ACCESSING THE LEGAL PLAYING FIELD: EXAMINING THE RACE-CONSCIOUS AFFIRMATIVE ACTION LEGAL DEBATE THROUGH THE EYES OF THE COUNCIL OF LEGAL EDUCATION OPPORTUNITY (CLEO) PROGRAM

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INTRODUCTION

Since the 1960s, 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.[2] Nevertheless, for more than thirty years, 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. 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 in terms of access to employment and educational opportunities.[3] Opponents, however, argue that minorities benefit from the preferential treatment of affirmative action simply because they are born into a protected class, and this special treatment occurs to the detriment of qualified whites.[4] Further, opponents argue that race-based affirmative action policies are unnecessary in the 21st century because we are living in a post-racial and colorblind society.[5]

In their compelling study on race-sensitive admissions programs at elite and selective higher education institutions, Bowen and Bok be-

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2. JAMILLAH MOORE, RACE AND COLLEGE ADMISSIONS: A CASE FOR AFFIRMATIVE ACTION 7 (2005).

3. *Id.* at 80. *See generally* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 115 (5th ed. 2004).

4. MOORE, *supra* note 2, at 85–86.

5. MOORE, *supra* note 2, at 200; *see also* Mica Pollock, *How the Question We Ask Most About Race in Education Is the Very Question We Most Suppress*, EDUC. RESEARCHER, Dec. 2001, at 2, 10.

lieved that the fight over race-sensitive policies is deeper than the issue of whether the policies are fair or appropriate in today's society.[6] They opined, "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."[7] 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. Bowen and Bok also acknowledged that 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."[8]

This Article critically analyzes the evolution of the race-conscious affirmative action legal debate in higher education since the 1970s, with a particular emphasis on law school admission policies. Additionally, this Article examines how legal cases and anti-affirmative action policies correlate with the present function and future viability of a once federally mandated race-conscious affirmative action program, the Council on Legal Education Opportunity (CLEO). Part I of this Article outlines some of the historical barriers of underrepresented racial minorities in the legal profession. Part II explains the development of the CLEO program during the 1960s and its growth during the 1970s. Part III discusses the evolution of the affirmative action legal debate from the 1970s until the 2003 University of Michigan affirmative-action cases and evaluates the relationship between the escalating legal debate and the changes in the CLEO program over the past thirty years. Part IV of the Article is a summary on the feasibility of the CLEO program as well as the future of law school admissions for students of color, namely black students.

I. HISTORICAL BARRIERS TO LAW SCHOOL AND THE LEGAL PROFESSION

American law schools and the legal profession have had a long history of excluding racial minorities, particularly blacks. In the early decades of the twentieth century, black students were legally segregated by "separate-but-equal" policies. Thus, they were not receiving the same educational opportunities or access to knowledge as many white students attending elite undergraduate institutions and apprenticing

6. WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS xxii–xxiii (1998).

7. *Id.* at xxvi.

8. *Id.* at 282.

for practicing lawyers.[9] Between 1936 and 1950, there were four race discrimination cases involving the admission of black students to white law schools.[10] In spite of the seeming success of these cases with a few of the black litigants gaining access to white law schools or to some type of legal education, these victories were overshadowed by the dismal number of black attorneys in this country. One researcher estimated that in 1950, there were only 1,450 black attorneys out of a total of 221,605, which was 0.65% of the profession.[11] Though it seemed like the positive verdict in *Sweatt v. Painter*, in which the Supreme Court held that blacks had a right to an equal education like their white counterparts, would lead to a dramatic increase in the number of black attorneys, that result was mired by yet another barrier—the Law School Admissions Test (LSAT).

The LSAT was developed in 1948, even though the Law School Admissions Council's (LSAC) did not keep an official record of LSAT scores until around 1958.[12] Due to the timing of the LSAT's implementation as well as when it was required for 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 and to the legal profession. High scores on the LSAT posed a challenge to potential black law students.[13] 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.[14] Nevertheless, the LSAT's use has been perverted because law schools often use the test as the sole tool for admissions, which excludes entire minority groups who can do the work.[15]

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.[16] During the *Hopwood v. Texas*[17] lawsuit, researchers found that for black students attending the University of Texas Law School,

9. *See* Sweatt v. Painter, 339 U.S. 629, 634 (1950) (ruling that separate is not equal in legal education because the study of law is "intensely practical" and cannot be effective when done in isolation).

10. *See* Pearson v. Murray, 182 A. 590 (Md. 1936); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Board of Regents, 332 U.S. 631 (1948); *Sweatt*, 339 U.S. at 629.

11. William C. Kidder, *The Struggle for Access from* Sweatt *to* Grutter*: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 17(2003).

12. *See* William P. LaPiana & Joseph Solomon Professor, N.Y. Law Sch., Keynote Address at the 1998 LSAC Annual Meeting: A History of the Law School Admission Council and the LSAT 2 (May 28, 1998), *available at* http://www.lsacnet.org/lsac/publications/history-lsac-lsat.pdf; *see also* DeFunis v. Odegaard, 416 U.S. 312, 328 (1974).

13. Kidder, *supra* note 11, at 17.

14. LaPiana & Solomon, *supra* note 12, at 10.

15. Kidder, *supra* note 11, at 20, 27.

16. Michael A. Olivas, *Higher Education Admissions and the Search for One Important Thing*, 21 U. ARK. LITTLE ROCK L. REV. 993, 997 (1999).

the correlation of combined LSAT scores and undergraduate GPAs to first-year grades was only 0.28.[18] Similarly, at the University of Pennsylvania School of Law, the correlation for all students was 0.14 for first-year, 0.15 for second-year, and 0.21 for third-year grades.[19] Based on a LSAT cut-off score of 145, however, over 60% of black applicants will be presumptively denied compared to only 20% of white applicants who would be presumptively denied.[20]

Linda Wightman,[21] 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.[22] Wightman's study focused on students who would not typically gain admission to law school and those students who would gain admission using a LSAT and GPA-combined regression model.[23] 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.[24] 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.[25] Wightman 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.[26] Thus, law schools rely on test scores for admissions that have little or no significant correlation to academic success and bar passage rates. The reliance on the LSATs and GPA scores, however, has resulted in the reduction of qualified racial minority students in law schools and thus the reduction of racial minority lawyers in this country.

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17. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (en banc), *abrogated by* Grutter v. Bollinger, 539 U.S. 306 (2003).

18. Olivas, *supra* note 16, at 996.

19. Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 971 (1996).

20. VERNELLIA RANDALL, 2005 THE WHITEST LAW SCHOOL REPORT (2005), http://academic.udayton.edu/TheWhitestLawSchools/2005TWLS/Chapter2/index.asp.

21. Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 1 (1997).

22. *Id.* at 37–39.

23. *Id.* at 4, 37–39.

24. *Id.* at 38.

25. *Id.*

26. *Id.* at 39.

In 2000, minorities[27] comprised approximately 9.7% of all lawyers.[28] About 3.9% of these minority lawyers in 2000 were black.[29] Minority representation among lawyers is significantly lower than minority representation in other professions, such as accountants or 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 engineers (16.7%).[30] Moreover, according to the 2008 Bureau of Labor Statistics, combined black and Hispanic representation among U.S. professionals was 15.7%, compared to 8.4% among lawyers.[31] 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 utilization of race-sensitive affirmative action policies in law school admissions are alive and well.

II. THE DEVELOPMENT OF THE CLEO PROGRAM

A. *Background*

In 1960, the number of black attorneys was 2,180 out of a total of 285,933 in the United States, which was still a depressing representation at 0.76% of the profession.[32] Prior to the creation of CLEO, roughly, only 200 African-Americans graduated from law schools annually out of 10,000 law students.[33] The Law School Admissions Council (LSAC) was disturbed that law schools were placing significant weight on the LSAT, which was having a disproportionate impact

27. In this section of the article, the terms "minorities" and "minority representation" encompass the following racial/ethnic categories: (1) African American, (2) Hispanic, (3) Asian American, and (4) Native American.

