

**AN UNEQUAL AND UNLEVEL PLAYING FIELD:  
CRITICALLY EXAMINING THE RACE-CONSCIOUS AFFIRMATIVE ACTION  
LEGAL DEBATE IN HIGHER EDUCATION THROUGH THE EYES OF THE  
COUNCIL ON LEGAL EDUCATION OPPORTUNITY (CLEO)**

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**An Unequal and Unlevel Playing Field: Critically Examining the  
Race-Conscious Affirmative Action Legal Debate in Higher Education  
Through the Eyes of the Council on Legal Education Opportunity (CLEO)**

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University of Pittsburgh, 2007

Race relations in the United States have a tumultuous and painful history. The current legal battles over race-conscious affirmative action policies simply add more fuel to the fire and rekindle centuries-old racial conflicts and biases amongst many Americans. Some researchers are concerned that the current never-ending legal battles are being used to eliminate race-conscious education programs and destroy the original intent of affirmative action policies to equalize opportunities between Blacks and Whites alike. Researchers fear that the policies will be eradicated before the playing field has been leveled.

This study critically examined how the race-conscious affirmative action legal debate in higher education has evolved from the implementation of the Civil Rights Act of 1964 until 2006. The researcher used two constructs of critical race theory – interest convergence and whiteness as property - to guide the study in the examination and analysis of federal race-conscious legal cases in higher education and state anti-affirmative action policies. The researcher evaluated whether the evolution of the legal debates supports white privilege. Additionally, the researcher used case study methodology to investigate whether the legal debates relate to changes in a specific race-based legal education program, the CLEO program. The researcher analyzed multiple sources of evidence inclusive of both qualitative and quantitative data.

The findings in this study indicate that more reverse discrimination lawsuits are saturating the legal landscape and include multiple White plaintiffs. Concurrently, CLEO, which has assisted underrepresented racial minorities with entering and graduating law school, has experienced significant changes to its funding, programs, and the racial/ethnic and academic profiles of its students. The data support a correlation between the race-conscious affirmative action legal debates for more than 30 years, and the significant changes in CLEO's funding, the types of programs offered, and the types of students served. The findings show that an unequal and unlevel academic playing field still exists, yet the race-conscious affirmative action legal debate in higher education will continue until all policies and programs are annihilated. The findings also suggest that the evolution of legal cases and anti-affirmative action policies support the maintenance of white privilege in American society.

## TABLE OF CONTENTS

<b>ACKNOWLEDGMENTS .....</b>	<b>XII</b>
<b>1.0 INTRODUCTION.....</b>	<b>1</b>
<b>1.1 WHERE THE LEGAL DEBATE BEGAN.....</b>	<b>1</b>
<b>1.2 STATEMENT OF THE PROBLEM.....</b>	<b>4</b>
<b>1.3 PURPOSE OF THE STUDY .....</b>	<b>7</b>
<b>1.3.1 Research Questions.....</b>	<b>9</b>
<b>1.3.2 Background – The CLEO Program .....</b>	<b>10</b>
<b>1.4 THEORETICAL FRAMEWORK – CRITICAL RACE THEORY (CRT) 18</b>	
<b>1.4.1 A CRT Construct - Interest Convergence .....</b>	<b>19</b>
<b>1.4.2 Another CRT Construct – Whiteness as Property .....</b>	<b>20</b>
<b>1.5 RESEARCHER’S ASSUMPTIONS .....</b>	<b>22</b>
<b>1.6 RESEARCHER’S BACKGROUND.....</b>	<b>23</b>
<b>1.7 DELIMITATIONS OF THE STUDY.....</b>	<b>24</b>
<b>1.8 LIMITATIONS OF THE STUDY .....</b>	<b>25</b>
<b>2.0 SECOND CHAPTER .....</b>	<b>26</b>
<b>2.1 REVIEW OF RELATED LITERATURE .....</b>	<b>26</b>
<b>2.1.1 A History of Race-Based Legal Cases and Legislation.....</b>	<b>27</b>
<b>2.1.2 Race-based Legal Cases in Education.....</b>	<b>36</b>

2.1.3	What is Affirmative Action - The Pros and Cons .....	48
2.1.4	Federal Affirmative Action Education Programs.....	59
2.1.4.1	TRIO Programs and GEAR UP .....	60
2.1.5	The Origins and Development of Critical Race Theory.....	71
2.1.5.1	Major Criticisms of CRT .....	78
2.1.5.2	CRT and Education.....	79
2.1.5.3	CRT and Affirmative Action .....	86
3.0	THIRD CHAPTER.....	91
3.1	METHODOLOGY .....	91
3.1.1	Research Design – The Case Study .....	92
3.1.2	Setting and Data Sources.....	95
3.1.2.1	Document and Archival Records .....	96
3.1.2.2	Interview Sample Selection.....	98
3.1.2.3	Federal Legal Cases and State Anti-Affirmative Action Policies...	99
3.1.3	Data Analysis.....	100
3.1.4	Use of CRT Constructs.....	105
3.1.5	Format of Addressing the Research Questions .....	108
4.0	FOURTH CHAPTER.....	109
4.1	THE EVOLUTION OF AN ENDURING LEGAL DEBATE.....	109
4.1.1	The 1970s – The First Wave of Federal Legal Cases.....	110
4.1.2	The 1990s – The Legal Debate Gains Momentum .....	121
4.1.2.1	Anti-Affirmative Action Policies and Executive Orders.....	130
4.1.3	The 2000s – Revisiting <i>Bakke</i> as the Legal Debate Intensifies.....	139

4.1.4	Analyzing the Legal Debate from a Critical Race Theory (CRT) Perspective .....	152
5.0	<b>FIFTH CHAPTER</b> .....	167
5.1	<b>THE CLEO PROGRAM: THE FINDINGS</b> .....	167
5.1.1	<b>CLEO’s Operations: Then and Now</b> .....	168
5.1.1.1	<b>CLEO’s Purpose, Funding, and Programs</b> .....	173
5.1.2	<b>CLEO’s Students: Past and Present</b> .....	181
5.1.2.1	<b>Students’ Undergraduate GPAs and LSAT Percentile Scores</b> .....	182
5.1.2.2	<b>Students’ Race/Ethnicity</b> .....	193
6.0	<b>SIXTH CHAPTER</b> .....	206
6.1	<b>SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS</b> .....	206
6.1.1	<b>Summary of Research Findings</b> .....	209
6.1.2	<b>Current Climate Surrounding the Legal Debate, Law School, and the Legal Profession</b> .....	222
6.1.3	<b>Conclusions and Implications</b> .....	229
6.1.3.1	<b>The Future of Race-Conscious Affirmative Action Legal Debates and the Implications for CLEO and Other Race-Based Programs</b> .....	230
6.1.3.2	<b>The Future of Underrepresented Minorities in Law Schools and the Legal Profession</b> .....	231
6.1.3.3	<b>Conclusions from a Critical Race Theory Point of View</b> .....	233
6.1.4	<b>Recommendations for Future Research</b> .....	240
6.1.5	<b>Final Thoughts</b> .....	242
APPENDIX A	.....	246



**BIBLIOGRAPHY..... 248**

## LIST OF TABLES

Table 1: Chronology of Key Legal Cases and Legislation Leading to Affirmative Action .....	45
Table 2: Top 15 States Impacted by Upward Bound and Talent Search Budget Cuts .....	68
Table 3: Research Questions, Analysis, and Respective Data Sources .....	103
Table 4: CLEO’s Financial Statements for 1997 and 1998 .....	172
Table 5: CLEO’s Financial Statements for 2001 through 2005 .....	178
Table 6: Students’ GPAs in Summer Institutes – by Time Period .....	184
Table 7: Students’ GPAs in Summer Institutes - Post-Hoc Results .....	185
Table 8: Students’ GPAs – Comparison by Program (AIE and SI).....	187
Table 9: Students’ LSAT Percentile Scores in Summer institutes - by Time Period .....	190
Table 10: Students’ LSAT Percentile Scores – Post-Hoc Results .....	191
Table 11: Students’ LSAT Percentile Scores – Comparison by Program (AIE and SI).....	192
Table 12: Race/Ethnicity of Students in Summer Institutes (SI).....	195
Table 13: Race/Ethnicity of Students in Attitude is Essential (AIE).....	198
Table 14: Outline of Legal Cases/Policies and Changes in CLEO’s Data (By Decade).....	220
Table 15: Number and Percentage of Racial/Ethnic Groups Admitted Into Law Schools.....	228

## LIST OF FIGURES

Figure 1: Number of Summer Institutes – by Time Period .....	180
Figure 2: Students’ Race/Ethnicity – Comparison by Time Period (SI) .....	196
Figure 3: Students’ Race/Ethnicity - Comparison by Time Period (AIE).....	199
Figure 4: Students’ Race/Ethnicity – Comparison of AIE and SI (2004).....	201
Figure 5: Students’ Race/Ethnicity – Comparison of AIE and SI (2006).....	201

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## **1.0 INTRODUCTION**

This dissertation study is a historical, legal, and critical analysis of the race-conscious affirmative action legal debate in higher education. The study concentrates on the evolution of federal race-based affirmative action legal cases in higher education, with an emphasis on legal education and the legal profession. The intent of the study is to understand why there has been and continues to be an incessant legal and political debate regarding race-conscious affirmative action, specifically in legal education, and how these debates are related to a specific program, the Council on Legal Education Opportunity (CLEO). The study serves as an investigation into whether the constant legal debates and waning support for race-based programs may be related to the United States' legal history with race and maintaining white privilege in higher education, specifically in law school and the legal profession.

### **1.1 WHERE THE LEGAL DEBATE BEGAN**

Some events and subjects in American history are taboo and often a hotbed for fervent debate. An unmentionable event in history is the enslavement of Africans in America for more than two hundred years and the subsequent issues that emerged immediately following the abolishment of slavery, such as racial segregation and discrimination. The discriminatory practices that resulted from legalized segregation led to inequitable educational access, resources, and opportunities for

many minorities. In the renowned 1954 case of *Brown et al. v. Board of Education of Topeka*, almost a century after the end of slavery, the United States Supreme Court found racial segregation in public education to be unconscionable and illegal. Nevertheless, it took another 10 years before the advent of the Civil Rights Act and the utter death of legal racial segregation and discrimination.

After the passage of the Civil Rights Act of 1964, Congress implemented affirmative action policies to place supremacy on group rights rather than on individual rights (Graham, 1994). Thus, racial minority groups, specifically once-enslaved African Americans, held a priority claim to benefit from what affirmative action had to offer - access to equal opportunities. Congress's attempt to level the playing field between subjugated minorities and the white majority led to a resurfacing of racial tension in the form of disputes over race-conscious affirmative action policies and programs. Today, the remnants of racial segregation and discrimination live on through the firestorm of legal battles over race-conscious affirmative action, which has become one of the current taboo topics resulting in divisive and explosive discussions between individuals and groups.

Since the 1960s, the height of the Civil Rights Movement, affirmative action has supported race-conscious policies and programs as a necessary means to address entrenched racial inequalities in American society that had occurred for hundreds of years (Moore, 2005). Since that time, race-conscious affirmative action policies and programs have remained a bone of contention amongst American citizens, legislative bodies, the legal system, and educational institutions. The challenge to race-conscious affirmative action policies has emerged primarily in the form of reverse discrimination legal cases, legislation, and political debates, particularly with regards to higher education programs. The legal fights began in the 1970s with the United



States Supreme Court cases of *DeFunis, et al. v. Odegaard, et al.* (1974) and *Regents of the University of California v. Bakke* (1978). The number of higher education legal cases and policies continued to increase throughout the 1990s, but the Supreme Court's decision in the 2003 Michigan cases of *Gratz v. Bollinger* and *Grutter v. Bollinger* is a fresh memory in people's mind. Even today, the country waits with bated breath for the Supreme Court's impending decisions in *Parents Involved in Community Schools v. Seattle School District No. 1* (2005) and *Meredith, et al. v. Jefferson County Board of Education, et al.* (2005) to see if the Court will offer more guidance in interpreting the 2003 Michigan cases. The Supreme Court heard oral arguments on December 4, 2006 and will likely render a decision in the summer of 2007. The legal debates over race and affirmative action in education continue to escalate.

Although the United States Supreme Court has held previously that affirmative action, specifically race-conscious admissions policies, has a place in the educational arena in order to maintain a diverse student body, many individuals and groups complain that these policies are not based on academic merit, and are therefore, illegal forms of reverse discrimination (*Grutter v. Bollinger*, 2003; *Regents of the University of California v. Bakke*, 1978). Proponents of affirmative action maintain that such policies and programs are necessary to correct past discrimination, to eradicate present discriminatory practices, and to level the playing field for certain minority groups with access to employment and educational opportunities (Bell, 2004; Moore, 2005). Opponents, however, argue that minorities benefit from the preferential treatment of affirmative action simply because they are born into a protected class, and this occurs to the detriment of qualified Whites (Moore, 2005). Regardless of the position that individuals take, the main issue in many of the reverse discrimination legal cases revolves around the legitimacy of minority students' access to graduate and professional programs. In particular, resistance to

minority groups', especially African Americans', admission to law school has been the crux of many race-based higher education legal cases since the 1930s and continues today with opposition to race-conscious law school admissions programs.

## **1.2 STATEMENT OF THE PROBLEM**

Race relations in the United States of America, specifically as they pertain to the relationship between Blacks and Whites, have a turbulent and painful history that in many respects have not been forgiven or forgotten. The current legal battles over race-conscious affirmative action policies simply add more fuel to the fire and rekindle centuries-old racial conflicts, biases, and misunderstandings amongst many Americans. The racial divide gets wider and some say that it is attributed to race-sensitive policies and programs that are discriminatory and no longer have a place in today's society. Legal and education researchers are concerned, however, that the current never-ending legal battles are being used to eliminate race-conscious education programs and destroy the original intent of affirmative action policies to equalize opportunities for Blacks and Whites alike (see Bell, 2003, 2004; Bowen & Bok, 1998; Ladson-Billings, 1998; Lawrence, 2001). The fear among researchers is that the policies will be eradicated before the playing field has been leveled between White Americans and people of color. In their compelling study on race-sensitive admissions programs at elite and selective higher education institutions, Bowen & Bok (1998) believed that the fight over race-sensitive policies is deeper than the issue of whether the policies are fair or appropriate in this day and age. They noted, "In colleges and professional schools that admit nearly every qualified applicant, there is little to debate....It is when there are strict limits on the number of places in an entering class and far more qualified applicants than

places, that the choices become difficult and the issue of ... race comes to the forefront” (Bowen & Bok, 1998, p. xxvi). In other words, as more racial minorities vie for these limited spaces, more arguments arise regarding the use of race in admissions policies, and who has the right to be admitted into certain programs at certain institutions of higher education.

Admission to law school is a prime example of where these racial arguments arise most, even though more Whites dominate the legal profession. In fact, the percentage of minority lawyers, which has been stagnant and on the decline since the mid-1990s, is still diminutive compared to the percentage of White lawyers (Chambliss, 2004). Conversely, the number of minority groups in the United States is dramatically increasing every year, yet the legal profession does not reflect this increase in minorities. The U.S. population is 70 percent White and 30 percent people of color, but the number of minority lawyers hovers around 10 percent (American Bar Association, 2004). According to Moore (2005), the legal profession, with lawyers being the representatives and gatekeepers of the United States Constitution, should reflect a diverse society of all races, colors, and creeds in order for equity and democracy to prevail. The legal profession, however, has had a history of excluding racial minorities, particularly African Americans. One researcher estimated that in 1950, there were only 1,450 Black attorneys out of a total of 221,605, which was 0.65 percent of the profession (Kidder, 2003). After several racial discrimination legal cases, such as *Sweatt v. Painter* (1950), the Supreme Court held that Blacks had a right to an equal education like their White counterparts, so more Blacks entered institutions of higher education and law schools. However, another barrier to the legal profession was created - the Law School Admissions Test (LSAT).

The LSAT was developed in 1948, but the Law School Admissions Council’s (LSAC) record of scores go back to around 1958 (*DeFunis, et al.*, 1974; LSAC, 2006). Due to the timing

of when the LSAT was implemented, required as a part of law school admissions, and tracked by the LSAC, it appeared as though the LSAT was being used as yet another bar for Black students' admission to law school. After all, Black students were not receiving the same educational opportunities or access to knowledge as many White students attending elite undergraduate institutions and apprenticing for practicing lawyers; thus, high scores on the LSAT posed a challenge to Blacks (LSAC, 2006; Pye, 1987). One legal scholar acknowledged that the LSAT was originally created to be a tool to aid the admissions process, not a foolproof gauge for merit (LaPiana, 2001). Since the 1960s, however, the LSAT's use has been perverted since law schools often use the LSAT as the sole tool for admissions, which excludes entire minority groups who can do the work (LaPiana, 2001). Given the exclusionary nature of the legal profession generally and LSAT specifically, it was not surprising that by 1960, the number of African American attorneys had only risen to 2,180 out of a total of 285,933, which was still a dismal representation at 0.76 percent of the profession (Kidder, 2003). In the 1970s, two legal scholars predicted that the challenge of the future would be increasing the number of Black lawyers from 1 percent to 12 percent (Parker & Stebman, 1973). Unfortunately, the challenge remains to this day.

In 2000, minorities<sup>1</sup> comprised approximately 9.7 percent of all lawyers, which is only 2 percent higher than in 1990 (Chambliss, 2004). About 3.9 percent of these minority lawyers in 2000 were African American (Chambliss, 2004). Minority representation among lawyers is significantly lower than minority representation in other professions, such as accountants/auditors (20.8%), architects (14.9%), physicians and surgeons (24.6%), physical scientists (30.1%), postsecondary teachers (18.2%), computer scientists (23.1%), and civil

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<sup>1</sup> The author of this document used the terms "minorities" and "minority representation" to encompass the following racial/ethnic categories: (1) African American, (2) Hispanic, (3) Asian American, and (4) Native American.

engineers (16.7%) (U.S. Census Bureau, 2000). Moreover, according to the 2002 Bureau of Labor Statistics, combined African American and Hispanic representation among U.S. professionals was 13.6 percent, compared to 7.7 percent among lawyers (U.S. Census Bureau, *Statistical Abstract of the United States, 2002, 2004*). Based on these statistics, the playing field is not level between racial minorities and White Americans in the legal profession, yet the ferocious legal debates regarding to utilization of race-sensitive affirmative action policies in higher education admissions are alive and well.

### **1.3 PURPOSE OF THE STUDY**

Traditionally, African Americans and other subjugated racial minorities have been excluded from law schools because they usually have lower LSAT scores and undergraduate grade point averages (GPAs) than their White counterparts, even though they may be just as capable of doing well in law school and in the legal profession. Higher education admissions scholars have conducted studies that revealed no meaningful statistical relationships between test scores and academic performance for minority students, especially in law schools (Olivas, 1999). During the *Hopwood v. Texas* (1996) lawsuit, researchers found that for Black students attending the University of Texas Law School, the correlation of combined LSAT scores and undergraduate GPAs to first-year grades was only 0.28 (Olivas, 1999; Sturm & Guinier, 1996). Similarly, at the University of Pennsylvania School of Law, the correlation for all students was 0.11 for first-year, 0.15 for second-year, and 0.21 for third-year grades (Olivas, 1999; Sturm & Guinier, 1996). Based on a LSAT cut-off score of 145, however, over 60 percent of Black applicants will be

presumptively denied compared to only 20 percent of White applicants who would be presumptively denied (Randall, 2005).

Wightman (1997), an education researcher, studied bar passage rates among students who were admitted into law school, successfully completed law school, and passed the bar examination. She researched how some of these same students typically would have been denied admission if only their LSAT scores and undergraduate GPAs were considered in the admissions process (Wightman, 1997). Wightman's study (1997) focused on students who would not typically gain admission to law school and those students who would gain admission using a LSAT/GPA-combined regression model. The results of the study indicated that the students who were predicted not to be admitted based on lower LSAT scores and undergraduate GPAs, which were primarily Black and Latino students, had bar passage rates that ranged from 72.5 to 93.3 percent (Wightman, 1997). The students who were predicted to be admitted based on their higher scores, had very similar bar passage rates that ranged from 85.2 to 96.6 percent. Wightman (1997) concluded that there is little to no difference in the likelihood of passing the bar examination between students predicted to be admitted into law school and those predicted not to be admitted according to the model that depended only on LSAT scores and undergraduate GPAs for admission. Thus, abolishing race-conscious affirmative action policies and programs, namely legal education programs, in favor of relying on test scores for admissions that have little or no significant correlation to academic success and bar passage rates will likely result in the reduction of qualified racial minority students in law schools and thus the reduction of racial minority lawyers in this country.

Professional schools, particularly law and medicine, are highly selective, so "the effect of barring any consideration of race would be the exclusion of more than half of the existing

minority student population from these professions” (Bowen & Bok, 1998, p. 282). Nevertheless, successful race-conscious education programs are under attack in the legal system and are being phased out before higher education access and opportunities have been equalized between the white majority and racial minority groups. Therefore, this dissertation study critically analyzes the federal race-conscious affirmative action legal cases in higher education and state anti-affirmative action policies that have emerged since the implementation of Civil Rights Act of 1964. Furthermore, this study examines how the legal cases and policies may be related to the function and feasibility of an actual federally mandated race-conscious affirmative action program, the Council on Legal Education Opportunity (CLEO), and the future of similar programs.

### **1.3.1 Research Questions**

The following research questions guide this dissertation study:

(1) How have the federal race-conscious affirmative action legal cases in higher education and state anti-affirmative action policies evolved since 1964?

(2) How, if at all, do the ongoing legal debates in higher education reflect the support for, or maintenance of, white privilege as defined by the interest convergence and whiteness as property constructs of critical race theory?

(3) How, if at all, is the race-conscious affirmative action legal debate in higher education related to the original intent, current operations (i.e., the admissions criteria of fellows and associates, the number of summer institutes, funding, and the creation of new programs), and future viability of the CLEO program?

(4) Given the legal debates, what are the future implications for race-based affirmative action policies and programs, and the admittance of racial minorities, particularly African Americans, in law schools and the legal profession?

### **1.3.2 Background – The CLEO Program**

CLEO is a federal preparatory program for potential law students, which was started in 1968 due to the low numbers of racial minorities in American law schools and the legal profession. Prior to the creation of CLEO, on average only 200 African Americans graduated from law schools annually out of 10,000 law students in the 1950s and 1960s (Gellhorn, 1968). The Law School Admissions Council (LSAC) was disturbed that law schools were placing significant weight on the LSAT, which was having a disproportionate impact on disadvantaged minority groups being admitted to law schools. In fact, some law schools established an arbitrary floor to the LSAT of around 400, which was equivalent to around the 13<sup>th</sup> percentile and operated as an absolute bar to many minority students (Slocum, 1979). The Association of American Law Schools (AALS) Committee on Racial Discrimination found on a national basis that Blacks and other minority groups were not getting into law school because of “low aptitude scores plus academic records that were usually spotty at best and were made in substandard colleges” (AALS Proceedings, 1964). Accordingly, in 1965, the American Bar Association (ABA) and the AALS created a special Minority Groups Project to survey the overall enrollments of racial minority groups gaining access to law school and the legal profession (O’Neil, 1970; Slocum, 1979).

The Project’s survey found that 700 Black students were enrolled in ABA-approved law schools during the 1964-65 school year, which was 1.3 percent of total law school enrollment (O’Neil, 1970). This overwhelmingly low percentage of Black students was inflated because



267 of the students attended predominantly Black law schools, such as Howard, Texas Southern, and Southern University; thus, less than 1 percent of Black students were enrolled in predominantly White institutions (AALS, 1964). O'Neil (1970) opined that the law and the legal profession were either attractive to only a very small portion of minority graduates, or the application and admission process to law schools presented higher than usual barriers for minority applicants attempting to enter law schools. Rosen (1970) claimed, however, that the law schools' lackadaisical attitudes to redress the racial imbalance within the schools strongly contributed to the low number of racial minorities in law schools.

While some law schools developed special minority programs in the early to mid-1960s, such as the University of Toledo, New York University, Emory University, the University of Denver, the University of New Mexico, and Harvard University, to insure that Blacks, Latinos, and other underrepresented minority groups had an opportunity to enter law school, these programs were not far-reaching enough to make a significant impact on the number of minorities entering the legal profession (Slocum, 1979). Furthermore, these special admissions programs created other problems. First, the programs led disadvantaged minority students into a world that did not welcome them into the student body and did not consider the minority student's history and interests when teaching; therefore, many of these students did not perform as well, dropped out, or failed. In addition, minority students in the special admissions programs were often stigmatized and accused of entering law school on lower academic standards than their White counterparts (Cerminara, 1996). Undoubtedly, something more was needed to make a difference, or something that would have a dramatic effect on recruiting qualified, underrepresented minorities and increasing the retention of these students on a national level.

As a follow-up to the initial 1965 survey, the American Bar Association's Board of Governors authorized a committee to explore the type of program best calculated to encourage and assist qualified minorities to enter law school and the legal profession (Burns, 1975). In 1967, the committee found that although minority groups, such as African Americans, Latinos, and Native Americans comprised about one-third of the United States' population, attorneys from these minority groups comprised only one to two percent of the legal profession (Burns, 1975). The committee's report articulated that many minority students had the necessary qualifications to become lawyers but were not entering law school because of lack of financial support, cultural and academic disadvantages, and misunderstandings of the purposes of law and the legal profession (Burns, 1975). During the same time, the Office of Economic Opportunity (OEO) sponsored a series of meetings of leading educators to discuss the shortage and problems of minority law students. These meetings led to the formation of the Council on Legal Education Opportunity (CLEO) (Parker & Stebman, 1973). The ABA in partnership with the AALS, the LSAC, the National Bar Association (NBA), and LaRaza National Lawyers Association (a Latino organization) sponsored CLEO to provide opportunities for qualified minority persons from economically and educationally disadvantaged backgrounds to enter law school (Burns, 1975; Slocum, 1979). OEO provided most of the funding, with a \$500,000 grant during CLEO's first year (CLEO Annual Report, 1998). The partnership later reached out to include the Hispanic National Bar Association (HNBA), the National Asian Pacific American Bar Association (NAPABA), and Society of American Law Teachers (SALT) in 1972, 1990, and 1997 respectively (CLEO Annual Report, 1998).

CLEO was chartered on October 5, 1968, with the official backing of federal agencies and organizations as well as private bar associations. In the beginning, the CLEO By-laws specifically outlined its purpose, which was:

to expand and enhance the opportunity to study and practice law for members of disadvantaged groups – chiefly Negroes, American Indians, and Ibero-Americans – and thus help to remedy the present imbalance of these disadvantaged groups in the legal profession of the United States (Fulop, 1970).

CLEO's specific purpose was to give Blacks, American Indians, and Hispanics, who historically have been denied access to law school because of low LSAT scores and undergraduate GPAs as well as attending substandard undergraduate institutions, an opportunity to prepare for law school studies, hopefully attend and graduate from law school, and enter the legal profession. The goal was to bring more than 300 minority lawyers into the profession by 1973, and the pre-law summer institutes were the vehicle used to fulfill CLEO's purpose and objective (Gellhorn, 1968). Given CLEO's original intent to provide opportunities to minority persons, its very existence was married to the concept of affirmative action. CLEO was not created to exclude potential law students on the basis of race and did not have a two-track system, one for minority group members and one for majority students, but an overwhelming number of CLEO participants were minority students (Slocum, 1979). Ostensibly, CLEO became one of the first federal race-conscious affirmative action programs in higher education.

During CLEO's introductory year, the summer institutes operated for eight-week sessions, but it was cut back to six-week sessions in 1969 (O'Neil, 1970). The six-week regional summer institutes were held at numerous law schools throughout the United States, and the students typically attended during the summer immediately preceding their entry into law school.

The summer institute concept mirrored the Upward Bound programs sponsored by the Department of Health, Education, and Welfare (HEW – later the U.S. Department of Education), except CLEO was for potential law students and not potential undergraduate students. The purpose of the regional subdivisions was to insure that CLEO served students around the country, and to give a cognizable, racial, or ethnic character to each institute. For example, schools in the southwestern part of the United States would be most representative of Mexican Americans, and the northeast region would serve more Black students (Slocum, 1979).

The summer institutes functioned both as skills enhancers and as recruitment programs for participating law schools (Cerminara, 1996). CLEO's summer institutes helped prepare qualified minority students for the rigors of law school by exposing the students to one or two substantive first-year law courses, such as torts, contracts, or property, and a legal research and writing course. For the most part, the law faculty at each summer institute taught the same courses and used the same pedagogical methods that were typical in law school classes – usually the Socratic method of law teaching and the case method of legal analysis (Slocum, 1979). At the end of the six weeks, the law faculty at each participating law school would evaluate the academic performance of the CLEO students. The CLEO students who successfully completed the summer institutes were certified and deemed CLEO fellows. The CLEO experience worked to strengthen the skills of the disadvantaged, minority students interested in attending law school, while also serving as a tool for assessing the abilities of students who appear not to be qualified for law school based on the usual predictors of LSAT score and undergraduate GPA (Cerminara, 1996). There was the hope that many students who were not accepted into a law school because of their mediocre LSAT scores and undergraduate GPAs would be admitted after completing the CLEO summer institute and proving they could successfully matriculate through law school.

CLEO had developed, in conjunction with cooperating law schools, the “conditional admit” category in which students were conditionally admitted to law school pending the outcome of their CLEO evaluation (Slocum, 1979).

Since finances were an issue for most minority students, CLEO students attended the summer institutes without charge and were provided living expenses and stipends during the summer (Rosen, 1970). To help summer institute fellows who attended law school, CLEO provided financial assistance to its fellows throughout their three-year law school career. Living stipends of \$1,500 a year for three years were guaranteed to CLEO fellows completing the 1968 summer program (Parker & Stebman, 1973). Furthermore, the law schools admitting these CLEO fellows provided financial support for tuition and fees, usually by grants or waivers and occasionally through loans (Parker & Stebman, 1973). During those early years, CLEO was funded primarily by OEO and other government agencies with some assistance from private foundations (Gellhorn, 1968).

In 1968, CLEO had four regional summer institutes from the East Coast to the West Coast, which were hosted by elite law school institutions like Harvard; 161 students enrolled in the CLEO program, and 151 students actually completed the program to become fellows (CLEO Annual Reports, 1998; Slocum, 1979). By 1969, the number of CLEO fellows and summer institutes, which included host institutions like Columbia, NYU, University of Virginia, Duke University, and University of California at Berkeley, almost tripled. In 1969, CLEO had 10 summer institutes, in which 448 students enrolled and 444 completed the program (CLEO Annual Reports, 1998; Slocum, 1979). During the 1968-69 school year, the number of Blacks studying law had risen to approximately 1,254 (AALS Newsletter, 1968; Parker & Stebman,

1973). In the 1969-70 academic year, the minority enrollment was 2,933 of which 20 percent were CLEO fellows (Burns, 1975).

During its first three years, 722 CLEO fellows entered law school. CLEO's retention rates among its first-year law students have been approximately 80 percent since its inception (Burns, 1975). From 1968 to 1970, the number of law students increased from 68,562 to 86,028 (American Bar Foundation, 1972). During the same time, the number of minority law students increased from 944 to 1,468 (LSAC, 1969, 1970). Further, the number of Black lawyers in the United States had reached about 4,000 in 1970 (Chambers, et al., 2005). By 1973, the number of individuals admitted to the bar hit record numbers, with 30,075 people passing bar examinations and another 804 being admitted to the bar by diploma (American Bar News, 1974). CLEO seemed to have fulfilled the goal of having 300 minority students enter the legal profession by 1973. Moreover, the number of students of color entering law school continued to increase in the 1970s, and by 1976 there were 9,500 students of color in law school (Moore, 2005). From the time CLEO was founded in 1968, the legal profession started to change and, for the first time, started to reflect a more representative sample of an increasingly colorful society.

Despite CLEO's success of increasing the number of minorities in the legal profession, it was beginning to face some serious difficulties in the 1970s. Funding was one issue, but the biggest issue arose regarding CLEO's identification and justification as a special admissions program for minority students. While some researchers noted that there were several compelling reasons for developing special programs like CLEO, such as evaluation, preparation, and supplemental education, there were also innumerable difficulties with designing and operating them (Burns, 1975; Rosen, 1970). Rosen (1970) explained several difficulties that were characteristic for the 1960s and 1970s that are still major obstacles in the 21<sup>st</sup> century, such as the

issues of educational merit, backlash, constitutionality, stigma, and economics. In the 1970s, Robert O’Neil, former CLEO consultant and Chairman, responded to this quandary by expressing that

Efforts to equalize access to higher learning for minority students exemplify the paradox of institutional racism .... Thus, educational institutions are caught in a constitutional trap – neutrality of response reinforces the effects of prior discrimination; positive efforts to redress the balance may flounder on the shores of questionable racial classifications and inequality of opportunity for those students of both majority and minority ethnic groups who are hampered by institutional denial of preferential treatments (O’Neil, 1970, p. 281).

CLEO and its supporting law schools struggled with being two-faced for the sake of equality. One face could justify the attempt to right the wrong of past discrimination by giving an opportunity for subjugated minority groups to prove they could succeed in law school. The other face could not help but to question the constitutional fairness of having special law school admissions programs specifically for certain racial minorities. Slocum (1979) suggested that the real issue was not about constitutionality or meritocracy, but about whether United States citizens were prepared to recognize and meet the long outstanding socioeconomic debt owed to racial minorities of this country. Specifically, he stated that “[T]he disposition of claims by Blacks and other minorities cannot be obscured by focusing attention upon the rights of the majority to remain in absolute control of one of the most highly-valued commodities one can obtain – an extremely marketable law degree...” (Slocum, 1979, p. 345). In other words, Blacks and other disadvantaged minority groups were entitled to call in the unpaid debt taken out hundreds of years ago with no hopes of repayment. CLEO was simply the debt collector that had

the resources to get some form of reimbursement, which was access to a prestigious and powerful legal education.

In the mid-1970s, the response to the CLEO program was just a reflection of what was going on in American society – attacks on race-sensitive affirmative action policies and programs. Although more work needed to be done in leveling the playing field and creating equal opportunities for all citizens, the ongoing legal debates regarding race-conscious affirmative action policies in education and employment were beginning to take a toll on this country, including the legal profession. The percentage of minority law students and lawyers started leveling off in the 1980s. Although CLEO also may have felt the heat of the legal debates, the question remained what the legal controversy would mean to how CLEO fulfilled its original purpose, and whether racial minorities would continue to benefit from the summer institutes that were specifically created to increase the number of underrepresented minorities in American law schools and the legal profession.

#### **1.4 THEORETICAL FRAMEWORK – CRITICAL RACE THEORY (CRT)**

The researcher uses the critical race theory constructs of interest convergence and whiteness as property to inform the research and analysis in this study. The constructs are used in the analysis of the legal cases and anti-affirmative action policies in order to elucidate some reasons for the waning support for race-conscious affirmative action programs that help provide access to higher education institutions. Critical race theory (CRT) is a legal studies movement that was started in the 1970s by legal scholars who were disenchanted with legal analysis and civil rights legislation as they related to race, racism, and power in American society. Critical race theorists insisted on



“a complete reinterpretation of civil rights law with regard to its ineffectiveness in addressing racial injustices, particularly institutional racism and structural racism in the political economy” (Lynn & Adams, 2002 citing Parker & Lynn, 2002, p. 9). These theorists needed society to understand that race and racism were fundamentally ingrained in American social structures and historical consciousness and hence shaped this country’s ideology, legal systems, and fundamental conceptions of law, property, and privilege (Bell, 1984; Crenshaw, Gotanda, Peller, & Thomas, 1995). Critical race theorists have developed several analytic constructs to illuminate the racial inequalities that occur in various aspects of society, and how the law and society has responded to the inequalities. Interest convergence and whiteness as property are just two of the popular constructs, but they are the two utilized in this study.

#### **1.4.1 A CRT Construct - Interest Convergence**

When addressing those who say that racism no longer exists in today’s society, one of the CRT founding fathers, Derrick Bell, proposes the idea of “interest convergence” to explain the so-called benefits that Blacks on a whole have reaped over the past 50 years (Bell, 1980; Delgado & Stefancic, 2001). Bell (1980) defines interest convergence as the temporary alignment of the self-interest of elite Whites and the interests of Blacks. The notion of interest convergence, also known as material determinism, sets forth the belief that racism benefits white elites materially and working-class people physically, which results in a society having no interest in eradicating racism (Delgado & Stefancic, 2001).

Specifically, litigation involving racial issues over the past four or five decades that appear to protect the basic rights of Blacks have been closely connected with the defense of interests that Whites in policymaking positions perceive as being important to them (Bell, 1980;

Delgado & Stefancic, 2001). For instance, Derrick Bell (1980) claimed that the *Brown v. Board of Education of Topeka* decision in 1954 came down at a time when a distraction was needed from the United States' business as usual – racial discrimination. The landmark civil rights decision intentionally coincided with the United States' struggles with the Cold War, which entangled the loyalties of individuals in Third World countries who were black, brown, and Asian, and could succumb to the power of Communism and threaten U.S. democracy (Bell, 1980). It was then, 1954, that the U.S. decided it could not politically afford to continue to carry stories of lynchings, racist sheriffs, murders, and blatant discrimination while battling communism (Bell, 1980; Delgado & Stefancic, 2001). As Derrick Bell explained, “Self-interest has been described . . . as the most basic and important force underlying white policy and action vis-à-vis blacks . . . [which] more often than not serves the interests of the actors or is accounted for by an incorrect perception of objective interest” (Bell, 1980, p. 40). The basic civil rights conferred in the *Brown* case converged with the self-interests of U.S. foreign policy and White policymakers (Bell, 1980; Dixson & Rousseau, 2005).

#### **1.4.2 Another CRT Construct – Whiteness as Property**

Whiteness as property is one of the few CRT constructs where the analysis involves a stronger and more cohesive relationship between race and class. This analysis describes the interplay between democracy and capitalism as it relates to property rights in this country (Ladson-Billings & Tate, 1995). The origins of property rights in the United States are rooted in racial domination and oppression (Harris, 1993). Blacks were subjugated as slaves and treated as property, and through slavery, race and economic domination were fused. As a legal institution in the United States, slavery treated slaves as property that could be transferred, assigned,

inherited, or posted as collateral. As property, slaves were not afforded the rights or privileges of other citizens. Whites as citizens, however, wholly owned the right to possess property, such as land, businesses, and slaves (Harris, 1993).

The U.S. Supreme Court first addressed the issue of whether slaves were citizens or property in the *Dred Scott* case. The petitioner, Dred Scott, asked the Court to consider him a free man based on his temporary residence in the free territory in the state of Illinois. The Court noted that Blacks were not included in the word “citizens” in the Constitution because they were property; therefore, Dred Scott could not claim any rights or privileges afforded to citizens in the Constitution (*Dred Scott*, 1857). Whiteness was the characteristic, the attribute, and the property of the free human being. Critical race theorists assert that the United States was and is a nation built on property rights. One critical race theorist, in particular, insisted that the law has accorded “holders” of whiteness the same privileges and benefits accorded holders of other types of property (Harris, 1993). The critical characteristics of this privilege are displayed by the fact that white people can use the law to establish and protect an actual property interest in whiteness, as illustrated in the legal legacy of slaves as property and the seizure of land from Native Americans (Harris, 1993). Therefore, Harris (1993) proposed the “property functions of whiteness” to explicate the privileges and benefits that the law gives to white people, which are equivalent to the legal rights given to other property owners. The property functions of whiteness are: (1) the right of disposition; (2) right to use and enjoyment; (3) reputation and status property; and (4) the right to exclude (Harris, 1993).

## 1.5 RESEARCHER'S ASSUMPTIONS

The researcher selected law school and the legal profession as the unit of analysis because the researcher assumes that White Americans perceive a legal career to be a privileged profession that represents power; thus, access of certain groups must be limited. Throughout history, many of the race-based legal cases, including the ones today, have pertained to law school admissions policies. There are privileges and power that go along with a legal education, which ultimately become forms of white property. This assumption is supported by the fact that most of the nation's leaders have law degrees (see Justice O'Connor's opinion in *Grutter v. Bollinger* (2003), which will be discussed later in this study), many of whom are White. Furthermore, a legal career is one of the few professions where individuals have an opportunity and the power to make sweeping social and legal changes. For instance, Thurgood Marshall successfully represented his clients, achieved victory on their behalf, and made extraordinary changes to civil rights laws and education policies in the cases of *University of Maryland v. Murray* (1936), *Sipuel v. Board of Regents of the University of Oklahoma, et al.* (1948), *McLaurin v. Oklahoma State Regents for Higher Education, et al.* (1950), *Sweatt v. Painter* (1950), and *Brown, et al. v. Board of Education of Topeka* (1954) just to name a few. Of course, Thurgood Marshall later became a Supreme Court Justice in 1967.

Thurgood Marshall used his legal training to become an agent for social change, and his legal opinions reflected his nature of being a vocal spokesperson for civil rights as well as his thirst for justice and equality for all. Thus, the researcher asserts that White Americans believe that a legal education gives them the authority, privilege, and opportunity to make laws and enforce them to the benefit of Whites and to the detriment of Blacks. Some White people would not want such power revealed or reversed to benefit Blacks or other racial minorities with an

influx of minority lawyers and justice-seekers like the late great Thurgood Marshall. With this type of power to make and enforce the laws, the never-ending legal debates regarding race-conscious affirmative action are expected. Accordingly, the annihilation of policies and programs, such as the CLEO program that supports race-sensitive affirmative action and gives subjugated racial minorities an equal chance to compete, is probably inevitable.

This study is an attempt to remind people of the United States' history with race, and the use of the law to perpetuate white privilege, especially in higher education. The researcher uses the term "playing field," a term commonly used to describe minority groups' access to certain venues like higher education institutions through affirmative action. Because the United States is a country controlled by laws, the term "playing field" is being used traditionally as well as metaphorically to characterize the law – who has the right to attend law school, enter the legal profession, and make, interpret, and enforce the laws of this society. The researcher asserts that the legal playing field is unlevel and unequal so long as the ongoing legal debates are employed to deny certain racial groups access to law schools and equal representation in the legal profession.

## **1.6 RESEARCHER'S BACKGROUND**

To understand the researcher's point of view on this topic, it is important to note that the researcher conducting this study is an African American attorney who has practiced law and has focused on issues in employment discrimination and civil rights litigation. The researcher believes that some aspects of race-based affirmative action policies and programs are good and generally result in some positive outcomes for society. Additionally, the researcher knew about

the CLEO program prior to this study and knows minority attorneys who have greatly benefited from the program.

## **1.7 DELIMITATIONS OF THE STUDY**

This dissertation study was limited to analyzing the issues arising from race-conscious affirmative action legal cases and state anti-affirmative action policies directly related to higher education, not employment, minority contracts, or any other societal or political issues in affirmative action. Additionally, this study focused on some changes that may have occurred in a specific federal race-conscious affirmative action program, the Council on Legal Education Opportunity (CLEO), which is a legal education program. The examination of CLEO's data mainly highlights the summer institutes, the admissions criteria for prospective law students participating in the summer institutes (e.g., race/ethnicity, GPAs and LSAT scores), and the program's funding sources. The data collection methods were limited to reviewing CLEO's documents, archival records, and conducting interviews with key CLEO administrators and advisors. The data analysis in this dissertation included many racial and ethnic minorities, namely Latinos, Native Americans, and Asians, and the analysis has been helpful in understanding the impact that the legal debates may have had on these particular racial and ethnic groups. Nevertheless, the core of this study examined the racial and legal history between Blacks and Whites. Additionally, the study examined whether the current race-conscious affirmative action legal debates may correlate to Black people's access to the CLEO program, law school, and the legal profession.

## **1.8 LIMITATIONS OF THE STUDY**

The scope of this study was limited to researching one federal race-conscious affirmative action higher education program – CLEO, a legal education program. Consequently, the findings may or may not be applicable to other affirmative action education programs, or similar programs that offer higher education preparatory programs for economically disadvantaged students and racial minorities. Furthermore, the researcher experienced some problems with finding complete files at the CLEO program that contained all the necessary student and funding information. Accordingly, the researcher was limited to analyzing the data that were available. The researcher assumes that CLEO's archival records and documents contained accurate information.

## **2.0 SECOND CHAPTER**

### **2.1 REVIEW OF RELATED LITERATURE**

The United States of America is a country built on laws. The United States Constitution is the baseline from which citizens' rights are measured. Most of the major legal cases in the United States' history rely on the language outlined in constitutional amendments and legislation to support or oppose current race-conscious affirmative action policies. Therefore, this literature review begins with a discussion of the outcomes and analyses of federal race-based legal cases and legislation from the mid-1800s through the implementation of the Civil Rights Act of 1964. Part of this analysis includes the discussion of race-based legal cases that were directly related to racial minorities' access to education. The history of legal cases and legislation that discussed racial issues may shed some light on why race-conscious affirmative action policies were established as well as why legal debates regarding these policies in higher education have been continuous since the early 1970s. Moreover, the earlier legal cases and legislation may give a clearer understanding of society's current attitudes about race, race relations, and white privilege.

Additionally, the review examines this country's initial creation and purpose of affirmative action policies, and some of the common arguments for and against such policies. The review then explores a few federal affirmative action programs that were created after the Civil Rights Act of 1964 to assist disadvantaged racial minorities in gaining access to higher



education. Finally, the literature review discusses the theory that frames the study - critical race theory. The review examines the origin of critical race theory and its tenets, some of the major criticisms that have abounded regarding the theory, and how critical race theory's constructs have expanded into analyzing equity issues in education, including the legal debates surrounding race-based affirmative action.

### **2.1.1 A History of Race-Based Legal Cases and Legislation**

In 1857, the United States Supreme Court decided one of the most crucial legal cases that even now impacts how society thinks about people's race and color, particularly black and white. This case was *Dred Scott v. Sanford*. The question was simple but the outcome is still profound: "Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen?" (*Dred Scott v. Sanford*, 1857). In this case, the petitioner, Dred Scott, asked the Supreme Court to consider him a free man based on his temporary residence in the free territory within the state of Illinois. The Supreme Court held that Scott was not a United States' citizen, and his four-year residence in Illinois did not alter his slave status (*Dred Scott v. Sanford*, 1857).

The Court based its decision upon the fact that the U.S. Constitution considered Black people as property, not human beings (*Dred Scott v. Sanford*, 1857). In its analysis, the Court considered the Black race to be separate from the White race by indelible marks, and laws established this fact by thinking and speaking of Blacks as human property, while Whites were superior and entitled to all of the privileges granted in the U.S. Constitution and Declaration of

Independence. Whiteness determined one's legal status as a free person or a slave (*Dred Scott v. Sanford*, 1857).

In the *Dred Scott* case, the Supreme Court made two salient points regarding what the founders of this country thought of African American people, which has likely produced the chronic racial tension that exists today between Blacks and Whites:

(1) We hold these truths to be self-evident: that all men are created equal....The general words above quoted would seem to embrace the whole human family....But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration....

(2) No one of that race [Black] had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise. The number that had been emancipated at that time were but few in comparison with those held in slavery; and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free.... (*Dred Scott v. Sanford*, 1857).

These two statements intimate that Blacks were outsiders brought into the United States of America to be owned, used, bought, and sold like goods and services, with no rights or human consideration. The Constitution treated a slave as property and equivalent to three-fifths of a person for purposes of apportioning representatives and taxes among the states (United States Constitution, Art. I, § 2, 1791). Therefore, Blacks were property and an inferior race, so they were not accorded the personal rights and privileges that the Constitution extended to naturalized citizens, including freedom in a non-slave state (*Dred Scott v. Sanford*, 1857). The presumption of freedom arose from the color White, and the color Black raised the presumption of slavery

because Whites could not be held as slaves (Harris, 1993 citing Cobb, 1858). Slavery was a legal institution in which Blacks were property that could be transferred, assigned, and inherited, whereas Whites were the owners of slaves and accorded all the privileges and protections the law provided (Harris, 1993).

