is the way in which it shows that there is no "minority viewpoint" but rather a variety of viewpoints among minority students").

146. McNamee, *supra* note 29, at 10.

overrepresentation at elite institutions of learning does not necessarily advance the factors that are commonly viewed as the primary benefits of diversity. As Harvard Professor Mary Waters proclaimed, “[I]f it’s about having diversity that includes African-Americans from the South or from inner-city high schools, then [Harvard is] not doing well, either.”¹⁴⁷ In other words, overrepresentation of certain groups of Blacks, such as second-generation West Indian Blacks or Blacks from the Northeast, decreases the likelihood of differing viewpoints in the classroom and on campus—differing viewpoints that may be influenced by coming from a different black ethnic group or from growing up in a different region of the country. Consequently, rather than defeating stereotypes about minority viewpoints because a very diverse group of black students are presenting different opinions on similar topics both in and out of class, such overrepresentation may actually work to reinforce the view that all Blacks think alike—that is, of course, to the extent that first- and second-generation Blacks or mixed-race students share the same views and opinions. Moreover, insofar as first- and second-generation Blacks and mixed-race students tend to be of a more privileged socioeconomic and educational class, the disproportionate percentage of them on elite college campuses may paint a distorted view of black achievement and advantage to many of the future leaders of the world. Thus, although the inclusion of first- and second-generation black and mixed-race students is essential to achieving the goals of diversity, it can become so overwhelming at times that it actually works against the purported goals of diversity. In working towards the goal of diversity, it is not just important that we include different groups of Blacks in affirmative-action programs, but rather that we include everyone within the minority group in a way that reflects true diversity and representation within the black community.

B. Reaching Social Justice

What is less obvious, especially given the data I discussed in Part I, is how including non-legacy Blacks, in particular first- and second-generation Blacks, as part of affirmative-action programs furthers the social justice goals of the policy. Over the years, the meaning of social justice through affirmative action has been blurred in the debates over the highly contested policy. For example, in efforts to prohibit the use of affirmative action across the country, opponents have steered the debates about affirmative action away from racial

147. *Roots*, *supra* note 32, at 70.

disadvantages and toward class disadvantages by arguing that the policy largely benefits the black middle class.¹⁴⁸ As a result, debates concerning affirmative action have essentially ignored the fact that affirmative action was never designed specifically to address disadvantages solely due to class, but instead those that stemmed from race, which was and is in turn intimately associated with class.¹⁴⁹ In essence, race, not class, was the measure for the social disadvantage and lack of opportunity that affirmative action was designed to address.¹⁵⁰ Although both class and race disparities overlap in many instances for many Blacks and colleges certainly need to address the way in which the admissions process generally advantages those from higher socioeconomic classes,¹⁵¹ it is important not to forget that the original policy behind affirmative action focused on the need to overcome disadvantages due to race and racism, even though such disadvantages were admittedly often tied to class as well.

Keeping this corrective motivation in mind, it becomes clear that having first- and second-generation Blacks and mixed-race students in schools' affirmative-action programs is a necessary and important part of advancing the social justice goals behind the policy. Regardless of their skin color or recent ancestry, Blacks in the United States generally lag behind Whites with respect to a number of factors that correlate highly with academic achievement, such as income and

148. See, e.g., Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race,"* 1979 WASH. U. L.Q. 147, 153-54 ("I am not willing to prefer the son of a prosperous and well-educated black doctor or lawyer—solely because of his race—to the son of a recent refugee from Eastern Europe who is working as a manual laborer to get his family ahead."). But see Morton, *supra* note 11, at 1092, 1118, 1123-25 (noting how "affirmative action was never designed to combat indigence" but disadvantages due to race).

149. See Brest & Oshige, *supra* note 4, at 866 ("Affirmative action seeks to correct the injuries inflicted on a group by racial discrimination."); Morton, *supra* note 11, at 1123-25 ("There is nothing in the history of affirmative action, however, that would suggest that race was used as a proxy or that class was originally the basis for such programs. . . . Rather, it was designed to equalize access to areas from which blacks were traditionally excluded.").

150. See Harris & Narayan, *supra* note 59, at 9 ("[E]ven slavery and Jim Crow, which had devastating economic impacts on Black Americans, were more than merely unjust economic arrangements; they created and perpetuated a variety of attitudes and policies that are constitutive elements of racial discrimination in the United States today."); Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1855 (1996) (describing one view in which "class is said to interact with race, gender, and ethnicity (and perhaps other elements of social identity, such as place of residence) in interlocking and mutually defining structures, and it is their interaction that is seen to shape both consciousness and life chances" (footnotes omitted)).

151. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 115, 163-64 (1987) (arguing that minorities from the most advantaged families are likely to be overrepresented in programs that grant preferential treatment to minorities generally).

assets.¹⁵² Thus, to argue that the various educational, economic, and cultural advantages¹⁵³ that non-legacy Blacks *may* have over legacy Blacks mandate non-legacy Blacks' exclusion from affirmative-action programs misses the very point of the policy. Specifically, it ignores the policy's focus on addressing racial disadvantage and lack of opportunity. As noted above, affirmative action was instituted to address the disadvantages associated with being a racial minority, in particular being perceived and treated as inferior simply because of blackness and the destructive effects of such perception on one's opportunities in life.¹⁵⁴ As Lee Bollinger, President of Columbia University, asserted, "The issue is not origin, but social practices. It matters in American society whether you grow up black or white. It's that differential effect that really is the basis for affirmative action."¹⁵⁵ In other words, being middle class does not exempt any Blacks from the disadvantages that stem from blackness and racism in the United States,¹⁵⁶ nor does being a first- or second-generation Black or mixed-race person allow one to escape the harms of racial discrimination.¹⁵⁷ Although mild distinctions between legacy and non-legacy Blacks have, in some instances, worked to mitigate the racism against some first- and second-generation Blacks and mixed-raced individuals, nothing allows any person with "black" skin, even Caribbeans, Africans, and persons of mixed racial ancestry, to escape the harms of racism and racial disadvantage in this country. For the most part, Whites generally view a person with black skin as black; only in a few circumstances, such as when choosing between two different groups of

152. See *infra* notes 165-78 and accompanying text. Again, I note that, in this paper, I focus primarily on arguments as they are applied to and against first- and second-generation Blacks in debates about affirmative action. Perhaps because of the way in which many mixed raced individuals descend from black American slaves, issues are rarely raised as to the inclusion of biracial students in affirmative-action programs.

153. See Massey et al., *supra* note 19, at 256 ("With the exception of parental education, none of the measures of socioeconomic background [employment rates, income, and wealth] differ by immigrant status.").

154. See generally Onwuachi-Willig & Barnes, *supra* note 70.

155. Rimer & Arenson, *supra* note 13, at A1.

156. See Morton, *supra* note 11, at 1132 ("It is a grave mistake, however, to [think] that because of a middle class background, [a] black child has not been victimized by past and present racial discrimination."); Camille A. Nelson, *Breaking the Camel's Back: A Consideration of Mitigatory Criminal Defenses and Racism-Related Mental Illness*, 9 MICH. J. RACE & L. 77, 84 (2003) ("[D]iscrimination is not limited to low-income or uneducated Blacks, but is also reported by Black middle-class professionals."). See generally ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1993) (describing various forms of discrimination against middle and upper-class Blacks).

157. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 3* (1992) ("Despite undeniable progress for many, no African Americans are insulated from incidents of racial discrimination. Our careers, even our lives, are threatened because of our color. Even the most successful of us are haunted by the plight of our less fortunate brethren who struggle for existence in what some social scientists call the 'underclass.'").

black workers, will Whites—that is, generally speaking—make important distinctions between varying black ethnic groups.¹⁵⁸ For example, one Jewish carpenter in New York made a comment that revealed the tendency by many Whites to view all Blacks as monolithic and generally bad. He said: “The problem is that we see blacks as a mass. It is unfortunate. We can’t tell the difference between a black pimp and a black mailman. When I look at a white man, I can tell what social class he is, but if he is colored, I can’t tell.”¹⁵⁹ Likewise, Professor Mary Waters of Harvard University has explained that white “society generally classifies [black people] according to the color of their skin.” The white community, she notes, has, for the most part, been oblivious to the immigrant component of the black community¹⁶⁰ and usually does not make significant cultural distinctions between native Blacks with long term roots in the United States and those with shorter term roots in the country.

Thus, while some studies indicate that black Caribbeans and mixed-race people may be viewed more favorably than legacy Blacks within the employment context, the fact remains that mixed-race individuals, black Caribbeans, and first- and second-generation Blacks from other parts of the African Diaspora still suffer from the disadvantages that are attached to their blackness. Such disadvantages accrue to those who are identified as black in the United States, regardless of their or their parents’ national origins or their mixed racial ancestry.¹⁶¹ For example, Professor Devon Carbado has explained that many black immigrants to the United States become “Americanized” by the experience of racism in this country,¹⁶² regardless of whether they desire to be so “naturalized” or not. Professor Carbado has described his own experience as a Jamaican-British immigrant to the United States: he did not initially wish to be perceived as a black American, with all of its attendant socially ascribed negative stereotypes,¹⁶³ but he had no choice. The people he met imposed the negative stereotypes about black Americans upon

158. See *supra* text accompanying notes 115-19 (discussing studies in which employers expressed preference for West Indian employees over African-American employees).

159. Malamud, *supra* note 150, at 1893 (citations omitted).

160. Waters, *supra* note 101, at 61.

161. See Rong & Brown, *supra* note 23, at 556 (“Racism and discrimination prevent many Black immigrants from being incorporated into mainstream America.”); see also Malamud, *supra* note 11, at 967-88 (describing the discrimination and disadvantage that even middle-class Blacks face in housing, work, and education).

162. Devon W. Carbado, (*E*)*racing the Fourth Amendment*, 100 MICH. L. REV. 946, 947-50 (2002).

163. *Id.*; see also Michele Goodwin, *Race As Proxy: An Introduction*, 53 DEPAUL L. REV. 931, 933 (2004) (“Color is linked with laziness, incompetence, and hostility, as well as disfavored political viewpoints, such as a lack of patriotism and disloyalty to the United States.”).

him simply because of his phenotype. As Professor Carbado eloquently explained:

I became a black American long before I acquired American citizenship. Unlike citizenship, black racial naturalization was always available to me, even as I tried to make myself unavailable for that particular Americanization process. Given the negative images of black Americans on 1970s British television and the intra-racial tensions between blacks in the U.K. and blacks in America, I was not eager, upon my arrival to the United States, to assert a black American identity. . . .

But I became a black American anyway. Before I freely embraced that identity it was ascribed to me. This ascription is part of a broader social practice wherein all of us are made intelligible via racial categorization. My intelligibility was skin deep. More particularly, it was linked to the social construction of blackness, a social construction whose phenotypic reach I could not escape. Whether I liked it or not, my everyday social encounters were going to reflect standard racial scripts about black American life.

And in fact they did. I was closely followed or completely ignored when I visited department stores. Women clutched their purses upon encountering me in elevators. People crossed the street to avoid me. The seat beside me on the bus was almost always racially available for another black person. Already I wanted to be a black American no more. But that racial desire was at odds with my racial destiny. *There was nothing I could do to prevent myself from increasingly becoming a black American.* . . .¹⁶⁴

In sum, the disadvantage of being black in the United States, even in its most subtle forms, applies to all those who are perceived as belonging to such group, even in spite of more recent ancestry from another country or mixed raced heritage.¹⁶⁵

164. Carbado, *supra* note 162, at 947-50; (emphasis added and footnotes omitted); *see also* Baynes, *supra* note 25, at 124-25 (“I am ‘Black’ in the American context, I stay Black, and (even if I wanted to, which I do not) I am physically unable to lose my racial identity.” (footnotes omitted)); Inniss, *supra* note 49, at 125-26 (describing claims about the effect of American racism by Jamaican immigrant Colin Ferguson, who violently shot commuters on a subway in New York). A young Ethiopian immigrant student detailed similar feelings about discovering she was black through American racism. She stated:

During the first couple of years [after arriving in the United States], I considered myself only Ethiopian. Then I started thinking of myself as African. As time passed . . . I interacted more with [native] Blacks and other Americans. This country made me more aware of my race. I was Blacker than I thought I was!

Chacko, *supra* note 23, at 498 (alterations in original and emphasis added).

165. *See* Carbado, *supra* note 162, at 947-50; *see also* Paulette Caldwell, *The Content of Our Characterizations*, 5 MICH. J. RACE & L. 53, 84-85 (1999) (“Migrants to the United States, voluntary and involuntary alike, are either racialized or ethnicized, sometimes on initial arrival, other times over the passage of time.”); Kevin R. Johnson, *Immigration and Latino Identity*, 19 CHICANO-LATINO L. REV. 197, 206 (1998) (“Racism doesn’t recognize the distinctions between Mexican-Americans and Mexican immigrants. To dominant society, a ‘foreigner’ is a ‘foreigner.’”); *cf.* COSE, *supra* note 154, at 56-72 (describing various forms of discrimination against middle and upper-class Blacks); Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023, 2034-35 (2006) (describing how even corporate persons and businesses “seek to limit the perception of their enterprises as ‘black’”); Ediberto Roman, *The Citizenship Dialectic*, 20 GEO. IMMIGR. L.J. 557, 595-96 (2006) (acknowledging the more subtle forms of subordination of Blacks and how “African-Americans, irrespective of their academic or financial achievements, are repeatedly reminded of their inequality in society”).

Furthermore, even when one examines, from a class perspective, the inclusion of first- and second-generation Blacks and mixed-raced individuals in affirmative-action programs, the social justice rationale still applies. The fact that some first- and second-generation Blacks are relatively advantaged to legacy Blacks in terms of education and income does not mean that they are generally advantaged among the student populations at their elite institutions, especially when compared to their white peers. For example, when compared with Whites, many first- and second-generation Blacks are still significantly disadvantaged.¹⁶⁶ Recent findings from a study of students at twenty-eight colleges and universities reveal that, while only seventy percent of fathers of first- and second-generation Blacks and 55.2 percent of fathers of legacy Blacks were college graduates, 85.7 percent of white first-year students were college graduates; similarly, while only 43.6 percent of the fathers of first- and second-generation Blacks and 25.3 percent of the fathers of legacy Blacks had advanced degrees, 56.7 percent of the white fathers in the group had advanced degrees.¹⁶⁷ Thus, in terms of educational status within the family, even first- and second-generation Blacks look comparatively bad to Whites on their campuses.