28. U.S. Census Bureau, Census 2000 Special Tabulation, www.census.gov/eeo 2000/index.html (select "Employment by Census Occupation Codes and Older Age Groups" next button, select "US Total" next button, select "Lawyers" and display table) (last visited Jan. 25, 2010).

29. U.S. Census Bureau, Census 2000 EEO Data Tool, http://www.census.gov/eeo 2000/index.html (select "employment by census occupation codes and earnings" and "Data based on where people live"; Select "US Total"; Select "Lawyers" under the "Occupation Category", and then select the "display table" button. See the "percentages" table for percentage of minority lawyers that are Black); *see also* FLA. BAR, MINORITIES IN THE LEGAL PROFESSION (2007), *https://www.floridabar.org/divcom/pi/bips2001.nsf/* (follow "Minorities in the Legal Profession" hyperlink).

30. U.S. Census Bureau, Census 2000 EEO Data Tool, http://www.census.gov/eeo 2000/index.html (select "employment by census occupation codes and earnings" and "Data based on where people live"; Select "US Total"; Select a profession under the "Occupation Category", and then select the "display table" button. See the "percentages" table for percentage of minority lawyers in that profession).

31. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2008, LABOR FORCE, EMPLOYMENT, AND EARNINGS tbl. 598 (2008), *available at* http://www.census.gov/prod/2007pubs/08abstract/labor.pdf.

32. Kidder, *supra* note 11, at 6.

33. Ernest Gellhorn, *The Law School and the Negro*, 1968 DUKE L.J. 1069, 1077 (1968).

on disadvantaged minority groups being admitted to law schools.[34] In fact, some law schools established an arbitrary floor to the LSAT of around 400, which was equivalent to around the thirteenth percentile that operated as an absolute bar to many minority students.[35] 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."[36] 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.[37]

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% of total law school enrollment.[38] 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% of black students were enrolled in predominantly white institutions.[39] O'Neil 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.[40] Rosen 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.[41]

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 ensure 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.[42] Furthermore, these special admissions programs

34. Alfred A. Slocum, *CLEO: Anatomy of Success*, 22 How. L.J. 335, 337 (1979).
35. *Id.* at 338.
36. Ass'n of Am. Law Schools 1964 Annual Meeting, Report of the Comm. on Racial Discrimination 159 (1964).
37. Robert M. O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 2 U. Tol. L. Rev. 281, 300 (1970); Slocum *supra* note 34, at 337.
38. O'Neil, *supra* note 37, at 300.
39. *Id.*
40. *Id.*
41. Stanford J. Rosen, *Equalizing Access To Legal Education: Special Programs For Law Students Who Are Not Admissible By Traditional Criteria*, 2 U. Tol. L. Rev. 321, 324 (1970).
42. Slocum, *supra* note 34, at 337–38.

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.[43] 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.[44] Undoubtedly, something more was needed to make a difference—something that would have a dramatic effect on recruiting qualified, underrepresented minority students 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.[45] 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.[46] 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.[47]

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.[48] These meetings led to the formation of the Council on Legal Education Opportunity (CLEO).[49] 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.[50] OEO provided most of the funding with a $500,000 grant during CLEO's

43. Rosen, *supra* note 41, at 324.

44. Kathy L. Cerminara, *Remembering Arthur: Some Suggestions for Law School Academic Support Programs*, 21 T. MARSHALL L. REV. 249, 256 (Symposium Issue) (1996).

45. Kenneth J. Burns, Jr., *C.L.E.O.: Friend of Disadvantaged Minority Law Students*, 61 A.B.A. J. 1483, 1483 (1975).

46. *Id.*

47. *Id.*

48. Kellis E. Parker & Betty J. Stebman, *Legal Education for Blacks*, ANNALS AM. ACAD. POL. & SOC. SCI., May 1973, at 144, 148.

49. *Id.*

50. Burns, *supra* note 45, at 1483–86; Slocum, *supra* note 34, at 339–40.

first year.[51] The partnership later reached out to include the Hispanic National Bar Association (HNBA), the National Asian Pacific American Bar Association (NAPABA), and the Society of American Law Teachers (SALT) in 1972, 1990, and 1997 respectively.[52]

B. *The CLEO Program: 1968–1978*

Accordingly, on October 5, 1968, CLEO was chartered with the official backing of federal agencies and organizations as well as private bar associations. In the beginning, the CLEO bylaws 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.[53]

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.[54] 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.[55] 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.[56] Ostensibly, CLEO became one of the first federal race-conscious affirmative action programs in higher education.[57]

During CLEO's introductory year, the summer institutes operated for eight-week sessions, but they were cut back to six-week sessions in 1969.[58] 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

51. COUNCIL ON LEGAL EDUC. OPPORTUNITY, 1998 ANNUAL REPORT 2 (1998) [hereinafter CLEO 1998 ANNUAL REPORT].

52. *Id.* at 3.

53. Nancy J. Fulop, *1969 CLEO Summer Institute Reports*, 2 U. TOL. L. REV. 633, 635 (1970).

54. *Id.* at 635 n.7.

55. Gellhorn, *supra* note 33, at 1086.

56. Slocum, *supra* note 34, at 346.

57. Fulop, *supra* note 53, at 640.

58. *Id.* at 637 n.8.

into law school.[59] 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.[60] The purpose of the regional subdivisions was to ensure that CLEO served students around the country, and to give a cognizable, racial, or ethnic character to each institute.[61] 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.[62]

The summer institutes functioned both as skills enhancers and as recruitment programs for participating law schools.[63] 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.[64] 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.[65] At the end of the six weeks, the law faculty at each participating law school would evaluate the academic performance of the CLEO students.[66] The CLEO students who successfully completed the summer institutes were certified and deemed CLEO fellows.[67] 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 appeared unqualified for law school based on the usual predictors of LSAT score and undergraduate GPA.[68] 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.[69] 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.[70]

59. Slocum, *supra* note 34, at 348.
60. *Id.* at 347 n.42.
61. *Id.* at 352.
62. *Id.*
63. Cerminara, *supra* note 44, at 262.
64. Slocum, *supra* note 34, at 357–58.
65. *Id.* at 360.
66. *Id.* at 348.
67. CLEO, CLEO Fellows, Associates, and Alumni, http://www.cleoscholars.com/index.cfm?fuseaction=Page.viewPage&pageId=484 (last visited Feb. 1, 2010).
68. Cerminara, *supra* note 44, at 263.
69. *Id.*
70. Slocum, *supra* note 34, at 337.

Because 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.[71] To help summer institute fellows attend law school, CLEO provided financial assistance to its fellows throughout their three-year law school career.[72] Living stipends of $1,500 a year for three years were guaranteed to CLEO fellows completing the 1968 summer program.[73] Furthermore, the law schools admitting these CLEO fellows provided financial support for tuition and fees, usually by grants or waivers and occasionally through loans.[74] During those early years, government agencies, primarily the OEO, funded CLEO with some assistance from private foundations.[75]

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.[76] 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.[77] In 1969, CLEO had ten summer institutes, in which 448 students enrolled and 444 completed the program.[78] During the 1968–69 school year, the number of blacks studying law rose to approximately 1,254.[79] In the 1969–70 academic year, the minority enrollment was 2,933, of which 20% were CLEO fellows.[80]

During its first three years, 722 CLEO fellows entered law school.[81] CLEO's retention rates among its first-year law students were approximately 80%.[82] From 1968 to 1970, the number of law students increased from 68,562 to 86,028.[83] During the same time, the number of

71. Rosen, *supra* note 41, at 345.

72. *Id.*

73. Parker & Stebman, *supra* note 48, at 148.

74. *Id.*

75. Gellhorn, *supra* note 33, at 1086.

76. Slocum, *supra* note 34, at 368; CLEO 1998 ANNUAL REPORT, *supra* note 51, at 2.

77. Slocum, *supra* note 34, at 368.

78. *Id.*; CLEO 1998 ANNUAL REPORT, *supra* note 51, at 2.