Slavery was abolished in 1863 after the Civil War ended. The Thirteenth Amendment of the U.S. Constitution, which forbade slavery, was ratified in 1865 (United States Constitution, 1865). The ratification of the Thirteenth Amendment along with other legislation came during a time known as the Reconstruction era – a time for America to rebuild itself and the lives of newly freed slaves following the Civil War. During the Reconstruction era, Congress approved legislation, such as the Civil Rights Act of 1866 and the Freedmen’s Bureau Act, and amended the U.S. Constitution by ratifying the Fourteenth Amendment in order to help transition newly freed Black slaves into a life of freedom. Some researchers proffer that today’s affirmative action debate started after slavery and during the Reconstruction era’s attempts to reconstruct American citizenship without regard to skin color (Rubio, 2001).

In 1863, Congress created the Bureau of Freedmen’s Affairs to provide special assistance to Blacks (Schnapper, 1985). One of the first pieces of Reconstruction legislation that Congress introduced was the Freedmen Bureau Act. Initially, the Freedmen’s Bureau Act was proposed in 1864 and was supposed to aid only persons of African descent, or such persons who were once slaves, with enforcing contracts and renting abandoned land that came into the possession of the United States in order for Blacks to become self-sustaining individuals (Cong. Globe, 38<sup>th</sup> Cong. 1<sup>st</sup> session, 1864). Nevertheless, many opponents of the first Bill disagreed with offering preferential treatment for Blacks. Congressmen protested that under the original bill, taxes would be paid by Whites to assist only Blacks, so they suggested that a bureau of Irishmen’s

Affairs and Dutchmen's Affairs, or one for those of Caucasian descent be created (Schnapper, 1985). Specifically, some members of Congress inquired about, "[w]hy the freedmen of African descent should become these marked objects of special legislation, to the detriment of the unfortunate whites..." (H.R. Rep. No. 2, 38<sup>th</sup> Cong. 1<sup>st</sup> session, 2-4, 1864). As such, the support for white privilege prevailed, and Congress revised the Freedmen's Bureau Act of 1864 to include benefits for Whites.

Congressman Schenck introduced a new bill that President Lincoln signed into law on March 3, 1865 (Schnapper, 1985). The new legislation provided limited relief for Blacks and assistance for White refugees from the former confederate states (Cong. Globe, 38<sup>th</sup> Cong. 2<sup>nd</sup> session, 566, 1865). The Act of 1865 had three key provisions:

- (1) The Secretary of War was authorized to furnish provisions, clothing, and fuel for destitute and suffering refugees and freedmen;
- (2) The Commissioner of the Bureau was to lease, and ultimately to sell, up to forty acres of abandoned land to any refugee or freedman;
- (3) The Bureau was invested with the control of all subjects relating to refugees and freedmen (13 Stat. 507).

The 1865 bill is now known mainly for its famous provision of "40 acres and a mule", which were promised to former slaves (Moore, 2005). Once the bill took effect, however, and the Bureau realized how much assistance was being provided to the Black freedmen, Congress issued a report (Schnapper, 1985). The report revealed that freedmen were principally the only beneficiaries of programs such as education, labor regulations, Bureau farms, land distribution, and adjustments of real estate disputes, aid to orphans, and medical assistance (H.R. Exec. Doc. No. 11, 39<sup>th</sup> Cong., 1<sup>st</sup> session, 1865; Schnapper, 1985). As the Freedmen's Bureau's budget ran

dry and some Congressmen complained of unfair treatments to Whites, General Howard pushed for a renewal of funding for the poor Black freedmen for educational purposes (Schnapper, 1985). General Howard observed that “[e]ducation is absolutely essential to the freedmen to fit them for their new duties and responsibilities....Yet I believe the majority of the White people to be utterly opposed to educating the negroes” (H.R. Exec. Doc. No. 11, 39<sup>th</sup> Cong., 1<sup>st</sup> session 33, 1865). At that time, the final piece of freedmen’s legislation was proposed, the Freedmen’s Bureau Act of 1866 (Schnapper, 1985). The defeat of the first 1864 Bill, and the subsequent passage of the amended 1865 and 1866 Freedmen’s Bureau Acts that specifically included Whites illustrated the beginning of the legal and political debates over race-conscious affirmative action programs in American history. The “40 acres and a mule” soon became only a familiar historical phrase and a distant memory.

The 1866 Freedmen’s Bureau Act authorized Congress to appropriate funds for the purchase of school buildings to educate refugees and freedmen with a specific interest in educating Black children (Cong. Globe, 39<sup>th</sup> Cong. 1<sup>st</sup> Session 1866; Schnapper, 1985). While opponents of the 1866 Freedmen’s Bureau Bill continued to vigorously debate the distinctions of the races and the special treatment for Blacks, the proponents of the Bill understood that millions of former slaves “who had received no education, who had been laboring from generation to generation for their white owners and masters, able to own nothing, to accomplish nothing, are thrown, without protection, without aid, upon the charities of the world, in communities hostile to them....” (statement of Sen. Fessenden, Cong. Globe, 39<sup>th</sup> Cong. 1<sup>st</sup> Session 1866 at 365). Thus, Congress approved the 1866 Freedmen’s Bureau Act with race-conscious affirmative action programs specifically for former Black slaves intact, namely education programs, so that

Blacks could become self-sustaining American citizens. After 1866, the Freedmen's Bureau educated approximately 100,000 students, and nearly all of them were Black (Schnapper, 1985).

Concurrently, Congress implemented the Civil Rights Act of 1866 to abate the continued racism against former Black slaves (Cohen & Sterba, 2003). The Civil Rights Act of 1866 stated “[A]ll...citizens of the United States...of every race and color...shall have the same right...to full and equal benefit of all laws and proceedings for the security of person and property....” (Civil Rights Act, 1866). The Act proposed making African Americans automatic citizens as well as providing schooling, land and housing for them (Civil Rights Act, 1866). Despite the strong language in the Civil Rights Act of 1866 and Congress's attempts build an egalitarian society through the programs under the Freedmen's Bureau, racism still persisted. President Johnson himself vetoed the Civil Rights Act of 1866 on the basis that “[i]n all our history... no such system as that contemplated by the details of this bill has ever before been proposed or adopted....the distinction of race and color is by the bill made to operate in favor of the colored and against the white race” (Five Messages and Papers of the Presidents 3610-11, 1866). The Senate voted to override the President's veto (Schnapper, 1985). The legal and political debates regarding preferential treatment for the Black freedmen continued; thus, “[t]he principle of human equality needed the enforcement that could only be assured if incorporated into the U.S. Constitution” (Cohen & Sterba, 2003, p. 7). Congress hoped the Fourteenth Amendment to the U.S. Constitution would be the answer to racism against the Black freedmen.

Interestingly, members of Congress proposed the Fourteenth Amendment just weeks before the 1866 Freedmen's Bureau Act, even though it was not officially enacted until 1868. The Fourteenth Amendment was enacted in order to add constitutionality to race-conscious affirmative action programs and to ameliorate the condition of the freedmen (Cong. Globe, 39<sup>th</sup>

Cong. 1<sup>st</sup> Session 2459, 1866). The Fourteenth Amendment (1868), which is always relied upon by those opposing race-conscious affirmative action, has several sections to it. However, the critical part that most people remember states that all persons born or naturalized in the United States are citizens, and no State shall make or enforce any law which shall abridge the privileges or immunities of such citizens or deny to any person the equal protection of the laws (United States Constitution, 1868). The majority of Congressmen who supported the amendment was nearly identical to that which supported the Civil Rights Act of 1866 (Schnapper, 1985). Scholars have posited that Congress proposed and passed the Fourteenth Amendment to ensure the constitutionality and to support legally race-conscious legislation for Blacks who were subjected to centuries of legal slavery, racism, and subjugation (Moore, 2005; Schnapper, 1985). Furthermore, former Supreme Court Justice Thurgood Marshall stated, “Since the Congress that considered and rejected the objections to the 1866 Freedmen’s Bureau Act concerning special relief to Negroes also proposed the Fourteenth Amendment, it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures” (*Regents of the University of California v. Bakke*, 1978, p. 398). Despite the original intent, the Equal Protection Clause of the Fourteenth Amendment is now the legal weapon of choice and the crux of all race-based arguments before the United States Supreme Court. This is truly unfortunate especially since “[t]he objective of the Fourteenth Amendment was designed to provide equity for newly freed slaves, an objective that has yet to be accomplished today” (Moore, 2005, p. 101).

Because the power of the Fourteenth Amendment did not hold its weight, Black people were not completely protected from racism and discrimination. The case of *Plessy v. Ferguson* (1896) depicted just how much the legal system continued to distinguish Blacks and Whites in

spite of the Fourteenth Amendment. In the infamous case of *Plessy v. Ferguson* (1896), Mr. Plessy claimed that a railroad company violated his Fourteenth Amendment right of equal protection under the laws when it denied him seating in the railway car with White people. Plessy asserted that the reputation of belonging to the dominant White race was property, and his mixed race<sup>2</sup> entitled him to assert this privilege and get assigned to the railway car for White people. The United States Supreme Court wholly disagreed and explained that Mr. Plessy's mixed race made him a colored man and, therefore, he was not lawfully entitled to the privileged reputation or the property rights of White men (*Plessy v. Ferguson*, 1896). The Court held that the policy and practice of separate but equal was constitutional and appropriate, and thus, Mr. Plessy was placed in the separate railway car for Blacks. The Supreme Court set a tone for race relations and prejudices in American history when it stated that “[l]egislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences.... If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane” (*Plessy v. Ferguson*, 1896, p. 551-52).

*Plessy v. Ferguson* introduced the legal sanctioning of the separate-but-equal doctrine. Nevertheless, the Supreme Court made a significant point when reaching its decision in the *Plessy* case, which was that the practice of race separation was common, particularly in the establishment of separate schools for White and colored children (*Plessy v. Ferguson*, 1896). The Supreme Court was referring to a well-known 1849 Massachusetts case called *Roberts v. City of Boston*. In this case, Benjamin Roberts, a Black man, sued the Boston school district on behalf of his five year old daughter who was denied access to a primary school because of her

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<sup>2</sup> Mr. Plessy was mixed with approximately seven-eighths Caucasian and one-eighth African blood. The court noted that although the mixture of colored blood was not discernible in him, it was enough to make him part of the colored race.



race (*Roberts v. City of Boston*, 1849). Mr. Roberts claimed that his daughter was unlawfully excluded from the primary school that was closest to their home. Mr. Roberts cited the Massachusetts Constitution and laws that emphasized “all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law” (*Roberts v. City of Boston*, 1849, p. 206). The school district argued that the Roberts girl had access to a school, set apart for Black children, which was a part of the school committee’s regulation to keep White and Black children separate (*Roberts v. City of Boston*, 1849). Therefore, the Massachusetts Supreme Court had to ascertain the rights of individuals with regards to schools and whether the school regulations of providing separate schools violated Black children’s rights under the state laws and Constitution. The Massachusetts Supreme Court held that Mr. Robert’s lawsuit could not stand because

In the absence of special legislation on this subject [separating the races in schools], the law has vested the power in the [school] committee to regulate the system of distribution and classification....The committee, apparently upon great deliberation, have come to the conclusion, that the good of both classes of schools will be best promoted, by maintaining the separate primary schools for colored and for white children, and we can perceive no ground to doubt, that this is the honest result of their experience and judgment (*Roberts v. City of Boston*, 1849, p. 209).

The Massachusetts court further noted that maintaining separate schools perpetuated the loathsome distinction of class, but these prejudices were not created by law and probably could not be changed by law (*Roberts v. City of Boston*, 1849).

Although the *Roberts* case took place in an anti-slavery state, the Massachusetts courts and its society considered race and class to be one in the same. Individuals in the colored race

were of a lower social class, and those individuals in the White race were of a higher class. Given their lower status, colored children were not to associate with White children, particularly in schools, and the courts upheld that practice. The United States Supreme Court had an opportunity in *Plessy v. Ferguson* to deem the practice of race separation an illegal act, especially in light of the recent enactment of the Fourteenth Amendment, but instead the Supreme Court chose to make the doctrine of separate-but-equal the law. Accordingly, the long-established practice of white supremacy now was immortalized with legal authority behind it, specifically in the field of education.

### **2.1.2 Race-based Legal Cases in Education**

*Plessy v. Ferguson* (1896) ushered in a new era of discrimination with the racial segregation laws of separate-but-equal. The separate-but-equal doctrine was prevalent in every segment of society, but there was a constant reverberation of the Supreme Court's support for the doctrine when it came to education. In 1899, the United States Supreme Court confronted the issue of whether a school district in Georgia could legally establish public high schools for the sole interest of White children and refuse to maintain a similar high school for the benefit of Black children, when the Black parents' tax dollars were being used to maintain the high schools for White children (*Cumming v. Richmond County Board of Education*, 1899)<sup>3</sup>. The Black parents

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<sup>3</sup> There previously had been a separate building used to educate 60 Black high school children, but the Richmond County Board of Education claimed that for financial reasons they had to discontinue the high school in order to use the building to open four primary schools for younger Black children. Apparently, 400 or more Black children were being turned away from the primary grades because there were not enough seats or teachers to accommodate that large number of students. Since there was not enough money to open another high school building for Black students, the Board of Education made the decision to discontinue the high school education for Blacks in order to provide young Black children with the rudimentary education of learning the alphabet as well as reading and writing while at the same time maintaining high schools for White boys and girls.

complained that using the funds to maintain the high school without a similar school for Black children violated the Fourteenth Amendment of the U.S. Constitution; the parents requested an injunction to compel the Board of Education to withhold all assistance from the high school for White children (*Cumming v. Richmond County Board of Education*, 1899).

The Court determined that the Board of Education in Georgia did not violate the equal protection of the laws under the Fourteenth Amendment because both races have similar facilities and privileges of attending separate public schools; thus, the injunction was denied. The Court specifically noted that the White children should not be denied the educational privileges enjoyed by them simply because the Board of Education did not have the economic resources to maintain a separate high school for 60 Black children (*Cumming v. Richmond County Board of Education*, 1899). The Supreme Court would not consider permitting 60 Black children to attend a high school with the White children in furtherance of their education, because as the Court stated, “the rule as to the separation of races is enforced” (*Cumming v. Richmond County Board of Education*, 1899, p. 544). White privilege in education was becoming another mainstay in American history.

The racial segregation in education was also applicable to Chinese-Americans and other people of color. In the case of *Gong Lum, et al. v. Rice, et al.* (1927), a young girl in Mississippi was excluded from attending a high school for White children solely on the ground that she was of Chinese descent and not a member of the Caucasian race. The girl’s father, Gong Lum, petitioned the United States Supreme Court claiming that the school district violated his daughter’s Fourteenth Amendment rights by not admitting her to the school (*Gong Lum, et al. v. Rice, et al.*, 1927). Gong Lum averred that he was a county taxpayer contributing to the support of the high school, and since his daughter was not a member of the colored race or of mixed

blood, she was legally entitled to be admitted to the high school (*Gong Lum, et al. v. Rice, et al.*, 1927).

Because the Supreme Court determined that the young girl was a member of the Mongolian, or yellow race, and there was a school in the county for colored children, the Court denied Gong Lum's petition. The Court held that the legality of the school district's decision to exclude the young girl from the high school was in accordance with the Fourteenth Amendment. Specifically, the Court found that the question in this case was not any different from other cases involving the separation of the White race from the colored races, including black, brown, and red, except this case involves a Chinese pupil instead of a Black pupil (*Gong Lum, et al. v. Rice, et al.*, 1927). Thus, the answer remained the same, the separation of the races shall be enforced by the States and is not in conflict with the Fourteenth Amendment of the U.S. Constitution.

In 1936, the courts finally addressed the racial segregation issue in higher education in the case of *University of Maryland v. Murray*. While only the state courts heard this case, the holding and analysis in the case was cited in subsequent federal higher education cases and became essential to how later race cases were handled. Interestingly, the *Murray* case and three higher education race cases that soon followed specifically involved the separation of the races in law schools<sup>4</sup>.

In the case of *University of Maryland v. Murray* (1936), a Black man sought admission to the University of Maryland Law School, but because there was not a separate law school for

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<sup>4</sup> Another law school case was *Sipuel v. Board of Regents of the University of Oklahoma* (1948), in which a United States Supreme Court found that the University of Oklahoma denied Ada Sipuel, an African American woman, a legal education based on her race and in violation of the equal protection clause of the Fourteenth Amendment. The Court held that the state had to provide a legal education substantially equal to the White students in conformity with the Fourteenth Amendment. The Supreme Court relied on its opinion in *Missouri ex rel. Gaines v. Canada*, 1938, which is discussed later in this paper. Therefore, the opinion did not offer any different analysis. Thus, with little to no additional insight or analysis, this researcher chose not to discuss the *Sipuel* case in detail.

Blacks, he was denied admission solely because of his race. The University of Maryland argued that they provided adequate provisions to Negro students by offering scholarships to study in other states where colleges and professional schools were open to Negroes. The state court found that the scholarships were limited to just a small number of Black students, particularly those students interested in attending professional schools like law school. Furthermore, even if a law student received the small monetary scholarship, it was considerably more expensive for the students to travel to and attend these out-of-state schools than it was for White students who could stay in State (*University of Maryland v. Murray*, 1936). Therefore, the Maryland state court ordered the University to admit the young Black man to the law school because the State, which undertook the function of education in law, made no adequate provisions to provide a *substantially*<sup>5</sup> equal education to Black students (*University of Maryland v. Murray*, 1936) (emphasis added). In other words, the States were not required to provide wholly equal treatment to Black and White students.

In its analysis, however, the state court made it known that it supported the legality of the separate-but-equal doctrine and was in search of an alternate remedy, but in this case there was no other choice but to mingle the races in one school. The court expressed that “In Maryland no officers or body of officers are authorized to establish a separate law school, there is no legislative declaration of a purpose to establish one, and the courts could not make the decision for the State....[t]herefore the erection of a separate school is not here an available remedy” (*University of Maryland v. Murray*, 1936, pg. 488). Accordingly, the University of Maryland

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<sup>5</sup> It is important to note that the Courts interpreted the Fourteenth Amendment of the United States Constitution as only requiring a state “to extend to its citizens of the two races substantially equal treatment in the facilities it provides from the public funds” (*University of Maryland v. Murray*, 1936, p. 484).

Law School begrudgingly had to admit the one Black student, but the separate-but-equal doctrine still remained the law of the land.

A few years after the *Murray* case, another Black student faced the United States Supreme Court seeking admission to a White law school. This time the law school was located in Missouri. The Supreme Court relied on the holding and analysis in the *Murray* case (see *University of Maryland v. Murray*, 1936, *supra*) and held that the University of Missouri Law School had to admit the Black-Petitioner because the State did not provide a legal education for Negro students within the State as it did for White law students (*Missouri ex rel. Gaines v. Canada*, 1938). What is fascinating is that although the state of Missouri refused to establish a law school at Lincoln University, the state university for Black students, or at any other place in the State, the Supreme Court applauded the State for being a pioneer in the State of the Union by establishing a separate university for Black students that was *almost* on the same plane as the White university (*Missouri ex rel. Gaines v. Canada*, 1938) (emphasis added).

In two 1950 higher education cases, the United States Supreme Court simultaneously confronted the issue of whether Black students should be admitted to White universities to pursue advanced higher education degrees. The Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment entitled Black students to equivalent facilities and an equal education as White students<sup>6</sup>. Specifically, in the case of *Sweatt v. Painter* (1950), a Black man was refused admission into the University of Texas Law School because of his race. The United States Supreme Court concluded that under the Equal Protection Clause, the Black man was entitled to a legal education equivalent to that offered to White students; the separate law school

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<sup>6</sup>The United States Supreme Court decided the case of *McLaurin v. Oklahoma State Regents for Higher Education, et al.* (1950) on the same day as *Sweatt v. Painter* (1950). The *McLaurin* case involved a Black man admitted into doctoral program at the University of Oklahoma who was forced to be in a separate classroom, library, and cafeteria from the White students.

created for blacks was not equal (*Sweatt v. Painter*, 1950). The law school for Blacks had five full-time professors, 23 students, a library of 16,500 volumes, which according to the Supreme Court, did not compare to the University of Texas Law School's 16 full-time and 3 part-time professors, 850 law students, a library of 65,000 volumes, and access to many distinguished alumni.

In the holding, the Court acknowledged that the law is a highly learned profession, and a legal education requires the "interplay of ideas and the exchange of views," which cannot occur in an academic vacuum or in isolation from individuals (*Sweatt v. Painter*, 1950, p. 634). The Court noted that the White majority, who were attending the University of Texas Law School that had the rich traditions, prestige, and history of excellence and opportunities, would not want to attend the newly created Black law school that was partially staffed with few resources and no reputation or privileges (*Sweatt v. Painter*, 1950). Herein lie the inequality of the two law schools. Regardless of these types of apparent inequalities that were still in place in 1950, the Supreme Court stated that there was no need to "reach petitioner's contention that *Plessy v. Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation" (*Sweatt v. Painter*, 1950, p. 636). Once again, the Supreme Court upheld the legality of the separate-but-equal doctrine.

Shortly after the 1950 cases, however, the United States Supreme Court held that "In the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal" (*Brown, et al. v. Board of Education of Topeka, et al.*, 1954, p. 495). In *Brown, et al. v. Board of Education of Topeka, et al.* (1954), four children from four different states, Kansas, Virginia, South Carolina, and Delaware, wanted an equal education in desegregated public schools in their respective states. In *Brown*, the Supreme Court considered

the effect of racial segregation on public education, and whether separating youth of similar age and qualifications solely because of their race “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone” (*Brown, et al. v. Board of Education of Topeka, et al.*, 1954, p. 494). The Supreme Court aptly noted that

Segregation of white and colored children in public schools has a detrimental effect upon the colored children . . . . For the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn (*Brown, et al. v. Board of Education of Topeka, et al.*, 1954, p. 494).

Simply speaking, in the infamous *Brown* case, the Supreme Court finally acknowledged the negative effect that past racism and current racist views had had on society, and how it was affecting African Americans. The Supreme Court finally understood the abysmal impact of segregation, inclusive of the inequitable resources, unfair treatment, and the feelings of inadequacy. The fact remained that since slavery, Black children and White children were segregated by legal policy, practice, and educational opportunity. Black people were made to feel inferior for hundreds of years, but specifically in education. Therefore, in 1954, new questions began to surface regarding race and legal policy. Could years of intentional racism, discrimination, and segregation against Blacks and other people of color be overturned by the *Brown* decision and could equality truly be achieved?

Although it appeared from the *Brown* decision that the Supreme Court comprehended the detrimental effects of racial discrimination, it still took another ten years before the creation of the Civil Rights Act of 1964 and the total demise of the separate-but-equal doctrine. In general, the Civil Rights Act of 1964 prohibits an employer or organization from discriminating against



individuals because of their race, color, religion, sex, or national origin (42 USCS 2000 *et seq.*, 1964). Title IV permits the United States Attorney General to investigate school districts and university systems that may be engaging in racial segregation. Additionally, Title VI of the Civil Rights Act of 1964 specifically prohibits discrimination based on race, color, or national origin in any program, activity, or institution receiving Federal financial assistance (42 USCS 2000d *et seq.*, 1964). Title VI is applicable to all public schools and colleges, and most private educational institutions, such as Harvard and Stanford. For political reasons, higher education institutions were exempted from Title VI enforcement until 1972 when the Department of Health, Education, and Welfare issued guidelines pursuant to the 1972 Higher Education Amendments (Graham, 1994; Mosley & Capaldi, 1996).

Prior to the implementation of the Civil Rights Act of 1964, several southern senators opposed the Act claiming that the federal government was overstepping its authority by denying American citizens their basic economic, personal, and property rights for the sole benefit of the Black population. Representatives from Louisiana, Georgia, Virginia, South Carolina, North Carolina, and Mississippi argued that the rights of employers to hire and fire, the rights of unions to choose members, the rights of postsecondary and professional schools to choose students, and seniority rights in employment would be severely impaired by the Civil Rights Act of 1964 (Greene, 1989; Mosley & Capaldi, 1996). In spite of this opposition, Congress voted to enact the Civil Rights Act and even went a step further. Because of the Civil Rights Act of 1964 and the years of discrimination, Congress also implemented affirmative action policies to place primacy on group rights rather than on individual rights, and the protected class minorities, such as African Americans, held priority claims (Graham, 1994). Understandably, to many people, these affirmative action policies sounded like unjust discriminatory actions were being taken against

blameless Whites. Predictably, Title VI, like the Equal Protection Clause of the Fourteenth Amendment, became additional weaponry in the armory fighting against race-conscious affirmative action policies in higher education.

The road to race-based affirmative action and the pursuit for equality has been long and complicated. America's legal history with race and maintaining white dominance undoubtedly adds to the complexity of the creation of race-sensitive policies. This country's legal background offers some understanding of why the federal legislature found it necessary to implement race-conscious affirmative action policies and programs in the 1960s. The following table is a brief recap and chronology of key legal cases and legislation that may have laid the foundation for current race-conscious affirmative action policies in higher education. (Table 1).

**Table 1: Chronology of Key Legal Cases and Legislation Leading to Affirmative Action**

LEGAL CASES/LEGISLATION	LEGAL ISSUES/PURPOSE	FINDINGS	RATIONALE
Roberts v. City of Boston (1849)	A school district denied a Black child access to a primary school because of her race, so the child’s father sued the school district for illegally excluding the Black child.	The Massachusetts Supreme Court held the lawsuit could not stand against the City of Boston School District.	In the absence of special legislation, the school committee could regulate the school system including separating the races. While maintaining separate schools perpetuates the distinction of class, these prejudices are not created by law and cannot be changed by law.
Dred Scott v. Sanford (1857)	A slave living in the free state of Illinois wanted to become a citizen in that state and be entitled to all the rights, privileges, and immunities, guaranteed by U.S. Constitution.	The U.S. Supreme Court held that Mr. Scott was not a U.S. citizen, and his residence in Illinois did not change his slave status.	Blacks were property, inferior, and equal to 3/5 of a person, so they were not accorded the rights and privileges that the U.S. Constitution extended to naturalized citizens.
Freedmen’s Bureau Acts of 1864, 1865, and 1866	Legislation established appropriate programs to aid persons of African descent or former slaves with enforcing contracts and renting abandoned land in order to help blacks become self-sustaining individuals.	Original provisions provided blacks with education, land distribution, medical assistance and more. The 1866 Act included white refugees and provided only enough funding for blacks to receive some education.	The change in legislation was due to Congressmen debating the distinction of the races, and not wanting to give special treatment to blacks.
13 <sup>th</sup> Amendment of U.S. Constitution (1865)	The legality of slavery.	Abolished and forbade slavery.	To promote human rights.
Civil Rights Act of 1866	To provide equal rights and benefits for all citizens of every race and color, including blacks being considered citizens and provided them with schooling, land, and housing.	The President vetoed the original bill because it provided too much to blacks over whites. Congress enacted part of the bill and considered all blacks, including former slaves, to be U.S. citizens entitled to equal rights.	To alleviate the racism and discrimination against the newly freed slaves.
14 <sup>th</sup> Amendment of U.S. Constitution (1868)	Amendment required equal civil rights for all U.S. citizens, specifically Black freedmen (former slaves).	Formally and legally provided equal protection, privileges, and rights to all Black freedmen like that of White men.	To alleviate the racism and discrimination against the newly freed slaves and support special relief and programs for blacks.

LEGAL CASES/LEGISLATION	LEGAL ISSUES/PURPOSE	FINDINGS	RATIONALE
Plessy v. Ferguson (1896)	A railroad company denied Mr. Plessy, a man of mixed race, seating in the railway car for whites in violation of the equal protection clause of the 14 <sup>th</sup> Amendment.	The U.S. Supreme Court held that the policy and practice of separate-but-equal was constitutional and appropriate, so Mr. Plessy was properly seated in the railway car for blacks instead of whites. The doctrine of separate-but-equal was born.	Mr. Plessy's mixed race of 1/8 African blood and 7/8 Caucasian made him a colored man, so Plessy was not entitled to the privileged reputation or the property right of white men. Thus, he had to sit in the railway car for blacks.
Cumming v. Richmond County Board of Education (1899)	Using taxpayers' money to maintain a high school for White children without a similar school for Black children violated the 14 <sup>th</sup> Amendment of the U.S. Constitution; the parents requested an injunction to compel the Board of Education to withhold all assistance from the high school for White children.	The U.S. Supreme Court determined that the Board of Education did not violate the equal protection clause of the 14 <sup>th</sup> Amendment; injunction denied.	Both races had similar facilities and privileges of attending separate public schools. The White children should not be denied educational benefits enjoyed by them simply because the Board of Education did not have enough money also to maintain a separate high school for Black children.
Gong Lum, et al. v. Rice, et al. (1927)	A school district denied a Chinese citizen, who was not colored or of mixed race, from attending a White school in violation of her 14 <sup>th</sup> Amendment rights.	The U.S. Supreme Court held that the legality of the school district's decision to exclude the Chinese citizen from a public school for White children was in accordance with the 14 <sup>th</sup> Amendment.	The child was a member of the Mongolian, or yellow race. The separation of the White race from colored races, included black, brown, red, and yellow.
University of Maryland v. Murray (1936)	There was no separate law school for blacks, and the University of Maryland denied a Black man admission to the law school solely based on race and in violation of the 14 <sup>th</sup> Amendment.	Maryland state court ordered the University to admit the Black man in accordance with the 14 <sup>th</sup> Amendment's equal protection clause.	The University made no adequate provisions to provide a substantially equal education for Black students, and sending the students to an out-of-state law school at the students' expense was unreasonable and unfair.
Missouri ex rel. Gaines v. Canada (1938)	There was no separate law school for blacks, and the University of Missouri denied a Black man admission to the law school solely based on race and in violation of the 14 <sup>th</sup> Amendment	The U.S. Supreme Court held that under the 14 <sup>th</sup> Amendment, the University had to admit the Black man because Missouri did not provide a legal education for blacks within the State.	The University made no adequate provisions to provide a substantially equal education to Black students, and sending the students to an out-of-state law school was unreasonable and unfair.

LEGAL CASES/LEGISLATION	LEGAL ISSUES/PURPOSE	FINDINGS	RATIONALE
Sipuel v. Board of Regents of the University of Oklahoma, et al. (1948)	There was no separate law school for blacks, and the University of Oklahoma denied a concededly qualified Black woman admission to the law school solely based on race and in violation of the 14 <sup>th</sup> Amendment.	The U.S. Supreme Court held that the State must provide a legal education for a Black woman in conformity with the equal protection clause of the 14 <sup>th</sup> Amendment.	The University of Oklahoma was the only institution for legal education supported and maintained by taxpayers, so Black citizens were entitled to secure a legal education afforded by the State.
McLaurin v. Oklahoma State Regents for Higher Education (1950)	Whether Black students should be admitted to White universities to pursue advanced degrees.	The U.S. Supreme Court held that the equal protection clause of the 14 <sup>th</sup> Amendment entitled Black students to equivalent facilities and an equal education as White students.	A Black man admitted to a doctoral program in Oklahoma has a right to learn with White students. He should not be forced to be in a separate classroom, library, and cafeteria from White students solely because of race.
Sweatt v. Painter (1950)	Whether Black students should be admitted to White universities to pursue advanced degrees.	The U.S. Supreme Court held that the equal protection clause of the 14 <sup>th</sup> Amendment entitled Black students to equivalent facilities and an equal education as White students.	Law is a highly learned profession, and a legal education requires the interplay of ideas and exchange of views, which cannot occur in an academic vacuum or in isolation from individuals. Thus, Black students should learn and exchange ideas with White students and be exposed to the same academic resources, rich traditions, and opportunities that the University of Texas Law School offered to its White students.
Brown, et al. v. Board of Education of Topeka, et al. (1954)	Whether racially segregated public schools are unequal in violation of the equal protection of the laws under the 14 <sup>th</sup> Amendment.	The U.S. Supreme Court held that in the field of public education the doctrine of separate-but-equal has no place; separate educational facilities are inherently unequal.	The segregation of White and Black children in public schools has a detrimental effect upon the Black child, and a sense of inferiority affects the motivation of a child to learn.
Civil Rights Act of 1964	To eradicate discrimination and segregation against blacks and other subjugated minorities as well as to eliminate economic and social oppression against minority groups.	Generally, the Act prohibits an employer or organization from discriminating against individuals because of their race, color, religion, sex, or national origin. Also, provides legal remedies for those discriminated against.	To provide equal opportunities in employment, education, housing, etc. for all U.S. citizens.

### **2.1.3 What is Affirmative Action - The Pros and Cons**

Although there is no clear-cut definition for affirmative action, the concept of affirmative action originally came from an old English legal concept of equity, or the administration of justice according to what was fair in a particular situation (Skrentny, 1996). During the Reconstruction era, the word “affirmative” was used often to describe actions taken to protect Blacks’ civil rights and challenge white privilege (Rubio, 2001). More than half a century later, the phrase “affirmative action” actually appeared as part of the 1935 National Labor Relations Act, and declared that employers that discriminated against union members affirmatively had to act to place the victims where they would have been without the discrimination (Skrentny, 1996). President Franklin Roosevelt was known for taking affirmative action in 1941 when he issued Executive Order 8802 and several subsequent bills, which proposed that specific victims of discrimination be made whole and put in the position he or she would have held were it not for discriminatory acts (Mosley & Capaldi, 1996). However, it was during the 1960s, the height of the Civil Rights Movement, when the term “affirmative action” took on a more racialized and discordant meaning.

In 1961, President John F. Kennedy coined the phrase “affirmative action,” which is found in Executive Order 10952, when he established the Equal Employment Opportunity Commission (EEOC) and directed contractors on projects funded with federal money to “take affirmative action to ensure that applicants are employed, and employees are treated during their employment, without regard to the race, creed, color, or national origin” (3 C.F.R. 448, 450). It was this order that initiated the United States’ commitment to affirmative action and taking serious steps to eliminate racism (Cohen & Sterba, 2003). President Kennedy stressed that the

issue was not merely eradicating discrimination, but eradicating as well the oppressive economic and social burdens imposed on Blacks by racial discrimination; thus, the expansion of educational and employment opportunities was necessary (Mosley & Capaldi, 1996). On the heels of this Executive Order in 1961, the University of Georgia was court ordered to admit Black students after over 175 years of racial discrimination; the university admitted only two students (Moore, 2005). President Kennedy wanted more action, more movement than the University of Georgia and other universities and agencies were willing to give. The President then proposed legislation to implement a civil rights act to ensure appropriate measures would be taken to create a level playing field where equal opportunity would prevail (Cohen & Sterba, 2003).

Three years later, five days after President Kennedy's death, President Lyndon Johnson and some members of Congress arduously worked to pass the Civil Rights Act of 1964. Unfortunately, about 16 days after the act was passed, riots broke out in several cities, including Philadelphia, Brooklyn, Jersey City, and the Watts section of Los Angeles in opposition of the Act and its potential ramifications (Cohen & Sterba, 2003). This reaction to the Civil Rights Act of 1964 prompted President Johnson to issue Executive Order 11246 in 1965 to address the racist practices of the federal government and its private contractors, which stated:

It is the policy of the Government of the United States to provide equal opportunity in federal government for all persons, to prohibit discrimination to employment for all persons, to prohibit discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal opportunity through a positive, continuing program in each executive department or agency (Executive Order 11246, 1965, part 1, § 101).

The enforceable mandate of *nondiscrimination* extended both then and now to every aspect of employment and higher education admissions (Cohen & Sterba, 2003, emphasis added).

Discriminatory practices in the United States were to be decimated and legal remedies were to be implemented for those discriminated against. Accordingly, the federal guidelines required that policies and practices be created to break the racist effects of segregation; affirmative action was the law of the land for the good and equality of society. Cohen and Sterba (2003) remarked that "... [A]ffirmative action was morally right, as honorable as public policy can be....Affirmative action was to be the instrument with which we would expose and uproot unequal treatment of every kind, covert and overt, deliberate or inadvertent. Affirmative action...spoke then, and it speaks now, to our condition. It deserved its good name" (p. 14).

The United States Commission on Civil Rights stated that affirmative action encompasses "any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future" (U.S. Commission on Civil Rights, Oct. 1977, p. 2). Black's Law Dictionary (1991) defined affirmative action as employment programs required by federal statutes and regulations designed to remedy discriminatory practices in hiring minority group members. Given the battles over and evolution of affirmative action in American society, one researcher offered a comprehensive explanation for the purpose of affirmative action by stating:

[A]ffirmative action sums up the story of the United States: the struggle for justice, equality, and self-determination and whether African Americans will or even should be able to enjoy chosen labor and increased life chances. It represents the history of white supremacy, privilege, and guilt versus black protest, militance, and demands for compensation and reparations; black reality against white denial; formal equality versus



remedial “preferential” treatment; and the debate over integration, assimilation, segregation, and separation. The black-led struggle against discrimination has been the primary impetus for people of color, women, and other oppressed groups also to demand political and social equality . . . . [Affirmative action] has become an amorphous category that also includes . . . debates over quotas, statistics, and ideas of what constitutes merit. In fact, “affirmative action” has now become part of American folklore - and its main focus has been on what is called “race” (Rubio, 2001, p. 3).

Simply put, affirmative action is now a nebulous racial term that invokes division between Blacks and Whites in almost every meaningful part of life, such as decisions made regarding schooling, working, and voting.

The debates over race-conscious affirmative action have led to supporters offering many reasons why affirmative action is necessary, with critics opposing most of those reasons. Nevertheless, there have been some commonalities between the supporters and critics in defense of some forms of affirmative action. The three most common defenses of affirmative action, which are briefly discussed below, have been termed the: (1) outreach; (2) remedial; and (3) diversity defenses (Cohen & Sterba, 2003).

Outreach affirmative action is a weaker form of affirmative action, and it includes the “widespread advertisement to groups not previously represented in certain privileged positions” (Cohen & Sterba, 2003, p. 204 citing Pojman, 1998, pp. 169-80). After all, racial discrimination is one of those areas in society that cannot be cured by ceasing and desisting because employers and college institutions have engaged in racial discrimination for so many years (Sowell, 1975). Outreach affirmative action permits organizations to take some affirmative steps, so that White employers will not continue to hire their current employees’ friends and relatives through word

of mouth referrals, and elite institutions will not continue selectively to recruit White students from privileged backgrounds and wealthy alumni (Cohen & Sterba, 2003; Sowell, 1975). The primary requirement for outreach affirmative action is that “[a]ll reasonable steps must be taken to ensure that qualified minority and women candidates have available to them the same educational and job opportunities that are available to non-minority or male candidates” (Cohen & Sterba, 2003, p. 205).

Remedial action is another defensible type of affirmative action, but is probably one of the most controversial types of affirmative action. Remedial affirmative action suggests that certain minority groups should be compensated for past or present discrimination (Cohen & Sterba, 2003; Mosley & Capaldi, 1996). The United States Supreme Court has held that it is permissible for institutions to engage in remedial affirmative action as compensation for identifiable acts of purposeful discrimination committed by that institution (*Local 28 of the Sheet metal Workers Union v EEOC*, 1986). Individuals can make a case for remedial affirmative action when they can show evidence of statistical disparities in an institution. For example, in the *Local 28* case, the injured parties showed that there were no minority members in the Local 28 Union in New York City, but the relevant labor pool was comprised of 29 percent minorities (*Local 28 of the Sheet metal Workers Union v EEOC*, 1986). However, it is important to know that using race-based affirmative action to remedy unproven discrimination, which is also known as societal discrimination, is legally unacceptable because societal discrimination cannot be attributed to just one particular institution (*Regents of the University of California v. Bakke*, 1978). Furthermore, a race-based affirmative action policy or program must stand up to the Supreme Court’s strict scrutiny standard, which simply means that the policy or program must be carefully written and customized (narrowly tailored) to meet a compelling governmental interest,

such as the benefits of sharing or gaining specific knowledge in an educational institution (*Gratz v. Bollinger*, 2003; *Grutter v. Bollinger*, 2003; *Regents of the University of California v. Bakke*, 1978).

The final defensible type of affirmative action and perhaps the most common is known as the diversity rationale. Diversity may be an acceptable form of affirmative action if the objective supports the notion of gaining educational benefits or creating a more effective work force, such as policing or community relations (Cohen & Sterba, 2003; see also *Grutter v. Bollinger*, 2003; *Regents of the University of California v. Bakke*, 1978). Higher education institutions often have used diversity as an argument for race-based affirmative action policies. In fact, educational diversity is the primary reason why institutions of higher education want to maintain the use of race in the admissions process (Moore, 2005). The president of Tufts University stated that “affirmative action has taken us beyond the passivity of ‘equal opportunity’ and engaged us in the active and creative seeking of qualified, underrepresented candidates” (Moore, 2005, p. 9 citing John Dibiaggio, 2003). Some higher education institutions have been successful in recruiting qualified candidates with their use of diversity, but there are some limitations. For instance, in the *Bakke* case, the Supreme Court concluded that race could be considered a “plus” factor during a college admissions process to achieve educational diversity, so long as the individual qualities of each applicant were considered during the admissions process (*Regents of the University of California v. Bakke*, 1978). Similarly, in the *Grutter* case, the Supreme Court held that the University of Michigan’s Law School’s policy of seeking to enroll a critical mass of minority students did not violate the Equal Protection Clause of the Fourteenth Amendment or Title VI of the Civil Rights Act since it engaged in a highly individualized, holistic review of each applicant’s file (*Grutter v. Bollinger*, 2003). Nevertheless, these acceptable forms of

affirmative action policies cannot appear to include or promote a quota system, where a certain number of minorities is trying to be reached or certain individuals receive extra points for being part of a minority group. The Supreme Court has held that these types of quota systems are illegal, even when trying to achieve diversity.

Overall, there have been five key definitions given for affirmative action over the past 40 years. First, affirmative action is a set of policies designed to advertise all openings as widely as possible as well as to monitor job appointments and promotions to ensure that the process is fair and non-discriminatory (Cohen & Sterba, 2003; Mosley & Capaldi, 1996). Second, affirmative action consists of policies or programs ordered by the court to rectify proven cases of individual discrimination, in which there are numerical objectives for an institution to achieve a more equitable number of minorities during a specific period (Cohen & Sterba, 2003; Mosley & Capaldi, 1996). Third, affirmative action is congressionally mandated rules concerning federal contracts and involving a specific percentage of contracts to be set aside for minority contractors (Cohen & Sterba, 2003; Moore, 2005; Mosley & Capaldi, 1996). Fourth, affirmative action is a policy designed to redress alleged cases of past discrimination, in which the injured members of the discriminated group are placed in the position they would have been in but for the discriminatory actions (Cohen & Sterba, 2003; Mosley & Capaldi, 1996). Finally, affirmative action is any policy that is not based on a causal claim of discrimination, but is meant to produce a social goal by invoking quotas to achieve group representation (Cohen & Sterba, 2003; Moore, 2005; Mosley & Capaldi, 1996).

Although the original purposes for, and definitions of, affirmative action policies appear to represent what is good for maintaining a fair and just society, there have been numerous reasons given for why affirmative action should be eliminated. Probably the most obvious

criticism regarding affirmative action is that it is illegal. According to the Fourteenth Amendment of the United States Constitution, no state can deny any person within its jurisdiction the equal protection of the laws. When people oppose affirmative action policies, they typically cite the equal protection clause to bolster the idea that the amendment protects individual rights, not group rights (Mosley & Capaldi, 1996). Similarly, Titles VI and VII of the Civil Rights Act set forth that federally funded institutions and employers in the private or public sector are forbidden from discriminating on the basis of race, color, religion, sex or national origin (Civil Rights Act of 1964, Section 601 of Title VI; Civil Rights Act of 1964, Section 703 of Title VII). Critics argue that these specific sections of the Civil Rights Act make race-conscious affirmative action policies and programs illegal.

Another sharp attack against affirmative action is that it is immoral. Cohen & Sterba (2003) opined that affirmative action violates the basic equality principle – some receiving a public benefit that others do not receive is clearly unequal treatment. Critics continue to believe that affirmative action is synonymous with preferential treatment (Moore, 2005). Additionally, critics argue that affirmative action was meant to be a temporary fix in an effort to strive for a color-blind society that recognizes individuals, not to adopt race consciousness as a norm for groups of minorities (Mosley & Capaldi, 1996). In the dissent in *Plessy v. Ferguson* (1896), Justice Harlan strongly argued the point that the U.S. Constitution is color-blind and does not recognize groups, just individuals. In opposition to the separate-but-equal doctrine, Justice Harlan warned against making race classifications because “the destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law” (*Plessy v. Ferguson*, 1896, p. 559).

Affirmative action is seen as wrong because it has all of the ingredients for the making of immorality because it repeats an American history that began with racism and discrimination.

Cohen & Sterba (2003) illustrated this sentiment quite well when they stated

The most gruesome chapters in human history – the abomination of black slavery, the wholesale slaughter of the Jews – remind us that *racial* categories must never be allowed to serve as the foundation for official differentiation. Nations in which racial distinctions were once embedded in public law are forever shamed. Our own history is by such racism ineradicably stained. The lesson is this: Never again. Never, *ever* again. What is loosely called “affirmative action” sticks in our craw because it fails to respect that plain lesson (p. 25).

Researchers have agreed that the United States history of racial oppression hovers over all the arguments for or against affirmative action – making distinctions based on race can have good effects given American history of oppression and bad effects given the future of America striving to be a color-blind society (Cohen & Sterba, 2003; Moore, 2005; Mosley & Capaldi, 1996).

Two other common arguments have been waged against race-based affirmative action: (1) Black people and other disadvantaged racial minorities are stigmatized for being recipients of affirmative action, rather than qualified individuals, and (2) the playing field has been leveled between racial minorities and Whites. Specifically, some critics say that affirmative action reinforces the idea that blacks and other racial minorities can only succeed if held to lower or different standards (Mosley & Capaldi, 1996). In other words, affirmative action makes racial minorities feel inferior and not worthy of what they have received because of their racial or ethnic background. Furthermore, those in opposition often claim that the Civil Rights Act of 1964 and affirmative action policies have been in effect for more than 40 years, so that has been

more than enough time to level the playing field (Cohen & Sterba, 2003; Moore, 2005). More blacks and racial minorities go to college and have well-paying professional careers; therefore, there is no longer a need for preferential racial policies like affirmative action (Moore, 2005). Many researchers, such as Bowen & Bok (1998), have studied these arguments in their quest to understand the controversy surrounding race-sensitive policies at institutions of higher education.

In 1998, Bowen and Bok published a book entitled *The Shape of the River*. The book is a study that chronicles different sets of White and Black student cohorts entering 28 academically selective colleges and universities<sup>7</sup>. Bowen and Bok (1998) used the College and Beyond (C & B) database created by the Andrew W. Mellon Foundation from 1994 through 1997. Bowen and Bok (1998) studied the records of 80,000 undergraduate students attending these 28 selective higher education institutions in the fall of 1951, fall of 1976, and fall of 1989. The purpose of the study was to investigate the use of race and the debate surrounding race-sensitive admission programs in elite and selective institutions of higher education (Bowen & Bok, 1998).

