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# THE GOVERNMENTAL MAINTENANCE OF THE PRIVILEGES OF LEGAL ACADEMIA: A CASE STUDY IN CLASSIC RENT-SEEKING AND A CHALLENGE TO OUR DEMOCRATIC IDEOLOGY

JOHN S. ELSON\*

## I. LEGAL ACADEMIA - ANOTHER RENT-SEEKING CARTEL?

America's legal education establishment is in an especially celebratory mood these days. With the appointment of a new Consultant to the ABA Section of Legal Education and the retirement of its past long-time Consultant, we are hearing again what has become the credo of America's legal education establishment: we have the finest system of legal education in the world.<sup>1</sup> I suggest this celebratory mood is ill-deserved. There is no cause: to celebrate a system that limits competition in the legal services market so effectively that vast numbers of Americans cannot afford critical legal services;<sup>2</sup> to celebrate a system that is so costly that the non-wealthy are either priced out of legal education

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<sup>1</sup> For example, the new Consultant, John Sebert, stated in a speech honoring his predecessor: "We now have the best system of legal education in the world, and also the best system of accreditation of legal education institutions." *Syllabus*, vol. 31, no. p. 10 (Winter 2000).

<sup>2</sup> See Roy Abrams, *Are There Too Many Lawyers?* N.J. L.J., Feb. 13, 1995, at 23 (discussing lack of lawyers serving middle class); *Court Finds 'Obligation' to Assign Counsel for Indigent Man Charged with Violations; People v. Daniel Louis*, N.Y. L.J., Mar. 15, 1999, at 25 (stating many people can not afford legal representation); Stephanie Simon, *Cut-Rate Legal Eagles*, L.A. TIMES, June 7, 1996, at A1 (quoting UCLA Professor of Law Richard Sander, stating "an awfully large segment of the American Population does not have access to the legal system").

entirely or must take on tremendous debt;<sup>3</sup> or to celebrate a system that fails to prepare most students to meet the initial challenges of law practice.<sup>4</sup>

No doubt our legal education system does serve very well, and perhaps better than that of any other country, the interests of established legal educators, most lawyers and, perhaps, the wealthier segments of the business community. The reason for this is not, however, as the celebrators would have it, that our system of legal education is effective, efficient or fair. It is none of these things, a point that should be painfully obvious to anyone concerned about most Americans' inability to afford legal services or legal education.<sup>5</sup>

The primary reason American legal education so effectively entrenches the wealthy and denies access to the non-wealthy is that it operates as a rent-seeking cartel which in its essential aspects acts just like other industry cartels that use governmental restrictions on market entry in order to boost their members' profits.<sup>6</sup> Here, I define rent-seeking in a conventional, but very restricted sense, as the phenomenon by which a cartel obtains governmentally imposed restrictions on entry to the market in which the cartel members sell their goods or services in order that they can obtain higher profits than they otherwise would in open market competition.<sup>7</sup> It should be noted, however, that the law professor cartel is somewhat different from the typical trade group cartel in that their insulation from competitive market pressures gives faculty protection not only

<sup>3</sup> See Claudia MacLachlan, *Doing Well vs. Doing Good*, LEGAL TIMES, Sept. 4, 2000, at 50 (stating median law school debt currently hovers around \$80,000 per student); see also Symposium, *Legal Ethics, An Informal Discussion on Legal Ethics*, 2 J. INST. STUD. LEGAL ETHICS 427, 436 (1999) (stating students are inclined to take high paying jobs with large law firms and not serve poor and middle classes due to huge debt).

<sup>4</sup> See Robert Coles, *The LSAT - Reflection on an Experience*, 34 J. LEGAL EDUC. 412, 422 (1984) (questioning whether law schools have anything to do with good lawyering); Timothy W. Floyd, *Legal Education and the Vision Thing*, 31 GA. L. REV. 853, 856 (stating that law school curricula focuses too much on legal doctrine rather than on the roles of attorneys in society, in part since most law professors were not in practice very long).

<sup>5</sup> See Josh Ard, *Crossing the Bar - The Column of the Legal Education Committee - Serving over the Net: Legal Education over the Internet*, 79 MICH. BAR J. 1050 (discussing how on-line education may reduce cost of law school and open doors to segments of population traditionally left out).