79. *Newsletter 68-3*, AALS Newsletter (Ass'n of Am. Law Sch., Wash., D.C.) Oct. 7, 1968, at 2; Parker & Stebman *supra* note 48, at 147.

80. Burns, *supra* note 45, at 1484–85.

81. *Id.* at 1484.

82. *Id.*

83. *See February 1972 Newsletter*, AM. B. NEWS (Am. B. Ass'n, Chi., Ill.), Feb. 1972, at 1 (citing a fifteen percent increase in law school enrollment for 1972 and a record-breaking twenty percent increase in enrollment during the 1969-1970 school year). *See generally* AM. BAR FOUND., 1971 LAWYER STATISTICAL REPORT (Bette H. Sikes, Clara N. Carson, & Patricia Gorai eds. 1972) (on file with author).

minority law students increased from 944 to 1,468.[84] Further, the number of black lawyers in the United States had reached about 4,000 in 1970.[85] 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.[86] CLEO seemed to have fulfilled the goal of having 300 minority students enter the legal profession by 1973.[87] 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.[88] 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 the programs.[89] Standford Rosen explained several difficulties that were characteristic of the 1960s and 1970s, such as the issues of educational merit, backlash, constitutionality, stigma, and economics.[90] 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

84. William G. Hall, Jr., *Statistical Analysis of the LSAT-AALS-CLEO Survey of Minority Group Students in Legal Education*, 2 U. TOL. L. REV. 281, 983 (1970).

85. David L. Chambers, Timothy T. Clydesdale, William C. Kidder, & Richard O. Lempert, *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1856 (2005).

86. *December 1974 Newsletter*, AM. B. NEWS (Am. B. Ass'n, Chi., Ill.), Dec. 1974, at 1.

87. Robert W Meserve, *C.L.E.O.: A Bold Experiment Proving Its Worth*, 61 A.B.A. J. 445, 445 (1973).

88. JAMILLAH MOORE, RACE AND COLLEGE ADMISSIONS A CASE FOR AFFIRMATIVE ACTION 49 (2005).

89. Burns, *supra* note 45, at 1484; Rosen, *supra* note 41, at 336–37.

90. Rosen, *supra* note 41, at 336.

> majority and minority ethnic groups who are hampered by institutional denial of preferential treatments.[91]

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 question the constitutional fairness of having special law school admissions programs specifically for certain racial minorities. Slocum 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.[92] 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 . . . ."[93]

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. Access to the legal playing field, however, would soon change as the mid-1970s ushered a firestorm of reverse discrimination lawsuits raged against race-based affirmative action policies.

III. The Beginning of an Enduring Legal Debate

A. *The 1970s—The First Wave of Federal Reverse Discrimination Lawsuits*

The 1970s introduced the first reverse discrimination lawsuits in the cases of *DeFunis v. Odegaard* and *Regents of the University of California v. Bakke.* In both cases, white males sued institutions of higher education for illegally having special admissions programs for racial and ethnic minorities, which they claimed were in violation of the Fourteenth Amendment and the Civil Rights Act of 1964.[94]

In *DeFunis*, a white male sued the University of Washington alleging that he was not accepted into the law school due to less qualified minority students being admitted solely based on race and in violation

91. O'Neil, *supra* note 37, at 281.

92. Slocum, *supra* note 34, at 345.

93. *Id.*

94. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 269–70, 276 (1978); *see also* DeFunis v. Odegaard, 416 U.S. 312, 314, 337 (1974) (petitioner sued under the Fourteenth Amendment).

of the Fourteenth Amendment.[95] 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.[96] Prior to reaching the United States Supreme Court, the trial court agreed with DeFunis that the University of Washington School of Law violated the Fourteenth Amendment and issued a mandatory injunction that required the University of Washington School of Law to admit Mr. DeFunis.[97] The Washington Supreme Court reversed the trial court's decision and upheld the constitutionality of the law school's admissions policy.[98] When the case finally reached the U.S. Supreme Court, DeFunis was in his last year of law school at the University of Washington.[99] Thus, the Court did not address the merits of the case because the majority of the Supreme Court considered the issues to be moot because there were no longer any constitutional issues to be decided.[100] Given the conflict over the constitutional issue in the case as well as the fact that this was 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.[101] 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 more detail than the other legal cases.

In 1971, the University of Washington School of Law 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.[102] 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.[103] The highest average in 1971 was eighty-one, so many students with an average index from seventy-seven to eighty-one were considered outstanding applicants.[104] The outstanding candidates had their applications immediately reviewed by the Admissions Committee, which consisted of faculty, administration, and students, for a recommendation.[105] Many of the students with averages in the seventy-seven to eighty-one ranges were admitted.[106] The Chairman of the Admissions Committee reviewed the applica-

95. *DeFunis*, 416 U.S. at 314.
96. *Id.*
97. *Id.*
98. *Id.* at 316.
99. *Id.*
100. *Id.* at 319–20.
101. *See id.* at 314–20.
102. *Id.* at 320 (Douglas, J., dissenting).
103. *Id.* at 321.
104. *Id.*
105. *Id.*
106. *Id.* at 322.

tions with scores below 74.5. He had the authority to reject them summarily without further consideration (many were rejected) or to hold some applications that showed greater promise for review by the entire Committee.[107] DeFunis's 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.[108] After further review with the other competing waitlist applicants, DeFunis fell within the bottom quarter, so he was denied admission to the University of Washington School of Law.[109]

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.[110] Specifically, two members of the Admissions Committee reviewed the applications of black applicants.[111] 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.[112] 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.[113] All minority applicants were considered competitively against each other, but not against non-minority applicants.[114]

The University of Washington School of Law publicly distributed its Guide to Applicants, which indicated "an applicant's racial and ethnic background was considered as *one factor* in our general attempt to convert formal credentials into realistic predictions."[115] 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.[116] 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.[117] Out of the 275 applicants offered admissions to the law school, 37 of

107. *Id.* at 322.
108. *Id.* at 322–23.
109. *Id.* at 323.
110. *Id.*
111. *Id.*
112. *See id.* at 323 n.3.
113. *Id.* at 323.
114. *Id.*
115. *Id.* at 324 (emphasis added).
116. *Id.* at 324–25.
117. *Id.* at 321, 324 n.5.

them were minority students who went through the separate review process.[118] Thirty-six of the minority students had average index scores lower than DeFunis's average.[119] Moreover, there were 48 non-minorities admitted with lower averages than DeFunis, of which 23 were returning military veterans.[120] 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.[121]

In Justice Douglas's 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.[122] Before explaining his reasoning, Justice Douglas first noted that a university's admissions procedures are ordinarily not a subject for judicial oversight.[123] Nevertheless, the University of Washington School of Law 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.[124] Justice Douglas opined that the Equal Protection Clause did not enact a requirement that law schools employ a formula based upon the LSAT and undergraduate grades as the sole criterion for admissions.[125] 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.[126] 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.[127] In fact, prior to the LSAT's implementation in 1948, all applicants were accepted into law school and

118. *Id.* at 320.
119. *Id.* at 324.
120. *Id.* at 324–25.
121. *Id.* at 325.
122. *Id.* at 336.
123. *Id.* at 325.
124. *Id.* at 325–26.
125. *Id.* at 331.
126. *Id.*
127. *Id.* at 335–40.

the first-year of law studies determined if a person had the makings to be a competent lawyer.[128] 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.*[129]

This brought the Supreme Court Justice to his next point:

> [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.[130]

Therefore, Justice Douglas concluded that the University of Washington Law School did not discriminate against DeFunis in violation of the Fourteenth Amendment.[131] 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.[132] Justice Douglas summed up his decision in this final and fundamental thought:

> [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 deci-

128. *Id.* at 327 (quoting John H. Wigmore, *Jurisistic Psychopoyemetrology—Or, How to Find Out Whether a Boy Has the Makings of a Lawyer*, 24 ILL. L. REV. 454, 463–64 (1929)).

129. *Id.* at 336.

130. *Id.* at 336–37.