Additionally, a number of studies show that Blacks of all ancestries, including those of mixed racial heritage, lag significantly behind Whites in terms of income levels. For example, in looking at differences between all Blacks and Whites, one data set demonstrated rather large disparities between the income levels of Whites and Blacks, regardless of their ancestry. Specifically, it showed that, in the year 2000, while black Caribbean and African immigrants generally made about \$9000 to \$10,000 more in their median household incomes than African-Americans, white immigrants generally made \$10,000 more than both black Caribbeans and Africans in their median household incomes.¹⁶⁸ Likewise, another study exposed that African immigrants, despite higher levels of education than any other group in

166. Kalmijn, *supra* note 23, at 913; *see also* Harris & Narayan, *supra* note 59, at 9 (asserting that “policies that only address class-based inequalities will not adequately address those that stem from race”); *cf.* Brest & Oshige, *supra* note 4, at 885 (noting, for example, with Latina/os, that “[a]lthough Cubans are among the wealthiest and best educated of all the Latino groups, their median family income still lags behind that of whites” and the “poverty rate for American-born Cubans is 13.5 percent compared to 8.5 percent for whites”).

167. Massey et al., *supra* note 19, at 257 tbl.3.

168. *See* Abdi Kusow, *Africa: East*, in *THE NEW AMERICANS* 295, *supra* note 41, at 299 tbl.2. According to this same data set, Asian immigrants generally earn \$9000 more than white immigrants. *Id.*

the country,¹⁶⁹ earned significantly less than both Whites and Asians: Asian immigrants had a median household income that was thirty-seven percent higher than that of African immigrants and white Americans had a median household income that was thirty-six percent higher than that of African immigrants.¹⁷⁰ Indeed, the most recent findings from an evaluation of black and white students at a group of selective colleges and universities reported similar results in the income levels of black and white student subjects' parents, regardless of their ethnicity. Specifically, the findings revealed that only 23.8 percent of black immigrant families and 25.5 percent of African-American families had an income over \$100,000 as compared to 52.9 percent of white families, for whom fewer mothers were working outside of the home.¹⁷¹ So in addition to generally lower levels of education when compared to Whites, first- and second-generation Blacks earned significantly less than Whites, including when their education levels exceeded those of Whites.

Furthermore, studies have indicated that first- and second-generation Blacks are much more likely than Whites to have received welfare, to be unemployed, to be living at the poverty level, and to be receiving financial aid than Whites. For example, even though better off than African-Americans in terms of percentages of unemployment and poverty levels, black Caribbean and African immigrants are significantly worse off than Whites. Findings from the year 2000 showed that Whites were at four percent unemployment and 11.2 percent at the poverty level, while Africans were at 7.3 percent unemployment and 22.1 percent at the poverty level, black Caribbeans were at 8.7 percent unemployment and 18.8 percent at the poverty level, and African-Americans were at 11.2 percent unemployment and 30.4 percent at the poverty level.¹⁷² Lastly, whereas 15.7 percent of the black immigrant families and 19.5 percent of the African-American

169. *African Immigrants*, *supra* note 86, at 60-61 (noting that African immigrants were the most highly educated immigrant group in the United States with 48.9 percent of such immigrants having a college degree).

170. *Id.* Also, just as some legacy Blacks may grow up middle-class or upper middle-class, some first- and second-generation Blacks grow up poor or working-class and isolated from extensive networks that may be found on the East Coast. For example, I am a non-legacy Black—a second-generation Nigerian-American, but I grew up in various poor areas surrounded by legacy Blacks and isolated from other Nigerian-Americans and also, to some extent, isolated from African-Americans or legacy Blacks because of generally held negative perceptions of Africans. *See infra* notes 223-29.

171. Massey et al., *supra* note 19, at 257 tbl.3; *see also* Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1501-04 (1997) (highlighting that black married couples are more likely to be equal wage earners).

172. Kusow, *supra* note 166, at 299 tbl.2. Latina/os were at 8.8 percent unemployment and 26 percent of life in poverty, and Asians were at 4.6 percent unemployment and 13.9 percent life in poverty. *Id.*

families in the twenty-eight college study had ever been on welfare, only 5.3 percent of the white families had ever been on welfare.¹⁷³ In that same vein, 90.7 percent of first- and second-generation Blacks and 89.5 percent of legacy Blacks received financial aid compared to just 62.3 percent of Whites.¹⁷⁴ Therefore first- and second-generation Blacks were not only more likely to be earning less as middle-income families than white families, but they were also more likely to be experiencing many of the factors related to coming from poverty.

In fact, first- and second-generation Blacks have been shown to be significantly more disadvantaged than Whites even with regard to their own homes. For instance, the Massey study of the black and white students at select elite colleges revealed that, while only 71.4 percent of black immigrant families and 73.7 percent of African-American families owned a house as opposed to renting, 93.8 percent of white families owned one.¹⁷⁵ Second, the study showed that the average value of the homes for the black immigrant families was \$220,600 and the average value of the homes for the African-American families was \$193,200, whereas the average value of the homes for the white families was at least \$100,000 more than both legacy Blacks and non-legacy Blacks at \$327,400.¹⁷⁶ Third, the study revealed that, although first- and second-generation Blacks were more likely to grow up in two-parent homes than African-Americans, at 56.9 percent compared to 51.4 percent, the percentage of such homes for first- and second-generation Blacks was significantly lower than that of Whites at eighty-one percent.¹⁷⁷ Finally, in terms of peace of mind, whites families of the students in the survey were significantly more advantaged because they were exposed to neighborhood violence much less frequently at an index value of twelve instead of the first- and second-generation index value at forty-seven and the African-American index value at fifty-two.¹⁷⁸ In light of these significant differences in education, income, wealth, and neighborhood between the families of white students at elite schools and the families of first- and second-generation Blacks at the same institutions, it seems that first- and second-generation Blacks should still be eligible for racial

173. Massey et al., *supra* note 19, at 257 tbl. 3.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 254-55 tbl.2 ("As would be expected, differences between groups stemmed from the absence of the father rather than the mother.")

178. *Id.* at 258-59 tbl.4 (asserting that the fact that first- and second-generation Blacks are more likely to attend private school enables them to escape more exposure to violence than legacy Blacks).

preferences in admissions policies, including under a social justice rationale.

In fact, even the positive perception of first- and second-generation Blacks as good workers is relative only to legacy Blacks and not to other minorities or Whites. Most of the studies concerning the Caribbean advantage in employment examined only employer preferences of West Indians to African-Americans, not West Indians generally with other groups.¹⁷⁹ Given the prevalence of racism against Blacks in the United States and the effects that such racism has on future generations of black immigrants,¹⁸⁰ there is no reason to believe that the positive perception of West Indians as to legacy Blacks applies equally when they are compared to other non-black, racial or ethnic groups.¹⁸¹

Indeed, the precarious position of first- and second-generation Blacks in the American hierarchy of race and culture is demonstrated by the rapidity with which any immigrant advantage over legacy Blacks disappears after just one generation, which is another factor that motivates against excluding first- and second-generation Blacks from affirmative-action programs. As several studies demonstrate, even for the descendants of black immigrants living in the United States, it is the racial stigma and discriminatory effects and disadvantages that stem from blackness, and not the country from which one's parents, grandparents, or great-grandparents come from, that negatively affects their educational performance and opportunities within this country. Were it a simple matter of not having descended from slaves in this country, one would expect the relative advantages of voluntary immigrant status to be maintained

179. For example, one white male manager expressed his preference between the groups as follows: "If I had one position open and *it was a West Indian versus an American black, I'd go with the West Indian . . . their reliability, their willingness to do the job . . . they have a different drive than American blacks.*" Model, *supra* note 96, at 535 (alterations in original and emphasis added); *see also supra* notes 118-19 and accompanying text. Professor Pat Chew reported similar findings with the idea of Asian-Americans as the model minority. She reported that, although Whites in a survey viewed Asian-Americans more favorably than Blacks or Latina/os, they did not view Asian-Americans as "model Americans." Pat K. Chew, *Asian-Americans: The "Reticent Minority" and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 32-33 (1994). She wrote:

Consistent with the model minority image, the study found that whites perceived Asian Americans more positively on these traits than African Americans and Latinos.

Significantly, however, whites did not view Asian Americans as positively as they view themselves. Asian Americans were considered less intelligent, more violence-prone, lazier, and more likely to prefer living off welfare. Thus, whites apparently considered Asian Americans superior to other minorities but inferior to whites. While whites believed Asian Americans were model "minorities," they did not yet perceive them as equals, in other words, as "model Americans."

Id. (footnotes omitted).

180. *See infra* notes 183-201 and accompanying text.

181. *See supra* note 179 and *infra* notes 183-201 and accompanying text.

with later generations of immigrant Blacks, much like it has done with white immigrants and certain Asian-American groups who have the "model minority"¹⁸² image attached to them.¹⁸³ Yet, assimilation theory, which contends that "national origin groups gradually become more similar to the members of the host society,"¹⁸⁴ eventually takes effect as immigrant Blacks and their children become more and more like their host community of native African-Americans. Normally, such acculturation and assimilation into one's host group would lead to "upward progress with each succeeding generation," as has been the case with certain groups of Asian descent.¹⁸⁵ But while some "second-generation youth respond . . . by joining with their parents in embracing the national identity of their countries of origin," those "second-generation youth who are racialized as black . . . take on a black American identity," and "[t]he adoption of this identity . . . constitutes a rejection of white mainstream culture and values that, through processes linked to race and class, marginalize black youth."¹⁸⁶ In other words, as future generations of immigrant Blacks come to identify as part of their host group, which is African-Americans, they are more likely to adopt an oppositional culture and be affected by the disadvantage of racism. Accordingly, the children

182. See *supra* note 116 (discussing the "model minority" stereotype). The image of the "model minority," however, has also proven to be damaging in other respects because it works to mask the many ways in which Asian-Americans are discriminated against in the United States. See *Brest & Oshige, supra* note 4, at 894 (describing how the model minority myth obscures discrimination against Asian-Americans).

183. See *Chacko, supra* note 23, at 493 (noting studies that show that some groups such as Eastern European and Russian Jews and some Asians, such as the Chinese and Korean, follow "a path of upward mobility and assimilation into the White middle class"); see also *Deaux, supra* note 128, at 647 (noting that for Asian students, there is no shift between generations on the effects of stereotype threat); cf. Xianglei Chen, *Educational Achievement of Asian-American Students: A Generational Perspective* (1996) (unpublished dissertation) (finding that while the first and second generation of Asian-American students are advantaged over Whites in terms of parents' educational background and expectations and the students' own learning attitudes and behaviors, the third generation Asian-American students are similar to whites in terms of family background and learning characteristics).

184. *Kalmijn, supra* note 23, at 912; see also *Chacko, supra* note 23, at 493 (describing assimilation theory); *Model, supra* note 96, at 548 ("West Indians assimilate economically to the black population, not the white.").

185. *Rong & Brown, supra* note 23, at 538-39; *Deaux et al., supra* note 128, at 4-5 (asserting that the decline in education and occupational achievement from the first to second generation for West Indians is "in contrast to the linear process of assimilation characterized by earlier generations of White immigrants"); see also *WATERS, supra* note 103, at 5 (noting that "when West Indians lose their distinctiveness as immigrants or ethnics they become not just Americans, but black Americans" and "[g]iven the ongoing prejudice and discrimination in American society, this represents downward mobility for immigrants and their children").

186. *George E. Fournon & Nina Glick-Schiller, The Generation of Identity: Redefining the Second Generation Within a Transnational Social Field, in THE CHANGING FACE OF HOME, supra* note 12, at 168, 175.

and the grandchildren of immigrant Blacks may do less well in school and on the job market than their counterparts of other ethnicities.¹⁸⁷

Overall, because the generations that follow resident immigrant Blacks and their children in the United States eventually come to resemble their host group African-Americans or legacy Blacks, these later black Caribbean and African generations do not continue to “benefit” from their more recent immigrant status.¹⁸⁸ Instead, cultural assimilation for these generations means that they “lose some of the advantages that their immigrant parents had” over legacy Blacks, and that their “race becomes a handicap in the status attainment process.”¹⁸⁹ Not only do second- and later-generation Blacks lose any benefit that their parents may have had in growing up and experiencing life and potentially more favorable race relations in their home countries, but they begin to lose the self-confidence and cultural distinctiveness that aided their ancestors in succeeding in the United States.¹⁹⁰ As Professor Mary Waters has explained, second-

187. Model, *supra* note 96, at 536-37; Rong & Brown, *supra* note 23, at 543-44; see also Ruben G. Rumbaut, *The Crucible Within: Ethnic Identity, Self-Esteem, and Segmented Assimilation Among Children of Immigrants*, 28 INT'L MIGRATION REV. 748, 765 (1994) (noting that although Jamaicans often sustain a national origin identity into the second generation, that percentage “drops from 63 percent among those born in Jamaica to 23 percent among those born in the United States”). Again, studies have shown that as early as the second generation, immigrant Blacks are affected by stereotype threat. See *supra* note 128 and accompanying text.

188. Rong & Brown, *supra* note 23, at 556 (“For many Black immigrants, assimilation to the culture of inner-city native Blacks may lead to permanent subordination and disadvantage.”); Kalmijn, *supra* note 23, at 927 (same). An article in the *Journal of Blacks in Higher Education* explained the following among second-generation black youth in the United States:

[T]he ambition that propelled Caribbean parents to immigrate to America is rapidly quashed in second-generation children by the repressive forces of daily life in the American ghetto. For the most part, these young second-generation West Indians usually do not possess the favorable speaking accents, which helped their parents to find good jobs in the American economic mainstream. For most purposes, these students are no longer viewed and treated as hard-working and highly motivated West Indian immigrants. They are simply black Americans. For these second-generation immigrants, the effort to move ahead in American society means that because of the powerful influences attached to the color of their skin they will be subject to the same levels of racism and discrimination as the great-great-grandchildren of African-born slaves who were forcibly brought to these shores in the eighteenth and nineteenth centuries.