<sup>6</sup> See generally Robert D. Goldstein, *Reading Casey: Structuring the Woman's Decisionmaking Process*, 4 WM. & MARY BILL RTS. J. 787, 860-64 (1996) (stating some economists view some professions, like law, medicine and clergy, as rent seeking cartels because these professions are self-regulating); Jane Byeff Korn, *Collective Rights and Individual Remedies: Rebalancing the Balance after *Lingel v. Norge Division of Magic Chef, Inc.**, 41 HASTINGS L.J. 1149, 1298 (1990).

<sup>7</sup> See generally Goldstein, *supra* note 6, at 860-64; Korn, *supra* note 6, at 1298.

from price competition, but also from teaching competition, a luxury that enables them to write the myriad of articles that the market would not otherwise support.

The lynch-pin of the cartel is, of course, ABA accreditation. The forty-five state supreme courts that have made graduation from an ABA accredited law school a prerequisite for admission to the bar<sup>8</sup> have given those schools effective monopoly power over the legal education industry.

The defenders of the status-quo argue that this concentration of power in ABA accreditation is necessary to uphold minimum standards of legal education, a proposition I shall dispute.<sup>9</sup> What I suggest is not a matter of dispute, however, is that the accreditation system's restrictions on market entry limit the availability and the diversity of both legal education and legal services and, thereby, impose substantial social costs.<sup>10</sup> This conclusion follows from some elementary economic realities. (1) Lowering the cost barriers to entrance into the ranks of accredited law schools would enable lower cost providers of legal education to enter the legal education market. (2) As a result of the greater number of lower cost providers of legal education, the minimum costs of becoming a lawyer would decrease and the number of lawyers who could enter and survive in the legal services market would correspondingly increase. (3) The resulting increased competition among the greater number of lawyers would reduce the cost of many types of legal services, thereby, making such services more available to the non-wealthy. (4) Finally, the greater competition in the legal education marketplace would also likely lead to more diversity and innovation in educational programming and more specialization with respect to

<sup>8</sup> See Mark E. Dykstra, *Why Can't Johnny Sit for the Idaho Bar? The Unfair Effect of ADA Accreditation Standards on State Bar Admission Requirements*, 3 SAN DIEGO JUST. J. 285, 289-90 (1995) (discussing fundamental unfairness of ABA imposed standards on graduates of non-accredited law schools); see also James P. White, *Supreme Courts as Regulators in the Law: State Supreme Courts as Regulators of the Profession*, 72 NOTRE DAME L. REV. 1155, 1158 (1997) (discussing how state supreme courts continue to maintain a leading position in requiring ABA accreditation).

<sup>9</sup> See Andrew Portinga, Note, *ABA Accreditation of Law Schools: An Antitrust Analysis*, 29 U. MICH. J.L. REFORM 635, 638-40 (1996) (rejecting theory modern accreditation process is needed to uphold minimum education standards).

<sup>10</sup> See Robert W. Bennett, *Reflections on the Law School Accreditation Process*, 30 WAKE FOREST L. REV. 379, 383 (1995) (discussing ABA's accreditation process and its effect on the cost of law school). See generally A'Lelia Robinson Henry, *Inequality: Plessy v. Ferguson and the Dilemma of Black Access to Public and Higher Education*, 27 J.L. & EDUC. 47 (1998) (discussing accreditation process' contribution to economic obstacles many African-Americans face in attaining law degree).

preparing students intensively for currently under-served, or niche, markets that are now given short shrift in most law school curricula.

