

LSAC DATA REVEALS THAT BLACK/WHITE MULTIRACIALS OUTSCORE ALL BLACKS ON LSAT BY WIDE MARGINS

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The Supreme Court has now issued its opinions in both *Fisher v. University of Texas*¹ and *Schuetz v. Coalition to Defend Affirmative Action*,² and thereby reaffirmed its decision in *Grutter v. Bollinger*³ that upheld the legal validity of narrowly tailored affirmative action programs in higher education. There still remains, however, an important issue to address regarding the nature of affirmative action: the changing racial and ethnic ancestry of black students enrolling in the nation's law schools.⁴

Most Americans are not yet familiar with this historic change in attendance at selective higher education institutions, including the nation's law schools. At the time that affirmative action admissions policies were instituted—in the 1960s—Americans did not draw distinctions, in terms of race, between Single-Race Blacks and Black Multiracials.⁵ Anyone with one drop of “black blood” was considered black.⁶ In other words, the concept of Black Multiracials did not exist. Nor did a significant distinction between native blacks and Black Immigrants or their children⁷ exist in either the dominant American cultural attitudes or the black community. A main reason this distinction did not exist

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1. 133 S. Ct. 2411 (2013).

2. 134 S. Ct. 1623 (2014).

3. 539 U. S. 306 (2003).

4. For most of the past one hundred years, American society has treated all blacks alike, regardless of their racial or ethnic backgrounds. This article seeks to sensitize the reader to the reality that the perception of all blacks alike is a relic of the past. Thus, I have chosen to capitalize “Black” when referring to racial and ethnic distinctions among blacks, such as “Black Multiracials,” “Black Immigrants,” or “Ascendant Blacks.” However, when referring to the older notion of all people with some African descent as alike, I use the lowercase “black.”

5. The term “Black Multiracial” refers to those Blacks with a non-Black parent.

6. For example, instructions for the 1960 census form continued the rule originally adopted in 1930: “A person of mixed white and Negro blood was to be returned as Negro, no matter how small the percentage of Negro blood.” C. Matthew Snipp, *Racial Measurement in the American Census: Past Practices and Implications for the Future*, 29 ANN. REV. SOC. 563, 568 (2003).

7. The term “Black Immigrant” refers to those with at least one foreign-born Black parent.

was because the number of blacks who were foreign-born constituted less than one percent of the nation's black population.⁸ As a result, the major assumption upon which selective higher education institutions developed affirmative action admissions plans was that the predominant beneficiaries would be those blacks with two native-born black parents as defined by the one-drop rule, whom I call "Ascendant Blacks." Because of their parentage, these are the blacks with the greatest ancestral connection to the history of racial discrimination in the United States. Yet, Black Multiracials and Black Immigrants are increasingly replacing Ascendant Blacks as beneficiaries of affirmative action. Thus, in an ironic twist of fate, American society is on the road to virtually eliminating from its selective higher education institutions the racial/ethnic group of blacks most steeped in the history of racial discrimination that was the cause of the institution of affirmative action policies in the first place.

There is another huge difference between Ascendant Blacks and Black Immigrants or Black Multiracials that affects the lived experience affirmative action attempts to address. The difference is that the latter two groups are sort of "Neo-Black," in that they have a choice as to whether to identify with the historical struggle against racial oppression in the United States. Not all members of American society draw a distinction between Ascendant Blacks, Black Immigrants, or Black Multiracials, but Black Multiracials and Black Immigrants have a tremendous degree of flexibility in terms of whether they self-identify with the historical struggle against racial oppression in the United States that Ascendant Blacks do not possess. An individual black person, for example, may downplay their connection to this history by asserting a racial/ethnic identity that distinguishes them from other blacks by saying, "I am Ghanaian," "I am Nigerian," "I am Jamaican," or "I am Multiracial." Ascendant Blacks do not possess this ability to choose a different racial/ethnic self-identity that Neo-Blacks possess.