Not surprisingly, in their study, Bowen & Bok (1998) discovered that minority students enter these selective colleges and universities with test scores and high school grades that are significantly lower than White students' scores and grades. In spite of these academic qualifications, 75 percent of the Black students who matriculated in 1989 at the 28 selective institutions graduated from the first college they entered, as compared to the 40 percent of Black students or 59 percent of White students graduating from NCAA Division I schools (Bowen & Bok, 1998). Furthermore, Bowen & Bok (1998) found that despite their lower test scores and

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<sup>7</sup> The 28 colleges and universities in Bowen and Bok's study were: Barnard College, Bryn Mawr College, Denson University, Hamilton College, Kenyon College, Oberlin College, Smith College, Columbia University, Duke University, Emory University, Miami University (Ohio), Northwestern University, Pennsylvania State University, Princeton University, Swarthmore College, Wellesley College, Wesleyan University, Williams College, Rice University, Stanford University, Tufts University, Tulane University, University of Michigan at Ann Arbor, University of North Carolina at Chapel Hill, University of Pennsylvania, Vanderbilt University, Washington University, and Yale University.

grades, Black C & B graduates were more likely than White C & B graduates to earn degrees in law and medicine. About 90 percent of Black students attending leading professional schools of law, business, and medicine successfully completed their studies (Bowen & Bok, 1998).

In their study, Bowen & Bok (1998) did not find too many negative effects on racial minorities who benefited from race-conscious admissions policies; rather they found more positive outcomes, such as minority students' motivation and desire to achieve, once given an opportunity. The desire of these students to move forward in their studies is in congruence with the hope of the higher education institutions to enroll qualified, deserving minority students who are overlooked because of lower test scores and grades. Bowen and Bok (1998) acknowledged that, "The increased numbers of Black and Hispanic holders of law degrees, medical degrees, business degrees, and PhDs can be credited to the joint efforts of students of high ambition, strong undergraduate programs, and graduate institutions that have worked hard to enroll larger numbers of talented minority students" (p. 103). Bowen & Bok's study of race-sensitive affirmative action policies at the 28 selective universities does not support the argument that racial minorities are stigmatized by the policies, but rather minorities are fortified. Bowen & Bok's study also established the need for such policies to help continue leveling the playing field between Whites, Blacks, and other disadvantaged racial minorities.

While there is no obvious definition for affirmative action and its purpose, there has been unquestionable opposition as well as support for affirmative action policies. On one hand, affirmative action policies are known for providing opportunity to excluded individuals, increasing diversity in society, and eliminating discriminatory activity within companies and organizations. At the same time, however, affirmative action policies are known for being immoral, illegal, and unfair. A commonality between the critics and supporters is that they both



rely on past and present legislation, legal cases, and in some cases, actual statistics to augment their reasons for why affirmative action is good, bad, or unnecessary, as evidenced by Bowen & Bok's 1998 study in *The Shape of the River*. Despite on which side of the affirmative action fence one stands on, the one thing that is certain is that the United States has a treacherous history with race and race relations, especially when it comes to Blacks and Whites. The current affirmative action debates are now another cultural chasm that separates society.

#### **2.1.4 Federal Affirmative Action Education Programs**

When the Civil Rights Act of 1964 took effect, the need for affirmative action became a national priority with regards to achieving educational and economic parity among all American citizens. Various civil rights and national watchdog organizations, such as the National Association for the Advancement of Colored People (NAACP), the Urban League, the American Bar Association (ABA), and the Law School Admissions Council (LSAC) just to name a few, began to investigate the low numbers of women and minorities in certain careers and in institutions of higher education. They pushed for affirmative steps to be taken immediately. Before the mid-1960s and the beginning of affirmative action programs, minority enrollments in higher education institutions were low and either stable or declining (O'Neil, 1970).

Following the implementation of the Civil Rights Act of 1964, selective universities sought to open their large White male classes to previously excluded minorities and women (Fullinwider & Lichtenberg, 2004). The question, however, was whether these once excluded students were prepared for the demands of higher education. Preferential programs and policies were proposed to help insure that the incoming disadvantaged minority and female students would be equipped for the arduous tasks of higher education curricula. Several universities

initiated preparatory programs for poor and minority students to help make a smoother entrance into the world and expectations of higher education. The federal government supported initiatives as well; however, the federally funded programs were aimed at low-income students, rather than racial minorities. The researcher found one federally funded program that was specifically established for disadvantaged students and racial minorities – the Council on Legal Education Program (CLEO), which is the focal point of this dissertation study. Perhaps with the political outcry of the Civil Rights Act of 1964 and proposed affirmative action policies, the federal government was hesitant about supporting programs specifically created for racial minorities. Regardless of the reasons, the more germane issue today is that it appears that all federally funded programs that primarily benefit racial minorities, even if the programs did not originally intend to, are in jeopardy of losing funding. Therefore, in this portion of the paper, the researcher concentrates on two other federal education initiatives, besides the CLEO program, that have benefited many disadvantaged students and racial minorities. The TRIO Programs and GEAR UP are federal education programs that are also under attack.

#### **2.1.4.1 TRIO Programs and GEAR UP**

During the 1960s, President Lyndon Johnson and the federal government responded to the societal request of providing financial resources and encouraging poor, minority students to pursue higher education. In 1964, President Johnson signed into law the Economic Opportunity Act, which gave rise to the Office of Economic Opportunity, as part of the War on Poverty plan (Fields, 2001). The Office of Economic Opportunity (OEO) implemented the Special Programs for Students from Disadvantaged Backgrounds, which later became known as the TRIO Programs (McElroy & Armesto, 1998). TRIO is now a set of educational initiatives directed largely at youth from families of four or more earning under \$24,000 a year (Fullinwider &

Lichtenberg, 2004). In 1964, the OEO presented the first federal program called Upward Bound. The Economic Opportunity Act authorized the launching of 18 pilot Upward Bound programs (Blake, 1998). Upward Bound instructs high school students in math, literature, composition, and science on Saturdays during the school year and on a college campus for five weeks during the summer (Fullinwider & Lichtenberg, 2004).

In 1965, the Higher Education Act (HEA) introduced another program, Talent Search, which began operating in 1967 (Cahalan, et al. 2004). Both Upward Bound and Talent Search were designed to increase college access among low-income youth, many of whom were minority students having parents that did not graduate from college. After the reauthorization of HEA in 1968, OEO established the Student Support Services program. At that time, the new Student Support Services program, Upward Bound, and Talent Search assumed the moniker of the TRIO Programs (Fields, 2001). In 1968, TRIO Programs were transferred from the OEO to the Office of Higher Education Programs. TRIO Programs are now under the authority of the Office of Federal TRIO Programs in the U.S. Department of Education (McElroy & Armesto, 1998). Over the next twenty years, several additional TRIO Programs were created, such as Educational Opportunity Centers (EOC) and the Ronald E. McNair Post-Baccalaureate Achievement Program.

By 1998, over 1,900 TRIO Programs had provided services to 780,000 Americans, in which almost all of them were from minority or low-income backgrounds (Blake, 1998; Fields, 2001). Approximately, two million TRIO participants have graduated from college since the pilot programs for Upward Bound were introduced in 1964 (Blake, 1998). About 35 percent of TRIO Program participants are African American, and most of the students are first-generation college students (Fields, 2001). As more TRIO Programs came into existence and more students

benefited from the programs, controversy arose. Some of the controversy regarded the definitions of “educational disadvantaged” and determining who were eligible for TRIO Programs (McElroy & Armesto, 1998). Kendrick & Thomas (1970), the first group to evaluate the Upward Bound program, defined “educationally disadvantaged” as those who are members of groups that historically have been underrepresented in higher education and that are below national averages on educational indices. Additionally, Levin (1986) described the “educationally disadvantaged” as students lacking the home and community resources that enable them to succeed in conventional educational settings due to poverty, racial/ethnic and cultural distinctions, or linguistic abilities. The TRIO programs responded to the overwhelming need to prepare educationally disadvantaged students, who would typically not go to college but would assume low-skilled occupations, for higher education (McElroy & Armesto, 1998). Without TRIO, many of these students might have continued a familial cycle of unemployment and low status on the socioeconomic ladder. It is estimated that by 2010, almost 50 percent of all occupations in the United States will require higher levels of knowledge and skills that were once held for only the elite and highly educated (Darling-Hammond, 1997; McElroy & Armesto, 1998). Over the past 40 years, the TRIO Programs have helped to open the educational and economic doors so that disadvantaged and minority students may compete with the elite and the highly educated for these high-level positions.

Today, there are six TRIO outreach and support programs that prepare disadvantaged students in grades 6 through 12 as well as adults:

- (1) **Upward Bound** – 772 programs around the country prep about 57,000 youth between the ages of 13 and 19 years old (grades 9 through 12) for college. Upward Bound provides instruction in literature, composition, math, and

science through a five- to eight-week, full-time residential summer program at a college or university.

- (2) **Talent Search** – 361 programs serving over 300,000 students seek to identify individuals from disadvantaged backgrounds and provide students with academic, career, and financial counseling to help them graduate from high school and enroll in college. This program also serves high school dropouts by encouraging them to re-enter the educational system, finish high school, and pursue a post-secondary education.
- (3) **Student Support Services (SSS)** – serves approximately 177,000 low-income students at about 800 colleges and universities by providing tutoring, counseling, and remedial instruction to help them receive their bachelor's degree.
- (4) **Educational Opportunity Centers (EOC)** – 82 centers serve about 160,000 individuals who are displaced or underemployed workers with counseling and information on college admissions and financial aid. EOC tries to help these adults successfully negotiate the college application process and complete degree programs.
- (5) **Upward Bound Math/Science Program** – 123 programs specialize in strengthening the math and science skills of about 6,000 TRIO eligible high school students. This program also helps students learn computer technology, English, foreign language, and study skills.
- (6) **Ronald E. McNair Post-Baccalaureate Achievement** – 156 programs serving about 3,700 students encourage low-income and minority

undergraduates who have demonstrated strong academic potential, to consider pursuing doctoral studies and the professoriate. This program provides faculty mentoring, internship, research opportunities, and scholarly activities (Cahalan, et al., 2004; Fields, 2001; McElroy & Armesto, 1998).

Approximately two-thirds of TRIO students are racial/ethnic minorities (Cahalan, et al., 2004). Some other key facts about the TRIO Programs are: (1) over 1,200 colleges and universities, community colleges, and agencies offer TRIO Programs; (2) Upward Bound students are four times as likely to earn an undergraduate degree than those in similar backgrounds that are not in the TRIO Programs; (3) Student Support Services students are more than twice as likely to remain in college than students from similar backgrounds not in TRIO; and (4) the lack of federal funding permits fewer than five percent of eligible youth and adults to be served through TRIO (in 2001, 11 million needed TRIO) (Fields, 2001, as compiled from TRIO). TRIO Programs are still reaching only a small portion of the students that need their services and programs.

In the 1998 Amendments to the Higher Education Act of 1965, President William Clinton endorsed another preparatory program similar to TRIO, which is called Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP). GEAR UP is also an early intervention program designed to improve the pre-college preparation and college success rate of low-income students. The program is under the auspices of the Office of Postsecondary Education at the U.S. Department of Education. GEAR UP's mission "is to significantly increase the number of low-income students who are prepared to enter and succeed in postsecondary education (Fullinwider & Lichtenberg, 2004, p. 198 citing U.S. Department of Education, [www.ed.gov/programs/gearup](http://www.ed.gov/programs/gearup)).

The program starts when eligible students are in middle school (7<sup>th</sup> grade) and follows them through high school graduation. GEAR UP has two components: (1) a public/private partnership grant program, and (2) a state grant program, which includes college scholarships for eligible students. GEAR UP offers six-year grants to states and partnerships to provide services to high-poverty middle schools and high schools around the country (U.S. Department of Education, [www.ed.gov/programs/gearup](http://www.ed.gov/programs/gearup)). Institutions of higher education (IHEs), local education agencies (LEAs), and state education agencies (SEAs) may apply for the grants. In addition, partnerships should consist of at least one college or university, at least one low-income middle school, and at least two other partners, such as community organizations, businesses, religious groups, student organizations, SEAs, LEAs, and parent groups (U.S. Department of Education, [www.ed.gov/programs/gearup](http://www.ed.gov/programs/gearup)). Sarah Flanagan, a representative of the National Association of Independent Colleges and Universities (NAICU), mentioned that usually federally funded scholarships become the anchor piece of a student's financial aid package and are then supplemented by other state, private, and institutional funding (Fields, 2001). GEAR UP scholarships, however, are last-dollar awards, meaning they can only be tapped into after other available sources have been used (Fields, 2001). Thus, the GEAR UP scholarships can be restrictive and less beneficial to students who can use all the money they can get for college.

Since GEAR UP began in 1991, well over one million students have been served by the program in almost every state in the union. Many people in the post-secondary and pre-college communities celebrated GEAR UP as the missing piece to the federal government's efforts to provide educational opportunities to low-income students – the comprehensive middle school piece (Fields, 2001). Today, given the current political and legal climate, both GEAR UP and TRIO are struggling for funding and are reaching a point of trying to coexist. While TRIO

Programs primarily serve high school students and college undergraduates and GEAR UP serves middle school students, some Congressmen on Capitol Hill along with members of the Bush administration have inquired about whether the country needs both programs (Fields, 2001). Some say that “The question isn’t whether TRIO and GEAR UP can coexist at the practical level: The evidence of that is ubiquitous. The bigger question is whether GEAR UP can be made into something that the higher education community can embrace without jeopardizing other programs” (Fields, 2001 quoting Becky Timmons of the American Council on Education). Perhaps, an even bigger question is whether the federal government would want TRIO and GEAR UP to coexist. Since the federal funding for TRIO and GEAR UP are up for grabs, Fields (2001) found that the government is now exploring the idea of cutting one or two of the TRIO Programs and cutting funding for GEAR UP.

In 2000, the six TRIO Programs received a total of approximately \$630 million in federal funding, and GEAR UP, in its second year, received \$200 million in federal funding for seventy-three partnerships in seven states (U.S. Department of Education, [www.ed.gov/programs/gearup](http://www.ed.gov/programs/gearup)). In 2006, TRIO Programs and GEAR UP were not appropriated any monies and were going to be eliminated (Council for Opportunity in Education, 2006). After several Congressmen stepped in to defend the programs, the House of Representatives passed HR 3010 and helped TRIO maintain its 2005 funding of \$836.5 million (Council for Opportunity in Education, 2006). GEAR UP received over \$303 million and funded 175 new partnerships and 40 states (U.S. Department of Education, 2006).

Thus far, TRIO and GEAR UP generally on a whole have been spared over the past few years, but Upward Bound and Talent Search, which are individual TRIO programs, apparently remain targets for elimination. According to the proposed 2007 budget, Upward Bound and



Talent Search will lose over \$454 million in federal funding (Council for Opportunity in Education, 2006). The majority of the states that will lose the most funding and where the most projects will be affected are in places that have high populations of low-income and minority residents. For instance, some of the states losing the most Upward Bound and Talent Search funding are California, Texas, Alabama, Illinois, New York, which are slated to lose \$44,758,527, \$31,794,633, \$19,879,817, \$17,762,184, and \$15,063,692, respectively (Council for Opportunity in Education, 2006). The District of Columbia, the nation's capital, is one of the top 15 areas where the largest number of students will be impacted by cutting programs (Council for Opportunity in Education, 2006). Coincidentally, the U.S. Census Bureau reported that the District of Columbia, Louisiana, Texas, Alabama, and Oklahoma are among the top 15 states with the highest percentages of children under the age of 18 living below the poverty level (U.S. Census Bureau, 2005) (see Table 2). Additionally, the Census Bureau's records indicate that California, Texas, New York, Illinois also are among the top 15 states in the country to have the largest populations of Latino and multi-racial populations, while the District of Columbia, Louisiana, Georgia, and Alabama, are among the top 15 states to have the largest number of African Americans (U.S. Census Bureau, 2005). The best opportunity of attending college and beyond for most of the students from the above-referenced states may come only from the services that Upward Bound and Talent Search have provided for so many years.

**Table 2: Top 15 States Impacted by Upward Bound and Talent Search Budget Cuts**

Ranking of 15 States Where Most Students are Affected by Funding Loss			
	States with Highest % of Children Below Poverty	States with Highest % of Blacks	States with Highest % of Some Other Race*
California			X
Texas	X		X
Alabama	X	X	
Illinois		X	X
New York		X	X
District of Columbia	X	X	X
Pennsylvania			
Oklahoma	X		
Georgia	X	X	
Ohio			
North Carolina	X		
Louisiana	X	X	
Florida			X
South Carolina	X		
Kentucky	X		

\* The United States Census Bureau defines "Some Other Race" as those individuals who categorize themselves as being of Hispanic or Latino descent, such as Mexican, Puerto Rican, and Cuban, or as bi-racial or multi-racial.

Historically, Upward Bound has received the most federal funding out of all the TRIO Programs. For instance, in 2000, when the TRIO Programs received \$630 million in federal funding, \$249.7 million went to Upward Bound programs. Upward Bound itself has been on the chopping block for the two successive budget years of 2005 and 2006 (Council for Opportunity in Education, 2006). Upward Bound still may be eliminated. At minimum, some serious changes regarding how Upward Bound is run and the students' eligibility requirements may harm the program.

Recent newsletters issued by the Council for Opportunity in Education (2006) indicated that eligibility requirements now would include emphasis on state assessment tests when accepting students for the program and limited eligibility for students entering the ninth grade. Specifically, as of October 23, 2006, Upward Bound grantees are responsible for recruiting twice the number of students - half will be assigned to Upward Bound programs and the other half will be assigned to a control group that will not receive any services (Dervarics, 2006). The Department of Education claims that since Upward Bound now has a very limited budget this is the best way to evaluate the program's effectiveness and service the students who need it the most (Dervarics, 2006). Therefore, in another change, all potential Upward Bound students need to be low-income. Moreover, at least 30 percent of the students must qualify as academically at-risk, which means they have not scored a proficient rate on math and language arts assessments in eighth grade, or they have below a 2.5 GPA and have not taken rigorous math courses by eighth or ninth grade (Dervarics, 2006). Organizations and people in opposition argue that the changes to Upward Bound will overwhelmingly take away the rights and privileges from which most of the eligible students, who are predominantly students of color, have benefited (Dervarics, 2006). For example, the academically successful students who still have barriers to

attending college, are still financially needy, or are first-generation students will suffer for making good grades or not being poor enough (Dervarics, 2006). The U.S. Department of Education also will limit Upward Bound enrollment to academically at-risk ninth-grade students and some new tenth-grade students; new juniors and seniors will no longer be able to enter the Upward Bound program (Dervarics, 2006). What will happen to the juniors and seniors who just need that extra academic support or drive to attend college, but have not heard of or been exposed to Upward Bound's services?

Given all this information, it seems like the U.S. Department of Education does not understand the devastating impact that these changes will have on Upward Bound and the students it serves. More than 91 percent of Upward Bound students who graduate high school immediately enter a post-secondary education program (Council for Opportunity in Education, 2006). Furthermore, 95 percent of Upward Bound students come from families with income levels below 150 percent of the poverty level; the remaining students are selected from families where neither parent has a college degree (Council for Opportunity in Education, 2006).

Upward Bound, the other TRIO Programs, GEAR UP, and the CLEO program may not be the only federal initiatives that have experienced many trials, tribulations, and changes throughout the years that seem likely to continue. At minimum, these programs' original intent and their potential reach to students are being diluted. Perhaps it is not a mistake that the states losing the most funding for TRIO Programs are the same states with the highest numbers of poor minorities in this country. It appears as though the people who are in need are the people being cut out of America's pie of educational and economic opportunity because they are too needy. The programs that started out fighting the war on poverty may be the same programs that result in war against the impoverished people of color. In the United States, individuals over the age of

16 who have not earned a high school degree on average earn more than three times less than a person with a graduate or professional degree (i.e. \$18,435 v. \$57,785) (U.S. Census Bureau, 2005). There seems to be a correlation between race and social class in society, and education seems to be the only mechanism that may close the racial and socioeconomic gaps in this country. If programs like TRIO, GEAR UP, and CLEO are annihilated, the gaps will continue to widen. America - the land of democracy and freedom will increasingly become America - the land of the haves and have nots.

### **2.1.5 The Origins and Development of Critical Race Theory**

Critical race theory (CRT) is a legal studies movement that was started in the 1970s by legal scholars who were disenchanted with legal analysis and civil rights legislation as they related to race, racism, and power in American society. CRT is an outgrowth of, and separate entity from, an early leftist movement called critical legal studies (CLS), which challenged the traditional legal scholarship that focused on doctrinal and policy analysis in favor of a form of law that spoke to the specificity of individuals and groups in social and cultural contexts (Ladson-Billings, 1998). CRT scholars challenged the CLS movement and its limitations in addressing specific issues of race and the law (Tate, 1997). One of the biggest limitations for the CRT founders was that the CLS theorists assumed that racism was analogous to other forms of class-based oppression, which was largely a function of a hierarchal social structure. The CRT founders believed that racism should be associated with the substantive rights that people of color had been denied throughout history because of race (Bell, 1984; Crenshaw, 1988; Delgado, 1987; Tate, 1997).

New approaches were needed to deal with the color-blind, subtle, or institutional forms of racism that were developing and an American public that seemed tired of hearing about race (Delgado & Stefancic, 2001). Thus, the 1970s gave birth to the critical race theory movement through the initial founders - Derrick Bell and Alan Freeman (Delgado & Stefancic, 2001). In the early 1980s, several law professors and students joined the CRT struggle of addressing race and the law, namely Richard Delgado, Lani Guiner, Mari Matsuda, Charles Lawrence, Patricia Williams, and Kimberlé Crenshaw (Tate, 1997). Critical race theorists insisted on “a complete reinterpretation of civil rights law with regard to its ineffectiveness in addressing racial injustices, particularly institutional racism and structural racism in the political economy” (Lynn & Adams, 2002 citing Parker & Lynn, 2002, p. 9). These theorists needed society to understand that race and racism were fundamentally ingrained in American social structures and historical consciousness and hence shaped this country’s ideology, legal systems, and fundamental conceptions of law, property, and privilege (Bell, 1984; Crenshaw, Gotanda, Peller, & Thomas, 1995).

CRT analyzed and challenged race and racism in the law and society while also recognizing the socially constructed nature of race (Lynn & Adams, 2002). Critical race theorists questioned liberalism and liberal theory as another way to maintain the status quo. According to Lawrence (2001), liberal theory focused on protecting the liberty of an autonomous, disconnected human being, in which freedom, rather than equality is treated as the highest political value. The liberal legal theorist believes that racism consists of isolated discriminatory practices in an otherwise non-discriminatory world. CRT criticizes liberal theory and offers another way to think about promoting equality and human dignity, one that reflects the perspective of the subordinated (Lawrence, 2001). CRT brings race to the forefront of law,

politics, and society by talking about racial oppression and white dominance. As one legal scholar aptly noted, “[t]o break the interlocking patterns of racial hierarchy, there is no other way but to focus on, talk about, and put into effect constructive policies explicitly engaged with race” (Lopez, 2006).

For the original founders of the CRT school of thought known as the “racial realists,” racism is a means by which our society allocates privilege, status, and wealth (Delgado, 2003). CRT focuses on the persistence of conditions created by and traditionally associated with racist practices, such as discriminatory exclusions from employment, from “white” neighborhoods, from politics, from government contracts, and from universities like Texas, Michigan, and Berkeley (Lawrence, 2001). Racial realists also examine the role of international relations and competition, the interests of elite groups, and the changing demands of the labor market in hopes of understanding the racial hierarchy, including the part the legal system plays in that history (Delgado, 2003). In more recent years, the idealist approach and discourse analysis have also become part of the CRT analysis (Delgado, 2003; Tate, 1997). Idealist thinkers believe that race is a social construction created out of words, symbols, stereotypes, and categories (Delgado, 2003; Tate, 1997). As such, CRT idealists believe that society may purge itself of discrimination by ridding itself of texts, narratives, ideas and meanings that give rise to attitudes that certain racial groups are lazy, unworthy and dangerous (Delgado, 2003).

Given that civil rights encompass some diverse issues and situations, the CRT movement has spread beyond law into many other disciplines and ethnic movements (Delgado & Stefancic, 2001). Scholars in the field of education have embraced the CRT movement when trying to understand issues regarding race-sensitive affirmative action in higher education admissions as well as issues in Kindergarten through 12<sup>th</sup> grade, such as school discipline and hierarchy,

tracking, controversies over curriculum and history, and IQ and achievement tests (Delgado & Stefancic, 2001; Ladson-Billings, 1998). Ethnic and American studies courses in colleges and universities have incorporated material developed by critical race theorists, such as critical white studies (Delgado & Stefancic, 2001). Furthermore, political scientists ponder the issues of voting strategies and voting re-districting (Delgado & Stefancic, 2001). Since the 1980s and 1990s, critical race theory has splintered to address the specific needs of other groups that have been disadvantaged or discriminated against. There is now a broader connection between CRT and feminist theory in understanding gender inequality as well as the development of the Latino-critical (LatCrit) movement, the Asian American movement, and the queer-crit movement, which address issues facing gays and lesbians in society (Delgado & Stefancic, 2001).

Despite the multiple factions and various approaches, the critical race theorist generally addresses similar issues. Activists and scholars of CRT consider many of the same issues of conventional civil rights and ethnic studies discourses; however, CRT scholars place them in a broader perspective that includes economics, history, context, group- and self-interest, as well as feelings and the unconscious (Delgado & Stefancic, 2001). Unlike traditional civil rights that embraces incremental or step-by-step progress, critical race theory questions “the very foundations of the liberal order, including equality theory, legal reasoning, enlightenment rationalism, and neutral principles of constitutional law” (Delgado & Stefancic, 2001, p. 3). Moreover, CRT follows six unifying themes that define the movement:

1. CRT recognizes that racism is endemic to American life;
2. CRT expresses skepticism toward dominant legal claims of neutrality, objectivity, colorblindness, and meritocracy;



3. CRT challenges a historicism and insists on a contextual/historical analysis of the law. CRT presumes that racism has contributed to all contemporary manifestations of group advantage and disadvantage;
4. CRT insists on recognition of the experiential knowledge of people of color and our communities of origin in analyzing law and society;
5. CRT is interdisciplinary; and
6. CRT works toward the end of eliminating racial oppression as part of the broader goal of ending all forms of oppression.

(Matsuda, et al., 1993, p. 6). CRT starts with the basic tenet that racism is ordinary, not aberrational, and a common, everyday experience of most people of color in this country. The ordinariness of racism as described by critical race theorists means that it is difficult to cure or address (Delgado & Stefancic, 2001). This primary tenet is a consequence of the belief that racism is likely permanent, and periods of progress are often followed by periods of resistance and backlash as social forces reassert white dominance (Bell, 1980).

Another common theme is the CRT skepticism of liberalist ideals such as colorblindness, which disfavors any use or consideration of race in an American society that allegedly offers equal opportunity without regard to race. As Justice Scalia stated in a 1995 race-conscious affirmative action case, “In the eyes of government, we are just one race here. It is American.” CRT scholars, however, problematize the construction of colorblindness and the legal arguments made in support of a colorblind society. Delgado & Stefancic (2001) argued that the color-blind approach for equality is expressed in rules that insist on treatment that is the same across the board, but can only remedy the most blatant forms of discrimination, such as refusing to hire a Black person with a Ph.D. or mortgage redlining, rather than those instances that do not stand out or attract our attention – covert racism. Crenshaw *et al.* (1995) believed that colorblindness

serves as part of an ideological strategy by which the Supreme Court obscures its active role in sustaining hierarchies of racial power. Gotanda (1991) asserted that the colorblind ideal in the law perpetuates racial subordination, and the colorblind analysis of the law uses race to mean formal-race. Formal-race is connected to social realities, but fails to recognize connections between the race of an individual and the real social conditions underlying litigation or other constitutional dispute (Gotanda, 1991). Specifically, Gotanda (1991) stated that “[f]ormal-race is unrelated to ability, disadvantage, or moral culpability. Moreover, formal-race categories are unconnected to social attributes such as culture, education, wealth, or language. This unconnectedness is the defining characteristic of formal-race” (p. 4). Similarly, Lopez (2006) proffered that colorblindness continues to retard racial progress because it focuses on the surface and on racial classification, rather than looking down into the nature of social practices.

Despite the opposition to the colorblind approach to law and policy, Lopez (2006) contended that in the face of continued racial hierarchy, it is essential that society understands the colorblind ideology that remains at issue, particularly in the school cases before the Supreme Court. Contemporary colorblindness is a set of understandings, buttressed by the law and courts, which reinforces racial patterns of white dominance and defines how people comprehend, rationalize, and act on race (Lopez, 2006). Contemporary colorblindness loudly proclaims its antiracist pretensions, but colorblindness does nothing to respond to racial inequalities in society; it just avoids all reference to race and racism altogether (Lopez, 2006). Therefore, critical race theorists and responsible citizens of society are expected to discuss and respond to the racial inequalities. As such, critical race theorists have developed several analytic concepts to illuminate the racial inequalities and how the law and society has not responded to the inequalities.

Interest convergence and whiteness as property, which have been previously mentioned, are among the more popular concepts that are often used to analyze the six common CRT themes. However, another hallmark of CRT is the idea of storytelling. The idea of using storytelling in an effort to offer a unique voice to color is a departure from mainstream legal scholarship (Delgado & Stefancic, 2001; Ladson-Billings, 1998). Historically, storytelling has been a medicine to heal the wounds caused by years of racial oppression and domination (Ladson-Billings, 1998). Storytelling gives an opportunity for critical race theorists to integrate their experiential knowledge, which is drawn from a shared history of being “other” and the continuous struggles to transform a world falling prey to the shackles of racial hegemony (Ladson-Billings, 1998). Furthermore, the process of giving voice to the reality of subordinated people interrupts the power of the dominant group to name reality for others, the minorities (Ladson-Billings & Tate, 1995).

The use of voice or “naming your reality” is a way that CRT links form and substance of scholarship through parables, chronicles, stories, counter-stories, poetry, fiction, and revisionist histories to illustrate the false necessity of much of the current civil rights doctrine (Ladson-Billings, 1998, p. 13). Delgado (1987) offered three key reasons for naming one’s own reality in legal discourse: (1) much of reality is socially constructed; (2) stories provide members of out-groups a vehicle for psychic self-preservation; and (3) the exchange of stories from teller to listener can help overcome ethnocentrism and the dysconscious drive to view the world in one way. The social construction thesis is probably the most compelling reason for naming one’s own reality because of how the United States defines race and forces racial designations for its citizens. Delgado & Stefancic (2001) averred that races are products of social thought and relations that have nothing to do with biology or genetics; rather, races are categories that society

invents, manipulates, or retires when convenient. Racial categories of the U.S. census have varied over time; however, two categories have remained constant – Black and White (Ladson-Billings, 1998).

### **2.1.5.1 Major Criticisms of CRT**

Despite the popularity and support for critical race theory, there is a strong faction, specifically legal scholars, who criticize critical race theory. For example, CRT has been criticized for its failure to define liberalism, especially since liberals have been typically active supporters of minority rights (McMorris, 1999 citing Litowitz, 1997). The use of storytelling is often critiqued for insisting on privileging minority voices over majority voices, which should have an equal right to be heard. Legal critics are concerned that narrative through storytelling may replace legal doctrine in a domain that values the abstract and formal reasoning, rather than empathy and context (Kennedy, 1995). According to some legal critics, attorneys are to look beyond stories and find the issues affecting doctrine, policy, and argument (Litowitz, 1997). CRT is accused of failing to establish policy on a doctrinal level, which is evidenced by the fact that while many Black scholars oppose racism, they also oppose affirmative action (McMorris, 1999). In other words, what good is CRT in informing the law and society about racism, but not proposing legal policies to address the alleged racial practices?

One legal scholar disapproves of CRT analysis because CRT claims that race is so ingrained in our society that it fails to see the individual motivations and characteristics of both laws and persons (Egan, 1999). Egan argued that CRT seeks a system that mirrors *Plessy v. Ferguson*'s separate but equal doctrine; thus, critical race theorists want to maintain differences by finding racial issues in laws and legal precedents that have already been eliminated or in laws that have nothing to do with race (e.g. probate codes are not racist in terms of keeping blacks

from inheriting, but they are capitalist which is an economic issue not racist) (Egan, 1999). Egan agreed with critical race theorists that racism is embedded within American culture, but he believes that speech or meritocracy is not at fault, rather, the failure for Americans to see each other, Whites and Blacks alike, as individuals (Egan, 1999).

Another legal scholar criticized critical race theorists for attacking the foundation of liberal legal order, legal reasoning, and the neutral principles of constitutional law, yet critical race theorists do nothing to help disadvantaged minorities (Pyle, 1999). Pyle (1999) mentioned that race-crits describe race and racism in America and how the liberal legal system perpetuates racial subordination, but does not arrive at this conclusion empirically. Moreover, race-crits do not acknowledge alternative explanations for the disadvantaged, such as low wages, job insecurity, limited inheritances, and access to quality education. Instead, Pyle (1999) argued that the dominant theme of CRT is that “. . . American society and law are controlled by an overarching, all-controlling white racism that ensures the continued oppression of racial minorities, even as the law officially rejects racial classifications” (p. 803). In short, this legal scholar believes that CRT fails because it is all critique but unconstructive, rather than more constructive like liberalism. According to Pyle (1999), CRT “will eventually dissipate into the ether from which it came . . . .It has always been irrelevant outside of academia and is now feeling the stress of factionalism within its ranks . . . .” (p. 826).

#### **2.1.5.2 CRT and Education**

CRT analysis has been a recurring theme in school/civil rights litigation when debating equal opportunity for minority groups. CRT consists of basic insights, perspectives, methods, and pedagogies that seek to analyze and transform the structural and cultural aspects of education that maintain, dominate, and subordinate racial positions in and out of the classroom (Matsuda,

et al., 1993; Solorzano & Ornelas, 2004). There have been connections made between CRT analysis and education with regards to curriculum, instruction, assessment, and school funding (Delgado, 2003; Ladson-Billings, 1998; Ladson-Billings & Tate, 1995). Critical race theorists also believe that the CRT education movement needs to examine high-stakes testing, school accountability and exams, and voucher and charter school alternatives (Delgado, 2003). A few of the education issues that have been analyzed in a CRT context have been segregation, or more recently, the re-segregation of minority groups since the *Brown v. Board of Education* decision. Furthermore, education researchers have adopted some of the concepts of critical race theory in their analysis of hotly debated topics, like tracking and affirmative action in higher education. In many instances, these myriad education issues are analyzed or interpreted under CRT concepts, such as interest-convergence and whiteness as property. Ladson-Billings warns, however, that CRT in the hands of education researchers is likely to become the “darling” of the radical left in scholarly papers and debates, rather than penetrate the classroom because of the dangers and discomfort of talking about racism in education (Ladson-Billings 1998). She advises that “[a]dopting and adapting CRT as a framework for educational equity means that we will have to make bold and sometimes unpopular solutions for addressing it” (Ladson-Billings, 1998, p. 22).

Some critical race theorists have taken some bold moves by proposing models for analyzing CRT in education and access to advanced placement (AP) courses. Specifically, several theorists have put forth five elements of a basic model for analysis, which are: (1) the centrality of race and racism and their intersectionality with other forms of subordination in education; (2) the challenge to dominant ideology around school failure; (3) the commitment to social justice in education; (4) the centrality of experiential knowledge; and (5) the transdisciplinary perspective (Solorzano & Ornelas, 2004; Solorzano, 1997; Solorzano &

Delgado Bernal, 2001). These theorists claim that using critical race theory in education is different from other frameworks because it simultaneously: (1) foregrounds race and racism in the research; (2) challenges the traditional paradigms, methods, and texts, and separates discourse on race, gender, and class by showing how these social constructs intersect to impact students of color; (3) helps us focus on the racialized, gendered, and classed experiences of students of color; (4) offers a liberatory and transformative method when examining racial, gender, and class discrimination; and (5) utilizes the transdisciplinary knowledge and methodological base of ethnic studies, women's studies, sociology, history, and the law to better understand the various forms of discrimination (Solorzano & Ornelas, 2004; Solorzano, 1997).

Solorzano & Ornelas (2004) conducted a study in California schools using the five basic elements in the model to analyze CRT in education. Specifically, the researchers examined all of California's high schools that had a minimum of 500 students enrolled (780 high schools) to determine which schools had AP course offerings and which schools did not (Solorzano & Ornelas, 2004). The study revealed three definite patterns: (1) Latino and African American students are disproportionately underrepresented in AP enrollment in the top AP high schools in the state and the Los Angeles Unified School District (LAUSD); (2) schools that serve urban, low-income Latino and African American communities have low student enrollment in AP courses; and (3) even when African American and Latino students attended high schools with high numbers of students enrolled in AP courses, they are not proportionately represented in AP enrollment (Solorzano & Ornelas, 2004). This study is a good example of using a critical race theory framework to allow researchers to specifically place race and racism at the center of the analysis and focus on those educational inequalities that impact African American and Latino students inside and outside schools (Solorzano & Ornelas, 2004).

Yosso (2002) also suggested establishing a critical race curriculum that acknowledges the central intersecting roles of racism, sexism, classism, and the other forms of subordination that maintains inequality in curricular structures, processes, and discourses. Yosso (2002) mentioned that curricula in U.S. schools have processes designed to place students in certain classes where different students receive different types of knowledge. These structures are in place so that some students have access to certain knowledge, curriculum, and discourses (Yosso, 2002). The access to knowledge is often displayed in the form of ability-grouping or tracking, in which those students in honor programs and AP courses receive different knowledge through a more challenging curricula and preparation for higher education. Tracking remains an education issue heavily debated by critical race theorists and education researchers. Opponents of tracking argue that a differentiated curriculum maintains inequality in educational opportunity, especially for African Americans and Latinos (Oakes, 1985b; Braddock & Dawkins, 1993; Hallinan, 1987; Solorzano & Ornelas, 2004).

Furthermore, Ladson-Billings and Tate (1995) used a critical race theory framework to address racial inequities in the context of school resources for students in the Kindergarten through 12<sup>th</sup> grade environment. They expanded Cheryl Harris' (1993) idea of the property functions of whiteness to include the analysis of inequality in primary and secondary schools. These researchers brought out the issue of property and how some students are denied access to certain types of learning and educational experiences because they are poor and minority students. Since most school districts fund their schools with the property taxes of home owners, the schools located in the more affluent neighborhoods usually yield a higher tax base and more educational resources. Unfortunately, many affluent communities that are usually subjected to higher property values and higher tax assessments resent paying for a public system that



primarily educates poor and minority children (Ladson-Billings & Tate, 1995). This resentment is in spite of the fact that most affluent communities around the country spend more than twice the amount per pupil than many urban schools that serve minority and disadvantaged children (Kozol, 1991). Critical race theorists posit that the school curriculum is a form of intellectual property, and the quantity and quality of curriculum in schools is based on actual property values (Ladson-Billings & Tate, 1995). In these cases, curriculum represents a form of intellectual property undergirded by the ownership of real property: state-of-the-art technologies, well-prepared teachers, AP curricula, weighted AP grades, gifted or other sorts of honors programs all leading to admission to more elite colleges and better jobs (Lynn & Adams, 2002).

For example, one young boy was planning to attend school in an upper-middle-class White community, while his Black friend planned to attend school in an urban, largely African American district. The boy attending the predominantly White, upper-middle-class school had course offerings that included a variety of math, science, and foreign language classes. The upper-middle-class school offered algebra, geometry, trigonometry, calculus, statistics, general math, and business math. The science courses offered were biology, chemistry, physics, geology, science in society, biochemistry, and general science. Furthermore, the foreign languages offered were Spanish, French, German, Latin, Greek, Italian, Chinese, and Japanese (Ladson-Billings & Tate, 1995).

The African American child, on the other hand, had a very different curriculum with far fewer choices for classes in the various academic disciplines. The Black child had the following class choices: (1) foreign languages - Spanish and French; (2) math - general math, business math, and algebra; and (3) science – general science, life science, biology, and physical science (Ladson-Billings & Tate, 1995). There was also a vast difference in the elective courses offered

at each school. The upper-middle-class school offered Film as Literature, Asian Studies, computer programming, and journalism, while the urban school had very few elective courses and no band, orchestra, or school newspaper. This story depicts how intellectual property can be transformed into the “real” property of science labs, computers, and other state-of-the-art technologies as well as certified and well-prepared teachers (Ladson-Billings, 1995). Kozol (1991) illustrated that many urban schools that predominantly educate minorities do not have access to the real property resources, which negatively affects their ability to meet mandated educational standards. Therefore, the property values and racial demographics of the community impacted the intellectual property gained, or the opportunity to learn, at each school (Ladson-Billings & Tate, 1995).

In response to these educational disparities, researchers Ladson-Billings and Tate, have created a critical race theoretical approach to education that examines the intersection of race and social class, since according to them, society is based on class, which translates into property rights rather than human rights (1995). They rely on Cheryl Harris’ (1993) arguments regarding whiteness as property, which are listed earlier in this paper, to support the construct of how property rights relate to educational inequality and inequity. First, there is the right to disposition, which analyzes property rights as alienable or transferable (Harris, 1993; Ladson-Billings & Tate, 1995). Whiteness can be conferred as property in educational settings when students conform to “white norms” through certain cultural practices (e.g., dress, speech patterns, and unauthorized conceptions of knowledge) (Harris, 1993; Ladson-Billings & Tate, 1995). This white property is alienable for White students, but may be inalienable to Black children who do not want to or know how to conform.

Second, Ladson-Billings and Tate (1995) discuss White people's right to use and enjoy the social, cultural and economic privileges of whiteness. In school, whiteness allows for extensive use of what certain schools have to offer like the size of the student population and curriculum (Kozol, 1991; Ladson-Billings & Tate, 1995). For instance, one school serves 825 White children from Kindergarten to sixth grade, while another elementary school is overpopulated with 1,550 Black children in a building with a capacity of only 1,000 (Kozol, 1991).

Third, Whites possess reputation and status property, in which to damage their reputation is to damage some aspect of their personal property (Ladson-Billings & Tate, 1995). Foreign language learning is considered prestigious in the White community; however, bilingual education as practiced in the United States as a nonwhite form of second language learning carries a lower status. Similarly, urban schools are associated with "black" and lack the status and reputation of suburban White schools. When urban students are bused to or move into suburban schools these schools lose their reputation (Ladson-Billings & Tate, 1995). Thus, whiteness as property is to maintain separate lives and schools from people, things and places associated with non-whiteness.

The final aspect of this construct is the notion of the absolute right to exclude (Ladson-Billings & Tate, 1995). Whiteness in this society is constructed by the complete absence of any contaminating influence of blackness, such as one drop of Black blood (Bell, 1980; Ladson-Billings & Tate, 1995). In the schooling environment, the absolute right to exclude was initially demonstrated by denying Blacks access to any school. Later, the right to exclude reared itself when Jim Crow laws created the maintenance of separate schools for Whites and Black children. Recently, it has been demonstrated by White flight, the growing insistence of school vouchers,

public funding of private schools and charter schools, and schools of choice. Within schools, Blacks are excluded from honors and advance placement programs and re-segregated into lower tracked courses, and in colleges and universities, they are perceived as intruders or undeserved beneficiaries of affirmative action (Ladson-Billings & Tate, 1995). Critical race theorists have analyzed the attack on affirmative action policies and programs as a way to maintain white dominance and perpetuate the absolute right to exclude minority groups.

### **2.1.5.3 CRT and Affirmative Action**

The words ‘merit,’ ‘equality,’ and ‘colorblind’ are buzz words that often initiate lively discussions regarding affirmative action and minority students’ access to higher education institutions. Affirmative action admission policies have been greatly disputed for 40 years because of the alleged unfair benefits to racial minorities, particularly to Blacks. These policies have been demonized for trying to right so many unnecessary but intentional racial wrongs that benefited White Americans (Bell, 2004). Under Bell’s interest-convergence theory, racial remedies for Blacks historically have represented policies tending to provide benefit or advantage to Whites (2004). For example, based on statistical analysis, affirmative action has been more beneficial to Whites in general and White women particularly with hiring policies in employment and admissions in higher education (Bell, 2004; Ladson-Billings, 1998). Some Whites do not oppose affirmative action because of the loss of job opportunities or college admissions, but because of the fear that remedial assistance to Blacks may threaten the traditional social and economical hierarchy between the two groups, with Blacks at the bottom and subordinate to all Whites – rich and poor. Therefore, Blacks can progress in the society only when that progress is perceived by the white majority as a clear benefit to all Whites, or at least not a serious risk. Furthermore, opponents of affirmative action will continue to resist and

scrutinize policies and programs that survive judicial review because they represent penalties for racial wrongs that today's citizens did not themselves commit (Bell, 2004).

CRT scholars also assert that the colorblind or race-neutral approach to college admissions is really code for acting in the best interests for and operation of white privilege (Gotanda, 1991; Crenshaw, et al., 1995). According to Cheryl Harris (1993), the protection of the property interest of whiteness in affirmative action cases is accomplished by arguing for the colorblind norm. More specifically, Charles Lawrence, one of the founding members of CRT, argued that the colorblind post-affirmative action admissions process at the University of California –Berkeley, other state schools in California, as well as other states, has resurrected the old preferences of sons and daughters of privilege (Lawrence, 2001). Specifically, Lawrence (2001) states that

With the end of affirmative action [in the state of California], it is more apparent than ever that the old-time preferences for folks who are privileged by race and class have never died...First, it gives bonus points to high school students who are enrolled in advanced placement courses; and second, it relies in a determinative and exclusionary way on insignificant differences in the standardized test scores (p. 943-44).

Lawrence (2001) further expressed that advanced placement courses are not available in every school in California or in other states for that matter. As many as 25 percent of California's high schools offered no AP courses, while 4 percent offered 21 or more AP courses – the higher the number of Blacks, Latinos, and Filipinos in the schools, the fewer number of AP courses offered. Blacks, Latinos, and Filipinos with 4.0 GPAs from poorer neighborhoods are not admitted into college in favor of White students from Beverly Hills or Palo Alto with 5.0 GPAs that have been augmented by access to AP courses (Lawrence, 2001).

Taylor (2000) conveyed a similar response to Washington State's opposition to affirmative action policies. Specifically, he maintained that the insistence on race-neutral

language in university policies negates the social and historical context and does not challenge the privileged, oppressive position of whiteness (Taylor, 2000). Bell (2004) has questioned why upwardly mobile Whites dispute the minuscule number of seats set aside for minorities to rectify past discrimination, but do not challenge the overwhelming number of seats reserved for the well-to-do White applicants. Preferential treatment for minority applicants is minute in comparison to the special treatment for White applicants whose parents are faculty members, alumni, or major contributors, but there is no legal protection against these preferences. He averred that working-class Whites' often heated and violent reaction to affirmative action programs, which is directed toward Blacks who have allegedly benefited from the programs, are really manifestation of the working-class Whites' concern that they have been betrayed by upper-class Whites. In other words, the adoption of race-conscious admissions programs in colleges and professional schools has posed a serious barrier and threat to lower-class Whites that have had a problem being admitted under regular admissions requirements (Bell, 2004).

A notable example was in the *Gratz v. Bollinger* (2003) case, where the Court found that giving 20 points to underrepresented minorities during the admissions process was equivalent to a quota system and illegal, yet the Court did not consider the points that other potential undergraduate students received. For instance, an applicant could be awarded points for the following: (1) up to 16 points for being a Michigan resident and living in a county that was underrepresented in the university, usually the northern part of the state that has a large lower economic class of Whites; (2) 4 points if an applicant's parents graduated from the university; (3) up to 8 points for the difficulty of the high school curriculum and whether the student took AP courses, and (4) up to 10 points based on the quality of a potential student's high school (Solorzano & Ornelas, 2004). All potential undergraduate students are capable of receiving

these points if they qualify, but the research has shown that typically White students benefit from this point system and gain entrance to the University of Michigan's undergraduate program (Solorzano & Ornelas, 2004). In other words, special admissions criteria have typically advantaged more well-to-do Whites, but given the recent legal debates those advantages have accrued to encompass disadvantaged White applicants (Bell, 2004).