Educational Aspirations of Children of Black Caribbean Immigrants Surrender to the Forces of the Ghetto, 14 J. BLACKS HIGHER EDUC. 46, 47 (1996-97).

189. Kalmijn, *supra* note 23, at 912, 915 (“Caribbean blacks thus represent a case where cultural assimilation may hamper rather than improve their socioeconomic achievement.”); see also Rong & Brown, *supra* note 23, at 541, 556 (“This process of racial socialization into oppositional culture among second-generation immigrants may disrupt the plans for intergenerational upward mobility of many first-generation parents who are moving ahead economically.”).

190. Kalmijn, *supra* note 23, at 914; see also Gladwell, *supra* note 87 (describing racism against West Indian Blacks in Canada as partially due to the fact that, unlike West Indian-

generation Blacks begin to “use American, not Caribbean [or immigrant] yardsticks to measure how good a [situation] is.”¹⁹¹ Consequently, their lives become more affected by damaging social and psychological stresses that tend to harm African-Americans in this society.¹⁹² Professor Kay Deaux found in her research “that more time in the United States has negative consequences for black immigrants, making them more vulnerable to prevalent racial stereotypes and putting more pressures on them to negotiate a space between public norms and personal well-being.”¹⁹³ In the end, the drop-off rates for educational and occupational attainment for second- and later-generation Blacks often become significant. While even some white immigrants experience a drop-off in school attainment between the second and third generations, the differences are much larger for black populations, with Caribbeans having a .54 difference (more than half a year) in the number of years of school completed and Africans and Whites with a difference of .41 and .29, respectively.¹⁹⁴ Indeed, one study showed that by the third generation, the percentage of students of Caribbean descent graduating from high school had fallen from 63.9 percent in the second-generation to 50.2 percent in the third generation.¹⁹⁵ For the third generation students of African descent, the high school graduation rate fell from 60.3 percent in the second-generation to 51.4 percent.¹⁹⁶ This trend remained the same for the completion of college, with the percentages falling again for those of Caribbean and African descent to nearly half the levels of the second-generation.¹⁹⁷ These rates dropped from 21.5 percent to 11.3 percent for those of Caribbean descent and from 10.9 percent to 4.9 percent for those of African descent.¹⁹⁸ Overall, after one generation, the benefits of immigrant status among first-generation Blacks begin to disappear as their children and grandchildren become a part of their host group

Americans, such black Canadians do not have a group such as African-Americans to keep them from being placed at the bottom). As Professor Lolita Buckner Inniss has asserted, “The general failure of assimilation has made the black American experience unique among immigrant experiences in that it is an *unremitting* immigrant experience—an experience of continued exclusion.” Inniss, *supra* note 49, at 85-86.

191. WATERS, *supra* note 103, at 7. Studies demonstrate that, for second-generation Blacks, lower self-esteem is associated with being born in the United States, not with being born, for example, in the West Indies. Rumbaut, *supra* note 187, at 783.

192. See Deaux, *supra* note 128, at 646-47 (describing the development of these effects).

193. *Id.* at 647.

194. Rong & Brown, *supra* note 23, at 548.

195. *Id.* at 549-51 tbl.3.

196. *Id.* For third and later generations of persons of European descent, the high school graduation rate fell from 65.7 percent to 60.4 percent. *Id.*

197. *Id.*

198. *Id.*

and must encounter and overcome the many disadvantages that derive from simply being black in the United States.¹⁹⁹ As Professor Waters of Harvard University explained:

The experiences of West Indians show that even “good culture” is no match for racial discrimination. Over the course of one generation the structural realities of American race relations and the American economy undermine the cultures of the West Indian immigrants and create responses among the immigrants, and especially their children, that resemble the cultural responses of African Americans to long histories of exclusion and discrimination.²⁰⁰

Indeed, the role that race and racism play in limiting minority opportunities in the United States is mirrored in Canada with black Caribbeans, who without the buffer or comparison to African-Americans to distinguish themselves as “good Blacks,” take their place at the very bottom of that society’s racial and ethnic ladder.²⁰¹ This experience by black Caribbeans in Canada, where they are racialized as the least desirable minority, only helps to confirm that it is the racialization of later generations of black immigrants as “legacy Blacks” in the United States that most heavily influences their opportunities and performances, and not their recent ancestry and distinct cultures. Therefore, from a social justice perspective, recent ancestry does not in itself warrant the exclusion of first- and second-generation Blacks from affirmative-action programs; rather, it is these immigrants’ similar experiences with legacy Blacks in suffering the effects of racism and discrimination on life opportunity that should govern the operation of affirmative-action programs and support their inclusion in these plans.

199. WATERS, *supra* note 103, at 8 (noting that over time “the distinct elements of West Indian culture the immigrants are most proud of—a willingness to work, a lack of attention to racialism, a high value on education, and strong interests in saving for the future—are undermined by the realities of life in the United States”); *cf.* Inniss, *supra* note 49, at 137 (asserting that there must be an “acknowledgement that native blacks are not assimilated because of their existence in a continuing immigrant status”).

200. Inniss, *supra* note 49, at 137.

201. See Gladwell, *supra* note 87 (summarizing, in a study that found “positive discrimination,” the perceived ability to distinguish “good” black job applicants from “bad” applicants among employers in Brooklyn’s Red Hook neighborhood); see also Deaux, *supra* note 128, at 644 (noting the results of a study in which the credentials of white and black job applicants, who had been educated in either Canada or South Africa, were identical but evaluations revealed that “[t]he lowest ratings were given to Black applicants educated in South Africa, a condition that might be considered double stigmatization”). One author explained the phenomenon in Great Britain as follows:

The role of race and the barriers it presents in U.S. and British societies suggest that West Indians in the United States are viewed in the context of black America. In this manner, they can be seen in a favorable light and can boost their ethnic pride. Yet in Great Britain, their achievements are measured against those of the white majority.

Garcia, *supra* note 41, at 123.

Furthermore, while one could argue that the successes of and the absence of an impact from stereotype threat on first-generation Blacks requires that at least first-generation Blacks be excluded from affirmative-action programs, such an argument is flawed for two reasons. First, as I demonstrated earlier in this Article, because of the general disparities in educational attainment, income levels, and wealth between first-generation Blacks and Whites, first-generation Blacks still fit within the social justice goals of affirmative action.²⁰² Second, in light of the hard-hitting and rapid effects of racism and stereotype threat on second and later generations of black immigrants, the exclusion of first-generation Blacks from affirmative-action programs—plans that may have opened and may still be opening many doors for them to achieve their relative successes in the United States²⁰³—may only result in further speeding up the downward spiral of second and later generations Blacks in education and the workplace.²⁰⁴ Such results clearly do not comport with the notions of social justice inherent in affirmative action and should not be encouraged through the elimination of first-generation Blacks from affirmative-action programs.

Additionally, to argue for the exclusion of first- and second-generation Blacks based on their relative advantages to legacy Blacks ignores the fact that first- and second-generation black Americans themselves are not a monolithic group. Much like there are differences in the socioeconomic status between many Asian-American groups, including Japanese, Chinese, and Korean Americans and Laotian, Cambodian, Vietnamese, and Hmong Americans,²⁰⁵ there are vast differences among immigrant Blacks from various countries. For

202. See *supra* notes 166-78 and accompanying text.

203. See Harris & Narayan, *supra* note 59, at 11 (“Nevertheless, affirmative action policies serve important purposes—to partially counter the ways in which factors such as class, race, and gender function in our society to impede equal access, equal opportunity and equal treatment; and to foster a greater degree of inclusion of diverse Americans in a range of institutions and occupations than otherwise would exist.”).

204. See R. Richard Banks, “Nondiscriminatory” Perpetuation of Racial Subordination, 76 B.U. L. REV. 669, 680 (1996) (reviewing MELVIN L. SHAPIRO & OLIVER, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995)) (“Blacks from upper-white-collar backgrounds are twice as likely as whites to ‘fall all the way to lower-blue-collar positions.’ The expectation that occupational success will enable one to secure a better life for one’s children is more true for whites than for blacks.”); Delgado, *supra* note 11, at 140 (noting that “Blacks fall from the middle class more often and suddenly”).

205. John O. Calmore, *Racialized Space and the Culture of Segregation: “Hewing a Stone of Hope From a Mountain of Despair*, 143 U. PA. L. REV. 1233, 1247 (1995) (noting that 67.2 percent of Laotians, 65.5 percent of the Hmong, 46.2 percent of Cambodians, and 33.5 percent of Vietnamese in the United States live in poverty); Angelo N. Ancheta, *Community Lawyering*, 81 CAL. L. REV. 1363, 1382 & n.56 (1993) (book review) (summarizing 1980 census data regarding poverty rates among Asian Pacific American subgroups).

example, black British Caribbeans in the United States, who themselves are a diverse group, tend to be in a far better socioeconomic position than French or Spanish-speaking Caribbean Blacks,²⁰⁶ who are generally worse off than legacy Blacks.²⁰⁷ For example, although British Caribbeans complete slightly more years of schooling and are more likely to receive a college degree than legacy Blacks, French and Spanish-speaking Caribbeans are even less educated in terms of degrees than legacy Blacks.²⁰⁸ One study showed that British Caribbeans complete an average of 12.1 years of schooling while legacy Blacks or African-Americans complete an average of 12 years of schooling, French-speaking Caribbeans complete an average of 10.9 years of schooling, and Spanish-speaking Caribbeans complete an average of 10.3 years of schooling.²⁰⁹ Likewise, although British Caribbeans may have the advantage over legacy Blacks in terms of socioeconomic and occupational status, with nine percent higher occupational attainment and twelve percent higher earnings than African-Americans, French and Spanish-speaking Caribbeans respectively have five percent and ten percent lower occupational status and eleven percent and ten percent lower earnings when compared to legacy Blacks.²¹⁰ Such differences among ethnic groups of first- and second-generation Blacks are due to substandard English speaking by French and Spanish-speaking Caribbeans as well as

206. See Kalmijn, *supra* note 23, at 917 ("Black Caribbeans have higher earnings than African American blacks. On the other hand, men from the French- and Spanish speaking Caribbean have lower earnings than African American blacks."); see also Dadoo, *supra* note 84, at 527-28, 541-43 (highlighting the British Caribbean advantage). The social status of French-speaking Caribbeans is further reflected in this country's immigration policies as they relate to Haitians. See Malissia Lennox, Note, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687, 699-23 (1993) (asserting that Haitian immigrants are systematically returned to Haiti); Rick Bragg, *Haitian Immigrants in U.S. Face a Wrenching Choice*, N.Y. TIMES, Mar. 29, 2000, at A1 (describing the fate of 3000 illegal Haitian immigrants who are awaiting deportation and must face the difficult question of whether to take their children, who are American citizens, back with them).

207. See Kalmijn, *supra* note 23, at 918-20 (summarizing human capital differences among black subgroups).

208. *Id.* at 918.

209. *Id.* at 919 tbl.1, 928 (also noting that Spanish-speaking Caribbeans may face double discrimination because they are both black and Latina/o). Another study revealed that in 2000, African-Americans had an average of 12.4 years of schooling, while black Caribbeans and Africans had an average of 12.6 and fourteen years of schooling, respectively. Kusow, *supra* note 168, at 299 tbl.2. This same study revealed that Africans had a higher educational attainment than whites and Asians, who were at 13.5 and 13.9 years, respectively. *Id.*; see also Massey et al., *supra* note 19, at 246 (noting that Africans' educational attainment was at fourteen years while Whites were at 12.9 years and Asians were at 13.1 years).

210. Kalmijn, *supra* note 23, at 920-22, 921 tbl.2. Compared to Dominicans and Haitians, Jamaicans were much less likely to be laborers—13.3 percent as compared to 30.1 percent of Dominicans and 29.8 percent of Haitians). RANSFORD W. PALMER, PILGRIMS FROM THE SUN: WEST INDIAN MIGRATION TO AMERICA 13 tbl.2.2 (1995).

positive images of those who are thought to have British accents.²¹¹ Even “social capital,” meaning reinforcing networks through churches and other ethnic community organizations, play a significant role in determining who is advantaged by immigrant status among first- and second-generation Blacks. Those first- and second-generation Blacks outside of the extensive network of islanders on the East Coast face more difficulties in succeeding by traditional standards due to a lack of social capital.²¹² For example, unlike Blacks of recent Caribbean descent who often have large communities and strong ethnic networks in the Northeast, many African immigrants who lack a ready-made community in the United States because of significantly smaller numbers “face more difficulties in distinguishing themselves culturally, socially, and psychologically from native Black Americans and may accordingly assimilate into popular youth culture or oppositional culture at a faster rate.”²¹³ Lastly, the black population in the United States, especially the immigrant population, is not static. More recent black immigrants to the United States include a significant number of refugees from Sudan and Somalia. During the 1990s, 36,595 Sudanese and 18,576 Somali refugees immigrated to this country.²¹⁴ As statistics bear out, black immigrants from these countries are less likely to speak English than the British Caribbeans or Africans from former British colonies, do not have the same amount of education as these groups, and tend to have significantly lower incomes.²¹⁵ Accordingly, they often find themselves on the margins of

211. Kalmijn, *supra* note 23, at 918-22; *see also* Chacko, *supra* note 23, at 502 (acknowledging how “[l]anguage proficiency [of English] assists Ethiopian immigrants to assimilate more rapidly than their peers from non-English-speaking countries”); Garcia, *supra* note 41, at 121 (noting that language adjustments for young Haitians affects their educational ability).

212. *See* Doodoo, *supra* note 84, at 533 (noting that “[w]hile African, and more so African-Americans, are most likely to live in the South, the modal residence for Caribbean immigrants is the Northeast”). As Haynie described, these extensive networks for first- and second-generation Blacks exists primarily on the East Coast. *See* Haynie, *supra* note 15, at 45 tbl.4 (reporting that 51.85 percent of black Caribbeans in her study were from the Northeast and 9.26 percent were from the Mid-Atlantic and that forty percent of black Africans in her study were from the Northeast and 24 percent were from the Mid-Atlantic).