In 2010, new regulations promulgated by the Department of Education ("DOE") took effect that changed the way all educational institutions collect and report racial and ethnic information, allowing those institutions to differentiate self-identified Black Multiracials from other blacks.⁹ Up until that time, selective higher education institutions generally placed all those of African descent into a unified category, regardless of race or ethnicity. Nevertheless, before 2010,

8. In 1960, the 125,000 foreign-born Blacks in the United States comprised only 0.7% of the Black population. See CAMPBELL GIBSON & EMILY LENNON, U.S. CENSUS BUREAU, TABLE 8: RACE AND HISPANIC ORIGIN OF THE POPULATION BY NATIVITY: 1850 TO 1990 (Mar. 9, 1999), available at <http://www.census.gov/population/www/documentation/twps0029/tab08.html>.

9. The purpose of the new DOE regulations is to "obtain more accurate information about the increasing number of students who identify with more than one race." Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education, 72 Fed. Reg. 59,266, 59,267 (Oct. 19, 2007). Thus, it did not require colleges and universities to collect or report information about the ethnic background of Blacks applying to or attending their institutions. Therefore, compliance with the regulations will not generate information about the ethnic background of Blacks.

several studies pointed to the overrepresentation of Black Multiracials and Black Immigrants among blacks attending selective higher education undergraduate institutions. For example, a 2003 study by Princeton researchers noted that, of blacks entering twenty-eight selective colleges and universities in 1999, which ranged from highly selective to moderately selective, forty-one percent were either Black Multiracials or Black Immigrants.¹⁰ A 2006 article discussed the results of a 2004 study, which showed that Black Immigrants comprised 20.9% of the nation's black undergraduates and 27.4% of enrolled black graduate students,¹¹ and another study found that Black Immigrant high school graduates were almost four times more likely to attend selective colleges and universities than other blacks.¹² A study that tallied the 2007 reports from the Consortium on Financing Higher Education ("COFHE"), an institutionally supported organization of thirty-one highly selective private colleges and universities, showed that nineteen percent of the black students indicated that they had a parent of another race and an additional four percent answered "yes" to the Hispanic/Latino ethnicity question.¹³ In contrast, according to the 2000 census count, in 2007, Black Multiracials accounted for only 6.3% of the black population between the ages of seventeen and twenty-one.¹⁴

The change in regulations by the DOE in 2010 has revealed further evidence of the widespread increase in the number of Black Multiracials at selective higher education institutions. For example, while varying each year, forty-two percent of the black students enrolled as freshmen starting at Yale University in the falls of 2011–2014 were Multiracial (fifty-four percent in 2014), at the University of Virginia for the same years it was 21.5% (with 22.4% in 2014), and at Indiana University-Bloomington Black Multiracials made up 18.4% of all

10. DOUGLAS S. MASSEY, CAMILLE Z. CHARLES, GARVEY F. LUNDY & MARY J. FISCHER, *THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMEN AT AMERICA'S SELECTIVE COLLEGES AND UNIVERSITIES* (2003). In addition, Harvard professors Lani Guinier and Henry Louis Gates noted that, in the summer of 2003, Black Multiracials and Black Immigrants comprised two-thirds of Harvard's Black undergraduate population. See Ronald Roach, *Drawing Upon the Diaspora*, DIVERSE: ISSUES IN HIGHER EDUC. (Aug. 25, 2005), <http://www.diverseeducation.com/article/4558>.

11. *A Solid Percentage of Black Students at U.S. Colleges and Universities Are Foreign Born*, 54 J. BLACKS HIGHER EDUC. 22 (Jan. 2006).

12. Pamela R. Bennett & Amy Lutz, *How African American Is the Net Black Advantage? Differences in College Attendance Among Immigrant Blacks, Native Blacks, and Whites*, 80 SOCIOL. EDUC. 70, 90 (2009). This study looked at a nationally representative sample of eighth graders drawn from the National Educational Longitudinal Study who were first surveyed in 1988. There were four follow-up surveys conducted in 1990, 1992, 1994, and 2000. Bennett and Lutz stopped their research at the 1994 data set. This set of data was from two years after the students should have entered college. They found that while 9.2% of Black Immigrants attended selective colleges and universities, only 2.4% of other Blacks did. *Id.* at 70, 79.