131. *Id.* at 344.

132. *Id.*

> sion, 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.[133]

The *DeFunis* case did not hold legal precedence as it pertained to race-based affirmative action cases and admissions practices.[134] Nevertheless, the facts in this case and Justice Douglas's 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, Justice Douglas recognized that DeFunis brought his reverse discrimination lawsuit based on race when there were 48 non-minority applicants with lower averages than DeFunis offered admission into the University of Washington School of Law, as compared to the 36 racial minorities with lower averages.[135] In his seasoned wisdom, Justice Douglas found it necessary to inform 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.[136] 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.[137] The Supreme Court Justice went as far as to say that the LSAT 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.[138] 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.[139] Finally, Justice Douglas argued for colleges' right to autonomy and flexibility in making their own admission decisions.[140] After all, colleges have expertise as educators and experience with judging the academic potential of applicants. Courts should honor universities' admissions decisions and how institutions reach their decisions unless there is invidious discrim-

133. *Id.*
134. *See id.* at 316–17.
135. *Id.* at 324–25. (Douglas, J. dissenting).
136. *Id.* at 336–37.
137. *Id.* at 330.
138. *Id.* at 329.
139. *Id.* at 335.
140. *See id.* at 325, 331–32, 340, 344.

ination afoot, which was not present in the *DeFunis* case according to Justice Douglas.[141]

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 in 1978.[142] In the *Bakke* case, the United States Supreme Court addressed the constitutionality of race-sensitive policies and held that the University of California at Davis Medical School violated the Fourteenth Amendment because it reserved a specified number of admissions for racial minorities.[143] 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.[144]

B. *The 1980–1990s—The Legal Debate Gains Momentum*

The Republican Party politically controlled the country in the 1980s and early 1990s. Ronald Reagan was President of the United States from 1981 to 1989, and George Bush was President from 1989 to 1993.[145] 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.[146] In 1990, the Bush Administration issued an opinion that stated that scholarships set-aside for racial and ethnic minority students violated civil rights laws.[147] 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 con-

141. *Id.* at 344.

142. *Id.*; *see* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 269–71 (1978).

143. *Bakke*, 438 U.S. at 319–20.

144. *Id.* at 317.

145. The White House, Ronald Reagan, http://www.whitehouse.gov/about/presidents/ronaldreagan (last visited Feb. 16, 2010); The White House, George H. W. Bush, http://www.whitehouse.gov/about/presidents/georgehwbush (last visited Feb. 16, 2010).

146. *See* LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND, RESTORING THE CONSCIENCE OF A NATION 27 (2009) (quoting letter from Commission on Civil Rights advisory committee asserting President Reagan's responsibility for "dangerous deterioration in the Federal enforcement of civil rights"); Sidney D. Watson, *Health Care in the Inner City: Asking the Right Question*, 71 N. C. L. REV. 1647, 1669 (1993) (arguing under the Reagan administration the Department of Health and Human Services' Office of Civil Rights abdicated Title VI health care enforcement); Alex Willinghan, *Black Political Participation in the 1980's: Challenged by Conservativism*, SOUTHERN CHANGES, Winter 1978, at 5–8 (arguing Reagan administration sought to curb policies for racial advancement and appointed executives who "dismantle[d] the enforcement mechanism").

147. *See The Black Man Who Threw the Cat on the Table*, J. BLACKS HIGHER EDUC., Summer 1995, at 8.

tracts.[148] 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.[149] 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.[150] 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* and *Hopwood v. Texas*. The *Podberesky* case concerned a Hispanic student disputing a scholarship program exclusively for black students.[151] 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.[152]

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 the plaintiffs' claimed was a violation of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.[153] 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.[154] The United States Court of Appeals for the Fifth Circuit in Texas agreed with the *Hopwood* plaintiffs, and held that the

148. *See* United States v. Paradise, 480 U.S. 149, 185–86 (1987) (finding state agency's requirement that half of promotions go to blacks was permissible under Equal Protection Clause of Fourteenth Amendment); Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County, 122 F.3d 895, 929 (11th Cir. 1997) (findings that county's race-based affirmative action program was not narrowly tailored to goal of remedying effects of discrimination); Contractors Ass'n of E. Pa., Inc. v. City of Phila., 91 F.3d 586, 609–10 (3d Cir. 1996) (finding ordinance establishing race-based set-asides for construction contracts did not satisfy equal protection strict-scrutiny test); Podberesky v. Kirwan, 28 F.3d 147, 161(4th Cir. 1994) (holding scholarship program only open to black students was not narrowly tailored to remedy past discrimination and could not meet strict scrutiny test); Capeletti Bros., Inc. v. Broward County, 738 F. Supp. 1415 (S.D. Fla. 1990) (holding contractors lacked standing to challenge minority set-aside program on basis that program increased costs), *aff'd*, 931 F.2d 903 (11th Cir. 1991).

149. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

150. *Id.*

151. *Podberesky*, 38 F.3d at 152.

152. Hopwood v. Texas, 78 F.3d 932, 934, 940, 944 (5th Cir. 1996), *abrogated by* Grutter v. Bollinger, 539 U.S. 306 (2003).

153. *Id.* at 937–38.

154. *Id.* at 938.

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.[155] Interestingly, *Hopwood*, along with 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.[156] 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.[157] Most who voted in favor of the referendum were white males and Republicans who made $60,000 or more annually.[158] In 1998, the State of Washington passed a similar referendum eliminating affirmative action.[159] 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.[160] 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 these States' public universities so long as certain requirements are met.[161] Interestingly, the top high school graduates also have to have a certain number of college preparatory courses, which are not available to many disadvantaged racial minorities, in order to be considered for admissions by the public state universities of the graduates' choice;[162] thus, another barrier to law school admissions.

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155. *Id.* at 962.

156. *See, e.g.*, WASH. REV. CODE § 49.60.400. (West 2008); CAL. CONST. art. I, § 31.

157. CAL. SEC'Y OF STATE, STATEMENT OF VOTE, PRESIDENTIAL GEN. ELECTION, at 34–36 (Nov. 5, 1996), *available at* http://www.sos.ca.gov/elections/sov/1996-general/1996-general-sov.pdf.

158. American Civil Rights Institute, *How California Voted on Proposition 209*, http://www.acri.org/209votedemographics.html (last visited Feb. 24, 2010).

159. Adversity.net, Washington State Civil Rights Initiative, http://www.adversity.net/i200.htm (last visited Feb. 16, 2010).

160. CATHERINE L. HORN & STELLA M. FLORES, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences 18 (2003), *available at* http://www.ofr.harvard.edu/additional_resources/Harvard_Civil_Rights_Project_Report_on_Percent_Plans_in_College_Admissions.pdf.

161. *Id.* at 10.

162. *See* Press Release, Stanford Univ. News Serv., School Tracking Harms Millions, Sociologist Finds (Mar. 2, 1994), *available at* http://news.stanford.edu/pr/94/940302Arc4396.html.

C. *The 2000s—The Legal Debate Intensifies*

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 v. University of Washington Law School*, and *Johnson v. Board of Regents of the University of Georgia*, in 2000 and 2001, respectively. The *Smith* case was a class-action lawsuit led by a white female plaintiff-appellant who sued on behalf of her and other white applicants who were denied access to the Law School because the school's admissions policy favored racial and ethnic minorities.[163] 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.[164] The appellate court concluded that Initiative 200 bound the Law School, but the admissions policy was legal because the school considered other factors besides race to achieve a diverse student body.[165]

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.[166] 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.[167] Furthermore, the *Johnson* court refused to follow the Supreme Court's guidance in *Bakke* to use race as a plus factor in admissions decisions, although the *Smith* court recognized *Bakke* as binding precedent.[168] 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 *Gratz v. Bollinger* and

163. Smith v. Univ. of Wash., Law School, 233 F.3d 1188, 1191 (9th Cir. 2000).
164. *Id.*
165. *Id.* at 1201.
166. Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1264 (11th Cir. 2001).
167. *Id.* at 1254–55.
168. *Id.* at 1252; Smith v. Univ. of Wash. Law School, 2 F. Supp. 2d 1324, 1334 (W.D. Wash. 1998).