213. Rong & Brown, *supra* note 23, at 557; *see also* Haynie, *supra* note 15, at 45-46 (describing networks that have enabled Caribbean black students to participate in high school preparatory programs in the Northeast that serve as feeder schools to elite northeast colleges and universities such as Harvard).

214. *See* Kusow, *supra* note 168, at 295-96; *see also* Elizabeth Heger Boyle & Fortunata Ghati Songora, *Formal Legality and East African Immigrant Perceptions of the “War on Terror,”* 22 *LAW & INEQ.* 301, 305-06 (2004) (noting the shift to African immigration from East Africa in the mid-1990s).

215. Likewise, the Haitian immigrant population has changed since 1980. Whereas this population primarily consisted of professionals before 1980, the newer population of Haitians, if they are even allowed to remain in the United States, is not primarily professional. *See* Lisa Konczal & Alec Stepick, *Haiti*, in *THE NEW AMERICANS* 445, *supra* note 41, at 449-52.

society. In the interests of both diversity and social justice, race-based affirmative action should certainly work to absorb these new and generally disadvantaged immigrants. In sum, in addition to the advantages that Whites generally have over first- and second-generation Blacks, complicated differences and similarities between various groups of first- and second-generation Blacks makes decisions about blanket exclusion of all of them from affirmative action better suited for a case-by-case analysis by experienced admissions officers as they complete their individualized reviews of student files.

Furthermore, the fact remains that, while Blacks constitute *thirteen* percent of the population in the United States,²¹⁶ they are still severely underrepresented on college and university campuses across the nation. At many schools, black students comprise less than *seven* percent of the overall student body.²¹⁷ To try to exclude certain groups of Blacks from affirmative-action programs when Blacks as a whole are still severely underrepresented on campuses is, at best, premature. Furthermore, research reveals that the advantages of first- and second-generation Blacks disappear once these students are on campus. Studies have repeatedly shown that standardized tests such as the SAT overpredict the performance of black students, which suggests that “something [else] further depresses [the] grades of [Blacks] once they arrive[] on campus.”²¹⁸ This same finding applies to first- and second-generation Blacks. In fact, as Professors Massey, Mooney, Torres, and Charles found in their most recent study of black students at elite colleges and universities, first- and second-generation Blacks actually underperform more than African-Americans relative to their standardized test scores. Although first- and second-generation Blacks at the schools in the study enrolled in college with an average SAT score of 1250 as compared to the average score of 1193 by legacy Blacks,²¹⁹ they, like legacy Blacks, earned significantly lower grade point averages than their white peers, having virtually

216. JESSE MCKINNON, UNITED STATES CENSUS BUREAU, THE BLACK POPULATION IN THE UNITED STATES: MARCH 2002 1-2 (2003), <http://www.census.gov/prod/2003pubs/p20-541.pdf>.

217. I visited the websites for many of the elite colleges and universities identified in *supra* note 17. For many of them, the percentage of black students on campus was less than seven percent of the student population. In some cases, it was as low as three percent.

218. Steele, *supra* note 128, at 96-97; see also Dorothy A. Brown, *The LSAT Sweepstakes*, 2 J. GENDER RACE & JUST. 59, 63-64 (1998) (noting that the “LSAT overpredicts for minority students . . . [r]elative to whites with the same score, standardized tests actually overpredict the achievement that blacks will realize in law school,” which suggests that environment in law schools plays more of a role than test scores for black law students).

219. The average white score was notably higher than both of these numbers at 1361. See Massey et al., *supra* note 19, at 260-61 tbl.5.

identical coefficients with legacy Blacks.²²⁰ As the scholars of this study asserted,

the effect of parental education on GPA [in which GPA increased along with possession of advanced degrees by both parents] is limited to native Blacks [not immigrant Blacks]. . . . [A]lthough immigrant parents are better educated than native parents, this fact does not seem to help immigrant students that much because they are [somehow] less able than their native counterparts to translate parental education into academic advantage.²²¹

Indeed, such a finding raises a question as to whether any factors that are depressing the grades of Blacks on campus are more harmful for first- and second-generation Blacks than for legacy Blacks; at the very least, it indicates that “[w]hatever processes are operating on college campuses to depress black academic performance below that of whites with similar characteristics, they function for immigrants as well as natives.”²²² In other words, the same, or rather the slightly worse, failure of first- and second-generation Blacks in performing up to the expectations of their scores and high-school grades indicates that any advantages held by them are not so great or, more so, may not exist at all.

Finally, we cannot ignore the fact that many first- and second-generation Blacks are discriminated against by both traditional racism and by xenophobia, both by Whites *and* African-Americans.²²³ As one scholar noted, “those from African countries suffer from negative stereotypes, often considered unpolished, lacking in social graces, or unsophisticated. *These negative images are purveyed by American blacks no less than whites.*”²²⁴ For example, one second-generation Haitian student in secondary school described the double xenophobia she has experienced, stating:

It may be true that whites discriminate, but I have no complaints [about them] because I don't know many [whites] . . . but blacks, they're trouble; they make fun of the way we [Haitians] speak. . . . They call us stupid and backwards and try to beat us up. I was always scared, so I [tried] to do well in school and that's how I ended [in a magnet school]. There I don't stand out as much and I can feel good about being Haitian.²²⁵

220. *See id.* at 263.

221. *Id.* at 263, 268.

222. *Id.* at 269.

223. *See* Rong & Brown, *supra* note 23, at 544 (“The dual status of being Black and immigrant causes some researchers to anticipate academic difficulties for these youths These researchers argue that Black immigrants face dual barriers of racism and xenophobia.”); *see also* Fernandez-Kelly & Schaufler, *supra* note 99, at 675, 684 (finding in a study of second-generation students that “when Haitian children speak of discrimination, they are often thinking of the verbal and physical abuses they experience at the hands of native black Americans in their neighborhoods and schools”).

224. Inniss, *supra* note 49, at 132 (emphasis added).

225. Fernandez-Kelly & Schaufler, *supra* note 99, at 684. In a strange way, this negative treatment of first- and second-generation Blacks by legacy Blacks can work to the advantage of

In fact, studies have shown that one reason why some first- and second-generation Blacks may work to form identities separate from legacy Blacks is the negative social treatment that they have experienced from legacy Blacks, such as taunting because of accents and family dress.²²⁶ Immigrant Blacks often experience deeper hurt as a result of such criticism from legacy Blacks than from Whites.²²⁷ In this sense, first- and second-generation black Americans suffer a double discrimination that many African-Americans do not have to endure, both the disadvantage of blackness in a racist American society and the disadvantage of foreign-ness in a nationalist society.²²⁸ The fact is that the black immigrant experience is profoundly complex. In the United States, non-native Blacks have been greeted with a variety of reactions—"a curious mixture of fear and admiration, distaste and awe"²²⁹—and much like the descendants, they are rarely

first- and second-generation Blacks in terms of achieving traditional success because it prevents, as we see in the quotation above, their full integration into their host group.

226. Chacko, *supra* note 23, at 498. One young Ethiopian student described taunts from legacy Blacks, asserting "When you spoke, they would act like they didn't understand. They'd say, 'Speak English, man.'" *Id.* Another first-generation Black described resentment and discrimination she felt from African-Americans, noting:

"[When I came to this country] I thought that [black Americans] were going to be very much like me, that they were going to accept me as one of them. But I found that was not so at all. They felt that they were above us. The few that I had to deal with even insulted me at times, and they were not as willing to help you as a white person would. Those are the simple things that at that level of my mixing with people I met, I found that the black[] [Americans] were rather standoffish and didn't like us very much."

Waters, *supra* note 101, at 70.

227. Chacko, *supra* note 23, at 498 ("When native Blacks were vocally critically of them, young Ethiopian immigrants reported being more upset and offended than if the comments had been made by Whites.").

228. See Roy Simon Bryce-Laporte, *Black Immigrants: The Experience of Invisibility and Inequality*, 3 J. BLACK STUDS. 29 (1972) (arguing that Caribbean American Blacks face the double burden of xenophobia and racism on the labor market); see also Kalmijn, *supra* note 23, at 923 (noting "immigrants typically face some disadvantages in the labor market upon arrival in American society due to a lack of information on jobs and possibly a shortage of social capital to support the status attainment process as well").

229. Inniss, *supra* note 49, at 88. It is also important to note that, if we examine these issues of affirmative action in a global context, the inclusion of first- and second-generation Blacks in affirmative-action programs easily satisfies the social justice rationale of the policy. Like legacy Blacks, many Blacks from the Caribbean and South America descend from slaves. Additionally, many Blacks from the Caribbean, Africa, and South America come from economically depressed countries with huge poverty and unemployment rates. In other words, many first- and second-generation Blacks are facing the same obstacles as legacy Blacks in this country, with the primary difference being that the ancestors of first- and second-generation Blacks suffered such atrocities somewhere other than the United States. See Baynes, *supra* note 25, at 128-35 (arguing that, upon coming to the country, immigrant Blacks are subject to the same degree of de facto discrimination as African-Americans); Lewis, *supra* note 25, at 619-26 (examining the actual or perceived differences between native-born and immigrant Blacks in the context of a

greeted with true inclusion. Because of the consistent exclusion of Blacks of all ancestries from full participation and citizenship in American society, affirmative actions programs are needed as a forceful means by which Blacks in general can eventually be folded into the mainstream.²³⁰

C. Models of Affirmative Action for Other Ethnic Minority Groups

Maintaining first- and second-generation Blacks as part of schools' racial preference programs also advances the policy goals of affirmative action for other ethnic minority groups. For this reason, questions about the potential effects of excluding first- and second-generation Blacks from affirmative-action programs are important to answer. If such questions are ignored in this debate, certain inconsistencies in affirmative-action policies could develop. Given that the diversity rationale could be employed only as a means of limiting, not eliminating, first- and second-generation participation in affirmative-action programs, the exclusion of first- and second-generation Blacks from affirmative-action programs could fall only under a type of social justice rationale. Specifically, it would have to be premised on the notion that affirmative action is intended *only* to remedy the effects of racism for those Blacks with long-term, historical roots in the United States—in particular, the descendants of slaves in the South. Following this line of reasoning, the only logical result for other groups under affirmative action would be to exclude the most recent immigrants from different racial or ethnic backgrounds based on those same remedial grounds.²³¹

critical race feminist analysis); Sowell, *supra* note 120, at 45-46 (describing the lingering effects of slavery and racial attitudes in the West Indies).

230. See Harris & Narayan, *supra* note 59, at 11 ("Nevertheless, affirmative action policies serve important purposes—to partially counter the ways in which factors such as class, race, and gender function in our society to impede equal access, equal opportunity and equal treatment; and to foster a greater degree of inclusion of diverse Americans in a range of institutions and occupations than would otherwise exist.").

231. Such a rule could require each sub-group within a larger racial/ethnic minority category to justify its claim to redress. For example, would we then be forced to limit affirmative-action programs to the descendants of black slaves and not free Blacks and Chinese-Americans whose indentured servant ancestors were used to construct railroads? To some extent, practices of racial proof and past discrimination are necessary to receive benefits that are targeted toward certain racial minorities. For example, students who wish to receive financial aid due to their status as American Indians "must submit proof that they are members of federally recognized tribes." Mary Annette Pember, *Ethnic Fraud?*, DIVERSE ONLINE, Jan. 25, 2007, http://www.diverseeducation.com/artman/publish/printer_6918.shtml. As one author noted, this task may not be easy even for those who possess nearly 100% American Indian ancestry because their "ancestry may be so fractionalized that they are not eligible for enrollment in a single tribe." *Id.*

But, if first- and second-generation Asian and Latina/o students are excluded from racial preference programs, the effect, unlike for Blacks, would be the elimination of the generally most disadvantaged Asian and Latina/o ethnic groups in the United States, both economically and educationally. Educational and occupational success for certain non-black ethnic groups, including Latina/os and Asian-Americans, is more likely to be gained not by newly arrived immigrants, but rather by more assimilated, Americanized persons from earlier generations. Unlike African-Americans, Asian-Americans with long standing roots in the United States, such as Japanese and Chinese-Americans, tend to fare much better, both economically and educationally, than Asian-Americans of the first- and second-generation in the United States, such as those of Cambodian, Hmong, Laotian, and Vietnamese descent. For example, although Asian-Americans have the highest percentage of college graduates of all racial groups at 44.1 percent, the proportion of college graduates for different ethnic groups within the community vary widely. While 63.9 percent of Asian Indians, 48.1 percent of the Chinese, 43.8 percent of Koreans, and 41.9 percent of the Japanese in the United States have a college degree or higher, only 19.4 percent of the Vietnamese, 9.2 percent of Cambodians, 7.7 percent of Laotians, and 7.5 percent of the Hmong do.²³² Likewise, while only twenty-three percent of the Chinese, 13.7 percent of Koreans, 13.3 percent of Asian Indians, and 8.9 percent of the Japanese in the United States have less than a high school education, 59.6 percent of the Hmong, 53.3 percent of Cambodians, 49.6 percent of Laotians, and 38.1 percent of Vietnamese have less than a high school education.²³³

Statistics also reveal significant differences in the incomes of different Asian ethnic groups, with the difference between the highest and lowest average incomes for families being nearly \$30,000 per year—the Chinese at \$60,058 and the Hmong at \$32,384.²³⁴ Given these statistics, it would make little sense, under a social justice rationale, to exclude from racial preference programs Cambodian, Hmong, Laotian, or Vietnamese-American students, who arguably endure much discrimination and stigma from being perpetually perceived as foreigners. In fact, including these groups in affirmative-action programs will reduce such racially grounded perceptions and uncover the myth of the model minority by exposing students to

232. TERANCE J. REEVES & CLAUDETTE E. BENNETT, WE THE PEOPLE: ASIANS IN THE UNITED STATES, CENSUS SPECIAL REPORTS 12 fig.9 (2004) (examining persons who were twenty-five or older).

233. *Id.*

234. *Id.* at 16 fig.13.

greater ethnic as well as racial diversity among their peers and thus a more diverse set of lifetime experiences.