## II. HOW THE CARTEL TRIES TO JUSTIFY ITS RENT-SEEKING ACTIVITIES.

To the rare extent the defenders of the status-quo ever address the larger societal consequences of the accreditation system, they seem to argue that the present system ideally blends, on the one hand, the minimal market barriers needed to assure that law school graduates are prepared adequately to serve the public, with, on the other hand, the freedom to allow law schools to compete to attract the best students, the best teachers and the best scholars as well as the economic security to enable those scholars to produce the important social good of legal scholarship.<sup>11</sup> ABA accreditation has also been defended on the ground that it provides law school applicants and employers with useful information in making choices about law schools and their graduates.<sup>12</sup> On the cost side, the status-quo is defended as a virtual null factor on the ground that without it law students would still opt to attend equally costly law schools because they prefer their amenities, their more learned approach to law teaching and the better opportunities they afford for good jobs.<sup>13</sup> In the final analysis, however, the justification for the ABA's restriction on entry to the legal education market must rise or fall on its effectiveness in fulfilling its dual role of assuring, first, that at the bottom end of the legal education market, students are not exploited by schools without the resources, skill, or will to provide minimally competent instruction and, second, that the public is not exploited by such schools' incompetent graduates. There is, of course, some truth in all of these various defenses of the status quo in legal education. However, when they are measured against the realities of the actual operation of the ABA accreditation process, it becomes clear that they do not come close to off-setting the costs that the ABA cartel's rent-seeking activities inflict on the greater society.

<sup>11</sup> See George B. Shepherd & William G. Shepherd, *Scholarly Restraint? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2114 (1998) (discussing goals of ABA in instituting accreditation process).

<sup>12</sup> See Abbie Willard Thomer, *Education in the Recruitment Marketplace: Decades of Change*, 1987 DUKE L.J. 276 (1987) (discussing value of graduate's law school in hiring process).

<sup>13</sup> See Peter V. Lestou, *Law, Education and Legal Education: The Future of Legal Education*, 50 CASE W. RES. L. REV. 457 (1999) (estimating full cost of ABA accreditation at one million dollars).

*A. The argument that ABA accreditation is needed to protect the public from inadequately prepared law graduates.*

This argument, the one on which the legitimacy of the entire process depends, sounds plausible, but it does not withstand scrutiny in light of how the ABA accreditation process actually operates. The starting place for such scrutiny is, of course, the anti-trust consent decree forbidding the ABA from continuing certain anti-competitive accreditation practices, such as setting minimum salary levels for law faculty.<sup>14</sup>

ABA insiders tend to view this anti-trust episode as a misguided government intrusion into private educational decision-making and as an aberration that is irrelevant to the vast majority of accreditation practices. To the contrary, if the U.S. Departments of Justice and Education were to give serious scrutiny to how the entire accreditation process operates to restrict market entry, they would conclude that the major restrictions on such entry have as little demonstrable educational justification as the minimum faculty salary requirements had. What most of those restrictions do is impose costly input requirements that have never been, and, I submit, cannot be, validated as necessary for the effective preparation of students for the practice of law. The most notorious of the unvalidated input requirements are those relating to buildings and libraries.<sup>15</sup> Such requirements obviously facilitate student learning to a degree. It is, however, entirely self-serving, empirically unsupported and illogical for academics to contend that they could not effectively prepare their students for practice with buildings and libraries that are far less expensive than many of those that have resulted from ABA Accreditation Committee pressures.

Similarly, the accreditation standards addressed to faculty members are not intended to assure they have the knowledge and experience needed to prepare students for law practice.<sup>16</sup> Instead, they make it more difficult for schools that would employ a faculty

<sup>14</sup> See *United States v. ABA*, 118 F.3d 776 (D.C. Cir. 1997); see also STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 405(e) (1994) (stating ABA minimum salary requirements promote competent law faculties).

<sup>15</sup> But see Laura N. Gasaway, *Academic Law Library Statistics: 1876-1992*, 84 LAW LIBR. J. 573 (1992) (discussing important effect ABA requirements have on law libraries).

<sup>16</sup> See John D. Copeland, *Getting Tossed from the Ivory Tower: The Legal Implications of Evaluating Faculty Performance*, 61 MO. L. REV. 233 (1996) (comparing methods of evaluating law school faculty).

that concentrates on preparing students for practice.<sup>17</sup> Thus, standards that require a form of tenure [Standard 405], a significant degree of faculty governance [Standards 206, 207, 402(a)(3), and (c)], scholarship production [Standards 401(a), 402(a)(3), 402(c), and 404(a)(2)] and a high degree of competence in scholarly research and writing [Standard 401(a)] obstruct schools' ability to hire and maintain a faculty dedicated only to preparing students for practice.<sup>18</sup>

While overloading input requirements, the standards almost entirely neglect the sort of output measures that could assure that schools meaningfully address their students' needs for professional preparation. One would assume that if accreditation were seriously concerned with assuring that law schools adequately prepare their students for the initial challenges of practice, they would at a minimum require a methodical evaluation of the effectiveness of law school teaching. Yet, the evaluation of teaching is entirely unsystematic, entailing only cursory classroom visits and no analysis of what teachers' curricular goals are nor how effectively they achieve those goals.