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.[169] The white woman, Jennifer Gratz, was the lead plaintiff-petitioner.[170] A white woman from Michigan, Barbara Grutter, was the sole petitioner in the *Grutter v. Bollinger* case.[171] The petitioners in both lawsuits alleged that the University of Michigan's admissions 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.[172] All parties sought declaratory and injunctive relief as well as compensatory and punitive damages.[173] 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.[174]

The *Gratz* and *Grutter* cases yielded very different decisions, but in both cases the Supreme Court relied on the *Bakke* holding as binding precedent and attempted to add clarity to the confusing and controversial analysis in Justice Powell's opinion in *Bakke*.[175] Furthermore, in its majority opinions in *Gratz* and *Grutter*, the Supreme Court reached a consensus on how it would handle racial classifications as a compelling state interest when state-run institutions tried to achieve a diverse student body.[176] In *Gratz*, the Supreme Court found that the University of Michigan's undergraduate freshman admissions policy was unconstitutional.[177] The Court's holding was based on the fact that underrepresented racial and ethnic minorities were automatically awarded twenty points out of the 150 needed for undergraduate admission without assessing each applicant's individual qualities.[178] In the *Grutter* case, however, the Supreme Court held that the University of Michigan School of Law had a compelling state interest in attaining a diverse student body, and the admissions policy's use of race was

169. Gratz v. Bollinger, 539 U.S. 244, 251 (2003).
170. *Id.*
171. Grutter v. Bollinger, 539 U.S. 306, 311 (2003).
172. *Id.* at 316–17; *Gratz*, 539 U.S. at 260.
173. *Grutter*, 539 U.S. at 321; *Gratz*, 539 U.S. at 252.
174. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516); Brief for the United States as Amicus Curiae Supporting Petitioner, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241).
175. *Grutter*, 539 U.S. at 392–93; *Gratz*, 539 U.S. at 275.
176. *Grutter*, 539 U.S. at 392–93; *Gratz*, 539 U.S. at 275.
177. *Gratz*, 539 U.S. at 275.
178. *Id.* at 271.

narrowly tailored to further that interest.[179] The Law School's policy of seeking to enroll a critical mass of minority students was constitutional because it engaged in a highly individualized, holistic review of each applicant's file.[180] 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.[181] 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.[182]

D. *The Legal Debates Impact on CLEO's Purpose, Funding, and Programs*

As previously mentioned, the first case reached the United States Supreme Court in 1974, which was the law school admissions case of *DeFunis v. Odegaard,* and this occurred around the same time that CLEO began to have funding problems. Coincidentally, 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.[183] 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.[184] While DeFunis's 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.[185] The University of Washington Law School has not sponsored another summer institute program since 1974.[186]

Since its inception, funding has been a constant issue for CLEO because it was primarily funded by federal agencies.[187] From 1968 to 1973, and prior to the first reverse discrimination legal cases, the Office of Economic Opportunity (OEO) provided CLEO with most of its funding.[188] Due to legislative changes, however, the Department

179. *Grutter,* 539 U.S. at 343.
180. *Id.* at 337, 343.
181. *Id.*
182. *Id.* at 332.
183. DeFunis v. Odegaard, 416 U.S. 312, 323 n.3 (1974).
184. *Id.* at 323.
185. COUNCIL ON LEGAL EDUC. OPPORTUNITY, 2002–2003 ANNUAL REPORT: CELEBRATING DIVERSITY IN LEGAL EDUCATION 49 YEARS AFTER *Brown* 25 (2003) [hereinafter CLEO 2002–2003 ANNUAL REPORT].
186. *Id.*
187. Burns, *supra* note 45, at 1486.
188. Interview with Karen Austin (pseudonym), Exec. Dir., Council on Legal Educ. Opportunity, in Wash., D.C. (Aug. 18, 2006).

of Health, Education, and Welfare (HEW) became responsible for providing funding to CLEO through grant money after 1973.[189] Federal funding covered the law school students' stipends, the summer institutes, the CLEO office and staff, and the ABA's administration services.[190] 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.[191] 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.[192] 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.[193] 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.[194]

By 1990, the number of minority law students enrolled in law school was 17,330, or 13.6% of the total number of law students.[195] During the same period, the number of minority lawyers was 55,609,[196] several thousand of which were CLEO fellows, but the number of minority lawyers still only represented 7.6% of the total number of lawyers in the country.[197] Furthermore, the number of black and Latino students enrolled in law school hit their peak in 1994 with approximately 3,600 and 2,532 students, respectively.[198] Similarly, law school enrollments for Native-American students hit its peak during the 1995–96 school year with about 436 students.[199]

Although 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

189. *Id.*
190. *Id.*
191. *Id.* at 1468.
192. Higher Education Act of 1965, Pub. L. No. 89-329, § 721, 79 Stat. 1219, 38–40.
193. Interview with Karen Austin, *supra* note 188.
194. *Id.*; Interview with Richard Todd (pseudonym), Assistant Dir., Council on Legal Educ. Opportunity, in Wash., D.C. (Aug. 4, 2006).
195. *Id; see also* American Bar Association, Minority Enrollment 1971–2002, http://www.abanet.org/legaled/statistics/minstats.html (last visited Feb. 11, 2010).
196. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION: DETAILED OCCUPATION AND OTHER CHARACTERISTICS FROM THE EEO FILE FOR THE UNITED STATES, at tbl. 1 (1992), *available at* http://www.census.gov/prod/cen1990/cp-s/cp-s-1-1.pdf (last visited Mar. 1, 2010). Minority includes African American, Hispanic/Latinos, Asian American, and Native Americans. *Id.*
197. *Id.*
198. American Bar Association, Minority Enrollment 1971–2002, *supra* note 195.
199. *Id.*

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* and *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.[200] Nineteen ninety-four was also one of the first years that CLEO revealed its new financial eligibility requirements.[201] 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.[202] 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.[203] After 1995, CLEO completely lost 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.[204] When CLEO lost its federal funding, the executive director and the board of directors decided that while the organization could no longer rely on government dollars, they would need a plan to fund the summer institutes with private dollars.[205] 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 1).[206] 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.

200. CLEO 1998 ANNUAL REPORT, *supra* note 51, at 15.
201. David P. Pallozzi, *Advising Average Applicants*, NAPLA NOTES, Fall 1999, www.napla.org/Notes11-99.htm.
202. *See id.*; CLEO 1998 ANNUAL REPORT, *supra* note 51, at 15.
203. COUNCIL ON LEGAL EDUC. OPPORTUNITY, 1995 ANNUAL REPORT (1995).
204. CLEO 1998 ANNUAL REPORT, *supra* note 51, at 4.
205. Interview with Richard Todd, *supra* note 194.
206. CLEO 1998 ANNUAL REPORT, *supra* note 51, at 14.

TABLE 1: CLEO'S FINANCIAL STATEMENTS FOR 1997 AND 1998

Revenues	**1998**	**1997**
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
Total Revenue	$626,622	$498,950
Expenditures	**1998**	**1997**
Program Services		
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
Support Services		
General and Administrative	$47,325	$26,143
Total Expenses	$571,711	$366,835

Source: Council on Legal Education Opportunity, 1998 Annual Report.[207]

In response to the loss of federal funding, CLEO and its partners amended the bylaws, reworked the operation and funding of the summer institutes, modified the governing council structure, and designed the Thurgood Marshall Legal Educational Opportunity Program (Thurgood Marshall Program), which would be "a more comprehensive approach to achieving diversification of the legal profession."[208] The Executive Director boasted that CLEO, with the help of its many partners in legal education, was successful in convincing the 105th Congress to incorporate the Thurgood Marshall Program into the Higher Education Act Amendments of 1998.[209] 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.[210] 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.[211] In other words, the

207. *Id.*
208. *Id.* at 10.
209. Higher Education Act of 1965, Pub. L. No. 89-329, § 721, 112 Stat. 1581, 1794–95 (1998); Interview with Karen Austin, *supra* note 188.
210. Interview with Karen Austin, *supra* note 188.
211. Interview with Richard Todd, *supra* note 194.