Affirmative action lawsuits are based on the premise that an expectation of white privilege is valid, and that the legal protection of that expectation is warranted (Harris, 1993). This premise legitimates prior assumptions of White people's right to ongoing racialized privilege and is another manifestation of whiteness as property (Harris, 1993). Some critical race theorists believe that white privilege is a state of mind and a way of life planted in the roots of history and flourishing even today (Bell, 2004; Harris, 1993; Lawrence, 2001). Under cognitive theory, one critical race theorist opined that the backlash against affirmative action is rooted in history because when Blacks begin to achieve marginal success in mainstream society, the legal obstacles to that success are resurrected. Given the backlash, affirmative action can be a useful tool in changing attitudes because it does not rely on an individual's ability to make an independent assessment of others. Affirmative action attacks racism head on by putting qualified minorities in positions that they may not have access to because of pre-judgments, prevailing stereotypes, and prejudicial inferences that history has helped solidify in the mind of Whites (McMorris, 1999).

Critical race theorists would like the courts to understand that affirmative action is based on principles of anti-subordination, not principles of black supremacy. Affirmative action creates a property interest in true equal opportunity, where opportunity and means are equalized (Harris, 1993). Whiteness as property, Harris (1993) contended, continues to perpetuate racial

subordination through the courts' doctrine on and hostility toward affirmative action. The use of affirmative action policies places in tension the settled expectations of Whites, based on both the ideology of white supremacy and the structure of the U.S. economy that have operated to subordinate - the 'other' (Harris, 1993). "The court's hostility toward affirmative action is that 'it seeks to de-legitimize the assumptions surrounding existing equality.' It exposes the illusion that the original or current distribution of power, property, and resources is the result of 'right' and 'merit'" (Harris, 1993, p. 1778).

Although the courts appear to support diversity as a legally acceptable reason for race-conscious affirmative action policies, critical race theorists disagree with the use of the diversity rationale. Moses and Chang (2006) proffered that the courts' use of the diversity rationale skews the debate over race-conscious policies in a direction away from discrimination, inequality, and social justice. Analyses of diversity should be integrated with considerations of equality and social justice, which is more appropriate for framing issues to inform the public about race-conscious education policies (Moses & Chang, 2006). Lawrence (2001) reasoned that the liberal defense of affirmative action justifies diversity as a way to help privileged Whites better understand people of color in a nation that may soon have a non-white majority. Rather, he argued that diversity should be a necessary way to insure equal opportunity in a world where a variety of social structures, institutional practices, and racist beliefs conspire to deny minority groups equal access to education and employment. Affirmative action begins the work of rethinking rights, equality, race, property, and power from the perspective of the minority groups who have been limited by oppression (Harris, 1993). Thus, the U.S. Supreme Court and legislatures may do well to consider equality and social justice first and maintaining white privilege second before ending affirmative action.



### **3.0 THIRD CHAPTER**

#### **3.1 METHODOLOGY**

To this point, the researcher has established the context for this study. Specifically, the researcher has briefly examined the findings and analyses in some historical race-based legal cases and legislation that may have shaped the implementation of race-conscious affirmative action policies during the 1960s as well as programs that were a result of the policies, including the CLEO program. Additionally, the researcher has introduced critical race theory as a framework for analyzing race and the law as well as race and education issues, including the debate surrounding race-conscious affirmative action in higher education.

The critical race theory framework in education is often used to elucidate why certain inequities occur in the educational arena. This dissertation study goes a step further by using the critical race theory framework to explain the progression of the race-conscious legal debate in higher education for more than 30 years, and examine how the evolution of and analysis within the legal cases may be related to changes in an actual race-conscious affirmative action program in higher education. The researcher also uses two critical race theory constructs, instead of one, to do this analysis. Through the critical race theory analysis, this study offers an explanation for the waning support for race-conscious affirmative action policies and programs that help provide access to higher education institutions. Furthermore, the researcher explicates how the constant

legal debates may be related to the United States' legal history with race and maintaining white privilege in higher education, specifically in law school and the legal profession.

This chapter identifies the research design and methods used to conduct the study. In addition, the researcher discusses data collection methods, sources, and analyses. Furthermore, in this chapter, the researcher delineates how two specific critical race theory constructs are used to analyze the evolution of race-based affirmative action legal cases in higher education since 1964. The research methodology being utilized in this study answers the following questions:

(1) How have the federal race-conscious affirmative action legal cases in higher education and state anti-affirmative action policies evolved since 1964?

(2) How, if at all, do the ongoing legal debates in higher education reflect the support for, or maintenance of, white privilege as defined by the interest convergence and whiteness as property constructs of critical race theory?

(3) How, if at all, is the race-conscious affirmative action legal debate in higher education related to the original intent, current operations (i.e., the admissions criteria and demographic profiles for CLEO fellows and associates, the number of summer institutes, funding, and new programs), and the future viability of the CLEO program?

(4) Given the legal debates, what are the future implications for race-based affirmative action policies and programs, and the admittance of racial minorities, particularly African Americans, to law schools and the legal profession?

### **3.1.1 Research Design – The Case Study**

The researcher undertakes a case study approach to this study. Robert Yin (1981) has defined the case study research method as an empirical inquiry that investigates a contemporary

phenomenon within its real-life context, when the boundaries between the phenomenon and context are not clearly evident and in which multiple sources of evidence are used. Case study is often used as a research strategy to contribute to our knowledge of an individual, group, organizational, social, political, and related phenomena (Yin, 2003b). Accordingly, in this dissertation study, the researcher examines the contemporary phenomenon of the continual legal debates regarding race-conscious affirmative action programs in higher education within the real-life context of a race-based affirmative action legal program, the CLEO program.

Case study research may be quite descriptive because it is often grounded in deep and varied sources of information, such as quotes from key participants, prose comprised from interviews, anecdotes, and documented information that may create mental images that bring the data to life (Hancock & Algozzine, 2006). Case studies can also be a mix of qualitative and quantitative evidence and need not always include direct, detailed observations as a source of evidence. A case study's unique strength is its ability to handle a variety of evidence, such as documents, artifacts, interviews, and observations (Yin, 2003b).

In most situations, case studies are the preferred research strategy when questions of "how" or "why" are being asked in the study. In a case study, "how" or "why" is typically being asked about a contemporary set of events of which the researcher has little or no control. While case study as a research design can be exploratory, explanatory, descriptive, or a combination of all three, the questions of "how" and "why" generally have a more explanatory nature. Explanatory questions "deal with operational links needing to be traced over time, rather than mere frequencies or incidence" (Yin, 2003b, p.6). The main purpose of an explanatory study is to determine how events occur and which ones may influence particular outcomes (Hancock & Algozzine, 2006). Exploratory case studies usually ask the research question of "what," which

can be in the form of how many or how much, and these studies inquire into what may be learned or what outcome may occur because of an event (Yin, 2003b). The research questions in this dissertation study ask the questions of “how” and “what” in order to trace the development of the race-based affirmative action legal debate in higher education. The researcher hopes to investigate how the legal debates may be related to the CLEO program, and what these debates may mean for the future of programs like CLEO and the admittance of racial minorities in higher education, particularly law school.

Case study also can be found in various research orientations, such as ethnographical, psychological, historical, or sociological (Hancock & Algozzine, 2006; Merriam, 2001). Ethnographic case studies are often used to explore learned patterns, customs, and behaviors of a culture-sharing group, while psychological case studies typically focus on the human behaviors of an individual. Historical case studies usually include descriptions of events, programs, or organizations as they have evolved over time (Hancock & Algozzine, 2006). A historical case study produces “more than a chronological listing of events; it results in a researcher’s descriptive interpretation of factors that both cause and result from the events” (Hancock & Algozzine, 2006, p. 31). Sociological case study research focuses on society and social institutions (Hancock & Algozzine, 2006). Case studies with sociological orientations include topics involving families, religion, politics, demographics, and issues related to age, gender, race, and status (Hancock & Algozzine, 2006; Yin, 2003a).

This case study research can be characterized as socio-historical. The researcher uses the history of race in the United States as well as the analysis in previous race-based legal cases to inform the examination of the current race-based affirmative action legal debate. Furthermore, the researcher explores how the legal cases and anti-affirmative action policies have progressed

since 1964, and whether they are related to the evolution of the CLEO program, a race-based program. Specifically, the researcher studies the original intent of CLEO, its funding, summer institutes, particularly the demographic profiles of prospective law students (i.e. race/ethnicity, LSAT scores and GPAs), and the creation of new CLEO programs. The researcher uses the critical race theory constructs of interest convergence and whiteness as property as a template in which to analyze the legal cases, anti-affirmative action policies, and their possible correlation to the evolution of the CLEO program.

### **3.1.2 Setting and Data Sources**

The researcher conducted fieldwork by visiting the CLEO offices located in the American Bar Association building in Washington, D.C., on numerous occasions. After receiving IRB approval in May 2006, the researcher began collecting data. To gain a better understanding of CLEO and its operations over the past 38 years, the researcher analyzed multiple sources of evidence inclusive of both qualitative and quantitative data. The researcher gathered relevant documents and conducted interviews with key CLEO informants. The documents were used as the primary source of data, and they included information on CLEO's purpose, programs, funding, as well as students' demographic information, namely their race/ethnicity, undergraduate GPAs, and LSAT scores. In addition, as a secondary source of data, the researcher conducted interviews of key CLEO informants for clarification on CLEO's purpose, funding, and programs. The interviews also shed light on whether the facts and opinions in the race-based affirmative action legal cases may be related to the past, present, and potential future of CLEO. These kinds of data collection strategies are consistent with field-based research in

education, particularly when the goal is an increased understanding of educational programs and their objectives (Bogdan & Biklen, 1998).

### **3.1.2.1 Document and Archival Records**

Documentary information is typically relevant to every case study topic and should be the object of explicit data collection plans (Hancock & Algozzine, 2006; Yin, 2003b). Similarly, archival records are essential in case study research and may take the form of computer files and various records (Yin, 2003b). In this study, the researcher analyzed annual reports, corporate By-laws, Board of Director meeting minutes as well as archival records that contained demographic information on students attending CLEO programs. Student records for the years of 2001 to 2006 were in the form of computer files. Because the researcher did not have direct access to board members or individuals who worked for CLEO at its inception in 1968 and in the 1970s, the researcher also read and referred to articles written on the CLEO program during the 1970s to supplement and support some of the information found in documents. The documents and archival records helped the researcher understand the purpose of CLEO, how the program has operated generally over the past 38 years, and how the summer institutes and other programs have functioned specifically in terms of funding and the types of students that have been accepted into these programs in light of legal cases and anti-affirmative action policies.

Most of the archival records that contained student and funding information were incomplete. Some records were missing entirely, particularly during the years of 1985 to 1989 and 1992 to 1997. Apparently, the missing and incomplete records are a result of the combination of poor recordkeeping due to cut backs in federal funding and records being misplaced over the years. CLEO changed Executive Directors numerous times throughout the 1970s and 1980s, and moved from its original office building in the mid-1980s into office space

provided in the American Bar Association's building, which contributed to the loss of files. Besides data found in previous grant applications, the annual reports, which were not produced for the first time until 1998, were the primary records that contained detailed funding information. The information on funding sources and levels also were gathered from interviews with the key CLEO informants.

The researcher selected a sample of records that had significant student data, such as undergraduate institution attended, LSAT scores and GPAs, race/ethnicity, and law school attended, from various years. Although some of the student records were incomplete, the researcher selected a sample of CLEO students from the first two years of the CLEO program for data analysis in order to become familiar with the number and types of students who initially benefited from the CLEO summer institutes. The other years of records chosen for examination had to meet the following criteria to be included in the sample for data analysis: (1) the archival records were one or two years after a federal race-conscious affirmative action legal decision or federal/state policies in higher education, or following some political action by the federal government with regards to race-based affirmative action; and (2) the archival records contained a significant amount of student information necessary for analysis (i.e., data on over 50 percent of the students who attended the CLEO summer institutes and Attitude is Essential program). The researcher also chose to analyze all of the student records for CLEO's summer institutes from 1998 to 2006 as well as the student records for the Attitude Is Essential (AIE) program from 2002 to 2006. The researcher made the decision to analyze these particular years due to the level of intensity of the race-conscious affirmative action legal debate during those years and the completeness of the files and the accessibility of the computerized records from 2001 to 2006.

### **3.1.2.2 Interview Sample Selection**

The researcher conducted three focused interviews with key CLEO personnel, and one informal interview with a representative of the Law School Admissions Council (LSAC). Interviews are an important source of case study information, and in a focused interview, the researcher pursues a consistent line of inquiry but in a fluid, conversational manner (Yin, 2003b). The interviews helped the researcher gain an understanding of why CLEO was initially created, the purpose of the summer institutes, how CLEO is currently functioning amidst the on-going legal debates, and whether CLEO has a viable future as a race-conscious affirmative action program.

Three interviews were done with the following CLEO administration: (1) Chairman of the Board of Directors; (2) Executive Director; and (3) Associate Director (The interview protocol can be found in Appendix A). These individuals were selected based on their position with the organization and individual and collective knowledge of CLEO's purpose and any changes that have occurred in programs, funding, and operations. CLEO's Chairman of the Board of Directors and the Executive Director have served in their positions since about 1995. CLEO's Chairman has served on the Board of the Directors since about 1993. Both the Chairman of the Board and Executive Director are well-versed on CLEO's history, purpose, the various funding sources, as well as any effects that organization may have experienced due to the race-conscious affirmative action legal debates.

The Associate Director has been with the organization since 2002. He served as the Law School Academic Coordinator until 2005, when he assumed the current position as Associate Director. The Associate Director is knowledgeable of CLEO's purpose, how the summer institute functions, the academic requirements for CLEO fellows and other students, and the development of new programs under the CLEO umbrella. The researcher also conducted an



informal interview with a LSAC representative who has worked with and has advised the CLEO program for approximately 20 years. LSAC is one of the founding organizations of CLEO and still remains a constituent organization with decision-making authority. The LSAC representative who was interviewed is familiar with CLEO's history, purpose, and the changes that have occurred since the 1980's, particularly with regards to the general operations and funding sources.

### **3.1.2.3 Federal Legal Cases and State Anti-Affirmative Action Policies**

The researcher analyzed several pivotal race-based affirmative action legal cases, anti-affirmative action policies, and executive orders directly affecting higher education programs. While the researcher mentioned the existence and purpose of state anti-affirmative action policies that directly affected race-conscious affirmative action, the primary focus in this study was the development and analyses of federal legal cases, namely United States Supreme Court cases, that may have impacted higher education admissions policies and programs.

The federal legal cases that were carefully examined as part of this study are *DeFunis, et al. v. Odegaard, et al.* (1974), *Regents of the University of California v. Bakke* (1978), *Podberesky v. Kirwan* (1994), *Hopwood v. Texas* (1996), *Smith, et al. v. University of Washington Law School* (2000), *Johnson v. Board of Regents of the University of Georgia* (2001), *Gratz v. Bollinger* (2003), and *Grutter v. Bollinger* (2003). The state anti-affirmative action policies that were discussed are the California Civil Rights Initiative Proposition 209 (1996), Texas Ten Percent Plan (1997), Washington State's Civil Rights Initiative 200 (1998), and One Florida Initiative (1999).

### 3.1.3 Data Analysis

The researcher used a mixed methods approach, inclusive of both quantitative and qualitative methods, when doing the data analysis. The analyses in this study comprised several different data sources, including document review, interviews, and statistical analyses of multiple variables. The statistical analyses included a comparison of three demographic variables of former CLEO fellows who completed the summer institutes programs in 1968, 1969, 1975, 1980, 1991, and 1998 through 2006 as well as the AIE associates from 2002 to 2006. The three demographic variables were: race/ethnicity, LSAT percentile scores, and undergraduate GPAs of the students. The researcher compared the race/ethnicity of the former fellows by coding the students according to the following categories: Black, Hispanic/Latino, Native American, White, Asian, and Other.<sup>8</sup> Chi-square statistics were used to examine the changes in the race/ethnicity of CLEO fellows and associates completing the summer institutes during the above-referenced periods of 1968 to 2006 (N = 1,304) and completing AIE programs during the periods of 2002 to 2006 (N = 1,075), respectively.

Similarly, the researcher analyzed the changes in LSAT percentile scores (N = 1,279) and undergraduate GPAs (N = 1,269) for CLEO fellows who attended the summer institutes from 1968 to 2006. The researcher also analyzed the LSAT percentile scores (N = 880) and undergraduate GPAs (N = 902) for AIE associates who attended seminars from 2002 to 2006. LSAT percentile scores and undergraduate GPAs were examined using ANOVA statistical

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<sup>8</sup> These racial designations were based on how students identified themselves on their CLEO summer institute applications. The racial categories are broken down as follows: Black includes African, Haitian, and Caribbean Americans; Hispanic/Latino includes Mexican, Spanish, Puerto Rican, Cuban American as well as South American and all other descendants of Hispanic/Latino countries; Native American also includes Native Alaskans, and Asian includes Japanese, Chinese, Vietnamese, Thai, Filipino, Korean, Cambodian, Asian Indian, and all other descendants of Asian countries. The category entitled “Other” includes the few individuals that identified themselves as bi-racial or multi-racial as well as those individuals that CLEO identified as “Other.”

analysis. Further, the researcher compared the LSAT percentiles and GPA scores of CLEO fellows and AIE associates over several years' time from the program's inception in 1968 to 2006. The actual LSAT scores were not used when doing the analysis because the LSAT test itself was changed three times between 1968 and 2006. For a fair and more accurate comparison, the researcher converted the students' actual LSAT scores into LSAT percentiles using a comprehensive list of LSAT percentiles from tests given between 1958 and 2006. This comprehensive list of LSAT percentiles was acquired from the LSAC in order to do the analysis for this study.

The researcher combined certain years of data for comparison and analysis purposes. Years of data were combined based on the time periods when federal race-conscious affirmative action legal decisions arose in higher education. For example, the researcher combined the data from the following years: (1) 1968 and 1969, (2) 1998 to 2000, (3) 2001 to 2003, and (4) 2004 to 2006; student data during the years of 1975, 1980, and 1991 were independently analyzed and compared to the other years. Furthermore, the researcher analyzed the three demographic variables (i.e. race/ethnicity, LSAT percentiles, and undergraduate GPAs) for summer institute fellows in 2002 through 2006 and compared them to the same variables of the AIE students during those years.

The researcher also attempted to tell the story of CLEO's creation as well as the past and present functions of its well-known summer institutes. The researcher tells the story of the CLEO program through the use of qualitative analysis. This analysis explained how the number of summer institutes has changed from 1968 compared to 2006 as well as how CLEO's funding level and funding sources have changed during these years. The qualitative information was

gathered from existing CLEO documents, such as annual reports and Board of Director meeting minutes, and interviews with key CLEO informants. (See Table 3).

**Table 3: Research Questions, Analysis, and Respective Data Sources**

<b><i>Research Questions</i></b>	<b><i>Analysis</i></b>	<b><i>Data Sources</i></b>
<p><b><i>Q1.</i></b> How have the federal race-conscious affirmative action legal cases in higher education and state anti-affirmative action policies evolved since 1964?</p>	<p>Q1.1. The researcher discusses facts, issues, findings, and analysis within specific race-based legal cases from 1964 to 2006, and whether there have been any changes in how the Courts have dealt with affirmative action in higher education. Also, the researcher briefly discusses and analyzes some policies that have passed since the 1970s that may have affected the legality of race-conscious affirmative action policies or programs on a federal or state-level.</p>	<p>Q1.1 Federal legal cases and state anti-affirmative action policies, referenda, and executive orders.</p>
<p><b><i>Q2.</i></b> How, if at all, does the ongoing legal debate in higher education reflect the support for, or maintenance of, white privilege as defined by the interest convergence and property functions of whiteness constructs of critical race theory?</p>	<p>Q 2.1 The researcher analyzes each of the federal legal cases and some policies and whether they support the second rule of interest convergence, which is that a remedy like race-sensitive affirmative action is being eliminated because of its threat to whites. Also, the research examines the analysis in the legal cases and policies under the four property functions of whiteness, and whether the analysis reflects or supports any of the four functions.</p>	<p>Q2.1 Federal legal cases and state anti-affirmative action policies, referenda, and executive orders.</p>

<b>Research Questions</b>	<b>Analysis</b>	<b>Data Sources</b>
<b>Q3.</b> How, if at all, is the race-conscious affirmative action legal debate in higher education related to the original intent, current operations, and future viability of the CLEO Program?	Q3.1 The researcher uses chi-square statistics to examine changes in race/ethnicity of CLEO fellows and associates.	Q3.1 CLEO's archived student records from 1968, 1969, 1975, 1980, 1991, and 1998 through 2006.
	Q3.2 The researcher uses ANOVA statistics to analyze changes in the LSAT percentile scores for fellows and associates.	Q3.2 LSAT percentile scores list from Law School Admissions Council and CLEO's archival student records from 1968, 1969, 1975, 1980, 1991, and 1998 through 2006.
	Q3.3 The researcher uses ANOVA statistics to analyze changes in undergraduate GPA scores for fellows and associates.	Q3.3 CLEO's archived student records from 1968, 1969, 1975, 1980, 1991, and 1998 through 2006.
	Q3.4 The researcher analyzes CLEO's original purpose, funding levels and funding sources, and whether the organization has a future.	Q3.4 Interviews of key CLEO informants, CLEO's archived records, and public records and documents (e.g., annual reports, articles, corporate by-laws, grant applications) from 1968 to 2006.
<b>Q4.</b> Given the legal debates, what are the future implications for race-based affirmative action programs and the admittance of racial minorities, particularly African Americans, to law schools and the legal profession?	Q4.1 The researcher reviews current numbers of racial minorities in the legal profession and in law school (2003 to 2006).	Q4.1 Data from the American Bar Association, Law School Admission Council, and the Bureau of Labor Statistics.
	Q4.2 The researcher discusses the facts and arguments in the most recent legal cases and policies (2005 to 2006).	Q4.2 Legal cases and policies (e.g., Proposal 2 in Michigan, the pending U.S. Supreme Court cases of <i>Parents Involved in Community Schools v. Seattle School District</i> as well as <i>Meredith v. Jefferson County Board of Education</i> )

### 3.1.4 Use of CRT Constructs

The researcher used constructs of critical race theory (CRT) to guide this study in the examination and analysis of federal race-conscious legal cases in higher education and state anti-affirmative action policies. The CRT constructs are interest convergence and whiteness as property. The researcher considered these two constructs together to understand the continuous race-based affirmative action legal debates in higher education, and to examine whether the analyses in the legal cases support white privilege. The researcher pulled ideas from both constructs to explain the evolutionary process of the legal debates.

This researcher proposed that Derrick Bell's first rule of the interest convergence theory was in operation during the 1960s, when the United States was anxious to promote equality and unity amongst its citizens. In the 1960s, United States citizens were focused on human rights of this country given the fiery deliberations over the morality and efficacy of war in Vietnam. Part of the worries over the Vietnam War spilled over into concern over the plight of Blacks caught in the constant cycle of racial discrimination that began at birth and was not subsiding in spite of the recent push for affirmative action (Slocum, 1979). As Blacks struggled for equal job opportunities in the mid-1960s, there were few minority lawyers available or willing to offer legal assistance to help Blacks gain these opportunities. This lack of legal help created a high demand and a dire need for minority groups' equal access to the justice system as well as access to the decision-making process that ultimately guides the plan for our lives – the law (Slocum, 1979).

With the controversy and picketing opposing the Vietnam War, the assassinations of beloved, respected leaders who fought for equality and civil rights in the 1960s - President John F. Kennedy, Robert Kennedy, and Rev. Dr. Martin Luther King, Jr., and the ensuing racial riots,

the country needed a positive distraction like the *Brown* decision provided in 1954. The federal government's support for civil rights, including affirmative action policies and programs like CLEO, offered a reprieve from the chaos as well as educational opportunities and jobs to the disenfranchised. According to Bell's interest convergence theory, race-sensitive affirmative action policies were only meant to be the temporary alignment of the self-interest of elite Whites and the interests of Blacks (1980). Thus, as race-sensitive affirmative action policies and programs have benefited more and more racial minorities, particularly Blacks, and began to level the playing field over the past 40 years, the second rule of the interest convergence theory took effect in the form of the legal cases as well as anti-affirmative action policies and referenda. The second rule states that "even when the interest-convergence results in an effective racial remedy, that remedy will be abrogated at the point that policymakers fear the remedial policy is threatening the superior societal status of whites" (Bell, 2004, p. 69).

This researcher further posited that Bell's second rule of interest convergence theory was triggered in the 1970s, specifically during the initiation of the *Bakke* case in 1978. It was at that time that the property functions of whiteness came into play and fueled what are now ongoing legal debates in order to maintain white privilege in the United States. The property functions of whiteness include (1) the right of disposition; (2) right to use and enjoyment; (3) reputation and status property; and (4) the right to exclude (Harris, 1993). The "property functions of whiteness" explicate the privileges and benefits that the law gives to White people, which are equivalent to the legal rights given to other property owners (Harris, 1993). The critical characteristics of this privilege are displayed by the fact that White people can use the law to establish and protect an actual property interest in whiteness. Cheryl Harris (1993) averred that property rights could be exhibited in citizenship, voting, knowledge, career and educational



opportunities, and land ownership among other exclusionary rights in this country, which give White people power. This researcher added to the list an actual property right and entitlement that White Americans claim in order to gain admission to higher education institutions, or law schools, of their choice over qualified Blacks.

Ladson-Billings and Tate (1995) utilized the property functions of whiteness to address racial inequities in the context of school resources for students in the Kindergarten through 12<sup>th</sup> grade environment. These researchers brought out the issue of property and how some students are denied access to certain types of learning and educational experiences because they are poor and minority students. This researcher, however, argued that the property functions of whiteness also perpetuate the racial inequities in higher education. Thus, this study attempted to develop further Ladson-Billings and Tate's use of the property functions of whiteness to address the inequities in accessing institutions of higher education, specifically law school, and how the legal process may be employed to sustain the inequities and maintain white privilege in higher education.

In a case study, the appropriately developed theory is at the level in which generalization of the case study results will occur. Under some circumstances, analytic generalization can be used in a single-case study (Yin, 2003a). According to Yin (2003a), a rationale for a single case is that it represents the critical case in testing a well-formulated theory. The researcher proposed that this case study of CLEO is a critical case given CLEO's salient purpose from its inception in the 1960s and now, its longevity and overall success as a program. Critical race theory, in particular the interest convergence and whiteness as property constructs, has been well-established, but further testing is necessary. This case study provided an optimal testing ground "to confirm, challenge, or extend the theory...." (Yin, 2003a, p. 40). Specifically, using these

two critical race theory constructs to analyze the race-conscious affirmative action legal debate in the context of how the continual debates correlated to changes in the CLEO program provided an optimal testing ground to confirm the basic tenets of critical race theory.

### **3.1.5 Format of Addressing the Research Questions**

The researcher addresses the four research questions in three different chapters. Specifically, the first and second research questions are answered in Chapter Four, the third research question is addressed in Chapter Five, and the fourth research question is addressed in Chapter Six. The questions are segregated intentionally in order to clearly delineate the distinct points in the researcher's general argument without causing confusion to the reader. The fourth research question serves as a summary to the research findings and brings all the separate points together in the conclusion.

The first two research questions are answered together in Chapter Four because they speak to the race-conscious affirmative action legal debate. These two questions particularly explicate the evolution of the race-conscious legal debate and whether the legal decisions, analyses, and anti-affirmative action policies support the maintenance of white privilege. The examination of the legal debate is done through the theoretical lens of critical race theory.

The third research question deals with the growth and the changes in the CLEO program, a race-based legal program, over the past 38 years and during the periods of the legal debate. In the fourth summative question, the researcher outlines the current number of minority law students and lawyers, and where society is positioned legally and politically on the issue of race-conscious affirmative action. Further, the researcher draws conclusions on the future of the race-based affirmative action legal debate as well as affirmative action policies and programs.

## **4.0 FOURTH CHAPTER**

### **4.1 THE EVOLUTION OF AN ENDURING LEGAL DEBATE**

This research study concentrates on the evolution of race-based affirmative action legal cases in higher education, with an emphasis on legal education and the legal profession, and anti-affirmative action policies. This chapter critically examines the decisions and analyses in specific federal legal cases affecting higher education policies since the Civil Rights Act of 1964. Additionally, the researcher discusses the intent of specific state policies and executive orders that abolished race-based affirmative action or offered race-neutral alternatives. The exploration of the legal cases and policies in this chapter answers the first research question, which is: how have the federal race-conscious affirmative action legal cases in higher education and anti-affirmative action policies evolved since 1964?

Moreover, this study investigates how the constant legal debates may be related to the United States' legal history with race and maintaining white privilege in higher education, specifically in law school and the legal profession. In this chapter, the researcher analyzes some of the legal holdings and the courts' rationale when reaching these opinions using the theoretical framework of critical race theory. Therefore, Chapter Four also speaks to the second research question in this study, which is: how, if at all, do the on-going legal debates in higher education

reflect the support for, or maintenance of, white privilege as defined by the interest convergence and whiteness as property constructs of critical race theory?

#### **4.1.1 The 1970s – The First Wave of Federal Legal Cases**

##### DeFunis, et al. v. Odegaard, et al. (1974)

The first case of interest to reach the United States Supreme Court was the 1974 law school admissions case of *DeFunis, et al. v. Odegaard, et al.* In *DeFunis* (1974), a white male sued the University of Washington alleging that he was not accepted into the law school in 1971 due to less qualified minority students being admitted solely based on race and in violation of the Fourteenth Amendment. Mr. DeFunis brought the reverse discrimination lawsuit on behalf of himself, his parents, and his wife, but not as a representative of a class of similarly situated students (*DeFunis, et al. v. Odegaard, et al.*, 1974). Prior to reaching the United States Supreme Court, the trial court agreed with Mr. DeFunis that the University of Washington Law School violated the Fourteenth Amendment and issued a mandatory injunction that required the University of Washington Law School to admit Mr. DeFunis. The Washington State Supreme Court reversed the trial court's decision and upheld the constitutionality of the Law School's admissions policy (*DeFunis, et al. v. Odegaard, et al.*, 1974).

When the case finally reached the U.S. Supreme Court, Mr. DeFunis was in his last year of law school at the University of Washington. Thus, the Court did not address the merits of the case because the majority of the Supreme Court considered the issues to be moot since there were no longer any constitutional issues to be decided (*DeFunis, et al. v. Odegaard, et al.*, 1974). Nevertheless, there was some division amongst the Supreme Court Justices that resulted in separate dissenting opinions relating to the mootness issue. The primary issue was whether the

*DeFunis* case presented a constitutional question that was “capable of repetition, yet evading review” (*DeFunis*, 1974, pp. 318-19). Given the conflict over the constitutional issue in the case as well as the fact that this is the first race-based affirmative action admissions case, it is important to discuss many of the facts of this case and the analysis within the main dissenting opinion. The facts and analysis in the *DeFunis* case may have set the stage for later cases and influenced the ongoing race-conscious affirmative action legal debate that haunts society today; therefore, this case is discussed in slightly more detail than some of the other legal cases.

In 1971, the University of Washington Law School received over 1,600 applications, and the Law School offered admission to 275 applicants in order to achieve a first-year class of 150 students. The admissions process was based primarily on determining an average index called the Predicted First Year Average, which was calculated through a formula measuring each applicant’s LSAT score and grades from the last two years of college. The highest average in 1971 was 81, so many students with an average index of 77 to 81 were considered outstanding applicants. The outstanding candidates had their applications immediately reviewed by the Admissions Committee, which consisted of faculty, administration, and students, for a recommendation. Many of the students with averages in the 77 to 81 range were admitted. The Chairman of the Admissions Committee reviewed the applications with scores below 74.5, and he had the authority to reject them summarily without further consideration, of which many were rejected, or to hold some applications that showed greater promise for review by the entire Committee. Mr. DeFunis’ average index of 76.23 fell within the mid-range, so he was initially waitlisted with many other applicants in the middle group for further review by the entire Committee. After further review with the other competing waitlist applicants, Mr. DeFunis fell

within the bottom quarter, so he was denied admission to the University of Washington Law School (*DeFunis, et al. v. Odegaard, et al.*, 1974).

Applicants who indicated on their applications that they were in an underrepresented minority group, such as Black, Hispanic, American Indian, or Filipino, did not have their applications reviewed by the Chairman regardless of their average index score; rather, minority group applications were separated out. Specifically, two members of the Admissions Committee reviewed the applications of Black applicants. The two committee members were: a first-year Black law student and a professor who served as the Director of the CLEO program, which was held at the University of Washington Law School in 1970. The Assistant Dean of the Law School, who also served on the Admissions Committee, evaluated the applications of the students from the other three minority groups. All minority applicants were considered competitively against each other, but not against non-minority applicants (*DeFunis, et al. v. Odegaard, et al.*, 1974).

The University of Washington Law School publicly distributed its Guide to Applicants, which indicated that “an applicant’s racial and ethnic background was considered as *one factor* in our general attempt to convert formal credentials into realistic predictions” (*DeFunis, et al. v. Odegaard, et al.*, 1974, p. 324) (emphasis added). Additionally, the Law School publicly acknowledged that it considered other factors for admissions other than the index scores for most students who showed academic potential but did not have the highest scores. For example, the Law School pondered the rigor of the applicants’ undergraduate curriculum track, the attainment of an advanced degree and the nature of the degree, the written portion of the LSAT, the quality and strength of letters of recommendation, and the number of years the applicant had been out of college prior to taking the LSAT. Out of the 270 applicants offered admissions to the law

school, 37 of them were minority students who went through the separate review process. Thirty-six of the minority students had average index scores lower than Mr. DeFunis' average. Moreover, there were 48 non-minorities admitted with lower averages than Mr. DeFunis, of which 23 were returning military veterans (*DeFunis, et al. v. Odegaard, et al.*, 1974). Mr. DeFunis contended that the racial minority applicants would not have been admitted into the Law School if they were considered under the same general procedures of admissions.

In Justice Douglas' dissenting opinion (in which Justice Brennan joined), he agreed with the Washington Supreme Court's opinion that the Law School's selection process was racially neutral, based on the record, but Justice Douglas suggested remanding the case back to the lower court for a new trial, rather than considering the issue moot (*DeFunis, et al. v. Odegaard, et al.*, 1974). Before explaining his reasoning, Justice Douglas first noted that a university's admissions procedures are ordinarily not a subject for judicial oversight. Nevertheless, the University of Washington Law School had presented a special situation because it had two sets of criteria for considering applicants – one for minority students and one for other students – in order to achieve a “reasonable representation” of minority groups in the Law School. Justice Douglas opined that the Equal Protection Clause did not enact a requirement that law schools employ as the sole criterion for admissions. He mentioned that it might be acceptable for a law school to select a Black applicant who pulled himself out of the ghetto and attended junior college over a son of a rich alumnus who achieved better grades at Harvard (*DeFunis, et al. v. Odegaard, et al.*, 1974). Simply stated, the Black student demonstrated a high level of motivation, perseverance, and ability, which are outstanding qualities for a law student and lawyer, of which the Harvard graduate may have been lacking.

Justice Douglas maintained in his opinion that a formula for LSATs and undergraduate GPAs were not necessarily the best criterion, especially since the LSAT tended to be racially and culturally biased and did a disservice to minorities (*DeFunis, et al. v. Odegaard, et al.*, 1974). In fact, prior to the LSAT's implementation in 1948, all students were accepted into law school and the first-year of law studies determined if a person had the makings to be a competent lawyer. Justice Douglas noted:

[m]y reaction is that the presence of an LSAT is sufficient warrant for a school to put racial minorities into a separate class in order to better probe their capacities and potentials. This does not mean that a separate LSAT must be designed for racial minority racial groups....The reason for the separate treatment of minorities as a class is to make more certain that racial factors do not militate *against an applicant or on his behalf* (*DeFunis, et al. v. Odegaard, et al.* 1974, p. 336).

This brought the Supreme Court Justice to his next point, which was that:

[t]here is no constitutional right for any race to be preferred. The years of slavery did more than retard the progress of blacks. Even a greater wrong was done [to] the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race. There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability no matter what his race or color (*DeFunis, et al. v. Odegaard, et al.*, 1974, p. 336-37).

Therefore, Justice Douglas concluded that the University of Washington Law School did not discriminate against Mr. DeFunis in violation of the Fourteenth Amendment. He did, however, recommend that the United States Supreme Court vacate the Washington Supreme Court



decision and remand to the lower court for a trial so that the parties could present additional evidence and facts regarding Mr. DeFunis and the constitutionality of the Law School's admissions procedures. Justice Douglas summed up his decision in this final and fundamental thought, which was that:

[t]he problem tendered by this case is important and crucial to the operation of our constitutional system; and educators must be given leeway. It may well be that a whole congeries of applicants in the marginal group defy known methods of selection. Conceivably, an admissions committee might conclude that a selection by lot of, say the last 20 seats, is the only fair solution. Courts are not educators; their expertise is limited; and our task ends with the inquiry whether, judged by the main purpose of the Equal Protection Clause – the protection against racial discrimination – there has been an “invidious” discrimination. We would have a different case if the suit were one to displace the applicant who was chosen in lieu of DeFunis. What the record would show concerning his potentials would have to be considered and weighed. The educational decision, provided proper guidelines were used, would reflect an expertise that courts should honor. The problem is not tendered here because the physical facilities were apparently adequate to take DeFunis in addition to the others. My view is only that I cannot say by the tests used and applied he was invidiously discriminated against because of his race (*DeFunis, et al. v. Odegaard, et al.*, 1974, p. 344).

The *DeFunis* case did not hold legal precedence as it pertained to race-based affirmative action cases and admissions practices. Nevertheless, the facts in this case and Justice Douglas' dissenting opinion set forth some vital points that should not be ignored, such as the political and social milieu with regards to the attitude towards racial minorities as law school applicants and

the decision-making authority of higher education institutions. First, Mr. DeFunis brought a reverse discrimination lawsuit based on race when there were 48 non-minorities with lower averages than DeFunis offered admission into the University of Washington Law School, as compared to the 36 racial minorities with lower averages. Some of the 48 non-minorities were likely women, but Mr. DeFunis opted to pursue a legal fight to the United States Supreme Court that was based on a racial discrimination claim under the Equal Protection Clause of the Fourteenth Amendment, rather than a gender discrimination lawsuit that was also illegal under the newly enacted Civil Rights Act of 1964. This point did not escape the seasoned wisdom of Justice Douglas who found it necessary to inform Mr. DeFunis and others that despite society's belief, Whites are not the superior race with entitlements over racial minorities, namely Blacks who wore the inferior label as slaves for so many years. In other words, Blacks have an equal right to compete, be seriously considered, and accepted into a law school of their choice just like Whites.

Second, Justice Douglas averred that it was perfectly acceptable to consider other factors when deciding a law school applicant's ability to be an outstanding law student and lawyer, especially when it comes to racial minorities. The Supreme Court Justice went as far as to say that the LSATs may not be the best predictor for determining the future success or failure of racial minorities in the legal profession because the test is inherently racially and culturally biased and a barrier to most minority applicants. In fact, the Justice suggested that racial minorities be given different treatment in admission situations so that the negative racial effects of the LSAT do not stand in the way of fair consideration as a law school candidate. Finally, Justice Douglas argued for colleges' right to autonomy and flexibility in making its own admission decisions. After all, colleges have expertise as educators and experience with judging

the academic potential of applicants. Courts should honor universities' admissions decisions and how the institution reaches its decisions unless there is invidious discrimination afoot, which was not present in the *DeFunis* case according to Justice Douglas.

Justice Douglas opined that invidious discrimination did not appear to be present in the *DeFunis* case, yet several years later the Supreme Court was again confronted with a very similar constitutional issue of racial discrimination. This time the issue arose in a reverse discrimination lawsuit against a medical school, and like the *DeFunis* case, it involved a White male questioning the constitutionality of a university's admissions procedures. This lawsuit was the 1978 United States Supreme Court case of *Regents of the University of California v. Bakke*. The historical *Bakke* case represents the first time the United States Supreme Court fully addressed the merits of race-conscious affirmative action and reviewed the legality of race-based admissions policies in higher education. *Bakke* maintains legal precedence in this country with regards to race-sensitive affirmative action in higher education.

#### Regents of the University of California v. Bakke (1978)

In *Regents of the University of California v. Bakke* (1978), Allan Bakke, a White male, was denied admissions to the University of California at Davis Medical School for two consecutive years – 1973 and 1974. Mr. Bakke claimed that minimally qualified racial and ethnic minorities could compete for and fill 16 special admission seats (i.e., Blacks, Latinos, and Asians) out of 100 in the Medical School's first year class, while more qualified White applicants like Bakke could compete only for 84 seats under the general admissions program. Bakke argued that the reserved seats for minorities and the special admissions program amounted to racial and ethnic quotas, which was in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. Mr. Bakke brought the

lawsuit on behalf of himself and sought injunctive relief against the Regents of the University of California demanding that the Medical School admit him.

In *Bakke* (1978), the United States Supreme Court determined that the special admissions policy utilized by the University of California at Davis Medical School violated the Fourteenth Amendment, because it reserved a specified number of places for minorities to the exclusion of Whites. Additionally, the Supreme Court agreed that Mr. Bakke should be admitted into the Medical School. The Supreme Court Justices, however, could not agree on the reasoning for the decision, so the Justices wrote several different opinions. Justice Powell wrote the main opinion that explained that the University of California at Davis Medical School's admissions policy violated the Fourteenth Amendment, because the use of explicit racial classifications in the policy disregarded individual rights. What is troubling about the high Court's decision is that a majority of the Justices invalidated the admissions policy because it denied future White applicants the opportunity to compete for all the seats in the medical school class (*Regents of the University of California v. Bakke*, 1978). The Court did not find it important that the policy afforded the opportunity for a few disadvantaged minority groups to be admitted into the Medical School who had been excluded previously from the entire higher education process.

The Supreme Court Justice writing the opinion for the Court, however, concluded that race could be considered a "plus" factor during the college admissions process to achieve educational diversity, so long as the individual qualities of each applicant were considered during the admissions process. Justice Powell explained that a university sets out to admit different students who can create an environment where there is a robust exchange of ideas (*Regents of the University of California v. Bakke*, 1978). In the opinion, Justice Powell did not clearly address whether there was a private cause of action under Title VI of the Civil Rights Act in this case.

Nevertheless, Justice Powell recognized that the purpose of Title VI was to give fellow Black citizens the same rights and opportunities that White people have taken for granted for so many years but would not concede that race-conscious admissions programs were needed to help remedy the effects of the past societal discrimination. Justice Powell also acknowledged that racial classifications are subject to the strict scrutiny level of judicial review (*Regents of the University of California v. Bakke*, 1978). While Justice Powell asserted that educational diversity was compelling state interest that met the strict scrutiny standard and supplied sufficient justification for considering race in an admissions process, he also specifically stated that remedying societal discrimination and providing role models were never appropriate justifications for using racial classifications in admissions.

Justice Thurgood Marshall concurred with the judgment of the Court that a university may consider race a “plus” factor in its admission process, but he strongly admonished the Court for not permitting a class-based remedy for discrimination under the Fourteenth Amendment, since Blacks as a group were discriminated against for several hundred years, not as individuals, and solely because of the color of their skin (*Regents of the University of California v. Bakke*, 1978). Justice Marshall further noted that the Congress that voted for special relief for the Negro race under the 1866 Freedmen’s Bureau Act was the same Congress that proposed the Fourteenth Amendment; thus, it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures (*Regents of the University of California v. Bakke*, 1978). This was Justice Marshall’s argument for race-based affirmative action programs in light of the United States’ history of purposeful societal discrimination against Black people as an inferior group, not as individuals, as well as the Fourteenth Amendment’s support for the programs.

Because Justice Powell did not clearly explain the meaning of diversity, and no other Supreme Court Justice joined his opinion on the diversity rationale, the viability of race-conscious affirmative action programs became more vulnerable for attack to the detriment of Blacks. Without any lucid direction in *Bakke* and no consensus among the Justices as to the legality of affirmative action programs, it became more difficult to justify the ongoing need for race-conscious affirmative action policies, especially since the Supreme Court struck down societal discrimination as a valid justification for such policies and programs. Coincidentally, the *Bakke* decision was announced around the same time that the U.S. Department of Education brought enforcement actions under Title VI of the Civil Rights Act of 1964 against 19 states in the south that were racially segregated and refusing admission to Blacks. When President Reagan took office in the 1980s, he fought against civil rights enforcement and suspended most of the Title VI actions before the discriminatory acts had completely ceased and equality at the southern schools had been achieved (Williams, 1997).

Simultaneously with the cessation of the Title VI enforcements in the mid-1980s and early 1990s, the United States Supreme Court experienced a shift to a slightly more conservative bench that included Antonin Scalia, Anthony Kennedy, David Souter, and Clarence Thomas. As such, the Supreme Court was hearing more reverse discrimination legal cases that were commenced in order to end affirmative action. In the affirmative action cases in the 1980s and 1990s, the Supreme Court unabashedly and strongly enforced a high standard for race-based affirmative action policies. The Court decided that racial categories in affirmative action policies are always suspect classifications. The Supreme Court still utilized strict scrutiny as the legal standard to review the use of racial classifications but extremely restricted the circumstances under which race could be considered. Thus, racial classifications could be used if the policies

met the strict scrutiny standard of being narrowly tailored and are necessary to achieve a compelling state interest, but only an organization's need to rectify existing discrimination, not to achieve diversity, met this constitutional standard (*Adarand Constructors, Inc. v. Peña*, 1995; *City of Richmond v. J. A. Croson*, 1989).

This constraining type of strict scrutiny, which limited the use of racial classifications to eliminate current discriminatory activities, was initially adopted and applied to employment affirmative action policies and programs that were challenged during the 1980s and early 1990s. Corporations and organizations could satisfy the strict scrutiny requirements only if they proved that the race-conscious measures were necessary to remedy the "present effects" of past discrimination, not the current societal or past discrimination. Diversity was not acknowledged as an acceptable justification to meet the strict scrutiny standard for using racial classifications. Given the difficulty of meeting such a high burden of proof, the strict scrutiny standard also became the springboard to challenge *Bakke's* diversity holding as well as race being considered as a "plus" factor in an effort to eliminate all race-sensitive affirmative action programs and policies in higher education. Moreover, in December 1990, Michael Williams, the Assistant Secretary of Education for Civil Rights under the first Bush administration, issued an opinion that stated that scholarship set-asides for racial and ethnic minority students violated the civil rights laws. Accordingly, the 1990s ushered in a firestorm of higher education cases and policies that blatantly ignored and opposed the *Bakke* holding and any use for affirmative action policies and programs.

#### **4.1.2 The 1990s – The Legal Debate Gains Momentum**

*Podberesky v. Kirwan* (1994)

Because of Michael Williams' opinion regarding race-conscious scholarships, it may have been expected that one of the first reverse discrimination higher education cases of the 1990s would be based on a scholarship program. The University of Maryland lawsuit of *Podberesky v. Kirwan* (1994) was a higher education case that did not reach the United States Supreme Court, but it made it to the federal appellate court in the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit insisted on the rigid enforcement of the strict scrutiny standard that was specifically adopted in the *City of Richmond v. J. A. Croson* (1989) case, while also striking down the University of Maryland's assertions for remedying the present effects of past discrimination. In addition, the *Podberesky* court made no reference to the *Bakke* holding or the use of the diversity rationale in higher education cases.