Similar to students of Asian descent, children from Latina/o families that more recently immigrated are less likely to succeed in college admissions based on traditional standards of merit. As Professor Kevin Johnson has indicated, "the Latino community in the United States is far from static."²³⁵ In the next fifty years, the population of Latinos in the United States, in particular the Mexican-American population, is expected to grow dramatically.²³⁶ Yet, the high school dropout rate for Mexican immigrants is double that of Mexican-Americans with long-term roots in the United States.²³⁷ Likewise, one study showed that second-generation Cuban children who attend expensive private schools displayed higher grade point averages and higher standardized scores when compared not only to students of Cuban descent in public schools but also Mexican-American students of the second-generation in public schools.²³⁸ Similarly, while many second-generation Nicaraguan-American students from middle-class backgrounds also had relatively high scores,²³⁹ second-generation Mexican-American students, who were predominantly from working class or poor backgrounds and of darker hues, displayed comparatively low scores on standardized tests.²⁴⁰

235. Johnson, *supra* note 165, at 199.

236. Holzer, *supra* note 59, at 227.

237. See Brest & Oshige, *supra* note 4, at 887 (stating that "American-born Latinos are better off than the foreign-born"); Marjorie Coeyman, *The Story Behind Dropout Rates*, CHRISTIAN SCI. MONITOR, Jul. 1, 2003, at 13 (noting that high school dropout rates among Hispanic students in 2001 remained extremely high at twenty-seven percent); Angela Onwuachi-Willig, *For Whom Does the Bell Toll: The Bell Tolls For Brown?*, 103 MICH. L. REV. 1507, 1513 & n.26 (2005) (reviewing DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004)) (reporting a dropout rate among sixteen- to nineteen-year-old Latina/os at twenty-seven percent, but also noting that "the dropout rate of high school age Latinos born in the United States is half that of all high school age Latinos, but still at an alarming 14%"). *But see* Deaux, *supra* note 128, at 649-50. Like with black Caribbeans, however some scholars, such as Kay Deaux, have noted that Latina/os may attach more closely to ethnic identity and not assimilate as frequently in the face of high levels of discrimination. Deaux stated that one study "found that second-generation Mexican immigrants in California, who might be assumed to be in a process of moving toward American identity, instead reacted against things American when their experiences with discrimination became more numerous." *Id.* (citing ALEJANDRO PORTES & RUBEN G. RUMBAUT, *LEGACIES: THE STORY OF THE IMMIGRANT SECOND GENERATION* (2001)).

238. Fernandez-Kelly & Schauffler, *supra* note 99, at 678. *But see* Brest & Oshige, *supra* note 4, at 885 (noting that while the "first Cuban immigrants were well educated and from middle- or upper-class families[,] [e]ach subsequent group has been poorer and less well educated").

239. Fernandez-Kelly & Schauffler, *supra* note 99, at 678.

240. *Id.*; see also Deaux et al., *supra* note 128, at 30 ("In the case of Mexicans, however, it is not certain whether first-generation immigrants would be impervious to stereotype threat effects, given the negative stereotypes that often characterize both Mexican nationals and

Given these facts, one must question whether it would be appropriate to close off access to higher education through affirmative action to such a rapidly growing segment of the population.²⁴¹ The answer must be no. Removing first- and second-generation minority students from eligibility for affirmative-action programs would leave their access to higher education primarily dependent on testing regimes that are shown to be poor predictors of minority performance or that are negatively impacted by factors such as stereotype threat.²⁴² The effects of such decisions would not only harm the students of Latina/o, Asian, Caribbean, and African descent who would be excluded from affirmative-action programs but also the United States as a whole because the effects of a broad-based lack of education touch all people, especially all minorities, regardless of their citizenship or class status. In sum, in addition to the fact that including first- and second-generation Blacks in affirmative-action programs falls in line with the diversity and social justice rationales of the policy, it would make little sense to exclude such Blacks from affirmative-action programs on the grounds that they are first- and second-generation because such reasoning would also require the exclusion of first- and second-generation Latina/os and Asians. Such an action would actually run counter to the social justice goal of extending educational opportunity to a greater number of qualified, socially disadvantaged students of color.

III. ON CONSIDERING THE IMPACT OF ANCESTRAL HERITAGE ON STUDENTS

Although I have argued that the differences between legacy and non-legacy Blacks should not result in the exclusion of non-legacy Blacks from affirmative-action programs, I do contend that it is important for colleges and universities with race-based affirmative-action programs to consider the ancestral heritage of black college

Mexican immigrants. Thus, first-generation Mexican immigrants might show equal or even greater stereotype threat effects than would later generations.”).

241. Latina/os now outnumber Blacks as the largest minority group in the United States. Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253, 277 (2005).

242. See Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1072-75 (1997) (“For minority students, moreover, studies by several admissions scholars reveal small or no meaningful statistical relationships between test scores and academic performance.”); Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me A River: The Limits of “A Systematic Analysis of Affirmative Action in American Law Schools*, 7 AFR. AM. L. & POLY REP. 1, 22 (2005) (analyzing possible factors which may explain why African-American law students underperform academically when their admissions criteria predict higher levels of success); see also *supra* note 240.

applicants in the implementation of their programs. In this Part, I propose a few procedural changes to the admissions process at schools with race-based affirmative-action programs as a means of beginning a conversation about how colleges and universities may consider ancestral heritage along with race in their programs. I make these proposals with a few assumptions in mind: (1) that colleges and universities with race-based affirmative-action programs actually care about more than chalking up the numbers of Blacks on their campuses and, specifically, that they care about increasing the number of legacy Blacks at their institutions; (2) that these same colleges and universities are not purposefully “discriminating” against African-Americans by using first- and second-generation status among black applicants as a proxy for selecting the type of students they find to be attractive; (3) that these colleges and universities are open to expanding their ideas of merit beyond grade point averages and test scores; care about achieving true diversity, both interracial and intraracially, on their campuses; and maintain flexibility in their notions about the merit of race in advancing education, and (4) that these colleges and universities want to admit and enroll students who will help them achieve their stated missions.

My suggestion that colleges and universities should consider the ancestral heritage of black college applicants is not one I make lightly. I understand that choosing to engage in this game of differentiating between resident immigrant black students,²⁴³ second-generation black students, mixed-race students, and legacy Blacks comes with its own set of complications, and schools must carefully reflect on the potential consequences that such distinctions can have on the entire black community on their campuses.

The complications that must be addressed are many. For example, schools must be sensitive to the notion that measuring “deserved blackness” in affirmative-action programs can be acrimonious and result in further balkanization. The reality of the disadvantage related to blackness for all Blacks in this country makes the act of defining “blackness” in racial preference programs—such that it comes to exclude certain people who were raised in the United States and have endured life as a black person in a racist society—dangerous and risky.²⁴⁴ Second, even considering the relative

243. To be clear, this group, of course, excludes international students who moved to the United States temporarily to attend private boarding high schools away from their parents in their homeland.

244. See Kwame Okoampa-Ahoofe, *The New Seapegoats, Part 3*, 11 N.Y. BEACON 9 (2004) (asserting that “the problem still remains regarding how to scientifically identify these ‘descendants of slaves’” for those who “insist on clearly differentiating recent continental African

advantages that may come as a result of lighter skin color or more recent immigrant status, who can really say that a biracial student of mixed African-American and white ancestry or a black second-generation, Jamaican-American student is any less "black" than a monoracial black student from Mississippi who descends from plantation slaves in the United States? Also, given the history of slavery in this country and other countries in the African Diaspora, a history which makes any claims to "racial purity" practically impossible, do schools really want to entertain debates about what is "black enough" or which groups' blackness has caused them to suffer the most?²⁴⁵ Finally, even if schools decide to make these distinctions within the admissions process, how can they truly police the ways in which people will identify their ancestral backgrounds on their applications? While schools may have insights into a student's class background from the application forms that are used in today's admissions process, schools will encounter great difficulty in determining whether someone is a fifth-generation Black as opposed to a second-generation Black without explicit inquiry into such background.

Of course, I raise none of these questions to say that colleges and universities should not consider the relative advantages that mixed-race students and first- and second-generation Blacks may have on the path to elite institutions. These factors must be a part of the equation.²⁴⁶ Like Professors Paul Brest and Miranda McGowan, I do "acknowledge and to some extent share the view that a history of discrimination against a group creates a special claim."²⁴⁷ More importantly, in keeping in line with the current, legally acceptable and highly important rationale for affirmative action, diversity, I view consideration of the ancestral heritage of black applicants as an integral part of the overall effort by campuses to achieve true intraracial diversity and an important ingredient for institutions in meeting their goals of robust, intellectual exchange between a

immigrants, as well as their Afro-Caribbean counterparts, from what these critics term as 'indigenous African-Americans'").

245. See Leonard Baynes, *Who Is Black Enough for You: An Analysis of Northwestern University Law School's Struggle over Minority Faculty Hiring*, 2 MICH. J. RACE & L. 205 (1997) (examining an incident in which a minority faculty candidate's racial authenticity may have been questioned in the hiring process). I also acknowledge, again, that race is a social construct; thus, the idea of any person being racially pure is also a social creation.

246. See Haynie, *supra* note 15, at 54 ("The American ideal of equal opportunity appears to be somewhat undermined when it is found that black Americans, who endure not only present-day racism, but also the burden of dealing with the psychological disadvantages caused by [past] discrimination, benefit the least from affirmative action relative to other blacks at selective institutions.").

247. Brest & Oshige, *supra* note 4, at 859.

diversity of students, both outside of and within different racial groups. Second, although there are some inherent difficulties in racially and ethnically identifying applicants and admitted students, colleges and universities can implement certain, helpful tracking procedures. These procedures, though onerous, may assist institutions in maintaining records of their successes and failures in recruiting and enrolling certain groups of underrepresented ethnic and racial minorities and may also help to keep students “honest” about race and ethnicity in their applications, especially in light of recent trends that involve an increasing number of students who “misuse” the results of genetic testing on their applications.

The remainder of this Part explores concerns of intraracial diversity as they relate to legacy and non-legacy Blacks at elite campuses and proposes changes to application requirements that could help to account for and keep track of the ancestral heritage of black applicants in race-based affirmative-action programs at these institutions. Part III.A uses the rationale in *Grutter* to reiterate the significance of achieving true interethnic diversity within racial groups on campuses and then utilizes the reasoning in *Grutter* to explain the import of both interracial and intraracial diversity in achieving any school’s diversity mission.²⁴⁸ Part III.B underscores the need for further policing of racial and ethnic identifications on college admissions and financial aid applications in light of newly emerging practices of racial and ethnic “fraud” by students. Part III.C proposes including the requirement of a student essay on racial and ancestral diversity for applications and adding a joint counselor recommendation letter to the admissions process, both of which could enable elite colleges and universities to better tailor their programs towards the goal of attaining a truly diverse class and satisfying their schools’ missions.

A. Understanding the Significance of Diversity

As emerging immigration patterns increasingly influence the population of students within the United States, colleges and universities, especially elite ones, must strive for interethnic as well as interracial diversity on their campuses. For many institutions of higher education, diversity of all kinds within the student body is

248. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (Powell, J., concurring) (proclaiming that in utilizing “the right to select those students who will contribute the most to the ‘robust exchange of ideas,’” a university “seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission”).

paramount;²⁴⁹ an individual can visit practically any college or university's website and, if the institution has a mission statement or statement of values, that individual would likely find a declaration about the importance of diversity to that school.²⁵⁰

Student body diversity has many meanings and requires consideration of numerous types of factors such as geography, sex and gender, and musical talent.²⁵¹ In *Grutter v. Bollinger*,²⁵² however, the United States Supreme Court considered only one aspect of diversity as it relates to university admissions: race. Specifically, the Court considered the appeal of and affirmed the Sixth Circuit's decision denying the claim of Barbara Grutter, who argued in her lawsuit that the University of Michigan Law School discriminated against her on the basis of race in violation of the Fourteenth Amendment when it denied her admission to the institution.²⁵³ In so doing, the Court first held that the University of Michigan Law School had "a compelling state interest in attaining a diverse student body";²⁵⁴ the Court reasoned, in part, that "a diverse student body is at the heart of the Law School's proper mission."²⁵⁵ The Court then held that the Law School's admissions program possessed the "hallmarks of a narrowly tailored plan" in that it did not "operate as a quota," did not "insulate applicants who belong to certain racial or ethnic groups from the competition for admission," and did "engage[] in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."²⁵⁶

249. See David Orentlicher, *Diversity: A Fundamental American Principle*, 70 MO. L. REV. 777, 780 (2005) ("Diversity is central to the American legal and economic systems because diversity both promotes good outcomes and discourages bad outcomes. Diversity promotes good outcomes by multiplying options.").

250. For example, the Mission Statement of Dartmouth College in New Hampshire reads as follows: "Dartmouth embraces diversity with the knowledge that it significantly enhances the quality of a Dartmouth education." Dartmouth College, Mission, available at <http://www.dartmouth.edu/~presoff/mission/>; see also *supra* note 56 (describing mission statements at other colleges and universities that address the issue of diversity).

251. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003) (noting that the University of Michigan Law School's "1992 policy makes clear '[t]here are many possible bases for diversity admissions,' and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields").

252. *Id.* at 306.

253. *Id.* at 316-21.

254. *Id.* at 328.

255. *Id.* at 329.

256. *Id.* at 334.-37.

Critical to the Court's decision to affirm the Sixth Circuit's opinion was its assessment that the University of Michigan Law School's admissions program was, like the Harvard plan cited in *Bakke*: "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."²⁵⁷ Additionally, the Court highlighted the importance of the law school's consideration of a "broad range of qualities and experiences that may be considered valuable contributions to student body diversity" in making its admissions decisions.²⁵⁸ The Court also identified three important goals of the University of Michigan Law School, all of which, the school argued, were dependent upon the benefits that flow from a racially diverse student body. First, the Court pointed out the law school's role in promoting enhanced learning outcomes by producing lawyers who, because of the benefits of cross-racial understanding and exchange within the classroom, were better prepared to work as professionals and function in an "increasingly diverse workforce and society."²⁵⁹ In fact, in highlighting this goal and its relation to diversity, the Court was quick to rely on affirmations from businesses across the country, which declared that such benefits could be achieved in the workplace "*only . . . through exposure to widely diverse people, cultures, ideas, and viewpoints.*"²⁶⁰ Second, the Court recognized the law school's purpose in preparing students for citizenship. In so doing, the Court importantly proclaimed the following about inclusion in the educational system as the foundation of citizenship:

For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. . . . Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.²⁶¹

Finally, the Court acknowledged the law school's declared objective to help prepare the nation's leaders, highlighting that a significant percentage of the country's leaders come from "highly selective . . . schools."²⁶² To that end, the Court maintained that "[i]n order to

257. *Id.* at 334, 337 (asserting that "a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application").