13. See Kevin Brown & Tom I. Romero, II, *The Social Reconstruction of Race & Ethnicity of the Nation's Law Students: A Request to the ABA, AALS, and LSAC for Changes in Reporting Requirements*, 2011 MICH. ST. L. REV. 1133, 1176 (2011).

14. KEVIN BROWN, *BECAUSE OF OUR SUCCESS: THE CHANGING RACIAL AND ETHNIC ANCESTRY OF BLACKS ON AFFIRMATIVE ACTION* 151 (2014).

black undergraduate students on campus in the fall of 2013.¹⁵ However, many Black Multiracials may strategically check only the black racial box on their admissions forms, even though they also identify with other racial/ethnic categories, in an attempt to influence their likelihood of acceptance.¹⁶ Thus, even these figures may understate the number and percentages of Black Multiracials among blacks enrolled at these institutions.

Until now, little research has been published on the changing racial and ethnic ancestry of blacks enrolled in the nation's law schools. However, in response to the new DOE regulations, the Law School Admissions Council ("LSAC") changed the way LSAT test takers designate their racial and ethnic identification. Following the requirements of the DOE regulations, LSAC registrants are now provided with the ability to both indicate whether they are Hispanic/Latino and to check all of the racial boxes that apply to them: (1) American Indian or Alaska Native; (2) Asian American; (3) Black or African American; (4) Native Hawaiian or Other Pacific Islander; and (5) White. In fact, while not required by the DOE regulations, the LSAC form also allows registrants to designate ethnic subcategories within both the Hispanic/Latino category and each of the broad racial categories, except for the "Black or African American" category. Thus, while these changes allow LSAC to separate the performance of self-identified Black Multiracials from self-identified Single-Race Blacks, it does not allow for the separation of Black Immigrants from other Blacks.

LSAC data reveals that the LSAT scores of Black Multiracials, particularly Black/White ones, are significantly higher than those of Single-Race Blacks.¹⁷ According to LSAC figures, of the approximately 42,250 test takers who indicated some black ancestry and took the LSAT between 2010 and 2013, 9.5% were Black Multiracials.¹⁸ The percentage of Black Multiracials actually increased every year going from 6.7% in 2010 to 10.7% in 2013.¹⁹ The number

15. *Id.*

16. For example, one website that provides valuable advice to students applying for law school specifically states in its section for multiracial applicants "if a school lets you identify only one racial category, check the box that indicates the most disadvantaged group: Native American or Black." See *Race and Ethnicity*, DELOGGIO ADMISSIONS ACHIEVEMENT PROGRAM, <http://www.deloggio.com/diversty/race.html> (last visited June 4, 2015). In addition, some researchers have observed that multiracial individuals are more likely to identify with the minority component of their background when forced to choose in constrained, high-stakes settings and when they have specific knowledge of how such race-conscious data will be used—that is, in the context of LSAT pre-law school testing, as opposed to being asked to "check all that apply" once in law school. A.T. Panter, Charles E. Daye, Walter R. Allen, Linda F. Wightman & Meera E. Deo, *It Matters How and When You Ask: Self-Reported Race/Ethnicity of Incoming Law Students*, 15 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 51, 63 (2009).

17. See Table I, *infra*, for data on these scores.

18. Statistics obtained from Josiah Evans, the Assistant Director of Social Science Research for LSAC (on file with author).

19. *Id.*

and percentage of each black racial group that scored over 150, 155, and 160 are listed in the table.

Table I: Black LSAT Scores by Race, 2010 to 2013²⁰

Racial Group	# over 150	% over 150	# over 155	% over 155	# over 160	% over 160
Single-Race Blacks	9,941	25.9%	4,602	12.0%	1,925	5.0%
Total Black Multiracial	1,750	43.3%	997	24.6%	480	11.9%
Black Hispanic	357	34.9%	189	18.5%	74	7.2%
Black/American Indian	155	27.6%	65	11.9%	*	*
Black/Asian	194	46.7%	100	24.1%	57	13.7%
Black/White	675	57.1%	437	37.0%	247	20.9%
Black/Two or More Groups	369	43.1%	206	24.1%	95	11.1%