The issue in the *Podberesky* case dealt with whether the University of Maryland at College Park (UMCP) could maintain a separate merit-based scholarship program for which only African Americans were eligible. Daniel Podberesky, the plaintiff-appellant, contested UMCP's Banneker scholarship program for African Americans because as a Hispanic, Podberesky was not eligible. Although Mr. Podberesky met the academic qualifications for the Banneker scholarship, he was eligible only for the Francis Scott Key scholarship program for all other students. In the lower district court, UMCP argued that the purpose of the program was to counter the four present effects of past discrimination that existed at UMCP, which were that: (1) the University had a poor reputation within the African American community; (2) African Americans were underrepresented in the student population; (3) African American students who enroll at the University have low retention and graduation rates; and (4) the atmosphere on campus was perceived as being hostile to African American students. UMCP maintained that the pool from which eligible students were drawn was high-achieving African American high



school students in Maryland. The University intended to have the racial composition of its student body reflect the racial composition of qualified college eligible high school graduates in Maryland (*Podberesky v. Kirwan*, 1994).

The district court agreed with the University of Maryland and concluded that the Banneker program was narrowly tailored to remedy the four present effects of past discrimination, and it was constitutionally permissible (*Podberesky v. Kirwan*, 1994). After all, the University had a known history of discriminating against Black people in the past. Therefore, the district court approved of the Banneker program to admit African American students solely on the basis of race until the composition of African Americans on the UMCP campus reflected the percentage of African American Maryland high school graduates who may attend the University of Maryland at College Park (*Podberesky v. Kirwan*, 1994). The district court supported its decision by stating:

[I]n our earlier opinions both I and the Fourth Circuit may have construed too rigid a framework of analysis...I have come to believe that (1) precedents involving employment disputes provide imperfect analogies for determining the constitutionality of an affirmative action program in an education context, and (2) focusing solely upon past discrimination in education cases blurs vision and obstructs understanding (*Podberesky*, 1994, p. 153 citing *Podberesky v. Kirwan*, 838 F. Supp. 1075, 1097).

In other words, the lower court considered the strict scrutiny requirements of proving the present effects of past discrimination, which had been utilized in employment cases like *Croson*, was an improper standard for higher education cases. The Fourth Circuit wholly disagreed with the district court's holding and analysis.

The Fourth Circuit reiterated the necessity of using the *Croson* strict scrutiny standard as the relevant framework for analysis for the *Podberesky* case and all other cases in its jurisdiction (*Podberesky v. Kirwan*, 1994). Given that UMCP's Banneker program was based on remedying past discrimination through achieving a present composition of Black students that was equivalent to the percentage of Blacks graduating Maryland high schools, the program did not pass constitutional muster. Thus, the Fourth Circuit held that UMCP's Banneker program resembled outright racial balancing through a quota system, which is unconstitutional, rather than a narrowly tailored program to remedy the present effects of past discrimination. In its analysis, the Fourth Circuit found that the University's examples of four present effects of past discrimination were insufficient to meet the burden of establishing a race-based scholarship program because UMCP failed to supply the necessary evidence (*Podberesky v. Kirwan*, 1994). Additionally, UMCP failed to pursue race-neutral alternatives.

The Fourth Circuit criticized UMCP because it could not support the definition for a "high-achieving African American," and clearly establish how the University determined the African American applicant pool. Specifically, the University: (1) did not establish an effective minimum criteria for admission, such as the combination of SAT scores, high school curriculum requirements, and GPAs; (2) did not consider the eligibility of all Maryland high school graduates; and (3) included out of state Black students in the pool, even though the Banneker program was to remedy past discrimination against students who lived in the state of Maryland (*Podberesky v. Kirwan*, 1994). The Fourth Circuit expressed that "There is no doubt that racial tensions still exist in American society, including the campuses of our institutions of higher learning. However, these tensions and attitudes are not a sufficient ground for employing a race-conscious remedy at the University of Maryland" (*Podberesky v. Kirwan*, 1994, p. 155). The

choice of a race-based merit scholarship program to remedy the present effects of past discrimination could not be sustained. Accordingly, the Fourth Circuit required UMCP to re-examine Mr. Podberesky's admission to the Banneker program and enjoined the University from enforcing the African American racial requirement when considering Podberesky's qualifications (*Podberesky v. Kirwan*, 1994).

The *Podberesky* holding and analysis does not have legal precedence in today's national race-conscious legal debate. In fact, the *Bakke* case along with the 2003 United States Supreme Court cases of *Gratz v. Bollinger* and *Grutter v. Bollinger*, which will be discussed later, maintain that honor. What is very intriguing, however, is that the Fourth Circuit chose to follow the stringent analysis and requirements in showing the present effects of past discrimination to support race-conscious measures, which was utilized in the affirmative action cases in an employment context. While the *Bakke* Court took a disjointed approach in its decision-making process and reasoning, the conclusion still had legal primacy in the U.S. federal courts. There is no indication in the opinion that the *Podberesky* court assessed whether Banneker scholarship candidates and other applicants were reviewed on their individual merits, and race was simply the "plus" factor to offer the advantages of educational diversity, which is explained in the *Bakke* analysis. Simply put, the *Podberesky* appellate court had a great opportunity to attempt to make sense of the *Bakke* holding. At least in making a questionable attempt, the *Podberesky* court could have left an opening for a return trip to the United States Supreme Court in order to address the issue of the legality of race-conscious affirmative action programs in higher education. That return trip may have resulted in a clearer definition of "diversity" and "using race as a plus factor" in a higher education context.

Another peculiar factual issue in *Podberesky v. Kirwan* (1994) was that the case involved a member of a racial minority group, a Hispanic student, who had been historically underrepresented in institutions of higher education. The Banneker scholarship program was exclusively for an identified disenfranchised racial minority group, African Americans, and Mr. Podberesky was a part of another disenfranchised minority group. The Fourth Circuit could have required UMCP to reconsider Podberesky's application on its individual merits along with other applicants in order to support a diverse student body. This would have eliminated the exclusivity of the scholarship program. Instead, the *Podberesky* court chose to label the Banneker program as utterly unconstitutional without giving UMCP the chance to rework the qualification portion of the program. It appears that the United States Court of Appeals for the Fourth Circuit would not have been opposed to a race-conscious affirmative action program to benefit racial minorities, so long as the program did not exclusively benefit Black students. Of course, the legal debate did not end with the *Podberesky* court's interpretation of a race-conscious affirmative action program in higher education. More was to come.

Hopwood v. Texas, 78 F.3d 932 (1996)

*Hopwood v. Texas* (1996) was another law school admissions case that set forth some interesting facts and analysis as it pertains to race-based affirmative action policies. Similar to *Podberesky v. Kirwan* (1994), this case did not make it to the United States Supreme Court, even though the state of Texas petitioned the Court but the writ of certiorari was denied. Nevertheless, the *Hopwood* case had a significant impact on how *Bakke* was viewed as legal precedence and on the potential of more legal challenges regarding race-conscious admissions policies in the near future.

*Hopwood* (1996) was argued before the United States Court of Appeals for the Fifth Circuit and involved four individual White plaintiff-appellees, in which Cheryl Hopwood was the lead plaintiff-appellee in the lawsuit and the only woman of the four. It is important to note that the University of Texas School of Law (hereinafter “Texas Law School”) is one of the most competitive law schools as it is regarded as one of the top 20 law schools in this country, according U.S. News and World Report. Over 4,000 people apply to the Texas Law School each year, but only 900 applicants are accepted in order to obtain a first-year class of 500 students (*Hopwood*, 1996).

Ms. Hopwood and the other appellees averred that the Texas Law School had a special admissions program that gave Blacks and Mexican Americans preferential treatment in admissions, in which they could be admitted with lower test scores (i.e., LSAT and GPA) than White and non-preferred minority applicants.<sup>9</sup> The plaintiff-appellees sued several parties, including the state of Texas and the University of Texas Board of Regents under the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and statutory violations of 42 U.S.C. §§ 1981 and 1983, which are based on illegal government action. Unlike other reverse discrimination legal cases, the *Hopwood* plaintiff-appellees sought injunctive relief as well as compensatory and punitive damages. The Texas Law School claimed to have different standards for selected minority groups with hopes of admitting a class consisting of 10 percent Mexican Americans and 5 percent Blacks, which were the proportions roughly comparable to the percentages of those races graduating from Texas colleges. The Texas Law School reasoned that the race-based admissions procedures were necessary to help rectify the present effect of the past discriminatory practices of the Texas school system.

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<sup>9</sup> Non-preferred minorities were categorized as all other minority groups besides Black Americans and Mexican Americans, such as Asians, Native Africans, and Americans from El Salvador and Cuba.

The *Hopwood* (1996) court held that the University of Texas School of Law's admissions policy violated the Fourteenth Amendment since it placed Black and Mexican-American applicants in separate admissions categories than White applicants, and there were no identifiable present effects of past discrimination in the law school. The Fifth Circuit rejected the Texas Law School's contentions that evidence of discrimination in primary and secondary schools led to the present effects of discrimination in the state of Texas' universities, including the Law School.<sup>10</sup> The *Hopwood* court determined that only the present effects of past discrimination at the law school was acceptable evidence in this case.

In its analysis, the appellate court determined that *Bakke* was not a binding precedent since no other Justices joined the decision. The *Hopwood* (1996) court seemed to understand the Law School's need to increase the enrollment of minority students, but since the court did not know the meaning of diversity, it refused to consider diversity to be a compelling state interest. Thus, the affirmative action policy was terminated. The Fifth Circuit relied on what it considered a more logical and cohesive legal reasoning, which was set forth in *Croson* and other employment affirmative action cases to define a narrowly tailored policy and a compelling state interest. The Fifth Circuit did not find that the Texas Law School offered sufficient evidence to support its assertions that the special admissions program remedied the present effects of past discrimination in the law school. The *Hopwood* court reversed the district court's decision in favor of the state of Texas and other defendant-appellants and remanded the case to the district court with specific instructions based on the Fifth Circuit's conclusion, which was:

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<sup>10</sup> The Texas Constitution required segregated schools until 1954, and the Texas Law School had scholarships for Whites only until 1969 (Holley & Spencer, 1999; Horn & Flores, 2003). Additionally, the federal Office of Civil Rights (OCR) admonished the state of Texas for failing to eliminate the vestiges of *de jure* segregation and for maintaining a racially dual system of public higher education. The OCR approved several federally monitored plans from 1983 to 2000 to increase enrollment and retention of Black and Latino students in Texas' public universities (Horn & Flores, 2003).

In summary, we hold that the University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school. Because the law school has proffered these justifications for its use of race in admissions, the plaintiffs have satisfied their burden of showing that they were scrutinized under an unconstitutional admissions system. The plaintiffs are entitled to reapply under an admissions system that invokes none of these serious constitutional infirmities. We also direct the district court to reconsider the question of damages... (*Hopwood*, 1996, p. 962).<sup>11</sup>

The *Hopwood* court clearly stated its denunciation of the *Bakke* holding and analysis, and the use of race-sensitive admissions in higher education. Although the University of Texas Law School had a long history of racial segregation and discrimination (see *Sweatt v. Painter*, 1950, *infra*), the appellate court did not address the lack of diversity that still existed in the Texas Law School. A miniscule number of Blacks and Mexican Americans were being accepted to and attending the Law School. In fact, it is fascinating that four White students, including a woman who is often labeled a member of a minority group and the largest beneficiary of affirmative action, were fighting against diversity and using *Bakke* as legal precedence.

The Fifth Circuit was very specific with instructing the district court on how to reach its decision and what evidence the district court should evaluate on remand, including awarding

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<sup>11</sup> In 1997, after the *Hopwood* case, the OCR found that racial disparities still existed in Texas universities due to traces of *de jure* segregation (Texas Higher Education Coordinating Board, 2000). In response to the OCR, Texas introduced a new "Texas Commitment" that included the goal of improving the recruitment, retention, and participation rates of Black and Latino students at historically White institutions in Texas (Horn & Flores 2003; Texas Higher Education Coordinating Board, 2000).

damages to *Hopwood* and the other plaintiff-appellees. What is even more curious is that the court entertained and was seemingly willing to award compensatory and punitive damages to the plaintiff-appellees. Punitive damages are typically given in civil cases that involve malicious, wanton, and wicked conduct by a party (see Black's Law Dictionary, 1991) and may often amount to millions of dollars in damages. Punitive or exemplary damages are meant to make an example out of the wrongdoer by punishing the party for his evil behavior. This possible award of punitive damages to the *Hopwood* plaintiff-appellees begs an important question, particularly since the United States permitted hundreds of years of slavery, segregation, and discrimination to occur without being punished or forced to apologize or pay any type of damages. How can an institution in the United States, which tried to remedy its past discriminatory acts by implementing a policy to admit the underrepresented racial minority groups that had been intentionally excluded for so many years, be considered evil, egregious, and reckless?

#### **4.1.2.1 Anti-Affirmative Action Policies and Executive Orders**

##### California's Referendum (1996)

In addition to the influx of reverse discrimination legal cases, there came the arrival of anti-affirmative action policies and race-neutral alternatives in several states during the late 1990s. Perhaps the most well-known of the state anti-affirmative action policies is that which was introduced in California. On November 5, 1996, the State of California passed the Proposition 209 referendum under the California Civil Rights Initiative. Proposition 209 states in relevant part:

- (a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national



origin in the operation of public employment, public education, or public contracting;

(b) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting;

(c) For the purposes of this section, “state” shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state (California Civil Right Initiative, Proposition 209, November 1996).

After the State of California voted on Proposition 209, the *Los Angeles Times* released the demographic profiles of the voters. First, 54 percent of the voters were in favor of Proposition 209 while 46 percent were against it. Sixty-one percent of those who voted “yes” for Proposition 209 were males; 48 percent were female voters. Additionally, 63 percent of the voters in favor of Proposition 209 were White, 39 percent were Asian, 26 percent were Black, and 24 percent were Latino. The two largest income brackets that were in favor of Proposition 209 were in the \$60,000 to \$74,999 (65%) and the \$75,000 or more (59%) income brackets. Lastly, the California residents who voted “yes” for Proposition 209 categorized themselves in the following ways in terms of political ideology: (1) 77 percent were conservative; 52 percent were moderate; and 27 percent were liberal. The following voters categorized themselves in the following ways in terms of political party affiliation: (1) 80 percent were Republicans; (2) 59 percent were Independents; and (3) 31 percent were Democrats (*Los Angeles Times*, 1996).

In 1999, the newly elected Governor, Gray Davis, proposed that each public and private high school senior who graduated in the top four percent of his class receive guaranteed admission to the University of California system (Horn & Flores, 2003). There was plenty of opposition to Governor Davis' plan because of Proposition 209, but the University of California (U.C.) chose to act in support of the four percent plan because of the limitations placed upon public institutions under Proposition 209 (Horn & Flores, 2003). U.C. responded to Proposition 209's elimination of race-based affirmative action policies and programs by implementing a complex admissions process.

Currently, there are three ways that students may be admitted to U.C.'s system. First, students can be admitted through Eligibility in the Statewide Context, which has three elements: (1) the subject requirement – a student must complete 15 specified high school classes; (2) the scholarship requirement – a student must have a grade point average and standardized test score that fit within a sliding scale known as the eligibility index; and (3) the examination requirement – a student must have a sufficient standardized test score (U.S. Department of Education, Office for Civil Rights, 2003). Second, students may be admitted to U.C. through Eligibility in the Local Context, which is commonly known as the “4 percent plan.” The 4 percent plan enables students in the top four percent of seniors from each California high school's graduating class to be designated “U.C.-eligible,” but they must also complete 11 specific units of college preparatory coursework by the end of the junior year (U.S. Department of Education, Office for Civil Rights, 2003). Under the third element, students are admitted to the U.C. system solely because of an extraordinarily high standardized test score (U.S. Department of Education, Office for Civil Rights, 2003). Once students are admitted to the U.C. system under one of the three paths, each U.C. campus then evaluates each student to determine which school the student will

attend. The students are evaluated based on criteria, such as GPA in U.C.-required courses, standardized test scores, number of and performance in AP and honor courses, and quality of the senior year program. After the criteria is considered, the administrators at each U.C. campus further deliberate on the applicant's secondary school and residence in order to provide for geographical diversity in the student population (U.S. Department of Education, Office for Civil Rights, 2003).

The University of California at Los Angeles School of Law (UCLA Law School) also responded to Proposition 209 with an academic program that would attract highly competitive potential law students, including minorities. This was probably in response to the falling number of racial minorities in the University of California law schools. After the passage of Proposition 209 in 1996, the University of California reported that the number of minority law students in 1997 decreased from 43 Black students to 16, from 89 Latino students to 16, and from 10 Native American students to 4 (University of California, 2003). Thus, in the 1997-1998 school year, the UCLA Law School commenced the Law Fellows Program, which provides early academic outreach to high-potential undergraduate and graduate students with at least a 3.0 GPA. The Law Fellows Program is very similar to CLEO in that it includes Saturday Academies held at the UCLA Law School and exposes students to the course materials used in law school, such as legal cases and law review articles. Furthermore, the students learn how to conduct legal research and become familiar with legal procedures. The Law Fellows Program seeks students who have overcome economic and educational hardships, or have demonstrated leadership experience in economically and educationally underserved communities (U.S. Department of Education, Office for Civil Rights, 2003).

State of Texas' Legislation (1997)

Before President George W. Bush was President of the United States, he was Governor of the state of Texas. In a bipartisan response to the *Hopwood v. Texas* decision that forbade race-conscious admissions plans in institutions of higher education as well as the OCR's reprimand for racial disparities in Texas universities, Governor Bush implemented the Texas 10 Percent Plan (Horn & Flores, 2003; U.S. Department of Education, Office for Civil Rights, 2003). Governor Bush signed House Bill 588 into law and the Texas Legislature approved it in 1997 (Horn & Flores, 2003). This Texas admissions plan, which is also known as the class-ranking approach, allowed for the top 10 percent of every state accredited public and private high schools' graduates to be guaranteed admission into the University of Texas campus of their choice (U.S. Department of Education, Office for Civil Rights, 2003). After the student makes his choice, the selected university campus will review the applicant's academic record to determine whether he needs to take additional college preparatory courses. The University of Texas campus may then require the applicant to take the appropriate enrichment or orientation programs (U.S. Department of Education, Office for Civil Rights, 2003).

Proponents of Texas' class-ranking approach contend that this system promotes diversity and presents opportunities to all students who have worked the hardest and the achieved the most in high school. In 2000, the University of Texas at Austin admitted individuals in its freshman class that represented 135 high schools that had not attended the university prior to the *Hopwood* decision. Many of these students were from the inner-city, largely minority sections of Houston, Dallas-Ft. Worth, and San Antonio as well as rural White high schools in the Eastern and Northeastern parts of Texas (U.S. Department of Education, Office for Civil Rights, 2003).

Because the *Hopwood* case focused on the University of Texas Law School's admissions policy benefiting Blacks and Mexican Americans, the Fifth Circuit's abolishment of the policy

could ultimately result in the Law School's lack of a racially and ethnically diverse student body. In fact, the number of underrepresented minority law students decreased further between 1996 and 2002. Specifically, the already low number of Black law students enrolled in Texas' public law schools declined from 42 in 1996 to 27 in 2002. At the same time, the number of Latino law students decreased from 100 to 82, and the number of Native American law students decreased from 14 to 10 (Moore, 2005). Therefore, after Governor George W. Bush created the Texas 10 percent plan, the Law School took advantage of the requirements and eventually proposed a new admissions policy. The Texas Law School now has a policy that offers admission to the top 5 percent of graduates at five specified colleges mainly located in southern Texas (U.S. Department of Education, Office for Civil Rights, 2003). These colleges in southern Texas have large student populations representing Blacks and Mexican Americans.

#### State of Washington's Referendum (1998)

On November 13, 1998, the state of Washington introduced the Washington State Civil Rights Initiative, which is also known as Initiative 200, to voters. The purpose of this referendum was to prohibit the use of race and ethnicity in deciding student admissions, employment, and contract awards. Approximately, 64 percent of the voters were in favor of abolishing race-based affirmative action, 25 percent of the voters were against it, and 11 percent were undecided ([www.adversity.net/i200](http://www.adversity.net/i200), 2004). Initiative 200 was written almost identical to California's Proposition 209. Washington's Initiative stated in relevant part that:

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

- (1) The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(2) For the purposes of this section, “state” includes, but is not necessarily limited to, the state itself, any city, county, public college or university, community college, school district, special district, or other political subdivision or governmental instrumentality of or within the state (Washington State Civil Rights Initiative 200, 1998).

Unlike Proposition 209, there has not been much written or debated on a national level regarding Initiative 200. However, in 2001, there was at least one federal reverse discrimination case that relied on this state policy, which made it to Washington’s appellate court in the Ninth Circuit, and it will be discussed in detail below. The case regarded a law school admissions policy at the University of Washington Law School. Interestingly, after the voters passed Washington’s Initiative 200, the very low number of underrepresented minorities in the law school went from bad to worse. For example in 1995, there were 7 Black, 19 Latino, and 10 Native American law students enrolled in the University of Washington Law School (Moore, 2005). In 1999, the number of minorities decreased to two Black, four Latino, and five Native American law students. These numbers fell even further in 2000 to one Black, one Native American and three Latino law students enrolled in the law school (Moore, 2005).

Washington’s Governor wanted to take action to improve the declining number of minorities enrolled in the institutions of higher education. In 2004, Democratic Governor Gary Locke proposed a bill to repeal portions of Initiative 200 in order to permit race, gender, and ethnicity to be considered in college and university admissions (Senate Bill 6268 and House Bill 2700, 2004). Because of the public animosity for racial quotas, there was not enough favorable support for the bill to succeed, particularly in an election year (Trick, 2004). Today, Initiative 200 remains in effect.

### State of Florida's Executive Order (1999)

In 1999, Ward Connerly, the mastermind behind the Proposition 209 referendum in California, was preparing a similar anti-affirmative action campaign in Florida (Horn & Flores, 2003). Florida's Governor, Jeb Bush, beat Ward Connerly to the punch and implemented Executive Order 99-281 entitled "One Florida." On November 9, 1999, the One Florida Initiative eradicated the use of race- and gender-conscious decisions in higher education, government employment, and state contracting, which would go into effect in 2000. Race-conscious decisions, however, were still permissible in awarding scholarships, developing pre-college summer programs, and conducting outreach with students (Executive Order 99-281). Governor Jeb Bush exclaimed, "With my One Florida Initiative, we can increase opportunity and diversity in the state's universities and in state contracting without using policies that discriminate, or that pit one racial group against another" (One Florida, 1999). Florida became the first state where a government official ended its affirmative action policies (Horn & Flores, 2003).

In addition, under the One Florida plan, Governor Bush offered a race-neutral alternative very similar to Texas' class ranking approach, which is called the Talented 20 program. This plan guarantees that the top 20 percent of all public high school seniors will be admitted to the state university system. The rankings are determined after the senior's seventh semester (first semester of senior year), but the student must prove that he remains in the top 20 percent after he has completed the eighth semester. In addition to the class ranking's approach, the state of Florida also requires that the students complete 19 credits of college preparatory programs. Additionally, the students must take the SAT or ACT, even though there is no minimum score requirement (U.S. Department of Education, Office for Civil Rights, 2003).

Unlike the state of Texas' plan, the Florida plan does not unconditionally guarantee admission into one of the state institutions of higher education. After an applicant is admitted into the state system based on his ranking, he must still compete to earn a spot in the university that he chooses (U.S. Department of Education, Office for Civil Rights, 2003). Although the plan does not specifically articulate how the students must compete, it is likely the competition is primarily based on standardized test scores, actual GPA scores, and the number and level of difficulty of college preparatory courses. Given the competitive nature of the Talented 20 program, the state of Florida has entered into several partnerships and offers financial incentives designed to help students from low-performing schools prepare for college (U.S. Department of Education, Office for Civil Rights, 2003). Students in the Talented 20 are given priority to receive need-based financial assistance grants from the state.

Like California, Texas, and Washington, Florida's state law schools have seen a change in enrollment for underrepresented racial minorities since the state ban on affirmative action. In 1999, prior to the introduction of the One Florida initiative, there were 80 African Americans, 108 Latinos, and 17 Native American students admitted to the flagship campus of the University of Florida Law School. In 2001, however, after the full implementation of One Florida, there were 62 African Americans, 72 Latinos, and 3 Native Americans admitted to the law school. Between 1999 and 2002, the University of Florida Law School experienced a 27 percent decline in African Americans and a 37 percent decline in Latino law school students enrolled in the law school (Moore, 2005). Governor Jeb Bush's response to the lower number of minorities was that "we've got enough lawyers; the problem is we don't have enough in 2001" (Moore, 2005, p. 58). In other words, even though there were fewer lawyers entering the legal profession in 2001, the state of Florida did not need anymore minority lawyers to fill those positions.



California's Proposition 209, Washington's I-200, and One Florida maintain their vigor for many reasons. Nevertheless, one cannot underestimate the power of one man and his organization that is backed by conservative and wealthy Whites. Ward Connerly, a Black man, founded a non-profit civil rights organization in Sacramento, California called the American Civil Rights Initiative (ACRI) in 1996, around the time of the passage of Proposition 209. ACRI's purpose is to educate the national public about racial and gender preferences, assist federal representatives with public education on the issue, and monitor the implementation and legal action on California's Proposition 209, Washington's I-200, and One Florida (ACRI, 2007). Ward Connerly and ACRI continue to lead the national anti-affirmative action movement in the 21<sup>st</sup> century by infiltrating other states with anti-affirmative action referenda and influencing national policy. One Black journalist has argued that "Ward Connerly and his rich White benefactors want to erase Black people from the official American map" (Black Commentator, 2004). Given the support for anti-affirmative action policies and referenda as well as the declining number of underrepresented minorities in higher education and law schools, this journalist may be on to something real and unfortunately true.

#### **4.1.3 The 2000s – Revisiting *Bakke* as the Legal Debate Intensifies**

Smith, et al. v. University of Washington Law School, et al. (2000)

The facts and claims in this case were reminiscent of the *DeFunis* lawsuit against the University of Washington Law School. Unlike *DeFunis*, the present case did not make it to the United States Supreme Court, but it did make it to the appellate level at the United States Court of Appeals for the Ninth Circuit. The *Smith* case is important because both the district court and the appellate court revisited the *Bakke* holding and its precedential value.

In this present case, Katuria Smith, the lead plaintiff-appellant, along with Angela Rock and Michael Pyle, brought the reverse discrimination lawsuit against the University of Washington Law School and members of the administration and faculty on behalf of themselves and a class of White applicants who were denied admission to the Law School. Smith claimed that racial and ethnic minorities were admitted to the Law School instead of the plaintiff-appellents and considering race in the admissions process violated the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, as well as 42 U.S.C. §§ 1981 and 1983. The Law School argued two crucial points: (1) Smith's individual and class action claims were moot because the passage of Washington's Initiative 200 prohibited the law school from using race-conscious admissions policy; and (2) according to *Bakke*, the Law School was permitted to have an admissions policy that promoted educational diversity, but in this case, the Law School did not use race as a factor to achieve diversity (*Smith, et al. v. University of Washington Law School*, 2000). Rather, the Law School defined diversity in other ways, such as considering applicants who spoke a foreign language, previously lived in a foreign country, overcame adversity or social hardships, had an interesting employment history, career goals, special talents, or had unique life experiences. The lower court agreed with the Law School and decided that the plaintiff-appellees' individual and class action claims were moot because the passage of Washington's Initiative 200 prohibited the law school from using race-conscious admissions policy. In spite of Initiative 200, the lower court also determined that educational diversity is a compelling governmental interest that meets the strict scrutiny standard and race may be considered to achieve such diversity (*Smith, et al. v. University of Washington Law School*, 2000). The plaintiff-appellents appealed to the Ninth Circuit.

The Ninth Circuit affirmed the district court's opinion regarding the use of race and ethnicity to achieve educational diversity as a compelling state interest. The Ninth Circuit found it necessary to reiterate the *Bakke* holding, which permitted using race as one of many factors in admissions decisions in order to obtain a diverse student body. Although the *Bakke* decision had been unpopular and the Supreme Court later opposed race-based factors in employment cases, unless there were specific remedial purposes, such as eliminating the present effects of discrimination, the Ninth Circuit noted that *Bakke* was still the controlling precedence when it came to university admissions policies (*Smith, et al. v. University of Washington Law School*, 2000). The *Smith* court realized it did not have the legal right to overturn the highest court decision regarding higher education admissions policy that was still binding on lower courts. The court opined that according to *Bakke*, the "Fourteenth Amendment permits University admissions programs which consider race for other than remedial purposes, and educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures" (*Smith, et al. v. University of Washington Law School*, 2000, p. 1201). While the United States Court of Appeals for the Ninth Circuit acknowledged that the Law School was bound by Initiative 200, the *Smith* court would not assume that the Law School's facially nondiscriminatory policy that promoted diversity was really a cover for a racial quota system, especially in light of *Bakke*. Therefore, the Ninth Circuit held that the University of Washington Law School's admissions policy was constitutional (*Smith, et al. v. University of Washington Law School*, 2000).

Johnson, et al. v. Board of Regents of the University of Georgia, et al. (2001)

Unlike the *Smith* case that highlighted the importance of lower courts respecting the binding precedence of the *Bakke* decision, this current legal case renewed some of the court's

disdain for the Supreme Court's determination that a racially diverse student body is a compelling state interest. In *Johnson, et al.* (2001), three White females were the lead plaintiffs who sued the University of Georgia (UGA) on behalf of themselves and other similarly situated White females who were denied admission to UGA. The *Johnson* plaintiffs challenged UGA's freshman admissions policy due to the preferential treatment given to non-White applicants and males in violation of the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981. UGA admitted to awarding a fixed number of bonus points to non-White applicants and males; therefore, the district court found that UGA's admissions policy was unconstitutional. The district court held that a diverse student body was not a compelling interest sufficient to withstand the strict scrutiny standard (*Johnson, et al. v. Board of Regents of the University of Georgia, et al.*, 2001).

Because of the *Bakke* holding, UGA appealed the district court's decision with regards to the issue of considering race in the freshman admissions process. UGA argued that it did not unlawfully discriminate on the basis of race because the freshman admissions policy was narrowly tailored to serve the compelling state interest of achieving a racially diverse student body (*Johnson, et al. v. Board of Regents of the University of Georgia, et al.*, 2001).<sup>12</sup> On appeal, the United States Court of Appeals for the Eleventh Circuit disagreed with UGA's claims and upheld the district court's ruling that the University's freshman admissions policy was unconstitutional. The Eleventh Circuit, however, found that UGA's admissions policy was unconstitutional because even if the court assumed that diversity was a compelling state interest

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<sup>12</sup> During its first 160 years, UGA did not admit African Americans. As previously mentioned in this document, UGA admitted only two Black students when it was court ordered to do so in 1961, immediately after President Kennedy issued an executive order to eradicate racial discrimination (see page 48). From 1970 to 1989, UGA was mandated by OCR to desegregate the University and to adopt necessary affirmative action programs to alleviate the vestiges of past discrimination. In March 1989, OCR informed UGA that it had complied with the prescribed remedial measures and was now in compliance with Title VI, but UGA was required to maintain compliance (*Johnson, et al. v. Board of Regents of the University of Georgia, et al.*, 2001).

as articulated in *Bakke*, UGA's policy was not narrowly tailored to achieve this interest. The *Johnson* court concluded that UGA's policy failed strict scrutiny because it mechanically awarded arbitrary diversity points to each and every non-White applicant as a decisive stage in the admissions process and severely limited the other factors as relevant for diversity purposes (*Johnson, et al. v. Board of Regents of the University of Georgia, et al.*, 2001).

Before discussing the Eleventh Circuit's rationale for its decision, it is necessary to outline some of UGA's admission policy that is in dispute, especially since race was only one of many factors that were assigned bonus points during the admissions process. Many of these other factors held more weight and received more points towards admissions. As part of the admissions policy, applicants were placed into a pool for further review if they had a certain score that was based strictly on the applicant's combined SAT score and GPA. At this stage, UGA then calculated a Total Student Index (TSI) for each applicant, in which each potential student would earn additional points based on 12 factors for the chance to gain admission. The additional points available to applicants were based on the following: (1) 67 percent (5.40 points) of the maximum points available were based on the actual SAT score, GPA, and curriculum quality; (2) 18 percent (1.5 points) were based on the student's parent or sibling ties to UGA, extracurricular activities, summer work, and whether the applicant would be a first-generation college student; and (3) 15 percent (1.25 points) were based on demographic factors, such as race/ethnicity, gender, and Georgia residency. Specifically, applicants could receive 0.5 additional points if they defined themselves on the application as Asian/Pacific Islander, Black, Hispanic, American Indian, or Multiracial, 0.25 points for being male, and 1.0 additional point for an SAT score between 1200 and 1660 (*Johnson, et al. v. Board of Regents of the University of Georgia, et al.*, 2001).

In its analysis, the Eleventh Circuit first mentioned that the United States Supreme Court still needed to determine whether student body diversity was a compelling state interest and whether race could be considered to achieve this diversity. According to the Eleventh Circuit, the Supreme Court had not made this determination in *Bakke*, because the majority of the Court did not agree on this point. Therefore, the *Johnson* court chose to follow the factors set forth in the 1987 United States Supreme Court case of *United States v. Paradise*, which was an employment case where the affirmative action plan at issue was designed to remediate past discrimination. In *Johnson*, the Eleventh Circuit customized the *Paradise* factors to evaluate UGA's admissions policy, which allegedly served a compelling interest in achieving a diverse student body (*Johnson, et al.*, 2001). The *Paradise* factors used to examine UGA's policy were: (1) whether the policy used race in a rigid or mechanical way that did not take sufficient account of the different contributions to diversity that individual candidates may offer; (2) whether the policy fully and fairly took account of race-neutral factors which may have contributed to a diverse student body; (3) whether the policy gave an arbitrary or disproportionate benefit to members of the favored racial groups; and (4) whether the school had genuinely considered, and rejected as inadequate, race-neutral alternatives for creating student body diversity (*Johnson, et al. v. Board of Regents of the University of Georgia, et al.*, 2001, p. 1253).

After carefully reviewing UGA's freshman admissions policy under these factors, the Eleventh Circuit concluded that the policy lacked flexibility by mechanically and inexorably awarding arbitrary points to non-White applicants (*Johnson, et al. v. Board of Regents of the University of Georgia, et al.*, 2001). The *Johnson* court determined that out of all the factors considered during the critical TSI stage, race and first-generation college factors were the only factors that meaningfully captured characteristics of diversity. Accordingly, the set amount of

bonus points given to minority students because of race in order to achieve a diverse student body was to the detriment of mainstream White applicants who could not obtain a similar number of diversity points. Moreover, there was no evidence that UGA would ever end the practice of mechanically awarding points based on race, even though it was no longer federally mandated to correct past discriminatory practices (*Johnson, et al. v. Board of Regents of the University of Georgia, et al.*, 2001). Thus, UGA's policy was unconstitutional because it was not narrowly tailored to fulfill the strict scrutiny requirements.

The *Johnson* court's holding and rationale for finding the UGA freshman admissions policy to be unconstitutional was surprising for several reasons but not shocking given the earlier federal race-based admissions cases. First, the court did not consider UGA's long and recent history of intentionally committing racial discrimination and the fact that the student body remained primarily White to be an important detail. In fact, UGA was ordered by the OCR to implement affirmative action measures to ameliorate the vestiges of discrimination, and it took almost 20 years before the federal government found the measures to be sufficient. Even then, UGA was still responsible for maintaining some level of racial parity within its student body, which the freshman admissions policy was helping to do.

Second, UGA applicants had to make it through the first stage of the admissions process, which was clearly a race-neutral evaluation since only test scores and grades were considered, before making it to the TSI stage where race was just one of many factors given points. When applicants reached the TSI level, they received more bonus points for non-racial characteristics that likely benefited more White applicants, such as SAT scores, GPA, curriculum quality (which is usually measured by the number of AP and honors courses taken during high school), and being a child or sibling of a UGA graduate. Third, the *Johnson* court refused to deem the

other TSI factors as personal features of an individual that contribute to a diverse student body. Finally, the Eleventh Circuit's long 36-page opinion was written in a way that primarily discounted the *Bakke* holding and analysis as binding precedence. The Eleventh Circuit's opinion appeared in search of any other alternative affirmative action case that could supply a reasonable argument to invalidate UGA's policy. The *Johnson* court criticized Justice Powell's opinion in *Bakke* for not being supported by the majority of the Supreme Court. However, in *Johnson*, the Eleventh Circuit relied on factors explained in a Supreme Court affirmative action employment case that was decided by plurality opinion,<sup>13</sup> and not by an opinion agreed upon by the majority of the Court. Furthermore, at the time of the *Johnson* case, the factors relied upon by the Eleventh Circuit had only been adopted by one other federal appellate court. In other words, the *Johnson* court seemed determined to find any reason to nullify UGA's admissions policy regardless of legal precedence. One other vital point about the *Johnson* opinion was that the long diatribe about the problems with the *Bakke* holding and whether a diverse student body was a compelling state interest was further proof that the issue had ripened and was in need of immediate attention from the highest court. The *Bakke* decision was about to be revisited in time enough to add more confusion and controversy to the already explosive race-conscious affirmative action legal debate.

Gratz, et al. v. Bollinger and Grutter v. Bollinger (2003)

In 2003, about 25 years after *Bakke*, the U.S. Supreme Court again confronted the legality of the use of race-conscious admissions policies in higher education with the cases of *Gratz, et al. v. Bollinger* and *Grutter v. Bollinger*. Both of these cases originated at the University of Michigan: one from the undergraduate school and the other from the law school. These lawsuits

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<sup>13</sup> A plurality opinion means that more Supreme Court Justices joined one concurring opinion over other opinions, but a majority of the Justices did not join one particular opinion.



have become known simply as “the Michigan cases” due to the unrelenting and polarizing conversations that have resulted from the cases, especially with regards to the utility of race-conscious affirmative action policies in higher education during this century. The Bush Administration even submitted an Amicus Curiae, which means “friend of the Court” Brief to the Supreme Court in support of the petitioner-students’ arguments that race-based affirmative action in school admissions should be illegal.

The *Gratz* case was a class action suit involving a White man and a White woman, both Michigan residents, who wanted to be admitted into the University of Michigan’s undergraduate program. The White woman, Jennifer Gratz, was the lead plaintiff-petitioner. A White woman from Michigan, Barbara Grutter, was the sole petitioner in the University of Michigan Law School case. The petitioners in both lawsuits alleged that the University of Michigan’s admission policies violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981. All parties sought declaratory and injunctive relief as well as compensatory and punitive damages. In the analysis in *Gratz* and *Grutter*, the Court followed the precedence established in *Bakke* as well as subsequent affirmative action cases but reached different decisions in each case.

In *Gratz* (2003), the Supreme Court found that the University of Michigan’s undergraduate freshman admissions policy was not narrowly tailored to achieve a compelling state interest in diversity; thus, the policy violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act. The Court’s holding was based on the fact that underrepresented racial and ethnic minorities were automatically awarded 20 points out of the 150 needed for undergraduate admission without assessing each applicant’s individual qualities

(*Gratz v. Bollinger*, 2003). In opposition to the University of Michigan's admission policies, President George W. Bush asserted that:

The Michigan policies amount to a quota system that unfairly rewards or penalizes perspective students, based solely on their race....Our Constitution makes it clear that people of all races must be treated equally under the law. Yet we know that our society has not fully achieved that ideal. Racial prejudice is reality in America....Yet quota systems that use race to include or exclude people from higher education and the opportunities it offers are divisive, unfair and impossible to square with the Constitution (Remarks by President Bush, Press Release, January 15, 2003).

The Supreme Court concluded that giving 20 points to underrepresented minorities was equivalent to a quota system and illegal, yet the Court and President Bush did not consider the points that other potential undergraduate students received. For instance, an applicant could be awarded points for the following: (1) up to 16 points for being a Michigan resident and living in a county that was underrepresented in the university, usually the northern part of the state that has a large lower-class White population; (2) 12 points for receiving a perfect SAT score; (3) 4 points if an applicant's parents graduated from the university; (4) up to 8 points for the difficulty of the high school curriculum and whether the student took AP courses; and (5) up to 10 points based on the quality of a potential student's high school (*Gratz v. Bollinger*, 2003; Solorzano & Ornelas, 2004). All potential undergraduate students are capable of receiving these points if they qualify, but education researchers have shown that typically White students benefit from this point system and gain entrance to the University of Michigan's undergraduate program (See Bell, 2004; Solorzano & Ornelas, 2004). Supporters of affirmative action questioned the points automatically awarded to many White applicants to the exclusion of Blacks and other racial

minorities who were not privileged enough to have the same advantages to earn such points. This type of preferential treatment in favor of White applicants, many of whom may have an economic advantage, is not considered problematic to the Supreme Court or President George W. Bush.

Concurrently, the Supreme Court decided the other Michigan case - *Grutter v. Bollinger* (2003). The University of Michigan Law School receives more than 3,500 applications each year for a first-year class of 350 students (*Grutter v. Bollinger*, 2003). The Law School contended that it looks for individuals with “substantial promise for success in law school” and “a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others” (*Grutter v. Bollinger*, 2003, pp. 313-14). Further, the Law School was in search of “a mix of students with varying backgrounds and experiences who will respect and learn from each other” (*Grutter v. Bollinger*, 2003, p. 314). During the admissions process, the University of Michigan Law School considered applicants’ LSAT scores, undergraduate GPAs as well as soft variables, such as the quality of the undergraduate institution, the applicant’s essay, the difficulty of undergraduate course selection, and the enthusiasm of the recommenders. The Law School averred that it contemplated all types of diversity contributions without giving significant weight to one type over the other, but the Law School was committed to racial and ethnic diversity. The Law School strived to admit a critical mass of racial and ethnic minorities to add to the diverse student body (*Grutter v. Bollinger*, 2003).

The Supreme Court held that the University of Michigan Law School had a compelling state interest in attaining a diverse student body, and the admissions policy’s use of race was narrowly tailored to further that interest (*Grutter v. Bollinger*, 2003). The Law School’s policy of seeking to enroll a critical mass of minority students did not violate the Equal Protection

Clause of the Fourteenth Amendment or Title VI of the Civil Rights Act since it engaged in a highly individualized, holistic review of each applicant's file. Furthermore, the Law School considered all pertinent elements of diversity and used race only as a "plus" factor, as set forth in *Bakke*, which did not unduly harm or exclude non-minorities from all consideration. Justice O'Connor wrote the majority opinion in the *Grutter* case, in which she made some noteworthy observations and suggestions. Justice O'Connor aptly mentioned that "[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders" (*Grutter v. Bollinger*, 2003, p. 332). Additionally, Justice O'Connor stated, "Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives" (*Grutter v. Bollinger*, 2003, p. 332). For instance, as of the year 2000, 23 of 50 governors, 52 of 100 senators, 159 of 435 congressional representatives, and 26 of 43 presidents had attended law school, which shows that the United States is being governed by many law school graduates (LSAC, 2002; Moore, 2005). Most of these law school graduates and national leaders are White Americans, not people of color.

Like Justice Powell's opinion in *Bakke*, Justice O'Connor rejected the use of race-conscious affirmative action policies to rectify past societal discrimination but embraced the diversity argument. Justice O'Connor, however, went a step farther and required that all race-conscious admissions policies have a logical end point of preferably 25 years or less (*Grutter v. Bollinger*, 2003). The other Supreme Court Justices did not attempt to define diversity or the educational benefits of diversity, but the majority of the Justices agreed that race-conscious policies needed to end very soon. Only two Justices agreed that racism is still alive in this country, and that many schools in predominantly minority communities lag far behind in

achievement levels and educational resources; however, they hope optimistically that within the next generation it will be safe to end affirmative action (*Grutter v. Bollinger*, 2003). This raises an intriguing question, “When half a century was not enough to desegregate the schools and a century of so-called freedom did not provide equity for slaves, can we now expect just 25 years to end the need for affirmative action?” (Moore, 2005, p. 154).

In response to the first research question, the evolution of federal race-conscious affirmative action legal cases in higher education and anti-affirmative action policies over the past 40 years has revealed a constant increase in legal claims, the number of plaintiffs, and contempt for any use of race in admissions. For instance, in the earlier cases of the 1970s, each of the two Supreme Court cases involved one White male bringing traditional individual discrimination claims under the Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Act of 1964. Both young men in *DeFunis* and *Bakke* simply sought admittance into the institution of higher education that they were suing through mandatory injunctions.

From the 1990s and forward, the reverse discrimination lawsuits and state anti-affirmative action policies occurred more often and in a steady fashion. From 1994 to 2003, federal legal cases and anti-affirmative action referenda and policies arose every one or two years. Additionally, the typical reverse discrimination complaint and request for an injunction that was present in the 1970s cases soon were replaced with complicated lawsuits concerning multiple plaintiffs and criminalizing claims. Specifically, the 1990s and 2000s consisted of class action lawsuits, primarily lead by White women, as well as state action claims, which are more criminal-like claims, and requests for punitive damages to punish the universities for having race-based policies in place. Furthermore, the late 1990s and 2000s took dislike for race-conscious affirmative action policies to another level when entire states moved to eliminate all

types of affirmative action policies and programs, with the focus being on ending racial quotas. Not surprisingly, the evolution of the legal debates showed some consistency in most of the cases, which was the familiar plaintiff argument that higher education admissions decisions should concentrate on test scores and ignore the *Bakke* holding that permits race to be used as a “plus” factor in the admissions process.

#### **4.1.4 Analyzing the Legal Debate from a Critical Race Theory (CRT) Perspective**

This section of the chapter now analyzes the evolution of the legal debate under the critical race theory (CRT) framework. Specifically, the researcher’s examination of the legal debate is guided by CRT constructs of interest convergence theory and the property functions of whiteness. Before analyzing the development of the legal debate according to the CRT constructs, it is imperative first to acknowledge that the majority of race-sensitive affirmative action legal cases in higher education stemmed from professional degree programs, namely law schools. Specifically, out of the eight cases evaluated in this chapter, five of the cases, *DeFunis, et al. v. Odegaard, et al.*, *Regents of the University of California v. Bakke*, *Hopwood v. Texas*, *Smith, et al. v. University of Washington Law School*, and *Grutter v. Bollinger*, involved professional programs. Out of those five legal cases, all but *Bakke* were entirely based on the constitutionality of law school admissions policies. From the early race-based cases in the 1930s through the 1950s, law school admissions is the most heavily contested higher education program when it comes to race-sensitive affirmative action policies.

##### The 1970s - Legal Cases and the Interest Convergence Theory

In 1974, the *DeFunis* legal case, which was the first of two race-conscious affirmative action admissions cases to reach the United States Supreme Court in the 1970s, reflected the first

prong of Derrick Bell's interest convergence theory. As previously mentioned, Bell (1980) defines interest convergence as the temporary alignment of the self-interest of elite Whites and the interest of Blacks, which creates an illusion that Black people are receiving a great benefit. The *DeFunis* case came at a time in the early 1970s when Blacks' and Whites' interests had converged and all racial groups appeared to have equal rights and opportunities. During this time in history, there was an interest convergence because of society's militancy concerning equal rights for minority groups and the insistence of the United States' withdrawal from the Vietnam conflict. The societal cataclysm remained at an all time high in the early 1970s. Elite Whites, particularly lawmakers, had to be cautious about what laws were passed, enforced, and interpreted by the courts in this country to maintain a semblance of peace and order in the world's Super Power known as the United States of America. While the United States Supreme Court is not the lawmaker, it is the interpreter of the laws enacted, and the Justices who serve on the highest court are appointed and approved by the political party in power. Thus, the Supreme Court is the interpreting legal arm that often times gets caught in the political quagmire and has to play political games. Therefore, the *DeFunis* holding and rationale depicted an alignment of common interests between racial groups.