258. *Id.* at 338.

259. *Id.* at 330-31.

260. *Id.* at 330-31 (emphasis added).

261. *Id.* at 331-32.

262. *Id.* at 332.

cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”²⁶³

Keeping in mind all of these principles from *Grutter*, it is clear that including consideration of ancestral heritage in a college’s admissions program is central to achieving the type of diversity at the heart of many institutions’ missions. As the Court asserted in *Grutter*, every school must engage in an individualized review of each applicant’s file and must remain flexible in the elements that it considers in determining what any one student may contribute to the diversity of the institution. In this context, looking underneath the race of an applicant to also consider that applicant’s ancestral heritage only further individualizes review of applicants’ qualities and potential contributions by allowing schools to broaden the factors that are considered in the course of admissions decisions.

Second, in the terms of the three institutional goals of elite universities such as the University of Michigan Law School—the promotion of learning outcomes, preparation for citizenship, and preparation for leadership, all of which are advanced through diversity—the consideration of ancestral heritage in the admissions programs of schools not only moves forward each of these objectives but also is essential to them. As the Court noted in looking at the University of Michigan Law School’s program and its relation to the promotion of learning outcomes, such enhanced learning can occur “only . . . through exposure to widely diverse people, cultures, ideas, and viewpoints.”²⁶⁴ In light of the strikingly disproportionate percentage of first- and second-generation Blacks and mixed-race students at the nation’s top colleges and universities, a central component of this tool for enhanced learning is missing: widely diverse peoples and cultures, specifically legacy Blacks. Without exposure to the diverse ideas and viewpoints that may stem from legacy Blacks in the classroom and beyond, cross-racial and cultural understanding and exchange is diminished on campus, thus lessening the promotion of better learning outcomes. Additionally, with respect to the preparation of students for citizenship, the Court declared that such preparation would be incomplete without access to education and “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation.”²⁶⁵ In this vein, if legacy Blacks are left further behind in a way that essentially excludes them—at least in proportionate or close to proportionate percentages of them in the

263. *Id.* at 332.

264. *Id.* at 330-31 (emphasis added).

265. *Id.* at 331-32.

greater population—then colleges and universities have failed to diffuse the knowledge and opportunity through education that the Court declared must be accessible to individuals of all races and ethnicities. Thus, in light of evidence indicating that certain ethnicities are severely underrepresented in their student populations, elite colleges and universities have an obligation to consider ancestral heritage in their admissions programs so that their institutions can become more accessible to differing intraracial groups of minorities.

Finally, if elite colleges and universities wish to satisfy their goal of helping to prepare the country's leaders, then they must begin to account for ancestral heritage in a way that will enable them to "cultivate a set of leaders with legitimacy" within the common population.²⁶⁶ This need is heightened especially by the fact that African-Americans constitute an overwhelming percentage of all Blacks in the United States and by the fact that most of the nation's leaders come from elite institutions of learning. If ordinary citizens do not see themselves reflected within their leadership, they will lose faith in the political system and the ability to have their concerns and issues voiced in politics.²⁶⁷ As Professor Guinier has indicated, "Colleges and universities are defaulting on their obligation to train and educate a *representative* group of future leaders."²⁶⁸ In sum, applying the principles and rationale of *Grutter* to present circumstances at many elite colleges and universities, where legacy Blacks are starkly underrepresented on campus, it becomes clear that the consideration of ancestral heritage of black college applicants is not only helpful in enhancing the goals of these institutions as they relate to diversity, but imperative.

266. *Id.* at 332.

267. Accord Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5, 29 (2004) ("Racial diversity on the judiciary contributes to judicial legitimacy. In order for this argument to make sense, it requires a belief in courts as having large degrees of discretion to decide cases. It further requires a belief that a 'voice of color' in fact exists and must be represented in the judiciary."); Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That Is Inclusive: What Grutter v. Bollinger Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101, 141 (2004) ("Inclusive judging provides a reason for minority citizens to continue to trust key governmental institutions and believe that they are neutral rather than political."); Angela Onwuachi-Willig, *Representative Government, Representative Court? The Supreme Court as a Representative Body*, 90 MINN. L. REV. 1252, 1264 (2006) ("[D]iversity that reflects the make-up of the population in the United States would add greater legitimacy to the institution in the eyes of the public.").

268. *Roots*, *supra* note 32, at 70 (emphasis added).

B. Policing Racial Identifications in the Road to Diversity: Uncovering Racial Fraud

Apart from the need for greater interracial and intraracial diversity among students to facilitate cross-cultural and cross-racial learning on campus, there are other practical reasons why schools may want to more closely examine the racial and ancestral heritage of their applicants during the admissions process. As college and university admissions becomes increasingly more competitive,²⁶⁹ high school and transfer applicants are seeking more and more ways to make their applications stand out or to not include a “strike” against themselves in their applications during the process. In fact, perhaps because of the decision in *Grutter* and public perception of pervasive racial preferences, a greater number of white students are beginning to think more strategically about how they can assert their potential contributions to diversity in their applications. In a growing percentage of cases, these students are choosing to present themselves to admissions offices in a less-than-straightforward manner about race and ethnicity in order to avoid what they view as unfair uses of race in admissions or to claim an “entitlement” to preferences for admissions and/or financial aid for racial minorities.²⁷⁰ The ways in which more and more high school applicants are beginning to manipulate race during the college admissions process may call for a more vigorous policing of applicants’ box checking identifications on their forms. Just as with other types of fraud, college admission applicants are increasingly trying to achieve their racial manipulation schemes through one of two different means: concealment and misrepresentation.²⁷¹ In the next two subsections, I examine these changing student practices in completing college and university admissions applications in order to emphasize the potential need for at least a low level of racial identification policing during the admissions process.

269. See Roberta Holland, *Rejection Protection*, BOSTON BUS. J., Oct. 8, 1999, available at <http://boston.bizjournals.com/boston/stories/1999/10/11/smallb1.html?page=3>.

270. See *infra* notes 285-90 and accompanying text.

271. The well-known elements of a cause of action for fraud are: (1) a misrepresentation which includes a concealment nondisclosure, (2) knowledge of the falsity of the misrepresentation, (3) intent to induce reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damages. See *Cadlo v. Owens-Illinois, Inc.*, 23 Cal.Rptr.3d 1, 5 (Cal. Ct. App. 2004).

1. Concealing Racial Identity

The first means of “fraud” in the admissions process, concealment, is part of a growing trend among college applicants in the United States, many of whom are suspected to be white.²⁷² Since the year 2000, a rapidly rising number of students are working to conceal their racial identity by not checking a box for racial identification purposes on their applications.²⁷³ For example, in 2003, 2000 applicants at George Washington University in Washington, D.C. skipped the question of race on their applications, a forty-five percent increase from just two years earlier in 2001; likewise at the University of Maryland in that same year, almost 1500 of the 25,000 entering freshmen enrolled without ever disclosing their ethnicity or race, a twenty-five percent increase from three years earlier in 2000.²⁷⁴

The students offer a number of reasons for this new strategic act. For some students, it is a direct protest against affirmative action policies that they consider unfair, and for other students, it is just one more move in their attempt to out-game their competitors in the admissions game.²⁷⁵ Sara Schoen, a student at the University of Maryland, explained her decision to not check a race box as follows: “I just feel like being a white, middle-class girl from the suburbs is a huge strike against me, and I don’t want to further that effect.”²⁷⁶ Similarly, David Rubel, also a white student at Maryland, noted that “[i]t’s strategic. When you’re applying to college, it’s best not to take your chances. You need every little piece you can to get over the next person.”²⁷⁷ Still others are even more strategic, identifying their race only when they suspect that it may assist them and excluding it when they suspect that it may harm them. For example, Julia Edmunds, now a student at Wellesley College, identified her race as white on applications where she thought the college “want[ed] to get to know her . . . home-schooled and low income . . . [and] deeply religious,” but did not otherwise identify her race.²⁷⁸ Despite her many interesting background characteristics, she was reluctant to appear on some applications as her true self—a “white girl from tweedy New

272. See Elizabeth F. Farrell, *Students Identified as Being of ‘Unknown’ Race Tend to Be White, Study Finds*, CHRON. HIGHER EDUC., Jan. 13, 2006, at A41.

273. Amy Argetsinger, *College-Bound Students Often Skip Race Question*, WASH. POST, June 1, 2003, at C01.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

England.”²⁷⁹ Additionally, Edmunds, although seemingly very well-intentioned, revealed one very disturbing issue with this emerging form of racial concealment: that it is motivated in large part by a fundamental misunderstanding of the impact of race and racism on minorities in the United States. For example, in expressing her dissatisfaction with the use of race in admissions, she declared, “Race affects how other people view me, *but it doesn’t affect how I view myself.*”²⁸⁰ That Edmunds lives in a world in which her race does not affect her view of herself is remarkably illustrative of the very white skin privilege she seeks to hide—a privilege that purportedly allows her to live in this society without any personal psychological burdens of race.

To be clear though, as many colleges and universities have noted, refusals by students to check racial category boxes on admissions applications do not affect any admissions decisions. As Karen Cottrell, the Associate Provost at College of William and Mary declared, “If [race or ethnicity] is not there, it’s a neutral.”²⁸¹ Given this fact, one may, then, wonder why it even matters if students decide to check a race box on their applications. The reasons are twofold. First, although strategic actions of racial concealment by college applicants have no effect on admissions decisions, they do influence other matters, such as legal requirements for colleges and universities to report their students’ racial compositions to the Department of Education.²⁸² Second, such strategic actions of concealment are important to observe because they are indicative of the increasing pressures that motivate students to game the admissions system in various ways. The undeniable fact is that, when the stakes and pressures are as high as they are in the college admissions game, students may push procedural standards and practices beyond the limits of honesty and integrity. The next subsection analyzes one such way in which students may be crossing bounds of decency.

2. Discovering Race

Just like strategic acts of concealing race by college applicants, a second means of “fraud” in the admissions process, misrepresentation, is also part of a growing trend among students in the United States. Across the country, college applicants are

279. *Id.*

280. *Id.*

281. *See id.*

282. *Id.*

increasingly working to uncover their ethnic ancestries and backgrounds through genetic testing in order to then assert a minority identity on applications and gain an “advantage” in the admissions game.²⁸³ In fact, genetic testing companies are even beginning to advertise themselves in this manner. For example, DNA Print Genomics has urged people on its website to use the company’s testing “whether [their] goal is to validate [their] eligibility for race-based college admissions or government entitlements.”²⁸⁴ A number of high school students are responding to these calls from genetic testing companies. Many of these teenagers grew up with a socially and physically white identity, but are now choosing to engage in genetic testing so that they may claim a “biological race” that does not match up at all with their social experience.²⁸⁵ For example, Matt and Andrew Moldawer, adopted twins who knew that both of their biological parents identified as white and grew up in an adopted white family with a white identity, did just that. Because the boys and their father knew nothing about the twins’ genetically related, extended family, the father had the boys genetically tested in order to gain “any advantage [they could] take.”²⁸⁶ Ultimately, the boys learned that they were nine percent Native American and eleven percent North African

283. See Amy Harmon, *Seeking Ancestry in DNA Ties Uncovered by Tests*, N.Y. TIMES, Apr. 12, 2006, at A.1, available at <http://www.nytimes.com/2006/04/12/us/12genes.html?ex=1302494400&en=fa609519f8081dfe&ei=5088&partner=rssnyt&emc=rss> (noting, too, that “[p]rospective employees with white skin are using the tests to apply as minority candidates”). In fact, the practice had grown so much that it prompted a letter in the *New York Times* from Bruce Poch, Vice President and Dean of Admissions at Pomona College in California. He wrote:

To the Editor:

The grasp for any presumed advantage in college admission has led to the specter of DNA sampling to find some genetic connection to a historically underrepresented racial group. But please know that most colleges will not consider this meaningful in their selection process.

In ways that help and in ways that present challenges for many minority groups, race and ethnicity in this country do still generally connect directly to a set of life experiences.

It is distressing to see an anxious parent reduce such considerations to a chit and reduce his own kids to a game piece in an attempt to help them gain admission to college. And it just plain won’t work.

Just as disheartening is what it says about popular perceptions of the state of the college admissions profession. Clearly, my colleagues and counterparts at other institutions and I need to be better teachers about what matters.

Bruce Poch, Letter to the Editor, *Can a DNA Test Give You an Edge*, Letter 3, N.Y. TIMES, Apr. 17, 2006, at A.20.

284. Harmon, *supra* note 283.

285. As Lester Monts, Senior Vice Provost for Student Affairs at University of Michigan, asserted, “If someone appears to be white and then finds out they are not, they haven’t experienced the kinds of things that affirmative action is supposed to remedy.” *Id.*

286. *Id.*

and used that information to garner a better financial aid package.²⁸⁷ Likewise, the sister of Ashley Klett, whom DNA tests showed to be two percent East Asian and ninety-eight percent European, checked the “Asian” box on her college application, an act she believes helped her earn a scholarship.²⁸⁸

The actions of the Moldawer brothers and the Klett sister raise serious questions about the efficacy of relying solely on self-identification in current race-based affirmative-action programs at a time when students seem to be shockingly willing to make what are essentially false claims to race. What these students fail to understand is that the “advantage” they see themselves as gaining from this genetic testing exists only because of the ways in race was constructed along lines such as skin color, hair, nose width, and performance and because of the negative social meanings and statuses that are then attached to these proxies for minority races. After having lived a childhood with the privileges of white citizenship, these students desire to use what they perceive as purely scientific “biology” to claim, not really their genetic race, (they do not actually want to be and live the experiences of racial minorities) but the social privileges that they view as coming with their biology, without any of the legal and social disadvantages.