Since it is generally known that non-white test takers score lower on the LSAT than white test takers, it is interesting to note that the median LSAT scores of Black/White Multiracials appeared to exceed the median LSAT scores for all test takers. For comparison, the mean LSAT score for over 105,000 test takers for 2011–2012 was 150.66 for all test takers and 152.8 for whites.²¹ However, over fifty-six percent of Black/White Multiracial test takers exceed 150.²² As required of all educational institutions by the DOE regulations, the LSAT relies on a voluntary, self-reporting approach to collecting racial/ethnic identifications of test takers. There is therefore a good possibility that the advantage that Black Multiracials, particularly Black/White ones, have on the LSAT over Single-Race Blacks is actually understated by the LSAC statistics. Normally, self-identification is the proper approach to determine a person's racial/ethnic identity. As indicated earlier, however, in the context of applying to

20. *Id.*

21. SUSAN P. DALESSANDRO, LISA C. ANTHONY & LYNDA M. REESE, LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL/ETHNIC BREAKDOWNS: 2005–2006 THROUGH 2011–2012 TESTING YEAR 9 tbl.1 (Oct. 2012), available at <http://www.lsac.org/docs/default-source/research-%28lsac-resources%29/tr-12-03.pdf>.

22. The LSAT data on mean is actually from 2011 to 2012, whereas the scores of Black/White Multiracials are from 2010 to 2013. In addition, while the *mean* LSAT score for all test takers in 2011–2012 was 150.66, the *median* for Black Multiracials had to be higher than 150, since fifty-six percent scored 150 or above.

law school where admission decisions are competitive, there is a distinct probability that many multiracial individuals will choose the box for their racial identification for the LSAC registration primarily for the strategic purpose of improving their admissions prospects.²³ Thus, many of those with black ancestries who truly identify themselves as multiracial, non-racial, a race other than black, or Hispanic/Latino may decide to only select the “Black or African American” racial box. Since, on average, Black Multiracials score higher than Single-Race Blacks, those Black Multiracials who strategically only check the Black/African American box could elevate not only their prospects for admissions but also the average LSAT scores of Single-Race Blacks.

Regardless of the causes, the LSAT advantages that Black Multiracials have over Single-Race Blacks are likely to persist for the near future. In addition, the percentage of Black Multiracials among Blacks approaching the age at which most apply to law school or college is on a steep upward trajectory. According to census figures for 2012, the percentage of Black Multiracials between the ages of twenty and twenty-four was only 7.9%.²⁴ However, the percentage of Black Multiracials between the ages of fifteen and nineteen was 8.9%, between ten and fourteen was 10.9%, between five and nine was 15.0%, and for those under the age of five was 19.1%.²⁵ In addition, the percentage of Black Immigrants among blacks approaching law school and college age is also on a steep upward trajectory. When affirmative action programs began, foreign-born blacks constituted less than one percent of the black population.²⁶ The percentage of blacks who were foreign-born increased to 4.9% in 1990²⁷ and to almost ten percent in 2012.²⁸

No matter how overrepresented Black Multiracials and Black Immigrants are now in the nation’s law schools and other selective higher education programs, given their increasing percentages among Blacks who are approaching law school and college age, the negative impact of these overrepresentations on the admissions prospects of Ascendant Blacks is likely to increase significantly over the next decade. As a result, America’s law schools and other selective higher education institutions appear set on a path toward the virtual elimination of Ascendant Blacks from the campuses of most of these institutions.

23. *See supra* note 16.

24. KEVIN BROWN, *supra* note 14, at 6.

25. *Id.*

26. CAMPBELL GIBSON & EMILY LENNON, *supra* note 8.

27. *Id.*

28. U.S. CENSUS BUREAU, THE BLACK ALONE POPULATION IN THE UNITED STATES: 2012, TABLE 7: NATIVITY AND CITIZENSHIP STATUS BY SEX, FOR BLACK ALONE AND WHITE ALONE, NOT HISPANIC: 2012, available at <http://www.census.gov/population/race/data/pp1-ba12.html>.