Recall that Mr. DeFunis initiated his case as one White male bringing a reverse discrimination claim against a lower profile law school on behalf of himself and his family under the Fourteenth Amendment. Mr. DeFunis requested mandatory injunctive relief for the University of Washington Law School to abolish its separate race-based admissions policy that favored racial and ethnic minorities and to admit him into the Law School. Although there were more non-minorities with lower scores that were selected for admission, Mr. DeFunis did not have an issue with their acceptance into the Law School. The Supreme Court considered Mr.

DeFunis' claims to be moot because it was not the time to address the constitutional merits of reverse race discrimination case on behalf of a disgruntled White male when national peace as well as race and gender equality had not been achieved. After all, it was barely a decade after the passage of the Civil Rights Act of 1964.

Although the case was moot, Supreme Court Justice Douglas found it necessary to make some powerful and liberal remarks that would be looked upon favorably by many disadvantaged minority groups. First, Justice Douglas commended the University of Washington Law School for considering other qualifications in its admissions process. Justice Douglas expressed concern that law schools rely too heavily on the LSAT as a determining factor for law school admissions when the test is racially and culturally biased and works against disenfranchised racial minorities, especially Black people. He noted that there are so many other admirable factors, such as perseverance, commitment, and resilience that can be translated into leadership skills and academic success. Additionally, the Justice also commented that institutions of higher education should have the latitude to structure their admissions process as they see fit, so long as they are not blatantly discriminatory, since university faculty are the experts at crafting a capable student body. In this case, Justice Douglas did not deem the University of Washington Law School's separate admissions programs to be unconstitutional given the United States' history of slavery and racism. Finally, Supreme Court Justice Douglas warned that the relics of slavery could be found in the continual stalled progress of Black people and the arrogance of White people like Mr. DeFunis who consider themselves superior and entitled to his life choices over Blacks.

Simply put, at the time of the *DeFunis* case, many political and social issues were in sync amongst racial and ethnic groups. Interests had converged amongst racial groups, so the existence of race-sensitive affirmative action policies and programs were acceptable.



Accordingly, the Supreme Court's decision, or lack thereof, in *DeFunis* was a prime opportunity for the Court to avoid making a binding legal decision that would potentially enrage both Black and White people, especially White women who were also benefiting from affirmative action policies and programs. Rather, the *DeFunis* Court was able to show its support for the plight of disadvantaged minority groups. More race-based affirmative action policies and programs were being created due to the United States Supreme Court's legal reasoning articulated in *DeFunis*.

When the *Bakke* case was decided, however, the second rule of interest convergence theory was activated. Bell's second rule states that "even when the interest-convergence results in an effective racial remedy, that remedy will be abrogated at the point that policymakers fear the remedial policy is threatening the superior societal status of whites" (Bell, 2004, p. 69). In 1978, the *Bakke* reverse discrimination case was the first time the United States Supreme Court fully addressed the constitutional merits of race-based affirmative action admissions policies in higher education. It was also a time in history when more racial groups, particularly Blacks, were realizing some prosperity. For instance, the rate of Black high school graduates attending college rose from about 39 percent in 1973 to approximately 48 percent in 1977, which was almost equal to White high school graduates (Jaynes & Williams, 1989). Furthermore, there were more Blacks in higher income brackets as well as in graduate and professional programs, and more specialized occupations like business, medicine, and law. In 1979, about 10.7 percent of Black men and 14.8 percent of Black women who were working were employed in professional careers, such as business, medicine, and law (Jaynes & Williams, 1989). These percentages represented a noticeable increase when compared to 1969, when only 7.8 percent of Black men and 10.8 percent of Black women were employed in professional careers (Jaynes & Williams, 1989). By the early 1980s, Black men between the ages of 25 to 34 with at least some

college education earned 80 to 85 percent as much as their White counterparts (Jaynes & Williams, 1989). With these kinds of statistics, White America was probably ready for race-based affirmative action remediation to come to a close.

In *Bakke*, Allan Bakke had been denied admission to a University of California Medical School for two consecutive years. He claimed that reserved seats for racial and ethnic minorities as part of the Medical School's special admissions program was discrimination. Mr. Bakke argued that the special admissions program violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. The *Bakke* case represented the first time that the Civil Rights Act was being used to hamper racial minorities' progress rather than help progress. Like DeFunis, Mr. Bakke was just one White male bringing the lawsuit on behalf of himself, as opposed to a group of White individuals in a class action. Mr. Bakke was seeking injunctive relief and demanding admittance into the Medical School.

The majority of the Supreme Court Justices agreed with Bakke and determined that the Medical School's special admissions program that reserved a specified number of spaces for racial minorities was an unconstitutional quota system in violation of the Fourteenth Amendment. The Supreme Court's Justices could not agree on the reasons why the policy was unconstitutional or whether it was illegal under Title VI of the Civil Rights Act, but the *Bakke* holding was setting the stage for abolishing future race-conscious admissions programs. The Court straddled the fence with this decision and rationale by shutting down the Medical School's policy as unconstitutional on one hand. On the other hand, the Court left the door open for other public institutions to consider race as a "plus" factor in the admissions process in order to achieve a diverse student body as a compelling state interest. The Supreme Court did not agree on this point, offering no legal guidance on how to make race a factor in admissions programs,

but Justice Powell clearly stated that societal discrimination was not a valid justification for such programs. The *Bakke* case left dangling the future of race-sensitive admissions policies and programs in higher education and disconnected the converging interests between Blacks and Whites that were temporarily aligned in the mid-1960s and early 1970s.

The disconnection of interests became clearer during the 1980s. The Supreme Court's decisions in the 1980s concerning race-conscious affirmative action employment policies were very critical of and opposed to race-based affirmative action, except in very limited circumstances. This attitude carried over to the higher education legal cases and anti-affirmative action policies of the 1990s in order to regain the privileges that Whites had enjoyed for so long.

#### The 1990s and 2000s - Anti-Affirmative Action Legal Cases, Policies, and the Property Functions of Whiteness

The 1990s and 2000s have been busy times for debating the constitutionality of race-conscious affirmative action. As white privilege in America's elite and prestigious universities are threatened by the increasing number of racial and ethnic minorities, the number of reverse discrimination legal cases and the amount of plaintiffs continue to grow. Furthermore, anti-affirmative action policies and legislation in several different states were introduced in the late 1990s, which also seemed to be in response to myriad angry and frustrated Whites who were losing prime employment and college admission opportunities to racial minorities.

Unlike the legal cases of the 1970s, in which individual White males were the plaintiffs, the legal cases of the 1990s, and even now, welcome groups of White plaintiffs in the form of class action lawsuits. The *Podberesky* case was one of the first reverse discrimination legal cases of the 1990s, and it also was an outlier from the later cases. *Podberesky* was a Hispanic plaintiff, and the legal issues focused on the constitutionality of a college scholarship program that was

exclusively for Blacks. Nevertheless, the *Podberesky* case showed that even Hispanics, another disadvantaged racial minority group, have little regard for African Americans receiving educational access and financial opportunities from institutions of higher education that have intentionally excluded Blacks for hundreds of years. Additionally, in the 1990s and currently, more White females are plaintiffs criticizing the use of race-conscious affirmative action policies and programs, which is ironic since White females have been the main beneficiaries of affirmative action since the 1970s. It appears as though affirmative action policies that promote gender discrimination are acceptable so long as they are to the advantage of White women, but any type of race-based policy is unthinkable. Legal scholar Cheryl Harris would explain this phenomenon as part of the property functions of whiteness.

When explaining the property functions of whiteness, Cheryl Harris (1993) noted that the critical characteristics of white privilege are displayed by the fact that White people can use the law to establish and protect an actual property interest in whiteness, as illustrated in the legal legacy of slaves as property and the seizure of land from Native Americans. According to Harris (1993), the “property functions of whiteness,” are: (1) the right of disposition, (2) the right to use and enjoyment, (3) reputation and status property, and (4) the right to exclude. Ladson-Billings and Tate (1995) expanded the property functions of whiteness to analyze how poor and minority students are denied access to certain types of learning and educational experiences in Kindergarten through 12<sup>th</sup> grade. These education researchers created a critical race theoretical approach to education that examines the intersection of race and social class, since according to them, society is based on class, which translates into property rights rather than human rights (Ladson-Billings & Tate, 1995). Ladson-Billings & Tate (1995) utilize Harris’ property functions of whiteness to support the construct of how property rights relate to educational

inequality and inequity. Specifically, they and other critical race theorists posit that the school curriculum is a form of intellectual property, and the quantity and quality of curriculum in schools is based on actual property values (Ladson-Billings & Tate, 1995; Lynn & Adams, 2002). Curriculum represents a form of intellectual property undergirded by the ownership of real property: state-of-the-art technologies, well-prepared teachers, AP curricula, weighted AP grades, gifted or other sorts of honors programs all leading to admission to more elite colleges and better jobs (Ladson-Billings & Tate, 1995; Lynn & Adams, 2002). This researcher is extending the property functions of whiteness to include how the law is used as a vehicle to deny racial minorities, particularly Blacks, access to higher education and law school, because Blacks lack the proper intellectual and economic property values.

(1) *The Right to Disposition*

The right to disposition describes property rights as alienable or transferable (Harris, 1993). In an educational setting, whiteness can be conferred as property when students conform to “white norms” through certain cultural practices such as dress, speech patterns, and unauthorized conceptions of knowledge (Ladson-Billings & Tate, 1995). This particular property function of whiteness is almost always alienable for White students who may be better able to conform but may be inalienable to Black students who do not want to or know how to conform to the so-called White norms. For instance, in the educational arena, high SAT scores and GPAs are a cultural practice for admissions in the majority of White universities. Average and less than stellar standardized test scores and GPAs may be the most common inalienable and unattainable types of white property for Blacks. For decades, standardized tests such as the SATs and LSATs have been viewed as racially and culturally biased, and Justice Douglas mentioned this fact in his opinion in the *DeFunis* case. Because so many poor Black students, as

well as other racial minorities, do not have the resources or access to private schools, tutoring, advanced placement (AP) classes, or preparation courses to prepare for standardized tests, their scores may not be as high as White students who have those advantages. Unfortunately, standardized test scores and GPAs are the primary criteria to determine a potential student's qualifications for admission into institutions of higher education and where many racial minority students fall short. High scores are a type of intellectual property that cannot be transferred or simply conferred on people; rather, they must be individually earned to get students from kindergarten through 12<sup>th</sup> grade to higher education. Therefore, in order to keep certain racial groups out of higher education, the low test scores have become a mainstay of the legal arguments against any use of race in admissions decisions. In other words, it is unconstitutional to allow unqualified (Black) applicants to be admitted over the more qualified (White) applicants.

## (2) *The Right to Use and Enjoyment*

According to Ladson-Billings and Tate (1995), White people have the right to use and enjoy the social, cultural, and economic privileges of whiteness. In school, whiteness allows for extensive use of what certain schools have to offer or the type of privileges certain students have at these schools (Kozol, 1991; Ladson-Billings & Tate, 1995). The right to use and enjoyment is reflected in legal cases like *Gratz* and *Johnson*, when the plaintiffs complained of the points assigned to racial minorities, but enjoyed the points that benefited them.

In *Gratz*, 20 points were assigned to underrepresented racial minority applicants at the University of Michigan, and in *Johnson*, 0.5 arbitrary points were assigned to racial and ethnic minorities at the University of Georgia. In both legal cases, there was no problem with the points assigned that chiefly benefited the White applicants. In fact, in *Johnson*, all applicants

could earn far more additional points, besides a half point, for factors not specifically related to race, such as being a Georgia resident, hours worked at a summer job, hours spent in extracurricular activities, and one whole point for receiving a certain number on the SATs. Nevertheless, the *Johnson* court deemed the University of Georgia's policy as unconstitutional because the half point awarded to racial and ethnic minorities was mechanical, arbitrary, and unfair to White applicants who could not earn those points. Likewise, in *Gratz*, both the Supreme Court and President George W. Bush considered the 20 points assigned to racial minorities to be equivalent to a quota system and unconstitutional. The almost 50 points assigned to the many White applicants for being a legacy, attending certain high schools in specified elite areas of Michigan, receiving a perfect SAT score, or having a set type and number of AP courses, however, are permitted under a White applicants' right to use and enjoy the social, cultural, and economic privileges of whiteness.

### *(3) Reputation and Status Property*

According to the property functions of whiteness, White people possess reputation and status property, in which to damage their reputation is to damage some aspect of their personal property (Harris, 1993; Ladson-Billings & Tate, 1995). The recent and sudden move from the individual White plaintiff to class action lawsuits with multiple White plaintiffs is an example of a group banding together to reclaim their reputation and status, which is being damaged by the drops of colored blood. This is reminiscent of the 1970s and 1980s occurrences of White flight, in which Whites fled the city to seek refuge and higher property values in the suburbs because too many Blacks and other racial minorities were moving into the once-influential urban areas. Today, elite and selective schools are living this phenomenon. Prestigious universities like the University of Texas Law School, which has a history of racial exclusion, the University of

California's system, and the University of Michigan have been infused with too many people of color, which may bring down the esteemed name and celebrated degree that comes from these schools. Thus, groups of Whites have joined forces to maintain reputation and status property, as evidenced in recent legal cases and in state anti-affirmative action referenda and policies.

Moreover, since *Hopwood*, other plaintiffs that followed in later reverse discrimination cases have demanded compensatory and punitive damages from schools that are trying to add racial and ethnic diversity to the student body. Pursuing these kinds of damages are the same damages sought when a person's reputation is damaged by libel or slander. Thus, the current legal debate reflects groups of Whites fighting for their privileged reputation and against the tainting and belittling of White people's elevated status with racial and ethnic diversity.

#### (4) *The Right to Exclude*

The final aspect of the property functions of whiteness is the right to exclude. Whiteness in this society is constructed by the complete absence of any contaminating influence of blackness, such as one drop of Black blood (Bell, 1980; Ladson-Billings & Tate, 1995). In the school environment, the absolute right to exclude was initially demonstrated in slavery by denying Blacks access to any education. Later, the right to exclude appeared in the Jim Crow laws created to maintain separate schools for Black and White children. More recently, the right to exclude has presented itself in the actions taken to pass legislation abolishing race-based affirmative action in Florida as well as the anti-affirmative action referenda in California and Washington. For example, in the 1996 vote on Proposition 209 in California, of those in favor of eliminating all race-based affirmative action policies, 63 percent were Whites, and 65 percent and 59 percent were in the higher income brackets of \$60,000 to \$74,000 and \$75,000 or more, respectively. The privileged Whites had voted to maintain power and to exclude racial



minorities from a real chance to compete equally for employment, higher education opportunities in the University of California system, the defendant-school in the *Bakke* case, and public contracts. With the racial and economic disparity that already plagues the state of California's public primary and secondary schools, in combination with the mandate of Proposition 209, many Blacks and Latinos will be ultimately excluded from most jobs and higher education institutions.

Furthermore, California's 4 Percent Plan, Texas' 10 Percent Plan, and the 20 percent program under the One Florida Initiative are simply masks for exclusion. Since these three states require that high school graduates who qualify under the plans have a certain number of college preparatory courses prior to entering the state universities, many racial and ethnic minorities may be excluded by the fact that their high schools do not offer college preparatory courses. Additionally, racial and ethnic minorities may not be able to afford to take such courses elsewhere. Once again, there are certain types of knowledge that become necessary forms of intellectual property in order for students to make the transition from high school to higher education; however, some disadvantaged racial groups did not and will not have this knowledge, and will be left behind – utterly excluded.

This is all quite similar to the old 1896 legal case of *Plessy v. Ferguson* when that 1/8<sup>th</sup> of Black blood contaminated Mr. Plessy's whiteness. That little bit of Black blood excluded Mr. Plessy from the all-White railway car because he lowered the status and reputation property with his blackness. Of course, the *Plessy* case resulted in the Supreme Court's legalization of the separate-but-equal doctrine. The recent state anti-affirmative action referenda, legislative action, and policies are clear indications of the absolute right to exclude racial minorities and another

slap in the face to racial minorities who have endured years of legal discrimination and are still fighting to play catch up.

Finally, the property function of whiteness that gives White people the absolute right to exclude is illustrated in the continual disrespect and denunciation of *Bakke* as binding precedent. Throughout the legal debates of the 1990s and 2000s, the *Bakke* holding, which announced that universities could consider race as a “plus” factor to achieve a diverse student body as a compelling government interest, has been ignored and censured. Simply put, sharing classroom space with individuals who look different and are of a different race or ethnicity was not going to be permitted, except under very special and strict circumstances. Fortunately, the Supreme Court’s decision in *Grutter* reminded the world that *Bakke* remained good law, despite the incoherent nature of the *Bakke* opinion.

In *Grutter*, the Court even offered some clarification on how race could be used in an admissions process. Justice O’Connor informed society that the University of Michigan Law School was in search of a mix of students from different backgrounds and experiences who could learn from each other. While diverse experiences may be contributed in numerous ways and one way should not necessarily be given more significant weight, it is legal for a university, specifically a law school that generates many of the nation’s leaders, to be committed to racial and ethnic diversity. Despite the Supreme Court’s opinion in favor of the University of Michigan Law School’s policy, Justice O’Connor mentioned a 25-year sunset period when race-conscious affirmative action policies and programs should no longer be needed. In other words, the Supreme Court has told us that time is ticking and the racial remedy in the form of affirmative action is soon coming to an end, especially with state bans on affirmative action lurking at voting booths during almost every major election year.

One wonders if a 25-year time limit to realize a level playing field between Whites and disadvantaged racial minorities can actually occur. As minds wonder, the historical guide that society can consider and follow is that it took over 200 years to abolish the atrocities of legalized slavery. It took another 100 years after slavery and Reconstruction to ameliorate all legalized racial segregation and discrimination; and now, here it is 43 years after the implementation of the Civil Rights Act of 1964 and the first race-conscious affirmative action policies and programs. A level playing field still does not exist. In fact, the playing field is smothered in inequality because of the different rules that apply to Blacks and Whites during the higher education admissions and legal processes. In 2003, Justice O'Connor gave 25 more years for the viability of race-based affirmative action, which then will be about 65 years after the advent of the Civil Rights Act of 1964. Will 65 years of modest racial and economic progress, which has been consistently challenged since the 1970s throughout the race-conscious affirmative action legal debate, truly fulfill parity amongst the racial groups after over 300 years of lawful and intentional discrimination as well as racial and economic inequality? Perhaps, Whites' and Blacks' interests will converge again, in which some benefits will inure to racial minorities, or maybe white privilege will finally win the legal fight and the battle against racial and economic equality and equity.

This section of the Fourth Chapter addressed the second research question, which is: how, if at all, do the ongoing legal debates in higher education reflect the support for, or maintenance of, white privilege as defined by the interest convergence and whiteness as property constructs of critical race theory? In summary, the interest-convergence period occurred in the early 1970s, which was on the heels of the passage of the Civil Rights Act and around the time of the *DeFunis* case. This was a time when the needs and wants of Blacks and Whites, namely

policymakers, were very similar and in alignment. Because of the new desire to achieve racial equality and end the United States' part in the Vietnam Conflict, all parties were in favor of equity, peace, and harmony instead of societal rebellion, which led to a no contest opinion in *DeFunis*.

However, a political and societal shift seemed to happen after *Bakke* in 1978 - more underrepresented minorities were prospering educationally and economically. Additionally, a more conservative political party and Supreme Court emerged in the 1980s and early 1990s. Suddenly during this time, the Supreme Court implemented a more stringent strict scrutiny standard with regards to analyzing the use of racial classification in legal cases. Thus, a surge of reverse discrimination cases in higher education flooded the legal system, and state anti-affirmative action referenda and policies became commonplace. As previously mentioned, the legal cases included, groups of White students, instead of individuals, as well as entire states of citizens, namely upper-middle class Republican White males, fighting for all race-based admissions policies to be abolished. Although Ward Connerly, a Black man, is the ringleader of the state referenda, he has allowed himself and his organization to become a puppet to rich and conservative Whites who want to eradicate civil rights and all things resembling Black power and privilege, such as educational opportunity. Nevertheless, these same people and the Supreme Court have no problem with admissions policies that give special consideration and points to legacies, students from certain elite schools, and students with a certain number of AP courses, all which benefit more White students than people of color. Yes, white privilege seems alive and living in this ongoing legal debate through critical race theory as well as the property functions of whiteness - the right to disposition, right to use and enjoyment, status and reputation property, and the right to exclude.

## **5.0 FIFTH CHAPTER**

### **5.1 THE CLEO PROGRAM: THE FINDINGS**

This chapter explicates the development of the CLEO program during the growth of the legal debates surrounding race-based affirmative action from the 1970s through 2006. The chapter presents findings on how the CLEO program has functioned in light of the specific legal cases and policies that were deconstructed and examined in Chapter Four. Specifically, the findings in this chapter describe CLEO's purpose, funding, summer institutes, the creation of new programs, and the demographic profiles of CLEO students (i.e., race/ethnicity, LSAT scores, and GPAs), all which may have been impacted by the analyses and outcomes in the legal cases and policies.

As previously mentioned, the findings are both qualitative and quantitative. These findings address the third research question, which asks, "How, if at all, is the race-conscious affirmative action legal debate in higher education related to the original intent, current operations, and the future viability of the CLEO program?" This research question is answered based on the findings regarding CLEO's purpose, funding, summer institutes, and the creation of new programs, which were primarily derived from the analysis of CLEO's archival records, annual reports, and other documents. The responses given by key CLEO informants were used as secondary data in order to bring clarity to the information found in the archival records and other documents. Furthermore, the findings from the demographic profiles of CLEO students,

which were a result of statistical analysis using ANOVA and Chi-Square, address the third research question.

### **5.1.1 CLEO's Operations: Then and Now**

As the political and legal questions about special admissions programs increased in the 1970s, the CLEO program was one of many higher education programs subjected to scrutiny. The number of minority law applicants and law students was slowly starting to creep upwards in the 1970s, with the number of students of color in law school reaching about 9,500 by 1976 from 1,468 in 1970. By 1977, the total number of students who successfully completed the CLEO summer institutes (fellows) was 2,337. Nevertheless, the reverse discrimination lawsuits were starting to inundate the courts. As previously mentioned, the first case reached the United States Supreme Court in 1974, which was the law school admissions case of *DeFunis, et al. v. Odegaard, et al.*, and this occurred around the same time that CLEO began to have funding problems. Coincidentally, Mr. DeFunis initiated his racial discrimination lawsuit in 1971, the school year after the University of Washington Law School hosted its first CLEO summer institutes, in which racial minorities were the primary beneficiaries of CLEO's pre-law program. In fact, the director of the CLEO summer institute at the University of Washington Law School served on the school's Admissions Committee and reviewed the applications of underrepresented minority students (*DeFunis, et al. v. Odegaard, et al.*, 1974). While DeFunis' racial discrimination lawsuit progressed through the judicial system from 1971 until the United States Supreme Court's decision in 1974, the Law School hosted the CLEO summer institutes in both 1973 and 1974. The University of Washington Law School has not sponsored another summer institute program since 1974.

Since its inception, funding has been a constant issue for CLEO because it was primarily funded by federal agencies (Burns, 1975). From 1968 to 1973, the Office of Economic Opportunity (OEO) provided CLEO with most of its funding. Due to legislative changes, however, the Department of Health, Education, and Welfare (HEW) became responsible for providing funding to CLEO through grant money after 1973 (Burns, 1975). Federal funding covered the law school students' stipends, the summer institutes, the CLEO office and staff, and the ABA's administration services. By the 1976-77 fiscal year, approximately two years after the *DeFunis* case, HEW experienced budget reductions and would not make any requests to Congress on CLEO's behalf for the necessary funds to run the organization (Burns, 1975). Consequently, CLEO's federal funding diminished significantly. When HEW became the U.S. Department of Education in the late 1970s, however, CLEO received federal money authorized in Title XI of the Higher Education Act of 1965 and administered by the U.S. Department of Education. According to CLEO's Executive Director, this federal funding came through the Assistance for Training in the Legal Profession (ATLP) program and was generally less than \$3 million annually. Therefore, CLEO began to rely on private donors, bar associations, and law schools in addition to the federal government for assistance with funding the summer institutes and providing financial assistance to CLEO fellows during the late 1970s through the early 1990s.

By 1990, the number of minority law students enrolled in law school was 17,330, or 13.6 percent of the total number of law students. During the same period, the number of minority lawyers was 56,397<sup>14</sup>, many of whom were CLEO fellows, but the number of minority lawyers still only represented 7.6 percent of the total number of lawyers in the country (American Bar

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<sup>14</sup> Minority includes African American, Hispanic/Latinos, Asian American, and Native Americans.

Association, 2004). Furthermore, the number of Black and Latino students enrolled in law school hit their peak in 1994 with approximately 3,600 and 1177 students, respectively. Similarly, the number of law school enrollment for Native American students hit its peak during the 1995-96 school year with about 436 students (American Bar Association, 2000).

While it seemed like CLEO was achieving its original purpose of helping to increase the number of minorities, with the focus being on Blacks, Latinos, and Native Americans, in law school and the legal profession, maintaining adequate funding to run the summer institutes and assist minority law students was a problem. Financial support from the federal government changed drastically in the 1990s, almost simultaneously with the lawsuits of *Podberesky v. Kirwan* (1994), *Hopwood v. Texas*, and the passage of Proposition 209 in California in 1996. CLEO's 1998 annual report indicated that by 1994 the program was entering a financial crisis due to budget cuts. Nineteen ninety-four was also one of the first years that CLEO revealed its new financial eligibility requirements. Many potential minority law students did not apply for the summer institutes, because they now would have to pay to attend the institutes due to CLEO's financial constraints. According to CLEO's 1995 annual report, CLEO had a budget that only included federal funding for the 1995-96 school year, and the CLEO staff was down to one employee – the Executive Director. After 1995, CLEO completely lost the federal funding for its summer institutes and student stipends, the heart of the CLEO program, which also meant a potential decrease in the number of minority law students (CLEO Annual Report, 1998). When CLEO lost its federal funding, the Executive Director and the Board of Directors decided that since the organization could no longer rely on government dollars, they would need a plan to fund the summer institutes with private dollars. In 1997 and 1998, CLEO's sole financial resources to support the organization and manage the summer institutes and related programs



came from member law schools, student and application fees, legal associations, individuals, private donors, corporations, and law firms (See Table 4). At that point, CLEO had to take a step back to review its purpose and whether it should continue in its pursuit to diversify the legal profession.

Table 4: CLEO's Financial Statements for 1997 and 1998

<b>Revenues</b>	<b>1998</b>	<b>1997</b>
Membership Fees	\$318,400	\$260,000
Student and Other Fees	\$150,872	\$110,500
Corporations and Law Firms	\$30,000	\$81,650
Individuals	\$6,000	\$4,400
Law Related Associations	\$58,400	\$41,000
Publications	\$950	\$1,400
Other	\$62,000	\$0
<b>Total Revenue</b>	<b>\$626,622</b>	<b>\$498,950</b>

<b>Expenditures</b>	<b>1998</b>	<b>1997</b>
<b>Program Services</b>		
Information Dissemination	\$61,257	\$43,256
Program Development	\$75,489	\$62,000
Program Support	\$10,297	\$8,800
Scholarships	\$4,300	\$4,000
Summer Institutes	\$373,043	\$222,636
<b>Support Services</b>		
General and Administrative	\$47,325	\$26,143
<b>Total Expenses</b>	<b>\$571,711</b>	<b>\$366,835</b>

Source: Council on Legal Education Opportunity, 2002-03 Annual Report.

### **5.1.1.1 CLEO's Purpose, Funding, and Programs**

In response to the loss of federal funding, CLEO and its partners amended the By-laws, reworked the operation and funding of the summer institutes, modified the governing council structure, and designed the Thurgood Marshall Legal Educational Opportunity Program (hereinafter called “Thurgood Marshall Program”), which would be “a more comprehensive approach to achieving diversification of the legal profession” (CLEO Annual Report, 1998, p. 10). The Executive Director boasted that CLEO, with the help of its many partners in legal education, was successful in convincing the 105<sup>th</sup> Congress to incorporate the Thurgood Marshall Program into the Higher Education Act Amendments of 1998 (P.L. 105-244). The Executive Director further noted that since 2001, the Thurgood Marshall Program has helped to expand CLEO to help college students become better law school applicants and has added academic and professional development programs for law students. However, CLEO's Associate Director mentioned that Congress permitted CLEO to administer the Thurgood Marshall Program but it had to be distinguished and kept separate from the CLEO program itself, which had been known for the summer institutes for minority students. In other words, the Thurgood Marshall Program and all federal funding donated to that program could not benefit the summer institutes.

The federal statute governing the Thurgood Marshall Program states that it is “designed to provide low-income, minority, or disadvantaged college students with information, preparation, and financial assistance to gain access to and complete law study” (emphasis added) (20 U.S.C. § 1136). As such, CLEO's By-laws were amended to focus on diversifying the legal community by helping members of educationally and economically disadvantaged groups or minorities; the statute does not specify any particular minority groups, in hopes of receiving

federal funds (CLEO By-laws, as amended, 1998; 2004). According to the Executive Director, CLEO's mission has not changed since 1968; however, CLEO has expanded its programs to serve today's students better. CLEO's Chairman of the Board stated that, "This country is more racially and ethnically diverse. It is not just Blacks and Whites, but Asians and Latinos are more omnipresent and want their piece of the pie [an opportunity to enter the legal profession]." CLEO's Chairman also pointed out that in the beginning CLEO's purpose as a program focused largely on race, mainly helping African Americans, but now CLEO is more diverse than it has ever been.

Since the implementation of the Thurgood Marshall Program, CLEO now distinguishes between those students who are "fellows" and those who are "associates." Students who attend and complete the pre-law summer institute programs are categorized as "fellows," and students who did not attend the summer institutes but are enrolled in law school and are educationally or economically disadvantaged students are categorized as "associates." According to the LSAC representative, the Thurgood Marshall Program was created so that CLEO could get federal funding. The federal funding, however, is not for the traditional summer institutes but for scholarships for "qualified" students who were already admitted to a law school. CLEO is now known for its scholarships, not its minority summer institutes, which attract more diverse applicants to the CLEO programs.

Beginning in 2001, CLEO began receiving federal funding through the Thurgood Marshall Program to aid educationally and economically disadvantaged students. The funding provides financial assistance awards to law students, which include both CLEO fellows and associates. Most of the Thurgood Marshall Program funding supports pre-law school, law school, and post-law school seminars, such as:

- (1) Attitude Is Essential (AIE) – a summer program for students already admitted to law school (i.e., Associates). CLEO sponsors a two-day weekend seminar prior to the first year of law school, which includes workshops such as legal analysis and writing, the Socratic method of law teaching, time management, and legal education financing;
- (2) Mid-Winter Academic Enhancement Seminar – a refresher course for fellows and associates that reinforces analytical reasoning skills and writing for first-year law students;
- (3) Bar Preparation Seminar – for third-year fellows and associates who intend to take the July or February bar examination after graduation; and
- (4) The College Scholars Program, which is funded by the U.S. Department of Education, is specifically for undergraduate students:
  - (a) Sophomore Summer Institute – a four-week residential summer program typically for Sophomore and Junior college students who want to be lawyers and may need assistance bringing up their undergraduate GPAs and preparing for the LSAT exam. For the past four years, the summer program has been held at the Northern Illinois University in DeKalb, Illinois and simulates a law school environment;
  - (b) Road to Law School Seminars – the seminars are for Freshman and Sophomore college students who may want to attend law school and become lawyers. These students are exposed to lawyers, and they attend weekend seminars that discuss analytical reasoning, logic, critical reading and writing, and an appropriate college curriculum in preparation for law school; and
  - (c) Junior Jumpstart the LSAT – this program is typically for Junior college students who want to practice LSAT examination and prepare for the law school admissions process (CLEO Annual Reports, 2001-02; 2003-04).

What is interesting and perhaps telling is that none of the federal funding covers the six-week summer institute program or anything similar to the summer institutes, which simulate the first-year experience in law school. CLEO's summer institutes were originally created to help underrepresented racial minorities and prepare these students for the challenging substantive courses prior to law school. The summer institutes offered students a better chance of getting into law school despite low test scores as well as an opportunity of succeeding in law school and in the legal profession. As the LSAC representative commented, CLEO was known for its

summer institutes and preparing at-risk minority students for law school. Nevertheless, according to the federal government, there was no real way to evaluate the success of the summer institutes since there was not a control group comprised of non-CLEO attendees to compare to the CLEO graduates who ultimately became law school graduates and practicing attorneys. The federal government did not want to give CLEO federal dollars for the summer institutes when there was no way to tell whether the success of CLEO fellows in law school and the legal profession were directly related to the summer institute program.

At the end of 2003, after the United States Supreme Court rendered its decision in the two University of Michigan race-based admissions legal cases, CLEO did not receive federal funding for the Thurgood Marshall Program for 2004 (CLEO Annual Reports, 2004-05). Each fall, Congress approves its federal budget appropriations to cover October 1<sup>st</sup> through September 30<sup>th</sup> of the following year. Fortunately, CLEO had money remaining in its budget since the federal appropriations are awarded as five-year grants. The Thurgood Marshall Program also was not included in Congress's education appropriations in 2005 until Senators Barack Obama and Richard Durbin of Illinois wrote compelling letters to members of Congress (CLEO Government Affairs Committee Report, 2005). On October 27, 2005, an amendment sponsored by Senator Obama and supported by Senator Durbin restored a \$3.5 million appropriation for the Thurgood Marshall Program. As of this writing, CLEO has not received any financial appropriations for 2007, so it may be a critical point to note that the United States Supreme Court recently heard oral arguments on two race-based affirmative action education cases on December 4, 2006. The Supreme Court will not likely release its legal opinions in these cases until the summer of 2007. CLEO executives are optimistic that the organization will eventually receive

appropriations for 2007, especially since the Democratic Party now controls Congress. What shall happen to CLEO's funding levels and operations in the meantime?

Table 5 reflects CLEO's funding sources, levels, and how the money has been applied to the various programs since 2001 – when CLEO began to receive federal funding for the Thurgood Marshall Program. Table 5 shows that most of the money flowing through CLEO is federal funding, which must be used to benefit the Thurgood Marshall Program's specifically defined purposes, but not CLEO's original purpose – the operation of the summer institutes. Between 2001 and 2005, federal funding has remained around \$3 million to \$4 million. Private funding lingers at \$400,000 to \$600,000, of which 50 percent of the private funding is used for the summer institutes. The summer institutes now function on a lower operating budget than they had at CLEO's inception in 1968, which was more than \$500,000.

Table 5: CLEO's Financial Statements for 2001 through 2005

<b>Year</b>	<b>2001-2002</b>	<b>2002-2003</b>	<b>2003-2004</b>	<b>2004-2005</b>
<b>Total Revenue</b>	<b>\$4,628,380</b>	<b>\$4,012,787</b>	<b>\$3,699,498</b>	<b>\$3,552,000</b>
<b>Source of Revenue:</b>				
<b>Federal Government Funding</b>	<b>\$4,003,549 (86.5%)</b>	<b>\$3,625,152 (90.34%)</b>	<b>\$3,162,331 (85.48%)</b>	<b>\$2,952,067 (83.11%)</b>
<b>Private Funding:</b>				
CLEO Member Schools	\$ 402,669 ( 8.7%)	\$ 253,608 ( 6.32%)	\$ 391,777 (10.59%)	\$ 427,306 (12.03%)
Student Fees	\$ 129,595 ( 2.8%)	\$ 86,676 ( 2.16%)	\$ 86,568 ( 2.34%)	\$ 107,981 ( 3.04%)
Contributions	\$ 83,310 ( 1.8%)	\$ 36,918 ( 0.92%)	\$ 52,903 ( 1.43%)	\$ 49,728 ( 1.40%)
Application Fees	\$ 9,257 ( 0.2%)	\$ 10,433 ( 0.26%)	\$ 5,919 ( 0.16%)	\$ 14,918 ( 0.42%)
<b>Total Private Funding</b>	<b>\$ 624,831 (13.5%)</b>	<b>\$ 387,536 (9.66%)</b>	<b>\$ 537,167 (14.52%)</b>	<b>\$ 599,933 (16.89%)</b>
<b>Federally Funded Expenses:</b>				
Financial Assistance Awards & Stipends	\$ 2,241,987 (56%)	\$ 1,667,570 (46%)	\$ 1,391,426 (44%)	\$1,416,992 (48%)
<b>Program Development:</b>				
Early Outreach Initiatives	\$ 320,284 ( 8%)	\$ 362,515 (10%)	\$ 284,610 ( 9%)	\$ 354,248 (12%)
Law School Preparation & Enhancement Activities	\$ 600,532 (15%)	\$ 652,527 (8%)	\$ 442,726 ( 14%)	\$ 442,810 (15%)
Bar Preparation Activities	\$ 40,035 (1%)	\$ 72,503 (2%)	\$ 31,623 (1%)	\$ 29,521 (1%)
Program Support Information	\$ 400,355	\$ 435,018 (12%)	\$ 284,610 ( 9%)	\$ 236,165 (8%)
Dissemination	\$ 320,284 (8%)	\$ 362,515 (10%)	\$ 474,350 (15%)	\$ 236,165 (8%)
Indirect Costs	\$ 80,071 (2%)	\$ 72,503 (2%)	\$ 252,986 (8%)	\$ 236,165 (8%)
<b>Privately Funded Expenses:</b>				
CLEO Summer Institutes	\$ 362,402 (58%)	\$ 228,705 (59%)	\$ 273,955 (51%)	\$ 251,972 (42%)
Program Support	\$ 106,221 (17%)	\$ 58,145 (15%)	\$ 69,832 (13%)	\$ 101,989 (17%)
MSSI Support Services	\$ 87,476 (14%)	\$ 69,774 (18%)	\$ 128,920 (24%)	\$ 173,981 (29%)
Alumni Development & Outreach	\$ 68,731 (11%)	\$ 31,011 (8%)	\$ 64,460 (12%)	\$ 71,992 (12%)



No federal funding for the summer institutes. The summer institutes were once CLEO's recruitment, preparation, and evaluation vehicle for law schools, which served so many now successful lawyers and offered opportunities to those minority students who may have been otherwise considered "under-qualified" for law school because of lack of access to the best schools and low standardized test scores. Today, the summer institutes continue to struggle financially with only private funding. According to the representative from LSAC, CLEO has faced many financial hardships throughout its years of existence, perhaps more than most organizations. The private funding comes from revenue raised through private donors and law firms as well as from the CLEO Consortium on Diversity of Legal Education. The Associate Director recalled that the consortium is comprised of over 130 law schools that are categorized as Member, Sustaining, or Supporting Institutions, and contributes \$5,000, \$3,000, or \$1,500 per year, respectively. The fees that the students pay for the summer institutes are based on each student's income. Low-income students, which are determined according to the federal guidelines, pay approximately \$200 for the summer institute, while all other students pay \$2,000. Summer institute participants also do not receive any stipends while they attend the summer institutes and do not automatically receive funding during their law school tenure; CLEO fellows have to apply for scholarships through the Thurgood Marshall Program along with associates.

Following the loss of federal funding in 1995 and the reorganization of CLEO, the number of summer institutes dramatically decreased; thus, the number of summer institute participants also decreased greatly. In 1969, CLEO hosted 10 summer institutes for about 448 students (see Figure 1). Every year after 1969 until 1996, there were approximately seven summer institutes located in different regions around the country. In 1996, CLEO financed three summer institutes, and since 2003, CLEO has offered only two summer institutes each summer.

Although CLEO receives about 750 applications each year from students who are interested in attending the summer institutes, the program accepts approximately 80 to 90 students, about 40 per summer institute, since there are only two summer institutes offered. Comparatively, the federally funded AIE summer program has hosted two weekend seminars since 2002, which hosted 211 students in 2004 and 187 students in 2005. On average, AIE admits about 200 to 250 law students each year.

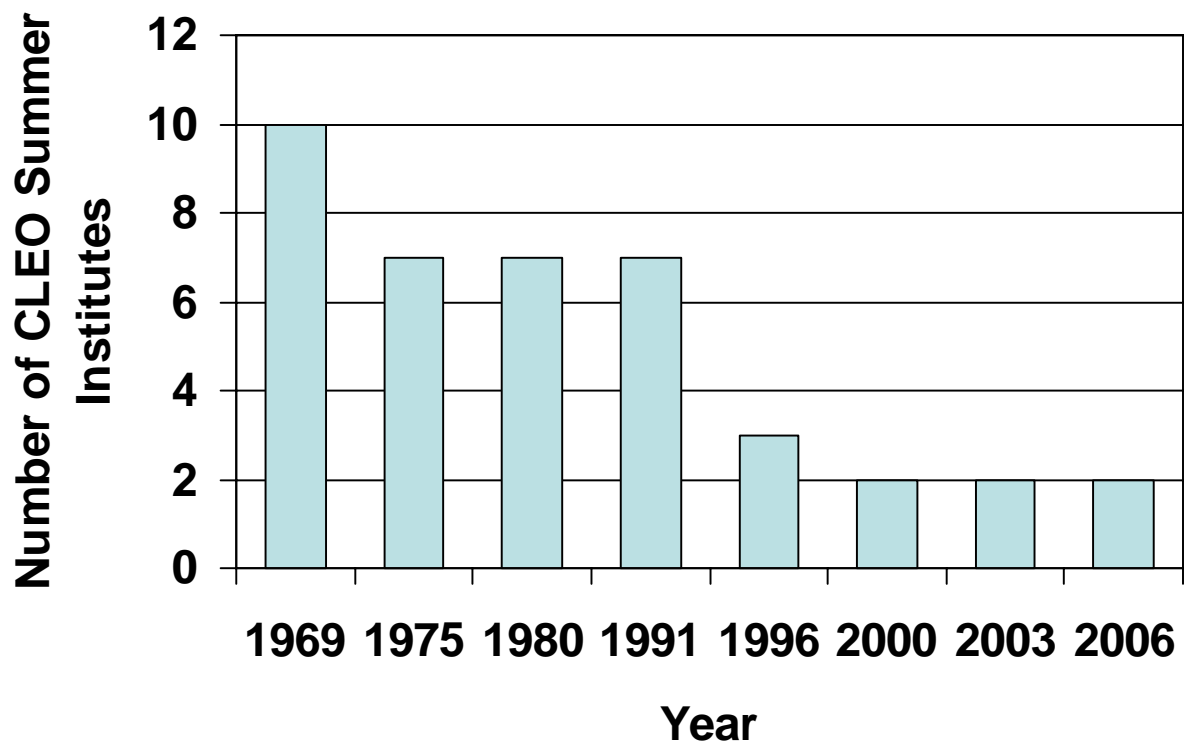


Figure 1: Number of Summer Institutes – by Time Period

### **5.1.2 CLEO's Students: Past and Present**

Similar to other higher education preparatory programs, CLEO's purpose and programs revolve around the students. The CLEO program was established after the creation of the Civil Rights Act of 1964 and the tragic deaths of several civil rights leaders. The development of the program was a direct result of the community and political outcry regarding civil rights, particularly as they pertained to equal opportunity and access to higher education institutions for racial minorities. As earlier noted, CLEO's original By-laws explained that its purpose was to expand and enhance the opportunity for disadvantaged groups, namely Blacks, Native American, and Hispanic/Latinos, who historically have been denied access to law school because of lower LSAT scores and undergraduate GPAs compared to White students, to attend law school and enter the legal profession. After almost 40 years of CLEO being in existence and enduring some programmatic and funding changes along the way, the question arises as to whether students from underrepresented minority groups are still the primary beneficiaries of CLEO programs. Simply put, what type of students does the CLEO program currently serve as compared to the earlier years?

In this section of the chapter, the researcher reveals the results of comparing CLEO students' demographic profiles over several periods. Data were collected on specific profile characteristics, including students' undergraduate GPAs, LSAT percentile scores, and racial/ethnic background, for the selected periods of 1968 and 1969, 1975, 1980, 1991, 1998-2000, 2001-2003, and 2004-2006, which were around the time of the key legal cases and policies that were discussed in Chapter Four. The students' undergraduate GPAs and LSAT percentile scores were analyzed using ANOVA, while chi-square analysis was used to examine the race/ethnicity of students. A significance level of .05 was used for statistical analyses.

### 5.1.2.1 Students' Undergraduate GPAs and LSAT Percentile Scores

CLEO's annual reports clearly indicate its guidelines - students with LSAT scores and undergraduate GPAs below 140<sup>15</sup> and 2.5 respectively should not apply to CLEO programs, unless they have recommendations from a member school. The current guidelines for today's CLEO students would have likely eliminated many of the CLEO students of yesteryear. In the beginning years, many summer institute (SI) fellows had undergraduate GPA scores in the low C average and high D average ranges, but many of these fellows successfully completed the summer institutes, law school, and the bar examination. In fact, CLEO's annual reports boast a success rate of over 95 percent of its SI fellows graduating from law school, passing a bar examination, and practicing law in some capacity. A CLEO informant noted that law school has become increasingly competitive over the past 30 years, so CLEO had to set specific standards in order to keep CLEO students competitive for law school admissions.

During the first two years of CLEO in 1968 and 1969, the mean GPA score of SI fellows was a 2.61 ( $SD = .43$ ), with a low GPA score of 1.33 and high of 3.80 (see Table 6). In more recent years, the mean GPA score for the SI fellows showed a meaningful improvement. In the combined 2004, 2005, and 2006 summer institutes, the fellows had a mean GPA score of 3.12 ( $SD = .46$ ), with a low GPA score of 1.89 and a high of 4.00. When considering all seven time periods, the overall mean GPA for CLEO's summer institute fellows was 2.96 ( $SD = .46$ ). The results of an ANOVA analysis showed that there was a significant difference in average GPA scores of summer institute fellows across time periods ( $F(6,1262) = 41.05, p < .001$ ). Furthermore, Tukey's post-hoc analysis revealed that the average GPA scores for the summer

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<sup>15</sup> Since 1996, the national LSAT score of 140 has been approximately equivalent to a LSAT percentile of 13 to 15.5 percent. This percentile is slightly higher than the 400 (13<sup>th</sup> percentile) minimum that most law schools required of law students in the 1960s, which barred most minority students.

institute fellows in the 1968-69 time period were significantly lower than all later time periods, and average scores in 1991 were significantly lower than averages in 1980, 2001-2003, and 2004-2006 (see Tables 6 and 7).