These applicants’ actions display a fundamental misunderstanding of a truly raced experience in the United States and a basic lack of respect for what that experience means.²⁸⁹ To this end, while the Kletts and Moldawers of the world may, given their extreme lack of knowledge about race, racism, and raced experiences, benefit greatly from exposure to diverse peoples and perspectives at an elite institution, they seemingly bring very little to the table in terms of promoting cross-racial understanding and exchange. That the universities at which these students attend classes awarded them greater financial packages allegedly because of their new-found ethnic

287. *Id.*

288. *Id.* A number of American Indian scholars have this same issue of ethnic fraud in faculty hiring, for which many colleges and universities do not require proof of tribal enrollment. See Mary Annette Pember, *Ethnic Fraud?*, DIVERSE ONLINE, Jan. 25, 2007, http://www.diverseeducation.com/artman/publish/printer_6918.shtml (asserting that “[f]or American Indian scholars, securing a job in higher education can sometimes be as simple as checking a box”). To address these claims, concerned American Indians have made suggestions for how to address this ethnic fraud, including through required documentation and a required statement to demonstrate past and future commitments to American Indians. See *id.*

289. See Christina Shanahan, *DNA Testing Factors into Student Aid Applications*, FORDHAM OBSERVER, May 4, 2006 (quoting the campus director of student financial services as saying, “As a practical matter it is not DNA composition that prompts our interest in ethnicity, but the diversity of the life experience and campus culture that students have the opportunity to share as part of their learning experience”).

backgrounds reveals a flaw in the current system of the use of racial preferences. Of course, it is not the fault of admissions officers and deans that students such as the Moldawers would choose to manipulate racial identification procedures. Certainly, admissions offices have every right to expect that applicants will not abuse the process in this way, but unfortunately, as university and college admissions gets increasingly more and more competitive, one fact remains clear: there will be Moldawers and Kletts out there who will use "any advantage [they can] take."²⁹⁰ In this sense, the actions of the younger Klett and of the Moldawers prove not only that race-based affirmative-action programs are not keeping up with the societal practice of race, but also that they may be failing to keep up with how certain people are practicing their race.

C. Satisfying Missions of Diversity: A Discussion on Proposed Solutions

As a means of both satisfying the goal of achieving true interracial and intraracial diversity on elite campuses and addressing emerging forms of racial and ethnic fraud in the admissions process at prestigious colleges and universities, I propose that colleges and universities with race-based affirmative-action programs consider two modest changes or additions to their applications. The first proposed change or modification is a requirement by colleges and universities with race-based affirmative action that all applicants write an essay that details their racial background and ancestral heritage (to the extent they know it), how such background has helped to shape their identity, whether they want such background to be considered in the admissions process, and how they can add to the diversity of the college environment, including through factors that are not linked to their race, ethnicity, or ancestral heritage. The second change or modification is the requirement of a jointly signed letter from the guidance counselors who worked with the student at each grade level (or if the counselors are unavailable, from a teacher who knows the student very well).²⁹¹ Like the student's essay, this joint letter from the counselors would discuss the general qualities of the student

290. Harmon, *supra* note 283.

291. Flexibility in this requirement is important here because the quality of counselors at schools differs greatly. Indeed, in many of the most disadvantaged schools, counselors are often so swamped with problem students that they hardly get to know their best high school students. By no means do I intend for the counselor letter addition to be rigid. Again, I simply intend to begin a conversation here. Also, the proposed essay does not have to be an additional essay; it could also serve as a substitute for the primary college application essay for schools who desire this flexibility.

applicant, but it would be expected to address specifically the contributions that the applicant could make to the mission of diversity for the school based, at least in part, on the student's racial and ancestral heritages.

Although both of these proposed requirements are difficult to implement and time-consuming because they would require lengthy reading and the hiring of many more admission officers at most schools, they are arguably worth the extra effort and expense in that they could not only help institutions satisfy the various goals of affirmative action but also could assist such schools in policing fraud in the racial and ethnic identifications for each year's increasingly competitive class of high school students. First, the diversity essay requirement could help to satisfy the goals of affirmative action by alleviating the use of racial preferences on people who may have a certain racial background in a physical or even in the "genetic" sense but do not personally identify as part of that racial group in any way.²⁹² The obvious targets of such a requirement are college applicants such as the Moldawers, who theoretically could draft an explicit lie in their essays by creating an entire story about the impact of their racial background on their lives. But I suspect that, for most people, that line is just not one they are willing to cross. The less obvious targets of the diversity essay requirement are those black or part-black individuals who do not identify in any way, shape, or form as part of the racial minority groups to which pluses are granted and thus would not be a part of the critical mass that helps to lessen feelings of alienation for minorities on campus.²⁹³ Professor Guinier has explained that more and more first-generation Blacks and mixed-race students are not identifying with native black American students on Harvard's campus, which raises a question about how these students may be contributing, rather than taking away from, the feelings of isolation on campus by legacy Blacks.²⁹⁴ Indeed, this growing form of distancing one's self from legacy Blacks on elite

292. See Scott Jaschik, *The Immigrant Factor*, INSIDE HIGHER ED., Feb. 1, 2007, <http://insidehighered.com/news/2007/02/01/black> (quoting Lani Guinier as saying "I don't think, in the name of affirmative action, we should be admitting people because they look like us, but then they don't identify with us").

293. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (highlighting the breakdown of stereotypes as one of the benefits of diversity).

294. See Rebecca Parrish, *The Meritocracy Myth*, DOLLARS & SENSE, Jan.-Feb. 2006, at 24 (detailing an interview with Lani Guinier); cf. Haynie, *supra* note 15, at 44 (emphasis added) (noting that many first- and second-generation and mixed-race students did not identify in her survey, even though they were asked to check all that apply, as "black American"). Such an analysis would not require, for example, a black student to hang out with other Blacks or join the black student union. It would not be a judgment of whether a student is, for instance, "black enough," but rather what they are really bringing to the table in terms of diversity.

campuses is supported by NLSF data on black first-year students at twenty-eight colleges and universities. From that data, Professor Douglas S. Massey, Margarita Mooney, Kimberly C. Torres, and Camille Charles reported that “only 63 percent of black immigrants said they were non-Hispanic blacks”—meaning “black, African-American, or Negro—as compared to “[r]oughly 82 percent of black natives.”²⁹⁵ Likewise, they reported that significantly larger percentages of first- and second-generation Blacks identified themselves as Hispanic—six percent compared to 0.5 percent of African-Americans—and as other—ten percent compared to 1.5 percent of African-Americans.²⁹⁶ Haynie, too, found that many first- and second-generation and mixed-race students did not identify as “black American” in her survey, even though they were asked to check all categories that applied.²⁹⁷

Nevertheless, such identifications by first- and second-generation Blacks are not problematic on their face. After all, these individuals make up a group which, if we consider the contributions for diversity of thought on campus, would certainly add to the exchange of ideas between diverse students and would further assist in breaking down stereotypes about minority viewpoints.²⁹⁸ Additionally, it may be that growing up with parents who are first-generation immigrants simply led an applicant to identify more with his or her parents’ nationality than with his or her own birthplace.²⁹⁹ In the end, while the verdict may still be out on these non-identifying Blacks at elite campuses, what is clearly problematic are those students like Matthew and Andrew Moldawer, who in terms of genetic testing may be able to make a claim to minority status, but share none of the social and psychological experiences of being a racial minority.

Second, both the proposed essay requirement and the jointly signed letter from guidance counselors would give elites colleges and

295. Massey et al., *supra* note 19, at 253.

296. *Id.*

297. See Haynie, *supra* note 15, at 44 (emphasis added).

298. RICHARD FORD, RACIAL CULTURE: A CRITIQUE 25, 31 (2005) (warning against essentialist ideas of blackness).

299. What may be problematic, however, is an identification as a non-black American for the explicit reason of distancing one’s self from African-Americans because the person believes that he or she is “better than” the negatively stereotyped group; after all, while a person with reasons for so identifying could add to the diversity of opinion on campus, thus enabling a greater exchange, they add nothing at all to the notion of critical mass. Nevertheless, this person also serves as an argument for why the numbers of Blacks on campus, if two of the goals are diversity and achieving a critical mass, should be more than token-worthy. Again, the point of the proposed essay is not to make applicants prove that they are a black person with certain beliefs or politics. In the words of Professors Catherine Fisk and Mitu Gulati, I am not calling for a “racial trial” of this type, but only a trial of an acknowledgement of a lived experience as a black person or as a person of African descent.

universities, in their individualized admissions process,³⁰⁰ more insight into the contributions that a student could make to the diversity of the school both in the classroom and outside of the classroom and apart from just creating an aesthetically pleasing class. Indeed, such a requirement would actually make any race-based affirmative-action program more narrowly tailored towards achieving its interest in diversity by requiring a more in-depth analysis of any participating student's potential contribution to the school and its mission. For instance, in considering general criteria for admission such as grade point averages, standardized test scores, extracurricular activities, public service, and references, colleges and universities would be closely examining, not only what insights they think a particular student may bring to campus as a result of raced experiences, but also what contributions the student may bring to the schools in terms of fulfilling its mission.³⁰¹ That mission could include matters such as involving "integrative learning through multidisciplinary studies that communicate across cultural and curricular perspectives" or embracing "an informed and active concern for the well-being of society,"³⁰² all of which are enhanced by both interracial and interethnic diversity.

Third, both proposed requirements would provide colleges and universities with a method for keeping track of how effective their admissions programs are at reaching legacy Blacks or other disproportionately under-represented ethnic groups, such as Mexican-Americans, at their schools.³⁰³ Accomplishing this task can only aid us

300. See also Neil Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781, 784 (2006) (noting that the Supreme Court "has imposed a legal requirement of individualized consideration . . . but it has not clearly explained what the concept of individualized consideration means and why particular forms matter").

301. See *Grutter v. Bollinger*, 539 U.S. 306, at 315 (2003) (affirming the law school's use of race as one soft variable that informed it of the "applicant's likely contributions to the intellectual and social life of the institution"); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (Powell, J., concurring) (maintaining that a school may implement affirmative action to admit "those students who will contribute the most to the 'robust exchange of ideas' " (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967))).

302. See *supra* note 56 (citing Vassar College's mission statement); see also Siegel, *supra* note 297, at 788-89 (" '[I]ndividualized consideration' means that government must determine whether a given individual meets the selection criteria by examining all of the individual's relevant characteristics or circumstances, not just one characteristic that (like all individual characteristics) is also a group characteristic.").

303. See Haynie, *supra* note 15, at 55 (suggesting "[a]cknowledgment and record-keeping of black ethnic enrollment at all American universities, such that ethnic enrollment may be monitored and/or adjusted according to appropriate standards set by the university"). One suggestion also includes having colleges and universities publish more detailed statistics about the percentages of different minority student populations on campus, including their categorization by ancestral background.

all in working towards the social justice component of affirmative action.

Fourth, the diversity essay requirement, by requiring that the applicant explicitly note whether he or she wants his or her race or ancestral heritage to be used as a plus factor in the admissions process, gives the *individual applicants* the privilege of determining whether or not they want to have their race considered as a plus factor in the process, rather than allowing *college administrators* to impose such considerations on students who do not welcome them. For example, Will Frankenstein, who is half-white and half Asian and now a student at Stanford University, proclaimed that he did not identify his race on his application in part because he wanted to prove that he was admitted into college on his own "merits."³⁰⁴ He later clarified his decision, stating, "I don't want to be defined by my ethnicity. I have friends who are from all over the world that don't judge me by my ethnicity. Why should someone else judge me by my ethnicity?"³⁰⁵ By giving students like Frankenstein the ultimate decision in determining whether they want their race to be a plus factor in the evaluation of their applications, then, colleges and universities accomplish three very important goals: (1) they satisfy the student by giving him or her some control over the evaluation of his or her college application; (2) they do not discourage students from completing information on their applications that they legally must report to the Department of Education, and (3) they enable elite colleges and universities to collect as much accurate information as possible so that they can carefully assess the effectiveness of their affirmative-action programs.

Finally, my second proposed requirement, which essentially serves as official school confirmation of racial and ancestral identities, would help to prevent any fraud by applicants who may find it easy to lie about or exaggerate their racial and ancestral heritages based on genetic testing or just plain creative spirit and then create a completely false story about how those factors had influenced their development as individuals. Additionally, because race is a social construct, which makes one's race just as much about how others perceive him or her as it does about how one identifies or perceives oneself,³⁰⁶ the second essay provides even more detail about what the admissions applicant may be able to contribute in terms of diverse

304. Argetsinger, *supra* note 273, at C01.

305. *Id.*

306. Social construction is "the idea that race does not exist at all antecedently of its invention in culture.... [R]ace does not exist outside of, but is instead the effect of, discourses [A] particular race consciousness emerges: namely, that race is real and that everyone has one." Carbado, *supra* note 162, at 978.

perspectives, viewpoints, activities, and ideas as they are influenced by his or her race or ancestry.

As with most college application requirements, my two proposed modifications or additions present some real risks in their implementation and effectiveness. First, the diversity essay requirement is essentially useless without the submission of a sufficient percentage of applications from any minority group within a minority group. That said, I note and stress that any adoption of my proposed requirements must also be accompanied by aggressive college recruitment tactics. Elite colleges and universities must make special efforts to travel to locations where legacy Blacks predominate, such as the deep South, and must work to inform those qualified but uninformed students in such areas of the school's offerings, their financial aid packages, and any other details that may be critical in encouraging such students to not only apply to the institution but also enroll there the following fall. Second, the diversity essay requirement presents risks in that it could be "gamed" by students of privilege in a way that would only nullify the intended effect of creating information about and thus more access to elite colleges and universities for qualified students who normally would not find their way to such institutions. For example, wealthy students could hire diversity essay experts, who could assist them in drafting just the "right" essay for their applications.³⁰⁷ In light of this strong potential for outside assistance by some applicants, however, I strongly emphasize to admissions officers across the nation that they should analyze each student's diversity essay with an eye towards its primary purpose. Although the writing in the diversity essay must constitute good writing in itself, its sole purpose is not to score points on eloquence and grammar for the student applicant, but rather to allow for deeper examination of the potential insights and contributions that the applicant may bring to campus to enhance diversity and facilitate a robust exchange of ideas between diverse individuals. Moreover, the essay is also intended to serve as a tool for schools to use in a broader context by keeping track of and getting a sense of how many legacy Blacks versus non-legacy Blacks are applying to their institutions and how many of them are actually gaining acceptance to the schools.