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."[212] As such, CLEO's bylaws 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.[213] 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.[214] 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.[215] 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.[216]

Since the implementation of the Thurgood Marshall Program, CLEO now distinguishes between those students who are "fellows" and those who are "associates."[217] Students who attend and complete the pre-law summer institute programs are categorized as "fellows," and students who do not attend the summer institutes, but are enrolled in law school and are educationally or economically disadvantaged students, are categorized as "associates."[218] According to an LSAC representative, the Thurgood Marshall Program was created so that CLEO could get federal funding.[219] The federal funding, however, is not for the traditional summer institutes but for scholarships for "qualified" students who are already admitted to a law school.[220] CLEO is now known for its scholarships, not its minority summer in-

212. 20 U.S.C.A. § 1136(a) (West 2010) (emphasis added).

213. Council on Legal Educ. Opportunity, By-Laws 1 (amended Apr. 21, 1998, June 19, 2004, and June 10, 2006) [hereinafter CLEO By-Laws] (on file with Council of Legal Educ. Opportunity in Wash., D.C.).

214. COUNCIL ON LEGAL EDUC. OPPORTUNITY, 2001–2002 ANNUAL REPORT 4 (2002); Interview with Karen Austin, *supra* note 188.

215. Telephone interview with Walter Battle, Chairman, Council on Legal Educ. Opportunity Governing Council (Sept. 21, 2006).

216. *Id.*

217. Interview with Jane Green (pseudonym), Admissions Dir., Council on Legal Educ. Opportunity, in Wash., D.C. (Aug. 3, 2006).

218. CLEO, CLEO Fellows, Associates & Alumni, http://www.cleoscholars.com/index.cfm?fuseaction=Page.viewPage&pageId=484.

219. Telephone interview with John Jones (pseudonym), LSAC Representative and CLEO Liaison, Law School Admissions Council (Sept. 14, 2006).

220. 20 U.S.C.A. § 1136(c)(6) (West 2010).

stitutes, which attract more diverse applicants to the CLEO programs.[221]

Beginning in 2001, CLEO began receiving federal funding through the Thurgood Marshall Program to aid educationally and economically disadvantaged students.[222] The funding provides financial assistance awards to CLEO fellows.[223] 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

221. Interview with Richard Todd, *supra* note 194; Interview with Jane Green, *supra* note 217; *see also* CLEO, Financial Assistance, http://www.cleoscholars.com/index.cfm?fuseaction=Page.viewPage&pageId=545&parentID=484&nodeID=2 (last visited Feb. 27, 2010).

222. Interview with Richard Todd, *supra* note 194; *see also* U.S. Department of Education, Thurgood Marshall Legal Educational Opportunity Program, http://www2.ed.gov/programs/legal/index.html (last visited Apr. 18, 2010).

223. CLEO Fellows, Associates & Alumni, *supra* note 218.

(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.[224]

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.[225] 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.[226] 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.[227] As the LSAC representative commented, CLEO was known for its summer institutes and preparing at-risk minority students for law school.[228] Nevertheless, according to the federal government, there was no real way to evaluate the success of the summer institutes because 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.[229] 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 was directly related to the summer institute program.[230]

At the end of 2003, after the United States Supreme Court rendered its decisions in the two University of Michigan race-based admissions legal cases, CLEO did not receive federal funding for the Thurgood Marshall Program for 2004.[231] Each fall, Congress approves its federal budget appropriations to cover October 1st through September 30th of the following year.[232] Fortunately, CLEO had money remaining in its budget because the federal appropriations are awarded as five-year grants.[233] The Thurgood Marshall Program also was not included in Congress's education appropriations in 2005 until

224. CLEO 2002–2003 ANNUAL REPORT, *supra* note 185, at 7, 11–12, 16.

225. *Id.* at 7, 24.

226. *Id.* at 16–17.

227. *See id.* at 16; COUNCIL ON LEGAL EDUC. OPPORTUNITY, BIENNIAL REPORT 2003–2004 / 2004–2005, at 1, 5 (2005) [hereinafter BIENNIAL REPORT].

228. BIENNIAL REPORT, *supra* note 227, at 13; Telephone Interview with John Jones, *supra* note 219.

229. Interview with Karen Austin, *supra* note 188; Interview with Richard Todd, *supra* note 194.

230. Interview with Karen Austin, *supra* note 188.

231. BIENNIAL REPORT, *supra* note 227, at 52.

232. James V. Saturno, Cong. Research Serv., CRS Report for Congress: The Congressional Budget Process 3 (2004), *available at* http://fpc.state.gov/documents/organization/34649.pdf; Bill Heniff Jr., Cong. Research Serv., CRS Report for Congress: The Federal Fiscal Year 1 (2003), *available at* http://www.rules.house.gov/Archives/98-325.pdf.

233. Interview with Richard Todd, *supra* note 194.

Senators Barack Obama and Richard Durbin of Illinois wrote compelling letters to members of Congress.[234] 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.

Table 2 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.[235] Private funding lingers at $400,000 to $600,000, of which 50% of the private funding is used for the summer institutes.[236] 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.[237]

234. COUNCIL ON LEGAL EDUC. OPPORTUNITY, GOVERNMENT AFFAIRS COMMITTEE REPORT (2005).
235. *See* Table 2 *infra* p. 40.
236. *Id.*
237. *Id.*

TABLE 2: CLEO'S FINANCIAL STATEMENTS FOR 2001 THROUGH 2005[238]

Year	**2001-2002**		**2002-2003**		**2003-2004**		**2004-2005**	
Total Revenue	**$4,628,380**		**$4,012,787**		**$3,699,498**		**$3,552,000**	
Source of Revenue:								
Federal Government Funding	**$4,003,549**	**(86.5%)**	**$3,625,152**	**(90.34%)**	**$3,162,331**	**(85.48%)**	**$2,952,067**	**(83.11%)**
Private Funding:								
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%)
Total Private Funding	**$ 624,831**	**(13.5%)**	**$ 387,536**	**(9.66%)**	**$ 537,167**	**(14.52%)**	**$ 599,933**	**(16.89%)**
Federally Funded Expenses:								
Financial Assistance Awards & Stipends	$2,241,987	(56%)	$1,667,570	(46%)	$1,391,426	(44%)	$1,416,992	(48%)
Program Development:								
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	$ 400,355		$ 435,018	(12%)	$ 284,610	(9%)	$ 236,165	(8%)
Information 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%)
Privately Funded Expenses:								
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%)

238. *See* CLEO 2001–2002 ANNUAL REPORT, *supra* note 214, at 22–23; BIENNIAL REPORT, *supra* note 227, at 52.

The summer institutes were once CLEO's recruitment, preparation, and evaluation vehicles 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.[239] 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.[240] 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.[241] The Associate Director of CLEO recalled that the consortium is comprised of over 130 law schools that are categorized as Member, Sustaining, or Supporting Institutions, and contribute $5,000, $3,000, or $1,500 per year, respectively.[242] The fees that the students pay for the summer institutes are based on each student's income.[243] 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.[244] 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.[245]

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.[246] In 1969, CLEO hosted ten summer institutes for about 448

239. *See* Burns, *supra* note 45, at 1483–84.

240. Telephone Interview with John Jones, *supra* note 219.

241. Interview with Richard Todd, *supra* note 194; CLEO 2001 – 2002 ANNUAL REPORT, *supra* note 214, at 26–29.

242. Interview with Richard Todd, *supra* note 194; CLEO 2001–2002 ANNUAL REPORT, *supra* note 214, at 26–28.

243. CLEO, Pre-Law Programs: Six Week Summer Institute, http://www.cleoscholars.org/index.cfm?fuseaction=Page.viewPage&pageId=522&grandparentID=483&parentID=531&nodeID=2 (last visited Feb. 20, 2010).