**Table 6: Students' GPAs in Summer Institutes – by Time Period**

<b>Program</b>						
<b>Year</b>	<b>N</b>	<b>Mean</b>	<b>Std. Deviation</b>	<b>Std. Error</b>	<b>Minimum</b>	<b>Maximum</b>
1968-1969	251	2.6133	.42711	.02696	1.33	3.80
1975	157	3.0314	.34679	.02768	2.08	4.00
1980	127	3.0474	.38194	.03389	2.19	3.96
1991	117	2.8913	.41313	.03819	1.83	3.85
1998-2000	93	2.9937	.41639	.04318	2.01	3.84
2001-2003	288	3.0775	.42088	.02480	1.79	4.00
2004-2006	236	3.1244	.46457	.03024	1.89	4.00
<b>Total</b>	<b>1269</b>	<b>2.9624</b>	<b>.45543</b>	<b>.01278</b>	<b>1.33</b>	<b>4.00</b>

**Table 7: Students' GPAs in Summer Institutes - Post-Hoc Results**

time period	N	Subset for alpha = .05		
		1	2	3
1968-1969	251	2.6133		
1991	117		2.8913	
1998-2000	93		2.9937	2.9937
1975	157		3.0314	3.0314
1980	127			3.0474
2001-2003	288			3.0775
2004-2006	236			3.1244
Sig.		1.000	.050	.086

In 2001, CLEO started Attitude is Essential (AIE) with the federal funding received through the Thurgood Marshall Program. Unlike the summer institutes that were created for law school hopefuls, AIE was created specifically for students who had already been accepted into and were attending law school. After 2002, the AIE program was getting more publicity and becoming more popular, so the total numbers of AIE associates increased dramatically as did the GPA scores of AIE associates when compared to SI fellows. In 2003, the number of AIE associates was about 220, while the number of SI fellows was 72. The results of an ANOVA analysis indicated that there was a significant difference in GPA scores between AIE associates and SI fellows during the years of 2003, 2004, and 2005 (see Table 8). The greatest difference in GPA scores occurred in 2004, with the mean GPA score of 3.32 ( $SD = .37$ ) for AIE associates and 3.04 ( $SD = .44$ ) for SI fellows. Additionally, there was no significant difference in GPA scores in 2002 or 2006. AIE associates and SI fellows had very similar GPA scores in 2002 (AIE = 3.02, SI = 3.05) and 2006 (AIE = 3.24, SI = 3.23).



**Table 8: Students' GPAs – Comparison by Program (AIE and SI)**

<b>ProgYear</b>	<b>Program</b>	<b>N</b>	<b>Mean</b>	<b>Std. Deviation</b>	<b>Std. Error</b>	<b>Minimum</b>	<b>Maximum</b>	<b>F</b>	<b>P</b>
2002	AIE	36	3.0236	.47182	.07864	2.11	3.93	<b>.085</b>	<b>.771</b>
	SI	110	3.0478	.41994	.04004	2.18	3.92		
	<b>Total</b>	<b>146</b>	<b>3.0418</b>	<b>.43175</b>	<b>.03573</b>	<b>2.11</b>	<b>3.93</b>		
2003	AIE	220	3.2764	.38329	.02584	2.24	4.00	<b>9.042</b>	<b>.003</b>
	SI	72	3.1163	.41880	.04936	2.11	3.92		
	<b>Total</b>	<b>292</b>	<b>3.2369</b>	<b>.39767</b>	<b>.02327</b>	<b>2.11</b>	<b>4.00</b>		
2004	AIE	210	3.3182	.36729	.02535	2.36	4.00	<b>27.231</b>	<b>.000</b>
	SI	72	3.0422	.44072	.05194	1.98	3.96		
	<b>Total</b>	<b>282</b>	<b>3.2477</b>	<b>.40490</b>	<b>.02411</b>	<b>1.98</b>	<b>4.00</b>		
2005	AIE	180	3.3166	.36890	.02750	2.42	4.00	<b>18.392</b>	<b>.000</b>
	SI	70	3.0714	.48886	.05843	1.89	4.00		
	<b>Total</b>	<b>250</b>	<b>3.2479</b>	<b>.41978</b>	<b>.02655</b>	<b>1.89</b>	<b>4.00</b>		
2006	AIE	256	3.2403	.42666	.02667	2.00	4.00	<b>.068</b>	<b>.794</b>
	SI	94	3.2267	.44927	.04634	1.98	4.00		
	<b>Total</b>	<b>350</b>	<b>3.2367</b>	<b>.43224</b>	<b>.02310</b>	<b>1.98</b>	<b>4.00</b>		

The students' LSAT percentile scores also have shown a considerable increase throughout the years. Since CLEO's inception, it has been typical for SI fellows to have LSAT percentile scores well below the 10<sup>th</sup> percentile, which means about 90 percent of LSAT test takers had higher scores than some of the SI fellows. This analysis found that there have been SI fellows with minimum LSAT percentile scores in the first, second, and third percentiles in all time periods, but also fellows with maximum scores in the 90<sup>th</sup> percentile and higher (see Table 9).

ANOVA results showed that there have been significant increases in mean LSAT percentile scores in every period ( $F(6,1272) = 40.39, p < .001$ ). In addition, Tukey's post-hoc analysis revealed that average scores in the 2004-2006 were significantly higher than in any other time period (see Table 10). In other words, the mean LSAT percentile of SI fellows in the 2004-2006 time period (47.29) was significantly higher than the mean percentiles of fellows who attended the 1968-1969, 1975, 1980, 1991, 1998-2000, and 2001-2003 summer institutes, whose mean LSAT percentile scores were 23.42 ( $SD = 19.81$ ), 34.41 ( $SD = 17.05$ ), 29.25 ( $SD = 17.30$ ), 29.72 ( $SD = 16.04$ ), 33.80 ( $SD = 18.04$ ), and 40.54 ( $SD = 20.69$ ), respectively. The average LSAT percentile for SI fellows in 2004-2006 time period was equal to the 47th percentile ( $SD = 19.61$ ), which indicates that the average LSAT scores for SI fellows were almost equal to the average LSAT test taker who took the test during the same time. The post-hoc analysis also revealed that the mean LSAT percentile in 2001-2003 was significantly higher than the means of all other time periods except 1975 and 2004-2006 and that the mean LSAT percentile in 1968-1969 was significantly lower than the mean in 1975 and in 1998-2000, 2001-2003, and 2004-2006.

When comparing the mean LSAT percentile scores of SI fellows and AIE associates, an ANOVA analysis showed that the associates' scores were significantly higher than the fellows' scores in all years except 2002 (see Table 11). In 2004, the mean LSAT percentile score for AIE associates was 57.52 ( $SD = 21.77$ ), while SI fellows had a mean score of 50.01 ( $SD = 17.18$ ). In 2006, there was a greater difference in mean LSAT percentile scores between fellows and associates. The mean LSAT percentile score of the 94 SI fellows in 2006 was 43.60 ( $SD = 19.85$ ), with a minimum score in the 10<sup>th</sup> percentile and the highest score in the 93<sup>rd</sup> percentile. The 255 AIE associates who were in the program in 2006, however, scored remarkably higher with a mean LSAT percentile score of 51.58 ( $SD = 22$ ). In the same year, the lowest score for associates was in the 11<sup>th</sup> percentile and the highest score was in the 100<sup>th</sup> percentile.

**Table 9: Students' LSAT Percentile Scores in Summer institutes - by Time Period**

<b>Prog Year</b>	<b>N</b>	<b>Mean</b>	<b>Std. Deviation</b>	<b>Std. Error</b>	<b>Minimum</b>	<b>Maximum</b>
1968-1969	263	23.4068	19.81108	1.22160	1.00	94.00
1975	156	34.4103	17.04676	1.36483	3.00	84.00
1980	126	29.2460	17.30327	1.54150	3.00	71.00
1991	117	29.7179	16.04081	1.48297	2.00	75.00
1998-2000	93	33.7957	18.04858	1.87155	2.00	88.00
2001-2003	289	40.5398	20.68663	1.21686	2.00	99.00
2004-2006	235	47.2894	19.60664	1.27900	2.00	95.00
<b>Total</b>	<b>1279</b>	<b>34.9163</b>	<b>20.66269</b>	<b>.57777</b>	<b>1.00</b>	<b>99.00</b>

**Table 10: Students' LSAT Percentile Scores – Post-Hoc Results**

<b>Time period</b>	<b>N</b>				
		1	2	3	4
1968-1969	263	23.4068			
1980	126	29.2460	29.2460		
1991	117	29.7179	29.7179		
1998-2000	93		33.7957		
1975	156		34.4103	34.4103	
2001-2003	289			40.5398	
2004-2006	235				47.2894
<b>Sig.</b>		<b>.054</b>	<b>.201</b>	<b>.068</b>	<b>1.000</b>

Means for groups in homogeneous subsets are displayed.

**Table 11: Students' LSAT Percentile Scores – Comparison by Program (AIE and SI)**

<b>ProgYear</b>	<b>Program</b>	<b>N</b>	<b>Mean</b>	<b>Std. Deviation</b>	<b>Std. Error</b>	<b>Minimum</b>	<b>Maximum</b>	<b>F</b>	<b>P</b>
2002	AIE	19	32.7368	11.57508	2.65551	11.00	58.00	<b>2.861</b>	<b>.093</b>
	SI	111	40.3964	19.10986	1.81383	2.00	91.00		
	<b>Total</b>	<b>130</b>	<b>39.2769</b>	<b>18.37044</b>	<b>1.61119</b>	<b>2.00</b>	<b>91.00</b>		
2003	AIE	217	56.0230	20.19590	1.37099	15.00	99.00	<b>4.145</b>	<b>.043</b>
	SI	72	50.3472	21.39051	2.52090	9.00	99.00		
	<b>Total</b>	<b>289</b>	<b>54.6090</b>	<b>20.60953</b>	<b>1.21233</b>	<b>9.00</b>	<b>99.00</b>		
2004	AIE	209	57.5215	21.76736	1.50568	7.00	98.00	<b>7.047</b>	<b>.008</b>
	SI	72	50.0139	17.17884	2.02455	20.00	90.00		
	<b>Total</b>	<b>281</b>	<b>55.5979</b>	<b>20.91868</b>	<b>1.24790</b>	<b>7.00</b>	<b>98.00</b>		
2005	AIE	180	57.0944	22.61351	1.68551	8.00	99.00	<b>5.870</b>	<b>.016</b>
	SI	69	49.4783	21.07731	2.53741	2.00	95.00		
	<b>Total</b>	<b>249</b>	<b>54.9839</b>	<b>22.41812</b>	<b>1.42069</b>	<b>2.00</b>	<b>99.00</b>		
2006	AIE	255	51.5765	21.99609	1.37745	11.00	100.00	<b>9.515</b>	<b>.002</b>
	SI	94	43.5957	19.85015	2.04739	10.00	93.00		
	<b>Total</b>	<b>349</b>	<b>49.4269</b>	<b>21.70276</b>	<b>1.16172</b>	<b>10.00</b>	<b>100.00</b>		

The LSAC representative remarked that during its first twenty years, CLEO selected the riskiest students who were the hardest to get admitted into law school because of their very low LSAT and GPA scores. Since the Reagan Administration, however, CLEO has had to change the type of students they admit because the law schools do not want to admit at-risk students. The LSAC representative indicated that the affirmative action legal debates have had a direct effect on CLEO's funding and how it functions, including the students participating in the programs. He noted that CLEO was once known for being a special admissions program, and in today's political and legal climate, no law schools want to be accused of having a special admissions program or be associated with one. Accordingly, CLEO now admits the students that law schools will take – those who have higher GPAs and LSAT scores.

#### **5.1.2.2 Students' Race/Ethnicity**

Over the past 38 years, CLEO also has seen a change in the race/ethnicity of students that attend the programs. Because the CLEO program originated with the summer institutes (SI) that primarily served disadvantaged racial minorities, Blacks and Hispanic/Latinos have been the dominant racial and ethnic groups involved in CLEO programs from the beginning. As seen in Table 12, Blacks and Hispanic/Latinos remain the first and second largest racial and ethnic groups, respectively, with Asian Americans usually being the third largest. However, chi-square analysis indicated a significant difference in the racial composition for SI across time periods ( $\chi^2(36, N = 1304) = 154.01, p < .001$ ). In 1968 and 1969, SI was comprised of Black, Hispanic/Latino, and Asian American students, which represented 75.1 percent, 23.5 percent, and 1.4 percent of the SI population, respectively. By 2004 through 2006, there was a noteworthy shift in the racial makeup of SI; 58.2 percent of SI fellows were Black, 20.7 percent were Hispanic/Latino, 10.1 percent were Asian American, and 6.3 percent were characterized as

“Other<sup>16</sup>.” There were no White students in CLEO’s SI in 1968 or 1969. In 2001 through 2003, however, the number of White SI fellows greatly increased to 15 (5.2%), and in 2004 through 2006, there were 11 (4.6%) White SI fellows (see Table 12).

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<sup>16</sup> The category “Other” represents those students who are biracial or multiracial, or students who listed “Other” as their race on the application, so CLEO listed them as a separate category called “Other.”



**Table 12: Race/Ethnicity of Students in Summer Institutes (SI)**

Time Period	Race/Ethnicity							Total
	Asian	Black	Hispanic/Latino	Native American	Native Hawaiian	White	Other	
1968-1969	4 (1.4%)	208 (75.1%)	65 (23.5%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	277 (100%)
1975	8 (5.2%)	100 (64.5%)	41 (26.5%)	0 (0%)	0 (0%)	6 (3.9%)	0 (0%)	155 (100%)
1980	7 (5.3%)	87 (65.9%)	33 (25%)	1 (0.8%)	1 (0.8%)	3 (2.3%)	3 (2.3%)	132 (100%)
1991	8 (6.8%)	63 (53.8%)	36 (30.8%)	4 (3.4%)	1 (0.9%)	3 (2.6%)	2 (1.7%)	117 (100%)
1998-2000	4 (4.2%)	59 (62.1%)	22 (23.2%)	1 (1.1%)	0 (0%)	3 (3.2%)	6 (6.3%)	95 (100%)
2001-2003	48 (16.5%)	145 (49.8%)	60 (20.6%)	2 (0.7%)	0 (0%)	15 (5.2%)	21 (7.2%)	291 (100%)
2004-2006	24 (10.1%)	138 (58.2%)	49 (20.7%)	0 (0%)	0 (0%)	11 (4.6%)	15 (6.3%)	237 (100%)
<b>Total</b>	<b>103 (7.9%)</b>	<b>800 (61.3%)</b>	<b>306 (23.5%)</b>	<b>8 (0.6%)</b>	<b>2 (0.2%)</b>	<b>41 (3.1%)</b>	<b>44 (3.4%)</b>	<b>1304 (100%)</b>

*Note:* The actual total number in the sample was 1,357, but 53 SI fellows did not indicate any race on their applications so their race was unknown.

Post-hoc comparisons showed that the percentage of Black SI fellows in 1968-1969 SI (75.1%) was significantly greater than the percentage in any other time period. Additionally, the percentages of Black SI fellows in 1975 (64.5%), 1980 (65.9%), and 1998-2000 (62.1%) were significantly greater than the percentage in 2001-2003 (49.8%). In general, the percentage of Asian-American SI fellows has increased over time, as the percentages in 1991 (6.8%), 2001-2003 (16.5%), and 2004-2006 (10.1%) were significantly higher than the percentage in 1968-1969. Furthermore, the percentage of Latino SI fellows in 1991 (30.8%) was significantly higher than the percentage in 2001-2003 (20.6%) and 2004-2006 (20.7%) (see Figure 2).

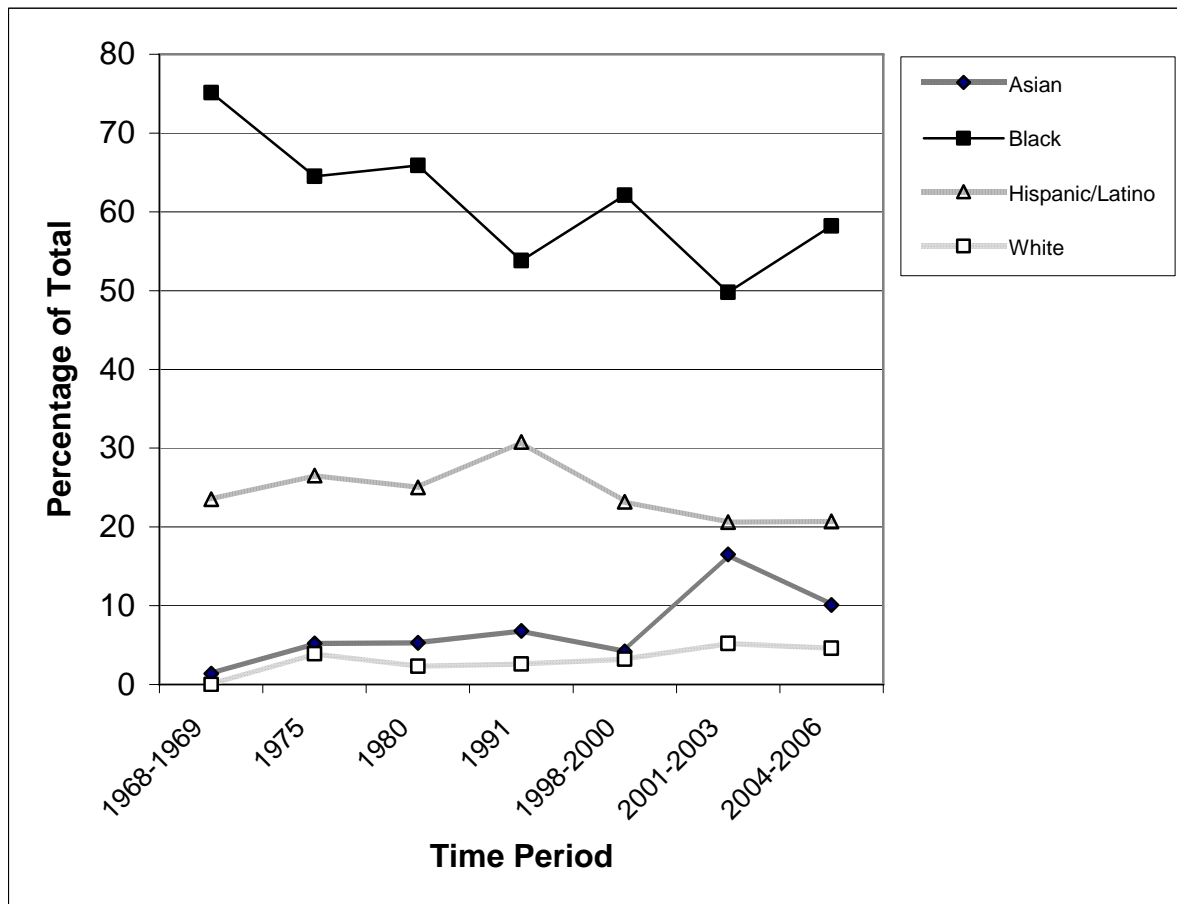


Figure 2: Students’ Race/Ethnicity – Comparison by Time Period (SI)

The Attitude is Essential (AIE) program also has experienced some movement in racial composition since 2002. While the largest percentages of AIE associates have been Black and

Hispanic/Latino, and the smallest percentage have typically been Native American, the order of percentages amongst the racial and ethnic groups has fluctuated throughout the years (see Table 13). In fact, chi-square analysis showed a significant change in racial composition across the years ( $\chi^2(20, N = 1075) = 74.97, p < .001$ ). Results of the post-hoc comparisons showed the percentage of Black AIE associates in 2002 (49.7%) was significantly less than the percentage in 2003 (62.6%), 2004 (61.8%), and 2005 (63.6%) (see Figure 3). Additionally, the percentage of Blacks in 2006 (51.9%) was significantly less than the percentage in 2003 (62.6%), 2004 (61.8%), and 2005 (63.6%). In 2002, the percentage of Hispanic/Latino AIE associates (26.7%) was significantly greater than the percentage in 2004 (17.9%) and 2006 (17.4%). The percentage of Asian American AIE associates in 2002 (13.9%) was significantly greater than the percentage in 2003 (7.7%). Moreover, the percentage of White AIE associates in 2004 (7.1%) was significantly larger than the percentages in 2002 (2.1%) and 2003 (1.8%).

**Table 13: Race/Ethnicity of Students in Attitude is Essential (AIE)**

Time Period	Race/Ethnicity						Total
	Asian	Black	Hispanic/Latino	Native American	White	Other	
2002	26 (13.9%)	93 (49.7%)	50 (26.7%)	4 (2.1%)	4 (2.1%)	10 (5.3%)	187 (100%)
2003	17 (7.7%)	139 (62.6%)	49 (22.1%)	2 (0.9%)	4 (1.8%)	11 (5.0%)	222 (100%)
2004	18 (8.5%)	131 (61.8%)	38 (17.9%)	9 (4.2%)	15 (7.1%)	1 (0.5%)	212 (100%)
2005	15 (8.2%)	117 (63.6%)	37 (20.1%)	2 (1.1%)	6 (3.3%)	7 (3.8%)	184 (100%)
2006	27 (10%)	140 (51.9%)	47 (17.4%)	8 (3.0%)	10 (3.7%)	38 (14.1%)	270 (100%)
<b>Total</b>	<b>103 (9.6%)</b>	<b>620 (57.7%)</b>	<b>221 (20.6%)</b>	<b>25 (2.3%)</b>	<b>39 (3.6%)</b>	<b>67 (6.2%)</b>	<b>1075 (100%)</b>

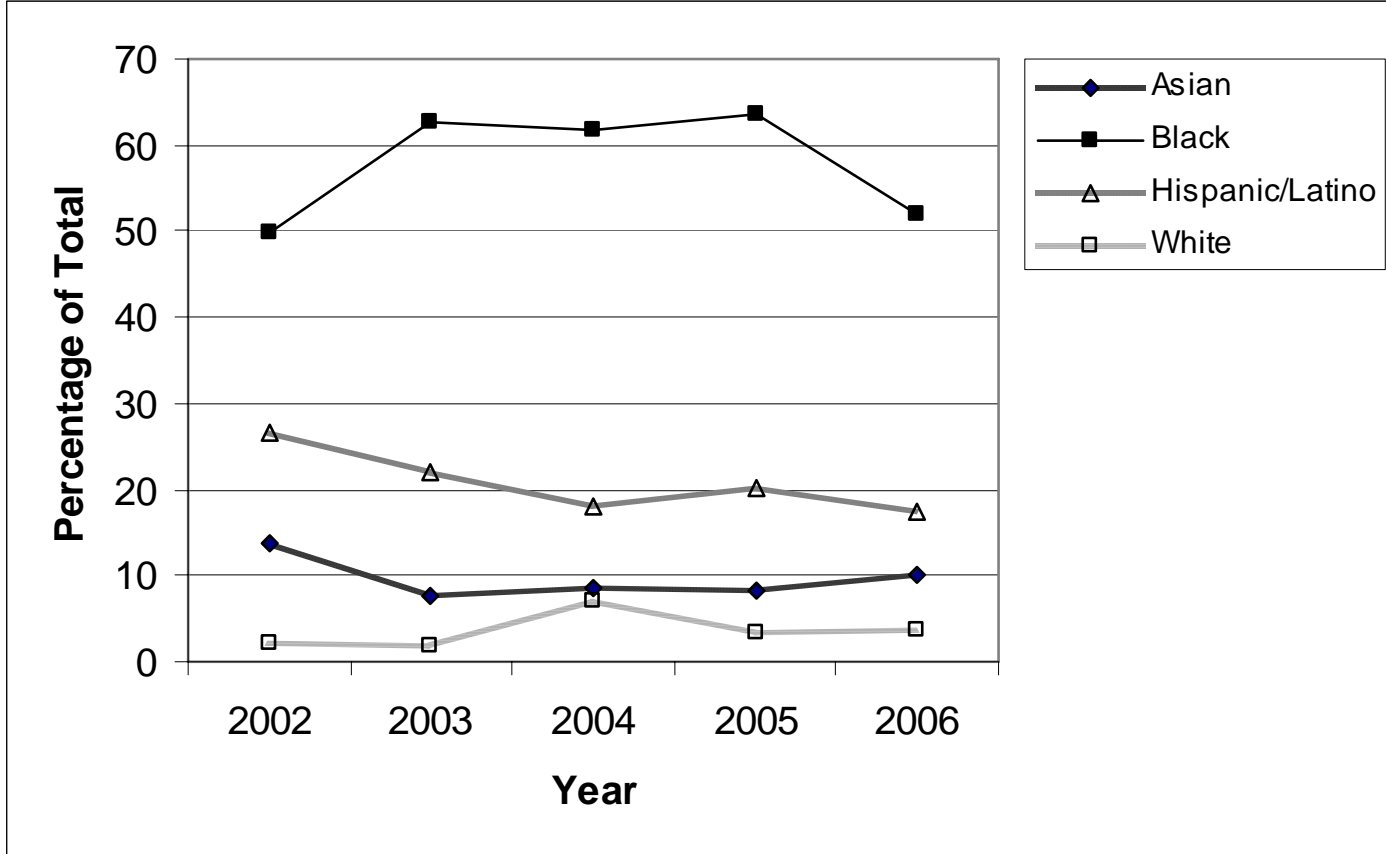


Figure 3: Students' Race/Ethnicity - Comparison by Time Period (AIE)

Since 2002, there have been about twice as many AIE associates than SI fellows; however, there only has been a meaningful difference in the racial composition between programs during two time periods. Chi-square analysis showed a significant difference in racial composition when comparing AIE and SI in 2004 ( $\chi^2(5, N = 284) = 24.02, p < .001$ ) and 2006 ( $\chi^2(5, N = 365) = 15.87, p = .007$ ). Post-hoc comparisons indicated that in 2004, the percentage of Black AIE associates (61.8%) was significantly larger than the percentage of Black SI fellows (47.2%) (see Figure 4). The percentage of Native Americans in AIE was considerably higher in 2004 (4.2%) than the percentage in SI (0.0%). Likewise, in 2006, the percentage of Native Americans in AIE (3.0%) was significantly higher than the percentage in SI (0.0%). Moreover, the percentage of Blacks in AIE in 2006 (51.9%) was significantly lower than the percentage in SI (67.4%) (see figure 5).

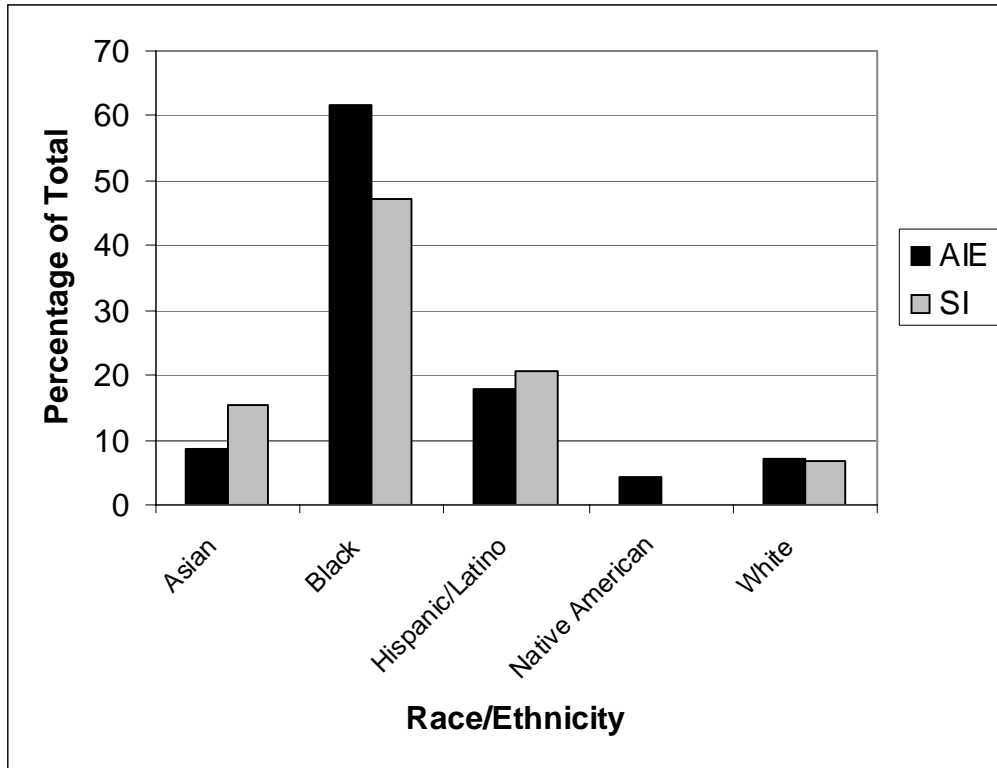


Figure 4: Students' Race/Ethnicity – Comparison of AIE and SI (2004)

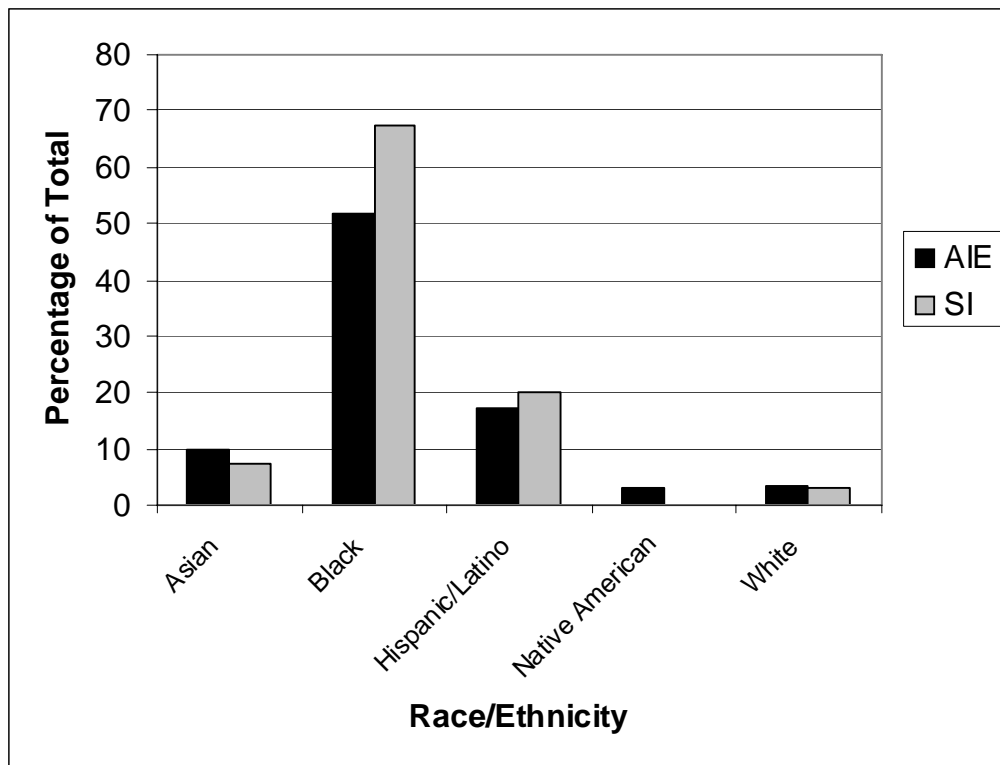


Figure 5: Students' Race/Ethnicity – Comparison of AIE and SI (2006)

When asked about the noticeable changes in the percentage of Black students in both the summer institutes and Attitude is Essential, a key CLEO employee revealed that CLEO has to make a conscious effort not to accept too many Blacks into any of its programs, especially the summer institutes. Accepting too many Black students looks too much like race-based affirmative action, and there is a constant fear of losing federal funding for the Thurgood Marshall Program. Similarly, CLEO's Chairman affirmed that the CLEO program does not want to be "painted by that brush" of affirmative action, but CLEO is trying to help qualified minorities enter the legal profession. Despite the concern of CLEO resembling a race-based affirmative action program, CLEO's Executive Director opined that:

The affirmative action legal cases and legislation have not impacted CLEO's operations because participation in CLEO programs is open to all students from low-income and economically or otherwise disadvantaged backgrounds. Although minority students who are not from disadvantaged backgrounds also participate in the programs, CLEO has never denied a student the opportunity to participate in the program because of his/her race. In fact, because we receive very few applications from American Indians and Caucasians, every effort is made to accept these applicants in order to increase the diversity of CLEO participants.

CLEO's Board Chairman has a different point of view regarding the race-conscious affirmative action legal debates. He maintains that how people react to the legal cases is more disastrous to CLEO than the legal cases themselves; people's negative reaction has resulted in CLEO not experiencing a complete positive impact as a program. The Chairman believes that the chilling effect that happens from the race-conscious affirmative action legal cases is the arguments that arise in the lawsuits, such as "these people [minorities] are not qualified" and



“they are not getting in because of merit,” but the legal cases are really about certain people’s sense of entitlement. CLEO’s Chairman highlighted a salient issue, which is that nobody questions the qualifications of the legacies who are admitted into law school, many of whom are less academically qualified than minority applicants.

The researcher questioned the key informants about CLEO’s future as a program for disadvantaged and minority students, particularly in light of the continuous political and legal debates surrounding affirmative action. Most were perplexed or unsure of how to answer the question; however, CLEO’s Board Chair chose to speak candidly. He admitted that the public funding aspect is always going to be an issue for CLEO in an anti-affirmative action society; however, he is pleased that at least the American Bar Association (ABA) and the minority bar associations understand the dubious situation. CLEO’s Chairman declared that the ABA and minority bars all understand that the numbers of racial minorities in law school and the legal profession are low, but minorities have proven that they can be successful lawyers. Therefore, according to the Chair, the question that remains is whether law schools are going to pursue students who can be successful or just those who have the high scores? Unfortunately, CLEO’s summer institutes are limited to private funding and by state anti-affirmative action policies, but CLEO’s Chairman is hoping for a brighter future for racial minorities’ access to law school because of the state initiatives in places like Indiana, Kentucky, and Georgia where law school specific programs have been modeled after the CLEO summer institutes.

This chapter addressed the third research question and whether the race-conscious affirmative action legal debate is related to the original intent, current operations, and the future viability of the CLEO program. In response to the third question, there does appear to be a correlation between the timing of the federal legal cases and state anti-affirmative action

referenda and the changes in CLEO regarding its original intent, current operations, and future viability. In particular, CLEO was created in 1968 and its original By-laws stated that CLEO was to expand and enhance the opportunity to study and practice law for members of disadvantaged groups – chiefly Negroes, American Indians, and Ibero-Americans (Hispanic/Latinos) – and thus help to remedy the present imbalance of these disadvantaged groups in the legal profession of the United States. The six-week summer institutes were the academic mechanism developed to properly prepare and evaluate potential minority law students for the rigors of law school. In 1969, there were 10 summer institutes with over 400 students.

The summer institutes were doing a great job of preparing successful law students and lawyers, even those with low LSAT scores and GPAs. Also, the national number of minority law students and lawyers was on the rise by the late 1970s. Nevertheless, after the affirmative action legal debate got underway in the 1970s, some of CLEO's federal funding was reduced, and the number of summer institutes decreased. By the time the legal debates in higher education increased and strengthened in the 1990s, mainly in 1996 after the *Hopwood* case and the implementation of Proposition 209, CLEO lost all its federal funding for the summer institutes, had one full-time employee, and had only three summer institutes. In the late 1990s and early 2000s, the reverse discrimination legal cases continued to crowd the federal courts and anti-affirmative action referenda and policies continued to surface in individual states. Simultaneously, CLEO created a new comprehensive program, amended its By-laws to cater to more disadvantaged and low-income students already attending law school, and received federal funding for the new programs but not for the summer institutes. The summer institutes currently exist off of private funding. The budget for the summer institutes has decreased from about

\$3,000,000 in the 1970s to around \$500,000 today, and there are only two summer institutes for 80 students total.

Federal funding for the new program also have been threatened almost every year, but especially in 2004 and 2005, which were the years immediately following the *Gratz* and *Grutter* legal cases. Furthermore, the racial composition of CLEO's summer institutes and other programs have shifted significantly since 1968. CLEO's programs are increasingly becoming more racially and ethnically diverse with more Asian, White, and Other racial students, but fewer Black and Latino students. CLEO now has specific academic performance levels (i.e., LSAT scores and GPAs) that is required of the summer institute participants. Thus, the more recent CLEO fellows have significantly higher LSAT percentile scores and GPAs than the early fellows, many of whom went on to become competent practicing lawyers. Key informants admit that the legal debates have been detrimental to the present and future existence of CLEO. Moreover, CLEO has to be cautious about the number of Black students that are accepted into any of its programs as well as the qualifications of the students, because CLEO cannot be viewed as a race-based program or it may lose funding for good. Given all of this information, there seems to be some relationship between the evolution of the race-conscious affirmative action legal debate and the changes in the CLEO program.

## **6.0 SIXTH CHAPTER**

### **6.1 SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS**

The purpose of this study was to examine critically how the race-conscious affirmative action legal debate in higher education has evolved since the implementation of the Civil Rights Act of 1964. Additionally, the intent of the study was to investigate how the debates may be related to the current operations of a specific legal program that was created as a result of the Civil Rights Act of 1964, the Council on Legal Education Opportunity (CLEO). CLEO was a federally mandated program developed because of the low numbers of racial and ethnic minorities in law school and the legal profession. CLEO's six-week summer institutes were established to help prepare underrepresented minorities for the demanding law school curriculum and evaluate those who may be qualified for law school and potentially become successful lawyers, but typically would not be admitted to law school because of lower than average LSAT scores and undergraduate GPAs.

The research also was to help gain an understanding of why there has been a constant legal and political debate regarding race-based admissions policies and programs in higher education, especially with regards to legal education and whether the debates are related to the United States' legal history with race and maintaining white privilege. Bowen & Bok (1998) previously noted that because professional schools like law and medicine are so highly selective,

the effect of barring any consideration of race would exclude more than half of the current minority population from these professions. The analysis in the study reveals that the legal and political debate continues to strengthen and race-sensitive affirmative action policies and programs in higher education, particularly those associated with law school admissions, are close to being eradicated completely.

The First Chapter outlined the purpose of this study, the background on how and why the CLEO program was originally created, and the researcher's assumptions. Additionally, the First Chapter offered a brief introduction of the critical race theory (CRT) framework and the specific CRT constructs used in this study. In the Second Chapter, the review of related literature began with a discussion of the outcomes and analyses of federal race-based legal cases, especially those related to racial minorities' access to education, and civil rights legislation implemented from the mid-1800s until the passage of the Civil Rights Act of 1964. Furthermore, the review of literature examined the initial creation and purpose of affirmative action policies and a few programs that were created after the implementation of the Civil Rights Act of 1964 to assist disadvantaged racial minorities in gaining access to higher education. Finally, the literature review explored CRT's origins, its tenets, major criticisms about the theory, and how CRT constructs have expanded into analyzing race and equity issues in education, including the legal debates regarding race-conscious affirmative action. In the Third Chapter, the researcher identified case study as the research design as well as data collection methods, sources, and the use of the CRT constructs of interest convergence and whiteness as property in order to analyze the evolution of the race-based affirmative action legal debate. Furthermore, the Third Chapter described the research questions for the study, which are:

(1) How have the federal race-conscious affirmative action legal cases in higher education and state anti-affirmative action policies evolved since 1964?

(2) How, if at all, do the ongoing legal debates in higher education reflect the support for, or maintenance of, white privilege as defined by the interest convergence and whiteness as property constructs of critical race theory?

(3) How, if at all, is the race-conscious affirmative action legal debate in higher education related to the original intent, current operations (i.e., the admissions criteria of fellows and associates, the number of summer institutes, funding, and the creation of new programs), and future viability of the CLEO program?

(4) Given the legal debates, what are the future implications for race-based affirmative action policies and programs, and the admittance of racial minorities, particularly African Americans, in law schools and the legal profession?

The analysis in the Fourth and Fifth Chapters confirmed the researcher's assumptions that law school admissions policies are the most challenged in reverse discrimination lawsuits because law is a powerful profession. The Fourth Chapter examined the decisions and analyses in federal legal cases and state anti-affirmative action policies affecting the use of race in higher education admissions decisions. The Fourth Chapter also evaluated the findings through the theoretical lens of the CRT constructs. The Fifth Chapter presented findings related to CLEO's purpose, funding, summer institutes, the creation of new programs, and the demographic profiles of CLEO students in light of the race-conscious affirmative action legal debate.

In this present chapter, the researcher summarizes how the legal debate has evolved since the 1970s until 2006 in relation to how the CLEO program has developed during the same period. This Sixth Chapter also considers the current climate of the race-conscious affirmative

action legal debate and reviews the most recent numbers of racial minorities in law schools and the legal profession. From the historical analysis of earlier race-based legal cases to the current affirmative action legal debate, the recent findings regarding the CLEO program, and the existing environment in law schools and the legal profession, the researcher draws conclusions in this chapter about the reasons behind the incessant debates and whether they are related to maintaining white privilege in this country. The summaries and conclusions in this Sixth Chapter address the special fourth and final question that is meant to sum up the research findings: Given the legal debates, what are the future implications for race-based affirmative action policies and programs, and the admittance of racial minorities, particularly African Americans, in law schools and the legal profession?

### **6.1.1 Summary of Research Findings**

In 1968, the CLEO program was created as a federally mandated race-conscious affirmative action program to address specifically the low numbers of racial and ethnic minorities in law schools and the legal profession. CLEO's six-week summer institutes were created as a motivational and educational catalyst to encourage underrepresented minorities to attend law school and pursue a legal career, to introduce minorities to a challenging curriculum in law school, and to test their ability to do law school work despite lower test scores. These types of special minority programs sparked many passionate and conflicted feelings regarding race-based affirmative action, especially since institutions of higher education hosted and supported programs like CLEO by accepting underrepresented minorities into their academic programs. These feelings revealed themselves prevalently in the continuous legal and political debates since the 1970s. The research conducted in this study with regards to the escalation of the race-

conscious affirmative action legal cases in higher education over the past 30 years revealed some major changes to the CLEO program's original purpose and offered insight into the dubious future of CLEO generally and CLEO's summer institute program specifically.

### The 1970s

The 1970s introduced the first reverse discrimination lawsuits in the cases of *DeFunis, et al. v. Odegaard, et al.* (1974) and *Regents of the University of California v. Bakke* (1978). In both legal cases, White males sued institutions of higher education for illegally having special admissions programs for racial and ethnic minorities, which they claimed was in violation of the Fourteenth Amendment and the Civil Rights Act of 1964. *DeFunis* involved a law school admissions policy and *Bakke* implicated a medical school's admissions policy. *Bakke*, the first time the United States Supreme Court addressed the constitutionality of race-sensitive policies, held that the University of California at Davis Medical School violated the Fourteenth Amendment because it reserved a specified number for racial minorities. The Court, however, or at least Justice Powell who wrote the main opinion, also concluded that race could be considered a "plus" factor during the college admissions process to achieve educational diversity.

During the time of *DeFunis* and *Bakke* between 1974 and 1980, the CLEO program had experienced some modest changes. For instance, CLEO's summer institutes went from almost complete federal funding through the Office of Economic Opportunity (OEO) and the Department of Health, Education, and Welfare (HEW) to relying more on private funding. By the late 1970s, CLEO was receiving about \$3 million a year of federal funding administered by the U.S. Department of Education through the Assistance for Training in the Legal Profession (ATLP) as well as small amounts of private funding from bar associations, laws schools, and corporate donors.



Additionally, in 1968-1969, CLEO hosted 10 summer institutes for approximately 448 students, which were mainly Black, Hispanic/Latino students, and about one percent of Asian students. By 1975 and 1980, there were about seven summer institutes, and the percentage of racial minorities changed slightly. Black students decreased from over 75 percent to about 65 percent, Hispanic/Latinos remained stable, Asian students increased from 1 percent to just over 5 percent, and White students increased from zero to approximately 3 percent. Moreover, the median LSAT percentile scores and GPAs of CLEO fellows in the summer institutes were higher in 1975 and 1980 than at CLEO's inception.

#### The 1980s- 1990s

The Republican Party politically controlled the country in the 1980s and early 1990s. Ronald Reagan was President of the United States from 1980 to 1988, and George Bush was President from 1988 to 1992. President Reagan was against civil rights enforcement and suspended most of the Title VI actions under the Civil Rights Act of 1964 that forced many southern universities to desegregate and end discrimination. In 1990, the Bush administration issued an opinion that stated that scholarship set-asides for racial and ethnic minority students violated civil rights laws. During the same period, there was a steady stream of reverse discrimination lawsuits, in which the majority of them were based on the constitutionality of considering race when making employment decisions or assigning public contracts. The Supreme Court decided that using racial categories is always suspect, so racial classifications may be used only if the policies meet the strict scrutiny standard. Race-conscious affirmative action policies had to be narrowly tailored and necessary to achieve a compelling state interest, such as rectifying existing discrimination, but not for diversity purposes. Therefore, the mid-1990s brought about dramatic developments regarding race-based affirmative action, particularly

as it pertained to higher education admission policies and the legitimacy of Justice Powell's opinion in *Bakke*.

In the 1990s, there were two federal legal cases addressing the legality of race-sensitive higher education policies – *Podberesky v. Kirwan* (1994) and *Hopwood v. Texas* (1996). The *Podberesky* case concerned a Hispanic student disputing a scholarship program exclusively for African Americans. However, the infamous *Hopwood* case, which was based on the constitutionality of a law school admissions policy, brought national attention to the contempt for the *Bakke* holding and fueled the disapproval for any use of race in higher education admissions decisions. *Hopwood* involved four individual plaintiffs, with a White woman as lead plaintiff, requesting that the University of Texas School of Law cease and desist using its special admissions program to enroll a certain number of Black Americans and Mexican Americans, which they claimed was a violation of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. The plaintiffs also requested compensatory and punitive damages from the State of Texas and the University of Texas system because of the alleged discriminatory action. The United States Court of Appeals for the Fifth Circuit in Texas agreed with the *Hopwood* plaintiffs and held that the University of Texas School of Law's policy was unconstitutional, forbade the use of race as a factor to achieve a diverse student body, and demanded the lower court to reconsider awarding the plaintiffs compensatory and punitive damages for what they endured. Interestingly, *Hopwood* along with the several reverse discrimination cases that followed were class action lawsuits with multiple plaintiffs in which White women were the lead plaintiffs.

Immediately following the *Hopwood* decision in 1996, government officials and citizens around the country pushed for outlawing all forms of affirmative action. The majority of voters

in the state of California were in favor of the Proposition 209 referendum to abolish the use of all affirmative action policies in the operation of public employment, education, or contracting. Most of those who voted in favor of the referendum were White males and Republicans who made \$60,000 or more annually. In 1998, the state of Washington passed a similar referendum eliminating affirmative action. Governor Jeb Bush signed an Executive Order into law in November of 1999, which eradicated the use of race- and gender-conscious decisions in higher education, employment, and state contracting in Florida. The states of California, Texas, and Florida implemented class-ranking systems as race-neutral alternatives, which allows for the top high school graduates to be conditionally admitted into the states' public universities so long as certain requirements are met. For example, the top high school graduates also have to have a certain number of college preparatory courses, which are not available to many disadvantaged minorities, in order to be considered for admissions by the public state universities of their choice.

The 1990s also brought about serious changes to the CLEO program, especially related to funding and the operation of the summer institutes. In 1995, CLEO lost all federal funding for its summer institutes and student stipends, and it could afford only to employ one staff member – the Executive Director. By 1998, CLEO's yearly budget dropped from approximately \$3 million dollars annually to about \$600,000. During this period, CLEO remained afloat by changing the organizational and financial structure of the program. CLEO began charging CLEO fellows a fee to attend the summer institutes and seeking private funding from the new member law schools, law associations, and corporations. Of course, the number of summer institutes offered dropped yet again from seven in the mid-1970s to approximately two or three a year in the mid-1990s. Additionally, the total number of CLEO fellows attending the summer institutes declined

by more than half compared to the first two years of the program in 1968 and 1969. The racial composition as well as the mean GPAs and LSAT scores of the fellows in the program in the 1990s remained stable when compared to the time periods of 1975 and 1980. When measured against the 1968-1969 period, the racial composition had changed greatly with a significant increase in the percentage of Asian, White, and Other fellows, and a significant decrease in the percentage of Blacks; the percentage of Hispanic/Latinos remained steady.