Lastly, I acknowledge the many financial and practical barriers to implementing my solutions. First, the expense of hiring more admissions officers to read files is certain to be enormous, and clearly many colleges and universities in the United States cannot afford such an undertaking. That said, I stress again that my focus in this Article

307. See Holland, *supra* note 269 (describing the services of College Coach, a company formed by two MBAs to advise students through the admissions process).

is on elite institutions, many of which do not share the same financial concerns of the vast majority of colleges and universities. Second, I do agree, somewhat, that there is some wisdom in implementing change slowly rather than quickly, and to the extent, that colleges and universities are interested in my proposals but wary of them, I recommend that they slowly incorporate these additional or substituted requirements into their admissions process over a period of several years (or that they at least consider how to resolve the issues that are raised in this Article). Third, I recognize that there are exceptions that must be made for students who know nothing about their ancestral heritage because they were adopted and because family histories were not orally passed down, but I contend that those cases are best dealt with on a case-by-case basis. Finally, I realize that my back-up plan for working to prevent racial and ethnic fraud among high school applicants is highly dependent upon an already understaffed, underpaid, and overworked group of guidance counselors, and that requiring a jointly signed letter from them rather than individual letters from teachers places an especially onerous burden upon them.³⁰⁸ There is no doubt that all of these factors present a huge obstacle to the second part of my proposal. But the reader should know that I selected guidance counselors primarily because they tend to get a more holistic view of students during high school and because they, as a group, are less likely to be defrauded by students as to their racial and ethnic backgrounds. Additionally, by requiring a joint letter from the counselors (where possible), I expect that colleges and universities would get a better sense of the applicant's relevant qualities over a period of years in high school as opposed to just one. Furthermore, requiring a joint letter makes it less likely that the student can "fool" any one person, such as an English teacher, about to his or her race and ancestral heritage by making concerted efforts to talk to this one recommending teacher about those issues. Moreover, I view a joint letter from guidance counselors in grades nine through twelve as essentially allowing only the most astute of students to game the system; after all, the act of fooling four different people as to one's race and ancestral heritage would require that the student be astute enough to begin his plan of deceit as early as ninth grade and continue for four years as opposed to just one year or even one semester with one teacher or counselor during the senior year.

Most of all, I ask that elite colleges and universities not allow any potential obstacles or problems as to the details of my proposal to

308. *See id.* ("With the national average of 500 students for one guidance counselor, more families are looking for outside assistance" with the admissions process.).

prevent them from thinking through, discussing, and working through these issues of interethnic and interracial diversity. If nothing else, they should use my Article as starting point for future conversations on this topic and other types of potential change. In the end, while incorporating these factors into an admissions program would certainly make the entire process more time-consuming and difficult, such changes may be necessary in order to ensure that the affirmative-action programs at elite colleges and universities stay in line with the practice of race and that they satisfy not only the diversity goals of racial preference policies but also the goals related to social justice.

CONCLUSION

As the practice of race and racism changes in our society, those of us entrenched in college and university life will have to ask ourselves: what legacy do we want to leave behind? Specifically, we will have to grapple with whether or not we want to continue our legacy of excluding disadvantaged racial minorities and poor people from our nation's most elite educational institutions, institutions which Justice O'Connor referred to in *Grutter* as "the path to leadership."³⁰⁹ One specific problem that we must contend with in answering these questions is the increasing and disproportionate rate at which first- and second-generation Blacks and mixed-race individuals are outpacing and outrunning legacy Blacks on the pathways to our country's finest colleges and universities. As this Article has argued, the disproportionate percentages of first- and second-generation Blacks and mixed-race students at the highest-ranked colleges and universities should be of serious concern to institutions that have race-based affirmative-action programs and that express a commitment to both diversity and social justice. If these schools' affirmative-action programs are not fulfilling either their mission-driven diversity goals and/or corrective justice purposes by failing to allow for opportunities at and access to institutions of higher education for black students of all backgrounds, then they have an obligation to re-evaluate their admissions systems and must do so with an eye toward improving the disproportionately low number of legacy Blacks in their hallways. For example, President Anthony Marx of Amherst College delivered very strong remarks about the need to address the absence of legacy Blacks at elite institutions. He maintained that colleges and universities needed to consider the ethnicity of black students in their admissions process because in

309. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

overlooking those students with predominantly American roots, they were missing an “opportunity to correct a past injustice” and depriving their campuses “of voices that are particular to being African-American, with all the historical disadvantages that that entails.”³¹⁰ Likewise, Professor Martha Biondi of Northwestern University asserted the following about the need to find and recruit legacy Blacks who could succeed at elite schools, stating: “It’s about being creative and looking for those uncut diamonds.”³¹¹ In other words, schools must ask themselves, “Are we really making the effort to find those students who have shown, through the obstacles they have overcome and their drive for success, that they will contribute greatly to our school and succeed within our hallways?”³¹² My proposals for a diversity essay and a jointly signed letter from all of the applicant’s high school counselors are just two modest suggestions for how to find these “uncut diamonds.” And, these two steps (or steps similar to them) just might begin to help fill the gap between legacy Blacks and non-legacy Blacks if coupled with more concerted recruitment efforts in regions such as the deep South.

Overall, the critical issue is how colleges and universities can best work to include a broad range of students, both socioeconomically and racially, within their environments. Such efforts require a close examination into not only racial and ethnic biases and disadvantages but also the exclusionary ways in which we define merit in academia. As Professor Lani Guinier has proclaimed, “Too many universities use their admissions criteria to consolidate privilege rather than expand opportunity.”³¹³ The plain truth is that the admissions process at colleges and universities across the nation conceals cultural and class biases, such as expensive test preparation courses, personal tutors,

310. *Roots*, *supra* note 32, at 70.

311. McNamee, *supra* note 29, at 10.

312. See *Roots*, *supra* note 32, at 70 (quoting Harvard Professor Mary Waters as saying, “If it’s only skin color, that’s a very narrow definition of diversity. I would hate to see Harvard not reaching out to those African Americans who have been in the United States for generations. Are we not looking as hard as we should in Mississippi or Alabama for kids who would do well if they were recruited?”).

313. Guinier, *supra* note 11, at A13. A recent study of students at the 146 most selective colleges revealed that seventy-four percent come from the upper twenty-five percent of the socioeconomic ladder, only three percent come from the bottom twenty-five percent, and roughly ten percent come from the bottom fifty percent. See Guinier, *Admissions Rituals*, *supra* note 34, at 148 (citing ANTHONY P. CARNEVALE & STEPHEN J. ROSE, THE CENTURY FOUND., SOCIOECONOMIC STATUS, RACE/ETHNICITY, AND SELECTIVE COLLEGE ADMISSIONS 8 (2003), available at http://www.tcf.org/Publications/Education/carnevale_rose.pdf); see also Parrish, *supra* note 294 (interviewing Lani Guinier, who asserted, “Currently, schools are more concerned about admitting people who have high SAT scores who will boost their status than recruiting leaders. Education is changing from an opportunity for students to explore and grow to institutions that are consumed with rankings.”).

and significant counseling and mentoring in private schools, which work to exclude most students but the very most privileged.³¹⁴ For these reasons, it is important for schools to re-evaluate the ways in which their admissions procedures generally favor those who come from families that are wealthier and know the process.³¹⁵ In fact, students of all races would benefit from a re-evaluation of admissions procedures and criteria that challenges current notions of merit.³¹⁶ For example, the forced re-evaluation of the use of standardized tests at state universities in Texas after *Hopwood v. Texas*³¹⁷ opened the doors not only to socioeconomically disadvantaged students of color but also poor rural white students. Specifically, the Texas Ten Percent Plan, which provides that any student in the top ten percent of his or her high school class receives automatic admission to his or her first-choice state institution, has increased the number of high schools in Texas that send students to the University of Texas-Austin from 600 to more than 800; many of the students from the previously excluded schools come from both poor, rural white districts and poor minority districts that had never or rarely sent students to the prestigious flagship school.³¹⁸ Additionally, last fall, with the use of race-conscious admissions and the Ten Percent Plan, the prominent flagship campus enrolled its highest percentages of black and Latino first-years, with

314. See Guinier, *Admissions Rituals*, *supra* note 34, at 148.

315. See *id.* at 146-47 (2003) (detailing upper middle-class bias in admissions and asserting that “[q]uantitative measures often reflect family resources and influence rather than a student’s resourcefulness or intelligence”); Harris, *supra* note 5, at 711 (“Affirmative action then is not a correction for societal discrimination, but a correction for the use of admissions criteria in which racial preferences are embedded.”). In particular, colleges and universities should re-examine their reliance on standardized test scores, which have not proven to be good predictors of minority student performance. See Holzer, *supra* note 59, at 223.

316. See Cho, *Multiple Consciousness*, *supra* note 10, at 1057 (emphasizing the need to question traditional standards of merit and warning that “deeper structures of domination may actually be strengthened when reforms are undertaken in ways that leave unchallenged the operational logic of subordinational systems”); see also Robin West, *Constitutional Fictions and Meritocratic Success Stories*, 53 WASH. & LEE L. REV. 995, 1016 (1996) (“If we wish to maintain our commitment to meritocracy and to maintain our belief that meritocracy is the normal . . . [w]e are forced to deny the extent to which the advantage, successes, and potentiality of every white person is a product of racial advantage rather than of individual merit standing alone. This denial, however, goes deeper. A belief in both the ideal and the typicality of meritocracy forces us to deny the extent to which success is a function not only of unearned racial privilege, but of any factor unrelated to merit. It forces us to deny, for example, both in our individual and in our collective histories, the influence of family connections in securing employment or education opportunities.”).

317. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 533 U.S. 929 (2001) (holding that the law school’s admissions program which provided substantial racial preferences in favor of racial minorities in its admission program violated equal protection).

318. See Onwuachi-Willig, *supra* note 237, at 1507, 1536, 1538; Jonathan D. Glater, *Diversity Plan Shaped in Texas Is Under Attack*, N.Y. TIMES, June 13, 2004, at A1; Clay Robison, *Minority Leaders Urge State to Keep College 10% Rule*, HOUSTON CHRON., June 24, 2004, at A17.

black students at five percent and Latino students at nineteen percent of the student population.³¹⁹ Undoubtedly, colleges and universities in general should experiment with ways to achieve this type of socioeconomic and racial diversity on their campuses, especially in light of the now twenty-one year clock on affirmative action.³²⁰

However, in evaluating their admissions standards, colleges and universities must be careful not to scapegoat certain segments of the black community in their efforts to ensure inclusion, equality, opportunity, and diversity within their doors. Blacks themselves must be careful not to fight each other over one very tiny sliver of a pie that should be expanded and opened to all.³²¹ Regardless of ancestral heritage, all Blacks endure discrimination in a society that negatively stereotypes, stigmatizes, and disadvantages blackness. First- and second-generation Blacks and mixed-race students, regardless of their relative educational and psychological “advantages” over legacy Blacks, are still generally underprivileged when compared to Whites, thus meriting their inclusion in race-based affirmative-action programs from a social justice perspective. Indeed, the manner in which first- and second-generation Blacks must perform their identity in order to distinguish themselves from legacy Blacks and avoid the disadvantages that stem from blackness in this country is an especially damaging form of discrimination because it requires that they reject what for many Blacks is a critical part of their identity—being part of the black community. The point of my analysis in this

319. See Lewin, *supra* note 2, at 1. Lobbyists are working to revise a bill, which is next available for revision during the 80th Regular Session (2007). HB 78 (80R), which would cap admissions under the Plan to just forty percent of the entering class, is planned to be introduced during this session. Supporters of the cap argue that “the law discriminates against good students from high-performing schools who fall short of the top 10 percent category but whose SAT scores are higher than those of top 10 percent students at lower-performing schools.” Posting of Ralph K.M. Haurwitz to College Admission Guide: College Search Guide, *Legislative Battle Brewing Over College Admission Law*, <http://college-search-and-colleges.blogspot.com/2006/12/legislative-battle-brewing-over.html> (Dec. 10, 2006 14:14 EST).

320. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (noting almost four years ago that “[w]e [the Court] expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today”); cf. Eboni Nelson, *What Price Grutter?*, 32 J. C. U. L. 1 (2005) (urging affirmative action supporters to begin to consider other ways of measuring and ensuring diversity at schools).

321. See Inniss, *supra* note 49, at 85 (“The black American experience is an immigrant experience. This is true, I submit, whether we speak of native or foreign-born blacks, poor or middle-class blacks.”); cf. Johnson, *supra* note 165, at 200-01 (“Latinos should recognize the arbitrariness of treating immigrants and citizens differently under the law. . . . It divides a community with members who have much in common, including dominant society’s classification of the entire group as ‘foreigners’ to the United States.”).

Article is to include, not entirely exclude, a broader cross-section of individuals.³²²

In conclusion, one critical step in reaching a broader level of inclusion among different groups is to embark on a re-evaluation of the traditional standards that colleges and universities use in deciding to whom they will open their doors and examine more closely the reasons that more qualified legacy Blacks and members of other disproportionately represented groups are not finding their way to elite colleges and universities. At the same time, we have to recognize that this goal of reaching out to and recruiting more legacy Blacks to elite colleges and universities does not run counter to the goal of satisfying the diversity and social justice rationales in a way that embraces first- and second-generation Blacks and mixed-race students. In fact, all of these considerations are central to fulfilling not only the social justice rationale for affirmative action but also our interest in diversity in all of its forms. As the Supreme Court noted in *Grutter*, greater diversity, both interracial and intraracially, can only enhance institutions of higher education by bringing a wider range of voices, perspectives, and understanding to those places. Instead of creating and widening what appears to be a black divide on affirmative action, we should join together to ensure that all of these goals of affirmative action are fulfilled.

322. Naturally, because each college and university has a limited number of spaces for students of all races, including more legacy Blacks necessarily means that others groups may be excluded, but such exclusion, unlike that currently of legacy Blacks, is unlikely to be grossly disproportionate or all encompassing.