244. American Bar Association, What is CLEO?, http://www.abanet.org/cleo/whatis.html (last visited Feb. 21, 2010).

245. *See* CLEO, Financial Assistance, http://www.cleoscholars.com/index.cfm?fuseaction=Page.viewPage&pageId=545&parentID=484&nodeID=2 (last visited Feb. 21, 2010).

246. *See* Donald J. Weidner, *The Crisis of Legal Education: A Wake-Up Call for Faculty*, 47 J. LEGAL EDUC. 92, 95 (1997); Pamela Edwards, *The Culture of Success: Improving the Academic Success Opportunities for Multicultural Students in Law School*, 31 NEW ENG. L. REV. 739, 766 (1997); Kenneth Jost, *Law-related Programs Facing Ax*, A.B.A. J., June 1996, at 38, 38; CLEO ANNUAL REPORT 2002–2003, *supra* note 185, at 25–27 (documenting that the average number of summer institutes from 1968-1994 was around seven, while the average number of summer institutes from 1995-2003 was around three).

students.[247] Every year after 1969 until 1996, there were approximately seven summer institutes located in different regions around the country.[248] In 1996, CLEO financed three summer institutes, and since 2003, CLEO has offered only two summer institutes each summer.[249] Although CLEO receives about 750 applications each year from students who are interested in attending the summer institutes, the program accepts approximately eighty, about forty per summer institute, because there are only two summer institutes offered.[250] Comparatively, the federally funded AIE summer program has hosted two weekend seminars annually since 2002, which host about 200 to 250 law students each year.[251]

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 bylaws explained that its purpose was to expand and enhance the opportunity for disadvantaged groups, namely blacks, Native-American, and Hispanic and 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.[252] After almost forty years of CLEO being in existence and enduring some programmatic and funding changes along the way, the question arises

247. CLEO diverCITY Network, CLEO 40th Anniversary, http://www.cleodivercitynetwork.org/index.cfm?fuseaction=Page.ViewPage&PageID=606 (last visited Feb. 28, 2010); Burns, *supra* note 45, at 1484.

248. *See* CLEO ANNUAL REPORT 2002–2003, *supra* note 185, at 25–27.

249. *See* CLEO, *Pre-Law Programs: Six Week Institute*, http://www.cleoscholars.com/index.cfm?fuseaction=Page.viewPage&pageID=522&nodeID=2 (two institutes in 2010) (last visited Mar. 6, 2010); Pete Rosenbery, *Law School to Host Nationally Recognized Institute*, THE SALUKI TIMES, Dec. 10, 2008, http://news.siuc.edu/news/December08/121008par8159.html (two institutes in 2009); CLEO, *Pre-Law Programs: Six Week Summer Institute*, http://www.cleoadmin.com/pre_law_programs/6weeksummerinst.cfm (two institutes in 2008) (last visited Mar. 6, 2010); *Schedule of Events: Six Week Summer Institute,* CLEO CONNECTIONS (Council on Legal Educ. Opportunity, Wash., D.C.), Winter 2007, at 1, *available at* http://www.cleoscholars.com/_data/global/images/CLEONewslett_Jan07.pdf (two institutes in 2007); *Schedule of Events: Six Week Summer Institute,* CLEO CONNECTIONS (Council on Legal Educ. Opportunity, Wash., D.C.), Winter 2006, at 1, *available at* http://www.cleoscholars.com/_data/global/images/CLEONewslett_Jan06.pdf (two institutes in 2006); CLEO ANNUAL REPORT 2002–2003, *supra* note 185, at 7, 16, 27 (two institutes in 2003 and three institutes in 1996).

250. Interview with Jane Green, *supra* note 217.

251. CLEO diverCITY Network, Attitude is Essential Program Synopsis, http://www.cleoscholars.com/index.cfm?fuseaction=Page.viewPage&pageId=568&parentID=557&nodeID=1 (last visited Mar. 1, 2010).

252. CLEO By-Laws, *supra* note 213.

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 Article, the researcher reveals the results of comparing CLEO students' demographic profiles over several periods. Data was collected on specific profile characteristics, including students' undergraduate GPAs, LSAT percentile scores, and racial and ethnic background, for the selected periods of 1968 and 1969, 1975, 1980, 1991, 1998–2000, 2001–2003, and 2004–2006, which were a year or two after decisions in key federal affirmative action legal cases and state anti-affirmative action policies. The students' undergraduate GPAs and LSAT percentile scores were analyzed using ANOVA, while chi-square analysis was used to examine the race and ethnicity of students. A significance level of .05 was used for statistical analyses.

CLEO's annual reports clearly indicate its guidelines—students with LSAT scores and undergraduate GPAs below 140[253] and 2.5 respectively—should not apply to CLEO programs, unless they have recommendations from a member school.[254] 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% 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 thirty years, and CLEO had to set specific standards in order to keep CLEO students competitive for law school admissions.[255]

253. Since 1996, the national LSAT score of 140 has been approximately equivalent to a LSAT percentile of 13 to 15.5 percent. LSAT Percentiles, http://tars.rollins.edu/prelaw/percentiles.htm (last visited Feb. 28, 2010); Empire State College, L.S.A.T. Sample Score Percentiles, http://www.esc.edu/ESConline/focused/prelawresources.nsf/db1a77fb2f6bcf2085256bfa005466b0/f6f479ed15e0764885256dba005f2d3f?Open document (last visited Feb. 28, 2010); Powerscore.com, Test, Experimental, and Scale Help, http://www.powerscore.com/LSAT/help/scale.cfm (last visited Feb. 28, 2010); ROBERT K. BURDETEE ET AL., THE BEST TEST PREPARATION FOR THE LAW SCHOOL ADMISSION TEST (LSAT), at I-9 (6th ed. 1999). This percentile is slightly higher than the 400 (13th percentile) minimum that most law schools required of law students in the 1960s, which barred most minority students. Slocum, *supra* note 34, at 338.

254. *Academic Criteria*, NAPLA NOTES, Winter 2000, http://www.napla.org/winter2000.htm; *Table 4: Grade Point Averages of CLEO Summer Participants*, NAPLA NOTES, Fall 1999, http://www.napla.org/Notes11-99.htm.

255. CLEO 1998 ANNUAL REPORT, *supra* note 51, at 13; Interview with Richard Todd, *supra* note 194.

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. 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 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.

In 2001, CLEO started Attitude is Essential (AIE) with the federal funding received through the Thurgood Marshall Program.[256] 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.[257] 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.[258] In 2003, the number of AIE associates was about 220, while the number of SI fellows was 72.[259] 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. 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).

The students' LSAT percentile scores have also 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 tenth percentile, which means about 90% of LSAT test takers had higher scores than some of the SI fellows.[260] This analysis found that

256. CLEO 2002–2003 ANNUAL REPORT, *supra* note 185, at 7; CLEO, Attitude is Essential, http://www.cleoscholars.com/index.cfm?fuseaction=Page.viewPage&pageID=520&nodeID=2 (last visited Mar. 15, 2010).

257. *See id.* at 11.

258. Interview with Jane Green, *supra* note 217.

259. CLEO 2002–2003 ANNUAL REPORT, *supra* note 185, at 11, 16.

260. *See* David M. WHITE ET AL., TOWARDS A DIVERSIFIED LEGAL PROFESSION: AN INQUIRY INTO THE LAW SCHOOL ADMISSIONS TEST, GRADE INFLATION, AND CURRENT ADMISSIONS POLICIES 36–37 (David M. White ed., 1981). The Author per-

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 ninetieth percentile and higher.

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 2004–2006 were significantly higher than in any other time period. 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 the 2004–2006 time period was equal to the forty-seventh 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. 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 ninety-four SI fellows in 2006 was 43.60 (SD = 19.85), with a minimum score in the 10th percentile and the highest score in the 93rd 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 11th percentile and the highest score was in the 100th percentile.