In response to the loss of federal funding for the summer institutes, CLEO and its partners designed the Thurgood Marshall Legal Educational Opportunity Program (Thurgood Marshall Program) in 1998. CLEO's By-laws were amended so that it did not appear as though CLEO primarily benefited racial minorities in order to receive some federal funding. CLEO presented the Thurgood Marshall Program to Congress as being more comprehensive in achieving diversity by serving low-income, educationally disadvantaged, or minority students presently in law school. Congress eventually approved federal funding for the Thurgood Marshall Program to be administered by CLEO, but the funding and the Thurgood Marshall Program had to be distinguished and kept separate from the CLEO program itself as well as the summer institutes known for helping racial minority students enter law school.

### The 2000s

The twenty-first century welcomed four more legal cases challenging the consideration of race in higher education admissions decisions, with the last two cases resulting in a definitive moment – an opportunity for the United States Supreme Court to revisit and interpret the *Bakke* decision and determine whether race can be a factor in higher education admissions. The first two cases were *Smith, et al. v. University of Washington Law School, et al.* and *Johnson, et al. v. Board of Regents of the University of Georgia, et al.* in 2000 and 2001, respectively. The *Smith*

case was a class action lawsuit lead by a White female plaintiff-appellant who sued on behalf of herself and other White applicants who were denied access to the Law School because the school's admissions policy favored racial and ethnic minorities. The plaintiff-appellant argued that she and others were not admitted because the Law School considered race in the admissions process in violation of the Civil Rights Act of 1964 and Initiative 200, which abolished affirmative action policies in the state of Washington. The appellate court concluded that the Law School was bound by Initiative 200, but its admissions policy was legal because the school considered other factors besides race to achieve a diverse student body.

Contrariwise, the appellate court in the *Johnson* case, which was a class action lawsuit led by three White females, held that the University of Georgia's (UGA) freshman admissions policy was unconstitutional. Specifically, the *Johnson* court found that UGA's freshman admissions policy lacked flexibility by mechanically and inexorably awarding an arbitrary 0.5 points to non-Whites during a decisive stage of the admissions process, even though all students could receive far more additional points for factors unrelated to race. Furthermore, the *Johnson* court refused to follow the Supreme Court's guidance in *Bakke* to use race as a plus factor in admissions decisions, while the *Smith* court recognized *Bakke* as binding precedence. This conflict over the *Bakke* holding and the consideration of race in admissions decisions had become all too familiar throughout lawsuits around the country. By the time the *Smith* and *Johnson* cases were heard in two different federal appellate courts, it had become clear to the legal community that the issue was ripe enough for the United States Supreme Court to assert its jurisdiction and interject its wisdom. The 2003 University of Michigan cases of *Gratz, et al. v. Bollinger* and *Grutter v. Bollinger* came along at a prime time when the race-conscious affirmative action legal debate in higher education reached a peak.

The *Gratz* case was a class action suit involving a White man and a White woman, both Michigan residents, who wanted to be admitted into the University of Michigan's undergraduate program. The White woman, Jennifer Gratz, was the lead plaintiff-petitioner. A White woman from Michigan, Barbara Grutter, was the sole petitioner in the University of Michigan Law School case. The petitioners in both lawsuits alleged that the University of Michigan's admission policies violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981 for the University's unlawful use of race in its admissions decisions. All parties sought declaratory and injunctive relief as well as compensatory and punitive damages. Moreover, the George W. Bush Administration filed legal briefs with the Supreme Court in support for the plight of the plaintiff-petitioners and other White people like them who were denied admission to the institution of higher education of their choice because of preferences to racial minorities.

The *Gratz* and *Grutter* cases yielded very different decisions, but in both cases the Supreme Court relied on the *Bakke* holding as binding precedence and attempted to add clarity to the confusing and controversial analysis in Justice Powell's opinion in *Bakke*. Furthermore, in its majority opinions in both *Gratz* and *Grutter*, the Supreme Court reached a consensus on how the high court would handle racial classifications when a higher institution is trying to achieve a diverse student body as a compelling state interest. In *Gratz* (2003), the Supreme Court found that the University of Michigan's undergraduate freshman admissions policy was unconstitutional. The Court's holding was based on the fact that underrepresented racial and ethnic minorities were automatically awarded 20 points out of the 150 needed for undergraduate admission without assessing each applicant's individual qualities. In the *Grutter* (2003) case, however, the Supreme Court held that the University of Michigan Law School had a compelling

state interest in attaining a diverse student body, and the admissions policy's use of race was narrowly tailored to further that interest. The Law School's policy of seeking to enroll a critical mass of minority students was constitutional since it engaged in a highly individualized, holistic review of each applicant's file. The Law School considered all pertinent elements of diversity and used race only as a "plus" factor, as set forth in *Bakke*, which did not unduly harm or exclude non-minorities from all consideration. The vital point in the *Grutter* decision was that Justice O'Connor specifically acknowledged that law schools are essential in training and preparing the nation's leaders, so it is necessary that racial minorities be represented in a law school's student body.

In this new millennium, the CLEO programs have continued to feel the increasing negative publicity surrounding the race-conscious affirmative action legal debate, especially after the 2003 Michigan cases. For instance, CLEO did not receive federal funding for the Thurgood Marshall Program for 2004, nor did Congress appropriate funds for 2005 until Senators Barack Obama and Richard Durbin of Illinois wrote compelling letters to members of Congress on CLEO's behalf. Currently, the federally funded Thurgood Marshall Program receives \$3 million to \$4 million per year, of which approximately 20 to 30 percent of the funds are used for educational programs for college and law school students, such as Attitudes is Essential (AIE) associates. The AIE summer programs host about 200 students per year. On the other hand, since 2000, CLEO's summer institutes have perpetually struggled with private funding, so each year after, there have been only two summer institutes hosting about 40 students each. CLEO's private funding hovers around \$500,000 each year, of which approximately 50 percent of the funding is used for the summer institutes. Thus, the pre-law summer institutes, which had been CLEO's original legacy and purpose in recruiting, educationally preparing, and evaluating

disadvantaged racial minority law school hopefuls who may have otherwise been denied access to law schools because of their low LSAT scores and GPAs, are slowly diminishing and may likely become nonexistent.

The mean GPAs and LSAT scores of both summer institute fellows and AIE associates were significantly higher in the 2000s than they were in the earlier decades. In fact, CLEO set minimum academic requirements for students who apply for its programs. In addition, since 2001, the racial composition for both the summer institutes and AIE programs have become increasingly more racially diverse, with significant increases in White and Asian students and fewer Black and Latino students.

While it is encouraging that the research shows that CLEO's programs are reaching a more diverse student body, it is unfortunate that the changes to CLEO also may mean a slow death to the once federally mandated summer institutes that have helped so many racial minorities enter and succeed in law schools since the late 1960s. Moreover, there are now many underrepresented racial minorities who will not qualify for the summer institutes or AIE because of new academic and financial standards. There are even more underrepresented racial minorities who will not benefit from the law school training offered by the almost extinct summer institutes and who may not be accepted into law school because of their low scores or lack of adequate preparation for the rigorous law school coursework. Finally, the research findings have established that funding also will remain an issue for CLEO so long as all the programs primarily benefit racial minorities, namely Blacks. All of these changes to CLEO appear to be related to the continuous race-conscious affirmative action legal debates.



Table 14 briefly delineates the timeline of race-conscious affirmative action legal cases in higher education and anti-affirmative action policies as well as changes that occurred within CLEO operations during the corresponding time periods.

**Table 14: Outline of Legal Cases/Policies and Changes in CLEO's Data (By Decade)**

<b>TIME PERIOD</b>	<b>LEGAL CASES AND POLICIES</b>	<b>CLEO'S FUNDING AND PROGRAMS</b>	<b>CLEO'S STUDENT DEMOGRAPHICS</b>
1970s	<p><i>DeFunis, et al. v. Odegaard, et al.</i> (1974)</p> <p><i>Regents of the University of California v. Bakke</i> (1978)</p>	<p><b>1968-73</b> – Summer institutes (SI) federally-funded by OEO.</p> <p><b>1973-76</b> – HEW (later U.S. Dept. of ED) issued grants to CLEO to fund SI and student stipends.</p> <p><b>1976-77</b> - budget reductions, but CLEO still received federal funding from ATLP as well as some private funding.</p>	<p><b>SI Mean GPAs:</b> <b>1968-69</b> – 2.61, <b>1975</b> – 3.03</p> <p><b>SI Mean LSAT:</b> <b>1968-69</b> – 23.41, <b>1975</b> - 34.41</p> <p><b>SI Racial Composition:</b> More Black SI fellows in 1968-69 (75.1%) than in any other time period.</p>
1980s-1990s	<p><i>Podberesky v. Kirwan</i> (1994)</p> <p><i>Hopwood v. Texas</i> (1996)</p> <p>California Civil Rights Initiative, Proposition 209 (1996)</p> <p>Texas' Ten Percent Plan (1997)</p> <p>Washington State Civil Rights Initiative 200 (1998)</p> <p>One Florida Initiative (1999)</p>	<p><b>1994-95</b> – No more free institutes. Financial eligibility requirements created for SI participants.</p> <p><b>1995-96</b> - SI loses federal funding. CLEO has one staff member and is dependent on private funding and membership school fees.</p> <p><b>1996-98</b> – CLEO's operations were funded with about \$500,000 per year, as opposed to \$3,000,000 in years past.</p> <p><b>1998-99</b> – CLEO modified governing council structure, amended By-laws to include disadvantaged and low-income students, and created Thurgood Marshall Program to be more diverse and inclusive. CLEO applies for funding from Congress.</p>	<p><b>SI Mean GPAs:</b> <b>1980</b> – 3.05, <b>1991</b> – 2.89, <b>1998-2000</b> – 2.99</p> <p><b>SI Mean LSAT:</b> <b>1980</b> – 29.25, <b>1991</b> - 29.72, <b>1998-2000</b> – 33.80</p> <p><b>SI Racial Composition:</b> More Black SI fellows in 1975 (64.5%), 1980 (65.9%), and 1998-2000 (62.1%) than in 2001-03 (49.8%).</p> <p>The percentage of Asian SI fellows has increased over time from 1968 to 2006. More Asian SI fellows in 1991 (6.8%), 2001-03 (16.5%), and 2004-06 (10.15%) than in 1968-69.</p> <p>More Latino SI fellows in 1991 (30.8%) than in 2001-03 (20.6%) and 2004-06 (20.7%).</p>

<b>TIME PERIOD</b>	<b>LEGAL CASES AND POLICIES</b>	<b>CLEO'S FUNDING AND PROGRAMS</b>	<b>CLEO'S STUDENT DEMOGRAPHICS</b>
2000s	<p><i>Smith, et al. v. University of Washington law School, et al. (2000)</i></p> <p><i>Johnson, et al. v. Board of Regents of the University of Georgia, et al. (2001)</i></p> <p><i>Gratz, et al. v. Bollinger (2003)</i></p> <p><i>Grutter v. Bollinger (2003)</i></p>	<p><b>2001</b> - CLEO receives federal funding through the Thurgood Marshall Program to aid educationally and economically disadvantaged student, but not for the summer institutes. Federal funding for Thurgood Marshall Program averages \$3 or \$4 million per year, while private funding for summer institutes averages \$400,000 to \$600,000 per year.</p> <p><b>2001-current</b> - AIE summer programs were established for already admitted law school students. AIE hosts about 200 to 250 students per year, while the summer institutes host about 80 students per year.</p> <p><b>2004-05</b> - No federal funding appropriated in 2004, but funding restored in 2005.</p> <p><b>2006-07</b> - CLEO is awaiting federal appropriations for 2007. Because of funding issues, the summer institutes have been reduced from 10 institutes in 1969 to 2 institutes since 2000.</p>	<p><b>SI Mean GPAs:</b>  <b>2001-03</b> - 3.08, <b>2004-06</b> - 3.12</p> <p><b>AIE Mean GPAs:</b>  <b>2002</b> - 3.02, <b>2003</b> - 3.28, <b>2004</b> - 3.32, <b>2005</b> - 3.32, <b>2006</b> - 3.24</p> <p><b>SI Mean LSAT:</b>  <b>2001-03</b> - 40.54, <b>2004-06</b> - 47.29</p> <p><b>AIE Mean LSAT:</b>  <b>2002</b> - 32.74, <b>2003</b> - 56.02, <b>2004</b> - 57.52, <b>2005</b> - 57.09, <b>2006</b> - 51.58</p> <p><b>AIE Racial Composition:</b>  Less Black AIE associates in 2002 (49.7%) and 2006 (51.9%) than in 2003 (62.6%), 2004 (61.8%), and 2005 (63.6%).</p> <p>More White AIE associates in 2004 (7.1%) than in 2002 (2.1%) and 2003 (1.8%).</p> <p>More Asian AIE associates in 2002 (13.9%) than in 2003 (7.7%). Similarly, more Latino AIE associates in 2002 (26.75%) than in 2004 (17.9%) and 2006 (17.4%).</p>

## **6.1.2 Current Climate Surrounding the Legal Debate, Law School, and the Legal Profession**

The research findings show that the race-conscious affirmative action legal debates in higher education have intensified since the mid-1990s and early 2000s. During this time, there was a discernable increase in the number of reverse discrimination legal cases, and the states of California, Texas, Florida, and Washington abolished affirmative action policies and programs or severely limited the use of them in favor of race-neutral alternatives. Today, in 2007, the legal debate maintains a strong and divisive atmosphere, with yet another state voting to ban anti-affirmative action and other legal decisions on the horizon, but with little change in the number of underrepresented minorities in law schools and the legal profession.

There was a litigation lull after the 2003 Michigan cases, but now the race-conscious affirmative action legal debate in higher education has regained its impetus. In November of 2006, the citizens of Michigan decided that the United States Supreme Court's opinion in *Grutter*, which was in favor of the University of Michigan Law School's admissions policy that used race as a factor to attain a diverse student body, was unacceptable. Accordingly, the Michigan Civil Rights Initiative (MCRI) Committee, which was spearheaded by Jennifer Gratz, the lead-petitioner in the 2003 *Gratz* case, with help from Ward Connerly and ACRI, sponsored Proposal 2 to propose a constitutional amendment banning affirmative action in the state of Michigan. Proposal 2 appeared on the November 2006 ballot in Michigan and stated that the proposed constitutional amendment say, in relevant part:

Ban public institutions from using affirmative action programs that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity, or national

origin for public employment, education, or contracting purposes. Public institutions affected by the proposal include state government, local governments, public colleges and universities, community colleges, and school districts (MCRI, 2006).

Fifty-eight percent of the Michigan voters agreed with the proposed constitutional amendment; 42 percent disagreed with the prospect of completely ending affirmative action. Approximately 56 percent of the White voters were in favor of Proposal 2; 86 percent of Black and 69 percent of Latino voters were opposed to the ballot. A journalist observed that the strongest opponents in favor of the measure either never earned a high-school diploma, had graduated from college, or gone on to graduate and professional school (Schmidt, 2006). Ward Connerly proclaimed proudly that if they could win in a democratic state like Michigan, they could win anywhere. Currently, the University of Michigan is considering legal action to block Proposal 2 from being applicable to colleges and universities (Schmidt, 2006).

Another recent development with the incessant debates is the United States Supreme Court cases of *Parents Involved in Community Schools v. Seattle School District No. 1* (2005) and *Meredith, et al. v. Jefferson County Board of Education, et al.* (2005) pertaining to the use of race in public school student assignments. While both of these cases are related to students in Kindergarten through 12<sup>th</sup> grade, institutions of higher education and public schools around the country are looking to the Supreme Court's holdings and analyses in these cases for guidance on how to interpret the divergent holdings in *Gratz* and *Grutter* and to better understand the utility of race-based policies and programs. In both cases, the United States Supreme will address the same issue of whether a race-based student assignment plan violates the Equal Protection Clause of the Fourteenth Amendment (see Brief for the United States as Amicus Curiae Supporting Petitioner, No. 05-908; Brief for the United States as Amicus Curiae Supporting Petitioner, 05-

915). Legal briefs were submitted by amici curiae in support of the petitioners and respondents in each case.

In the first case of *Parents Involved in Community Schools*, the Seattle School District operates ten, four-year public high schools. Ninth-grade students may choose to attend any of these schools under the District's Open Choice plan. The District, however, has implemented four tiebreakers to prevent one school from being oversubscribed with one particular race and be more racially balanced. The first tiebreaker considers whether a sibling is enrolled in the oversubscribed school, and if so, the ninth-grader is given priority admission. In the second tiebreaker, the District considers race (not ethnicity) when trying to maintain a racial balance of White and Non-White students within an oversubscribed school. The District's overall public school enrollment is about 60 percent Non-White and 40 percent White, so the District alleges that a student's race is considered only to bring a school's racial composition closer to the overall enrollment percentages. The third tiebreaker depends on a student's distance from an already racially balanced school, and the fourth tiebreaker is a lottery system, which is rarely used. In the amicus brief in support of *Parents Involved in Community Schools*, the parent-petitioners claim that their children were not or might not be admitted into the high school of their choice because of the race-based student assignment plan, which is illegal under the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and state law.

On the other hand, Jefferson County Public Schools had been under a federal court order since 1975 to desegregate its public schools and to cease its practices of *de jure* segregation. In 2001, after the decree was dissolved, Jefferson County Public Schools (JCPS) adopted a voluntary race-based student assignment plan that required each public school to seek to enroll at

least 15 percent Black students and no more than 50 percent in order to ensure a racially balanced school system. JCPS categorized its students as either “Black” or “Other,” and the racial demographics of the total student population in the school district were approximately 34 percent Black and 66 percent other. Like the former case, a group of parents in *Meredith, et al.*, including the petitioner, contend that their children were not admitted into, or denied a transfer into, the schools of their choice because of the race-based student assignment plan. The parents challenge the legality of the plan under the Equal Protection Clause of the Fourteenth Amendment. Both of the legal cases rely on the holdings in *Gratz* and *Grutter* and question whether the race-based student assignment plans implicate the compelling interest of diversity in the public school context. Furthermore, similar to the Michigan cases, the parents’ primary arguments are that: (1) the plans are not narrowly tailored because they do not provide for a holistic, individualized consideration of students, which is necessary for a constitutionally permissible race-conscious admissions process, and (2) the plans are almost identical to a quota system.

Social scientists and scholars submitted amici briefs on behalf of the respondents in both *Parents Involved in Community Schools v. Seattle School District No. 1* (2005) and *Meredith, et al. v. Jefferson County Board of Education, et al.* (2005). The briefs concentrated on the use of scientific evidence in race-based education cases as well as the type of evidence presented in *Brown, et al.* and *Grutter* that supported race-conscious education policies (Brief of 553 Social Scientists as *Amici Curiae* in Support of Respondents, Nos. 05-908 & 05-915). Specifically, the social scientists argue and offer research findings that (1) racially integrated schools provide significant benefits to students and communities, (2) racially isolated schools have harmful educational implications for students, and (3) race-conscious policies are necessary to maintain

racial integration in schools. The Supreme Court heard oral arguments in both cases in December and will render its decisions in summer of 2007.

Undoubtedly, the legal debate has propelled forward on all education levels – challenging race-sensitive policies from Kindergarten through 12<sup>th</sup> grade to graduate and professional schools, especially law school. As previously mentioned, legal and education scholars question whether these events will affect the number of underrepresented minorities applying, being accepted into, and attending institutions of higher education, such as law school. If less underrepresented minorities are applying to and accepted into law schools, then obviously less will be attorneys practicing law in the near future. The Bureau of Labor Statistics (2007) reported that out of approximately 965,000 employed lawyers (excluding judges) in the United States in 2006, 5 percent of them were Black or African American, 3 percent were Hispanic or Latino, and 2.9 percent were Asian.

In terms of minority representation in law schools, the American Bar Association (ABA) revealed that in the 2005-2006 academic school year, there was a total of 148,273 law students enrolled in 191 ABA-approved law schools, of which 11,252 (8%) were Asian or Pacific Islander, 9,126 (6%) were African American, 8,248 (6%) were Hispanic or Latino, 1,142 (1%) were American Indian or Alaska Native (2006). As of the fall of 2006, there were 56,000 first-year students admitted into ABA-approved law schools (LSAC, 2006). The racial and ethnic breakdown of students admitted into law schools in fall 2006 was as follows: (1) 39,850, or 71 percent, were White; (2) 4,560, or 8 percent, were Asian/Pacific Islander; (3) 4,020, or 7 percent, were Hispanic/Latino; (4) 3,920, or 7 percent, were Black/African American; (5) 400, or 1 percent, were American Indian/Alaskan Native; and (6) 2,690, or 5 percent, were Other (LSAC, 2006). It is important to note that since the fall of 2001, the percentage of racial/ethnic groups



admitted into ABA-approved law schools, in relation to those who apply from those groups, have remained consistent (see Table 15). Percentage-wise, fewer Blacks are admitted into law school, with approximately 40 percent admitted out of those who apply, than other racial/ethnic groups.

**Table 15: Number and Percentage of Racial/Ethnic Groups Admitted Into Law Schools**

School Year	Race/Ethnicity					
	Asian/Pacific	Black/African	Hispanic/Latino	Native American	White	Other
	Islander	American				
Fall 2001	3,750 (68%)	3,770 (44%)	3,580 (57%)	370 (64%)	37,670 (74%)	2,110 (63%)
Fall 2002	4,370 (63%)	3,770 (39%)	3,620 (51%)	380 (59%)	40,660 (68%)	2,360 (59%)
Fall 2003	4,610 (57%)	3,630 (34%)	3,880 (50%)	400 (54%)	40,230 (63%)	2,560 (55%)
Fall 2004	4,800 (56%)	3,720 (35%)	3,820 (58%)	430 (55%)	39,150 (60%)	2,510 (54%)
Fall 2005	4,720 (59%)	3,660 (37%)	3,980 (51%)	410 (54%)	40,020 (64%)	2,600 (56%)
Fall 2006	4,560 (63%)	3,920 (42%)	4,020 (54%)	400 (55%)	39,850 (69%)	2,690 (61%)

Note: The numbers in parentheses represent the percentages of each racial/ethnic group admitted into law school in relation to the number who applied from that particular group.

### **6.1.3 Conclusions and Implications**

In the beginning of this document, the researcher explained the United States' contentious history with race-based legal cases and legislation, particularly in education, from the mid-1800s until now. Additionally, the researcher described some federal programs that have helped many disadvantaged racial minorities enter colleges and universities over the past 40 years but that are currently in jeopardy of losing funding or being eliminated altogether. The research findings in this study indicate that as more and more reverse discrimination lawsuits saturate the legal landscape, the CLEO program, which has primarily benefited underrepresented racial minorities by assisting them in entering and graduating from law schools, has experienced some noticeable changes to its funding, programs, and the racial/ethnic and academic profiles of the students involved in CLEO programs. Based on the findings, the researcher concludes that there is a correlation between the ongoing race-conscious affirmative action legal debates over the past 30 years, and the significant changes in CLEO's funding, the types of programs offered, the types of students served (i.e., already admitted law students in the AIE program, rather than aspiring lawyers trying to gain access to law school with the help of the summer institute program), as well as the notable differences in the racial/ethnic composition of students and the students' academic profiles.

The United States has developed a notorious history, past and present, of race-based legal cases, legislation, and policies that negatively affect education and federal education programs benefiting disadvantaged minorities like CLEO. Given the current numbers of underrepresented minorities in law schools and the legal profession, the researcher outlines some conclusions and future implications in this section regarding the future of race-conscious affirmative action

policies and programs in higher education in light of the legal debates as well as white privilege. This section also addresses the special fourth question that serves as a summative analysis, which is: Given the legal debates, what are the future implications for race-based affirmative action policies and programs, and the admittance of racial minorities, particularly African Americans, in law schools and the legal profession?

#### **6.1.3.1 The Future of Race-Conscious Affirmative Action Legal Debates and the Implications for CLEO and Other Race-Based Programs**

Based on history and the findings in this study, it can be concluded that the race-conscious affirmative action legal debate in higher education will continue until all traces of race-sensitive policies and programs are obliterated. Although the number of racial and ethnic minorities in law school and the legal profession are minute when compared to Whites, the research findings support the conclusion that the legal claims will persist. More White students are joining together in class action lawsuits and fighting against race-based admissions policies and programs and are asking for punitive and compensatory damages as a way to punish financially those threatening the white privilege of accessing the colleges of their choice. Further, the findings show that the CLEO program's original purpose of assisting specific underrepresented racial minorities, namely Blacks, Latinos, and Native Americans, with entering law school is quickly becoming a dream of the past. Thus, CLEO's summer institutes are dying a low death.

As the legal debate began in the 1970s, the annihilation of the CLEO program started with a subtle decline in funding and financial support, and by the 1990s, moved to a complete change in federal funding, the program's purpose, members, and beneficiaries. Today, in the 2000s, as the CLEO program moves farther away from its original intent and continues to lose direction, funding, and followers, it may be concluded that CLEO itself will eventually perish or

completely change its objectives and the type of students it serves (e.g., students who are more economically and educationally advantaged and able to pay for the programs and receive the higher test scores). The people who need the CLEO program the most also will have the most to lose – an opportunity to attend law school and enter the legal profession. Academically successful programs like CLEO and perhaps even TRIO programs, such as Upward Bound and Talent Search, have helped a plethora of underrepresented racial minorities gain access to higher education institutions and graduate, yet these programs are well on their way to financially going down a forlorn road to oblivion given the legal climate. The data supports that at a minimum, CLEO will continue to have less funding for the summer institutes and fewer summer institute participants. Additionally, a lower percentage of Black students will be accepted into both the summer institutes and AIE programs, when compared to the earlier years, because of the increased academic requirements of the programs and the fear of CLEO being deemed a race-conscious program. Finally, the findings support the conclusion that the racial composition of students in CLEO programs will continue to shift, with more and more Asian, Other Race, and White students and less Black and Latino students in both AIE and the summer institutes. No matter how one looks at the situation, CLEO's future is dubious.

### **6.1.3.2 The Future of Underrepresented Minorities in Law Schools and the Legal Profession**

A historical and legal examination has shown that the majority of race-based legal cases in education are related to law school admissions. As such, the number of underrepresented racial minorities applying and being accepted into law schools has fallen or been stagnant since the late 1990s and early 2000s. The researcher concludes that the current reverse discrimination lawsuits challenging the use of race in law school admissions policies are due to the power associated

with the legal profession. Lawyers have held and still hold most of the leadership positions of power in state and federal government. Therefore, those trained in law are in control of making, enforcing, and interpreting the laws of this country. The historical evidence indicates that legal challenges will remain on the rise, particularly in law schools, until any consideration of race is discontinued from the admissions decisions.

Although Blacks and other racial minorities each represent less than 10 percent of law students and employed lawyers in the United States, it appears that some White people are not going to be happy until law schools and the legal profession represent far more than 70 percent of Whites. After all, the findings show that White people represent more than 70 percent of the total population, more than 70 percent of law students enrolled in ABA-approved law schools, and more than 80 percent of those in the legal profession and yet the legal debate lives on. As of fall of 2006, Blacks and other underrepresented racial minorities, such as Latinos and Native Americans, together represent about 15 percent of the law school student population (American Bar Association, 2007). Prior to the 2003 *Grutter* legal case, Blacks students were already being admitted into law schools at lower percentages (i.e. less than 40 percent) than White students and other racial/ethnic minority groups. Based on the findings in this study, it can be concluded that the numbers of underrepresented racial minorities, particularly Blacks, admitted into law schools and the legal profession will vacillate and eventually fall off. Even if the numbers of Black law students do not fall off of too much or remain consistent, one can still expect that no matter how many Black students apply, they will still be accepted in numbers representing less than 40 percent of those who have applied and well-below the Whites and other racial and ethnic minorities who have been accepted into law school.

### **6.1.3.3 Conclusions from a Critical Race Theory Point of View**

#### Interest Convergence Theory

According to Derrick Bell's interest convergence theory, the race-sensitive affirmative action policies implemented in the late 1960s were only meant to be the temporary alignment of the self-interest of elite White policymakers and the interests of Blacks (1980). As race-sensitive affirmative action policies and programs have benefited more racial minorities, particularly Blacks, and have started leveling the playing field over the past 40 years, Bell's second rule of the interest convergence theory took effect in the form of reverse discrimination legal cases as well as anti-affirmative action policies and referenda. The second rule states that "even when the interest-convergence results in an effective racial remedy, that remedy will be abrogated at the point that policymakers fear the remedial policy is threatening the superior societal status of whites" (Bell, 2004, p. 69).

Based on the findings, the researcher concludes that throughout history, the United States continuously enters a never-ending interest-convergence cycle of briefly creating legal remedies for equity and equal opportunities for Black people and other racial minorities and then taking it all away before there can be a power shift in racial, educational, and economic dominance in this country. Think back to the time between President Lincoln and members of Congress constitutionally banning slavery and creating race-sensitive legislation and policies to assist Blacks to the time that the United States Supreme Court legally sanctioned racial segregation. More than 30 years had elapsed between those periods. Similarly, it has been more than 40 years since the implementation of the Civil Rights Act and race-conscious policies and programs, so the time of race-conscious policies and programs are quickly slipping away and soon will be replaced with some form of re-segregation and racial discrimination in education. At this point

in time, the historical research shows that the United States has once again come full circle, and the legal remedy of race-conscious affirmative action policies and programs is fading away.

Historically, the United States has had controversy surrounding racism and discrimination, particularly between Blacks and Whites. Although other racial and ethnic groups, such as Asians, Latinos, and Native Americans, have experienced racism and discrimination, it was between the Black and White racial groups where active and overt racism began in America. Unlike other minority or migrant groups, Africans were forced to come to a country to serve White Americans, which automatically created an oppressive, authoritarian relationship, with White people holding the power over Blacks. Even after the abolishment of slavery in 1863, racism abounded against Blacks because they were viewed as property whose purpose was to serve others, not to gain or accomplish anything. A series of constitutional amendments, civil rights legislation, and race-based policies were passed in the late 1800s in order to create equal treatment and opportunities for newly freed Black people but to the consternation of many Whites. Congressional lawmakers and Supreme Court Justices were more concerned about how these benefits or any type of preferential treatment for Black people would harm the educational advancement as well as the personal and financial comfort-levels of White citizens. For instance, the Freedman's Bureau Act went through several amendments until all types of economic reparations, such as housing, medical treatment, and 40 acres and a mule were eradicated, reduced, or at least offered to White people who already had these opportunities. The changes to the Freedmen's Bureau Act along with the Supreme Court's holdings in legal cases like *Plessy v. Ferguson* (1896), which glorified white privilege and legalized the separate-but-equal doctrine, also helped sustain racism and inequality.



From the mid-1860s until the *Brown* case of 1954, public education was one thing made available to Blacks. After hundreds of years of no formal education, Blacks and other racial minorities could receive some form of public education, so long as it was separate from White people. Of course, Black people were seen as an inferior race, so the educational facilities and materials were well below par when compared to White people. The lawsuits that Black students filed in the 1930s, 1940s, and 1950s to gain access to institutions of higher education were successful, but only opened the doors for just a few Blacks; racism and segregation prevailed. The opportunity to network with people of power or privilege was unknown in the Black community or on a much lower scale than in the White community. Unlike Whites, the chance of Blacks working as an apprentice in any professional capacity, such as doctor, lawyer, or accountant, was simply unheard of or very unlikely since so few Black people had these types of careers. The Civil Rights Act of 1964 and the race-sensitive affirmative action policies and programs that followed offered that shred of hope as well as racial and economic equality for which so many Blacks and other subjugated minorities had long awaited. Nevertheless, in less than a decade, White people were complaining that Blacks were unfairly benefiting from special admissions policies to their detriment, so the Supreme Court was hearing its first reverse discrimination lawsuit in 1974.

As discussed throughout this paper, the lawsuits are still continuing and higher education policies that use race as a factor in admissions are constantly being struck down as unconstitutional. Meanwhile, the number of underrepresented minorities within institutions of higher education and in professional careers is no way equal or comparable to White people. The educational opportunities and economic wealth that Whites have amassed are also unmatched. The Fourteenth Amendment of the United States Constitution and the Civil Rights

Act were enacted legally to enforce equality for Blacks and other underrepresented and disenfranchised minority groups and to end discrimination. The race-based affirmative action policies and programs were the vehicle to ensure that the enforcement occurred and benefited underrepresented minorities in order to the level the playing. Unfortunately, like the Freedmen's Bureau Act amendments, the Fourteenth Amendment, the Civil Rights Act, and new state anti-affirmative action referenda and policies are now being used against Blacks and other racial minorities. Again, Congressional lawmakers are more concerned about how benefiting Black people will harm the educational advancement as well as the personal and financial comfort-levels of White people. While the Supreme Court is no longer maintaining overt racism, the Court is upholding white privilege in America. The Supreme Court is permitting race-conscious affirmative action legal cases to move forward as legitimate claims, without acknowledging the United States' legal and societal history of perpetuating racism, or the diminutive numbers of racial minorities in institutions of higher education and professional careers, as compared to Whites, that still stain this country.

The Scales of Justice represent a balance of power in this country. For example, the Legislative Branch makes the laws, while the Judicial Branch interprets the laws, but these scales are unlevelled. Citizens of the United States vote to place people within the state and federal legislature trusting that the lawmakers will make fair and impartial laws that are in the best interests of society on a whole and not colored by racial, ethnic, or economic prejudices. Nevertheless, the legislatures in the states of California, Washington, Florida, and now Michigan allowed anti-affirmative action referenda and legislation to pass knowing that they were influenced by racial and economic privilege and not in the best interest of all citizens. The state referenda banning affirmative action is an example of the Scales of Justice being unlevelled and

unequal in favor of maintaining white privilege. For example, the majority of California voters that were in favor of the state anti-affirmative action policies were primarily more affluent White males. One can conclude that the demographic profiles of voters in favor of the anti-affirmative action policies in Washington, Florida, and Michigan were very similar to California. Furthermore, one can conclude that other states with similar demographic profiles as Washington, California, Florida, or Michigan, or states that have been involved in race-based lawsuits, may soon move for anti-affirmative action policies.

Given this country's legal history and the evolution of the current race-based affirmative action legal debates, it is very likely that the Supreme Court will decide this summer that race-based student assignment plans are unconstitutional in *Parents Involved in Community Schools v. Seattle School District No. 1* (2005) and *Meredith, et al. v. Jefferson County Board of Education, et al.* (2005). Thus, legalized school segregation will probably re-appear on all education levels, from Kindergarten to 12<sup>th</sup> grade to higher education. If that occurs, we will have come full circle – the entire 360 degrees back to the starting point of fighting for equity and equal opportunities for Black people and other racial minorities, while awaiting another interest convergence period.

#### Property Functions of Whiteness

In the meantime, society can expect to watch the property functions of whiteness at work while Blacks and Whites interests are divergent. As discussed earlier, the property functions of whiteness include: (1) the right of disposition; (2) right to use and enjoyment; (3) reputation and status property; and (4) the right to exclude (Harris, 1993). The “property functions of whiteness” explicate the privileges and benefits that the law gives to White people (Harris, 1993). Like the examples of Black school children in Ladson-Billings & Tate's (1995) analysis of the property functions of whiteness, the Black children in *Parents Involved in Community*

*Schools v. Seattle School District No. 1* (2005) and *Meredith, et al. v. Jefferson County Board of Education, et al.* (2005) will be separated and educated in crowded public schools with less resources, course offerings, and academic opportunities. One may conclude that the Black children in these legal cases will be excluded from certain public high schools where White children have chosen to attend, and as such, these same Black children may be excluded from certain colleges and universities.

In race-conscious affirmative action programs like CLEO, some of the property functions have been active since the mid-1990s. The researcher has concluded that based on CLEO's data, the changes in CLEO's funding and the new financial requirements where students now have to pay a fee for the summer institutes is indicative of the right to use and enjoy. Only those who can economically afford the right to use and enjoy the educational benefits of the summer institutes may do so. Perhaps that is why more White students are partaking in the summer institutes because there is now a monetary value placed on them, and the summer institutes are now more selective. The right to use and enjoyment also is prevalent in some of the legal cases. For example, in both the *Gratz* and *Johnson* cases, White law applicants received additional points during the admissions process that benefited them more than Black applicants, such as being a legacy, hours spent working a summer job or doing extracurricular activities, taking a certain level of AP courses. However, these kinds of additional points were legal, acceptable, and enjoyed by many White applicants, but not Black applicants. Any consideration of race in the admissions process in both legal cases was deemed unconstitutional.

One may also conclude that CLEO's minimum LSAT score and undergraduate GPA requirements exclude many students who are capable of succeeding in law school. Because of the competitive nature of law schools and the negativity around the race-conscious affirmative

action legal debate, CLEO now reserves the right to exclude many students based on their scores just like law schools. Although 750 potential law students apply to CLEO's summer institutes each year, CLEO accepts approximately 80 to 90 students because of the augmented academic requirements and budgetary limitations. The other applicants are excluded from CLEO's six-week law school preparation process. The research findings further support the conclusion that the development of CLEO's AIE program represents the reputation and status property. AIE was created to change the reputation of CLEO from a race-conscious program for law school hopefuls to a scholarship program for successful law students. AIE is for students already admitted into law school and most of the students have higher LSAT scores and undergraduate GPAs than the students attending the summer institutes. CLEO's improved status and reputation has gotten them more national recognition and federal funding for the AIE and other programs.

The researcher concludes that the present lack of interest convergence between Blacks and Whites and the domination of the property functions of whiteness mean that the CLEO program may never function as originally intended, especially with the incessant legal debates. CLEO has already changed since its inception in 1968. In fact, it is now known as a scholarship program for disadvantaged law students, not a program to help underrepresented minorities gain access to law school. The United States' legal history involving race show a support for white privilege, and race-sensitive policies and programs like CLEO lose out almost every time. Perhaps the Supreme Court summed up this country's racial history best when it explained that "[l]egislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences.... If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane" (*Plessy v. Ferguson*, 1896, p. 551-52).

In other words, an equal and level playing between Whites and Blacks in the United States of America, where racial and economic domination reign amongst its White citizens, may be an unreachable goal in this lifetime. Racial equity and equal access to institutions of higher education, such as law school, have improved some since 1964, but not enough to level the playing field. More work needs to be done for complete racial equality and equity to occur, whether it is with the use of race-conscious affirmative action policies and programs or with a total overhaul of racist and prejudice hearts and minds in this country.

#### **6.1.4 Recommendations for Future Research**

First, this researcher's study may be continued with a follow-up on the race-conscious affirmative action legal debates. Specifically, the cases of *Parents Involved in Community Schools v. Seattle School District No. 1* (2005) and *Meredith, et al. v. Jefferson County Board of Education, et al.* (2005) have been mentioned throughout this paper, but the Supreme Court has yet to make its ruling. When the Supreme Court's decisions are rendered, a study should be done on the Court's opinions and analyses as well as the future of race-based student assignment plans in Kindergarten through 12<sup>th</sup> grade or on the higher education level. Additionally, this researcher's study revealed that more White women are bringing lawsuits regarding special admissions policies and programs in institutions of higher education. Researchers may want to study the history and overall increasing rate of women, especially White women, entering graduate and professional programs and certain professional careers in relation to the implementation of affirmative action policies and programs - in employment or higher education - and the existing legal debates. Moreover, a natural progression of this present study also

includes a research of how institutions of higher education are formulating race-conscious affirmative action policies that will withstand constitutional muster.

In addition, this study focuses on one specific federal education program that has assisted underrepresented racial minorities, particularly Blacks, with gaining access to law schools since the 1960s. Since that time, many similar affirmative-action programs have been created for undergraduate and graduate studies. Some of these programs primarily benefit or spotlight access for women, low-income students, older or elderly students, students from other racial/ethnic groups, or particular religious groups. Future researchers may want to conduct a study almost identical to the present study as it relates to the legal implications of having a special admissions policy or program that mainly benefits one of the above-referenced groups of students. This particular study could be based on a local university, state, or federal education or scholarship program for one of the above-referenced groups in either an undergraduate or graduate program.

Furthermore, this researcher intentionally limited the analytical lens of this study to the critical race theory framework. Critical race theory is known for its examination of historical events and legal analyses in cases in concert with current civil rights legislation and racial equity issues in society. More research, however, is necessary to analyze the affirmative action legal debate from a political, economic, or market theory contextual frame. Another research study may concentrate on more class-based or socioeconomic issues, which also seem to correlate with access to institutions of higher education and certain career opportunities.

Finally, this researcher's study consistently mentioned law schools' reliance on and legal claims emphasizing standardized test scores, such as LSAT scores and undergraduate GPAs, when considering the qualifications of potential law students and the legality of law school

admissions procedures. An interesting research project would be a longitudinal and comparative study on how a sample of law students with lower scores (i.e., LSAT scores and/or undergraduate GPAs) progressed in law school, bar examinations, and the legal profession compared to a sample of law students with the higher scores. This type of study could identify the academic and non-academic strengths and weaknesses of each sample of students as well as examine whether there are any correlations between the racial, economic, or educational backgrounds of each sample of students and their test scores and/or success in law school and the legal profession.

### **6.1.5 Final Thoughts**

In response to the fourth summative research question, the researcher concludes that the future implications for the existence of race-conscious affirmative action policies and programs are bleak. Race-based programs are being eliminated or extremely restricted far and wide and probably will not be sustained over the next decade because of the ongoing legal debates. The CLEO program is just one example of a program that has been constrained because of its focus on helping racial minorities prepare for and get into law school. CLEO now is concentrating more on helping disadvantaged and racial minorities who are already attending law school, in which the legal issues associated with race-based access have been bypassed.

This entire study - from the literature review to the summary of research findings - supports the notion that most analyses and outcomes of federal legal cases, legislation, and policies maintain white privilege in American society. Those who have exerted white privilege in the reverse discrimination legal cases discussed earlier have claimed a right to name their place in the undergraduate, graduate, or professional school of their choice, over and above the



equally qualified racial minorities. Those who have exercised white privilege and their right to admission throughout the years have argued that their test scores are higher, their parents or siblings also went to their university of choice, their high school or undergraduate institution from which they graduated was superior, and their Advanced Placement courses should be given more weight in the admissions process. These arguments, which are often not available or applicable to many disadvantaged racial minorities, are absolutely fair, legal, and permitted for the persons who have been fortunate enough to know white privilege. However, race, at least according to those who have filed or supported the reverse discrimination lawsuits, as well as the long history of intentional discrimination, mistreatment, and lack of educational access that goes along with race, may not be given a second thought in the admissions process because it is unconstitutional. Many people of color have had to develop survival, resilience, and leadership skills because of the barriers set in their path to bar them or severely impede their entrance into economic, employment, and educational arenas. Nevertheless, those skills typically do not stack up against money, test scores, private schooling, and networking opportunities that white privilege provides.

The Courts' maintenance of white privilege is probably inadvertent. The fact is this country's judicial system adheres to legal precedence, and white privilege was created and promoted in legal decisions long before the Supreme Court's unjust opinions were rendered in *Plessy v. Ferguson* or *Dred Scott v. Sanford*. Although slavery and legal segregation were eventually abolished by the courts, white privilege itself was never overturned. Not to say that the United States is hopeless, because this country has made great strides to overcome the great racial divide and to achieve parity amongst all groups of people. The increased numbers of women and underrepresented minorities in institutions of higher education and professional

careers show the improvement over the past 40 years. However, history as well as the research findings in this study show that the numbers of racial minorities in law school and the legal profession are miniscule compared to Whites. Nevertheless, the legal debates will probably continue until race as a “plus” factor is completely removed from the higher education admissions equation. The examination of the evolution of the legal cases in the Fourth Chapter indicate that combined groups of White litigants are still flooding the courts with reverse discrimination claims, and in most cases, White women are the lead-plaintiffs.

Thus, based on the findings in this study, one can conclude that diversity in an educational setting will be achieved within institutions of higher education, especially law schools, with more White women, Asian Americans, and Other races (biracial and multiracial) sitting in the classrooms. Those who classify themselves as “Black” or “African American” will continue to be the smallest percentage admitted into law schools when compared to those who apply. Furthermore, the majority of Blacks and Latinos that are admitted into law schools will have had some economic privileges that allowed them to attend private high schools, elite and selective colleges, and the best LSAT preparation courses so that they could academically compete with white privilege. Most of these Blacks and Latinos would have had the benefit of the first rule of the property functions of whiteness – the Right of Disposition, which is a good thing in today’s world. According to Ladson-Billings & Tate (1995), the right of disposition is the transfer of certain property rights, such as Black students conforming to “White norms” through certain cultural practices such as dress, speech patterns, and unauthorized conceptions of knowledge.

In conclusion, race-conscious affirmative action policies and programs are soon a thing of the past. Diversity is the key to constitutional higher education admissions policies, but racial

diversity is starting to mean very little in the diversity analysis. Additionally, law schools and other post-secondary, graduate, and professional programs will likely continue to rely heavily on standardized test scores and GPAs during the admissions process. Therefore, underrepresented minorities must find other ways to set themselves apart from others. Drawing on the events of history and on the strength of those, such as Thurgood Marshall, who previously fought for equal educational access with perseverance, resilience, wisdom, and a thirst for knowledge would be a great place to start. After all, white privilege is not going anywhere anytime soon, especially with individuals like Ward Connerly and his elite White supporters campaigning to maintain white privilege through the passage of state referenda and policies. In the meantime, the United States needs more attorneys who will be active in pushing for social change, particularly those who may live or experience racism, prejudice, and disenfranchisement on a daily basis and will not succumb to the pressure of supporting white privilege and unequal treatment in society. Who better to be the agents of this social change than Blacks, Latinos, and other people of color who want to be lawyers and gatekeepers of the law. If people of color could have a fair and equal opportunity to compete and to be admitted into law school, then perhaps the playing field would become level in the near future.

## **APPENDIX A**

### **INTERVIEW PROTOCOL**

1. What is your role/position with CLEO? Please briefly describe your duties.
2. How long have you worked for CLEO?
3. Has your role/position changed since you have been with the CLEO program? How?
4. In your own words, what would you say is CLEO's purpose and mission? How has the purpose or mission changed since CLEO's inception in 1968? Do you consider CLEO to be a race-based affirmative action program?
5. What is the purpose of the summer institutes? Please explain the admissions criteria that are considered when selecting CLEO summer institute fellows each year (e.g., LSAT scores, GPA scores, race/ethnicity, income levels, undergraduate institution, etc.). Has there been a change in the demographics of the students accepted into CLEO's programs since its inception? If there has been a change, why do you think there has been change?
6. How have the funding levels and funding sources changed since CLEO's inception until now? Are there limitations and/or requirements for federal funding that CLEO receives? Do you receive federal funding for the summer institutes?

7. What kind of impact, if any, have the race-conscious affirmative action legal cases (e.g., *Bakke*, *Hopwood*, *Grutter and Gratz*) or legislation had on CLEO's operations (e.g., admissions criteria for prospective students, funding, programming)? Are there any specific legal cases or legislation that have had more of an impact than others? If so, which ones? Please explain.
8. When was the Thurgood Marshall Legal Education Opportunity Program started? What were the reasons for starting the Thurgood Marshall Legal Education Opportunity Program, and how does its purpose differ from the traditional CLEO summer institutes?
9. Are there any additional programs for students interested in law school besides the summer institutes? How are these new programs different from the summer institutes and what type of students are being impacted by these programs? How are the student demographic profiles different for each program?
10. How has the structure of CLEO's Board of Directors, committees, or subcommittees changed since its inception in 1968?
11. Has CLEO's Board of Directors amended the organization's By-laws since CLEO's inception? If so, how and why? How, if at all, were the amendments related to the race-conscious affirmative action legal and political debates?
12. What do you envision for CLEO's future as a program for disadvantaged and minority students? Do you think the continuous political and legal debates regarding race-based affirmative action policies and programs will have an affect on the CLEO program's viability? How? Please explain.

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