Over the past forty years, CLEO also has seen a change in the race and 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 and Latinos have been the dominant racial and ethnic groups involved in CLEO programs from the beginning. Blacks and Hispanic and Latinos remain the first and second largest racial and ethnic groups, re-

formed statistical analysis of the LSAT scores from 1968 to 2006 collected from the Law School Admission Council. The Author then compared this data to the CLEO fellows' LSAT percentile scores during the same period.

spectively, with Asian Americans usually being the third largest.[261] However, chi-square analysis indicated a significant difference in the racial composition for SI across time periods ($x^2(36, N = 1304) = 154.01, p < .001$). In 1968 and 1969, SI was comprised of black, Hispanic and Latino, and Asian-American students, which represented 75.1%, 23.5%, and 1.4% of the SI population, respectively. By 2004 through 2006, there was a noteworthy shift in the racial makeup of SI; 58.2% of SI fellows were black, 20.7% were Hispanic and Latino, 10.1% were Asian American, and 6.3% were characterized as "Other."[262] 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 fifteen (5.2%), and in 2004 through 2006, there were eleven (4.6%) white SI fellows.

The Attitude is Essential (AIE) program has also experienced some movement in racial composition since 2002. While the largest percentages of AIE associates have been black and Hispanic and 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. In fact, chi-square analysis showed a significant change in racial composition across the years ($x^2(20, N = 1075) = 74.97, p < .001$). Results of the post-hoc comparisons show 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%). 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 and 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%). It is important to acknowledge that in 2004, after the *Gratz* and *Grutter* decisions, the largest ever percentage of white students were enrolled in both the AIE and SI programs, which were 7.1% and 6.9%, respectively.

IV. Discussion

The analysis of the evolution of the race-conscious affirmative action legal debates in higher education shows that debates 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 California, Texas, Florida, and Washington abolished af-

261. CLEO Annual Report 2002–2003, *supra* note 185, at 17.

262. The Author performed statistical analysis of the data collected from CLEO; *see* Interview with Richard Todd, *supra* note 194.

firmative action policies and programs or severely limited their use in favor of race-neutral alternatives. In 2009, the legal debate maintains a strong and divisive atmosphere, with two other states, Michigan and Nebraska, voting to ban all affirmative action policies. Additionally, out of the eight legal cases that were analyzed in this article, four specifically involved law school admission policies where historically there have been low numbers of racial minorities admitted.

The analysis in this Article also revealed that as the number of race-based affirmative action cases in higher education increased in the past thirty years, a notable change in the tenor of the lawsuits resulted. In the early years of the legal debate with the *DeFunis* and *Bakke* cases, the lawsuits consisted of an individual white male requesting the Court for a mandatory injunction to prohibit the use of race-based affirmative action policies at a particular university. In the more recent years of *Gratz* and *Grutter*, reverse discrimination cases evolved to class action lawsuits with multiple plaintiffs demanding injunctive relief as well as compensatory and punitive damages. The current plaintiffs are now requesting more courts to deem the universities' race-based policies unconstitutional and therefore prohibited. The current plaintiffs have come to the courts in large numbers requesting that universities with race-based policies be punished and made to pay for their "unjust" behavior. Thus, a university that implements affirmative action policies in order to create opportunity, to help level the playing field, and to assist qualified underrepresented racial minorities who may otherwise be excluded from higher education programs, may be deemed evil wrongdoers, and monetary punishment may be imminent for their efforts to achieve fairness and justice.

The findings further 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 enter and graduate from law schools, experienced some noticeable changes to its funding, programs, and the racial, ethnic, and academic profiles of the students involved in CLEO programs.

V. Conclusion

Based on the findings, the Author concludes that there is a correlation between the ongoing race-conscious affirmative action legal debates over the past thirty 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 and ethnic composition of students and the students' academic profiles.

As the legal debate began in the 1970s, the changes in the CLEO program started with just 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. In this new millennium, the CLEO programs continue to feel the increasing negative publicity surrounding the race-conscious affirmative action legal debate, especially after the 2003 Michigan cases. For instance, CLEO's federal funding for the Thurgood Marshall Program has been threatened every year since the *Gratz* and *Grutter* decisions. 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. Furthermore, CLEO's federal funding was severely delayed in 2007 and 2008, which also coincided with the race-based student assignment cases.[263] Currently, the federally funded Thurgood Marshall Program receives $3 million to $4 million per year, of which approximately 20 to 30% 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, only two summer institutes host about forty students each. CLEO's private funding hovers around $500,000 each year, of which approximately 50% of the funding is used for the summer institutes. Thus, the pre-law summer institutes, which was 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.

Moreover, CLEO set minimum academic requirements for students who apply for its programs. 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. 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

263. Press Release, United States Senator Dick Durbin Illinois, Durbin, Obama Pass Amendment to Encourage Diversity in the Legal Profession (Oct. 28, 2005), http://durbin.senate.gov/showRelease.cfm?releaseId=247981. It is important to note that after the U.S. Supreme Court heard oral arguments in the public school race-based student assignment cases of *Parents Involved in Community Schools v. Seattle School District No. 1, et al.; Crystal D. Meredith, Custodial Parent and Next Friend of Joshua Ryan McDonald v. Jefferson County Board of Education, et al.*, in December of 2006 and after the Court rendered its decision finding the race-based education policies to be unconstitutional in June of 2007, CLEO did not received federal appropriations for the Thurgood Marshall Program for 2007 or 2008. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 127 S.Ct. 2738 (2007). As of this writing, the funding has been restored. Interview with Richard Todd, *supra* note 194.

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. There are now many underrepresented racial minorities who will not qualify for the summer institutes or AIE because of new academic and financial standards. The people who need the CLEO program the most will also have the most to lose—an opportunity to attend law school and enter the legal profession. Academically successful programs like CLEO 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 fewer black, Hispanic, and Latino students in both AIE and the summer institutes. CLEO will continue to concentrate 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. Regardless of the cautious actions taken, CLEO's future is dubious.

With regards to law school programs and the legal profession itself, white people represent more than 70% of law students enrolled in ABA-approved law schools and more than 80% of those in the legal profession, yet the race-based anti-affirmative action legal debate lives on. 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. As of the fall of 2006, there were 56,000 first-year students admitted into ABA-approved law schools.[264] The racial and ethnic breakdown of students admitted into law schools in fall 2006 was as follows: (1) 39,850, or 71%, were White; (2) 4,560, or 8%, were Asian or Pacific Islander; (3) 4,020, or 7%, were Hispanic or Latino; (4) 3,920, or 7%, were black or African-American; (5) 400, or 1%, were American Indian or Alaskan Native; and (6) 2,690, or 5%, were

264. LSAC Volume Summary by Ethnic and Gender Group, http://www.lsacnet.org/data/Volume-Summary-Ethnic-Gender-Admits.htm (last visited Feb. 28, 2010).

Other.[265] It is important to note that since the fall of 2001, the percentage of racial and ethnic groups admitted into ABA-approved law schools, in relation to those who apply from those groups, have remained consistent. Percentage-wise, fewer blacks are admitted into law school, with approximately 40% admitted out of those who apply, than other racial and ethnic groups.

Based on the findings in this Article, the Author concludes that the legal debates will probably continue until race as a "plus" factor is completely removed from the higher education admissions equation. Despite previous studies and the success of the CLEO program's summer institutes that demonstrate how little LSAT and undergraduate GPA scores determine the success of a law student or future practicing lawyer, law schools will likely continue to rely heavily on standardized test scores and GPAs as the seminal factor during the admissions process. Simply put, race-conscious affirmative action policies and programs are soon a thing of the past. Educational diversity will be constitutionally permissible in law school admissions policies, but racial diversity will mean very little in the diversity analysis. Therefore, underrepresented minorities must find other ways to set themselves apart from others, such as gender, socioeconomic status, and geographic location—none of which rise to the level of strict scrutiny.

Given the current demographics of the legal profession, law schools, and the CLEO programs, 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. The United States of America 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. 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? For this to happen, however, people of color are going to have a fair and equal opportunity to compete and gain access to law schools and the legal profession.

265. *Id.*