Indeed, the one standard that explicitly deals with the evaluation of student learning demonstrates just how unconcerned the accreditation process is with preparation for law practice. Requiring that "the scholastic achievements of students [be] evaluated from the beginning of the students' studies," Standard 303(b) treats school achievement as an end in itself rather than as a means for students to gain the sort of practice-based knowledge and ability which is needed to be ready to take on the challenges of a real-world profession.<sup>19</sup>

<sup>17</sup> See generally Kevin R. Johnson, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory*, 51 SMU L. REV. 1423, 1424 (1998) (discussing benefits of practical experience over pure classroom learning); Gary Laser, *Significant Curricular Developments: The MacRate Report and Beyond*, 1 CLINICAL L. REV. 425, 426-29 (1994) (stating practical experience is important in developing meaningful law school education); Suellyn Scarnecchia, *The Role of Clinical Programs in Legal Education*, 77 MICH. B.J. 674 (1998) (discussing emergence of classes giving students practical experience).

<sup>18</sup> See generally Paul D. Carrington, *Tanking the Rankings: Grading Law Schools by Conventional Measurements Is More Than Shallow: Its Pernicious*, AM. LAW., Apr. 2000, at 39 (discussing factors considered when ranking law schools); Ken Myers, *Survey Ranks Scholarship Output as Critics Say Aim Is Too Narrow*, NAT'L L.J., Jan. 15 1996, at A15 (discussing relationship between scholarly output and prestige).

<sup>19</sup> See generally Mary Smith Judd, *Schools, Bar Wrestle with Preparing Grads for Practice Whose Role Is It?*, FLA. B. NEWS, Apr. 1, 1996, at 14 (comparing roles of law school and bar association in educating law students); *Law School's Motto: Be Unprepared*, PALM BEACH DAILY BUS. REV., Jan. 15, 1999, at C1 (discussing flaws in Socratic method); Susan Skiles, *Many Recent*

Standard 302(a)(1), which requires schools to offer a "core curriculum,"<sup>20</sup> is similarly emblematic of ABA accreditation's failure to take seriously students' interests in preparation for the challenges they will face in practice. The term "core curriculum" is undefined.<sup>21</sup> I suppose the accreditation committee 'knows it when it sees it,' as, in fact, virtually all law teachers and law graduates do. That unchanging, unstudied recognition is symptomatic of the problem. The curricular categories that are "core" derive in part from the ancient forms of action, in part from long-discredited, nineteenth century Langdellian pseudo-scientific conception of law<sup>22</sup> and, mostly, from the needs of case book publishers and writers to have a stable subject matter that need not be continually revised and complicated by the needs of modern law practice. The extent to which the "core" courses, which usually means the coverage of the major casebooks, relate to what law students need to know and do in order to become competent, ethical legal practitioners is highly problematic since preparation for practice is seldom the organizing goal of the casebooks. The traditional first year property course is, perhaps, the quintessential example of how far the "core" often is from the types of courses law schools would be offering had they actually to compete in an open market on the basis of how well they prepare their students for the challenges they will face in practice.

There is not time to detail what an accreditation process might look like were it serious about its mission of protecting the public's interest in competently prepared lawyers. Suffice it to say that, at the very least, such a process would require law schools to demonstrate through a variety of measures, including outcome assessments, that their curricula are rationally planned, periodically updated and consistently taught in order to provide students with what they need to know and to be able to do in order to perform

*Grads Say Law School Doesn't Teach Right Stuff*, CHI. DAILY L. BULL., Aug. 9, 1991, at 2 (stating law school may be leaving law students unprepared for post-graduation).

<sup>20</sup> See, e.g., Laser, *supra* note 17, at 429 (giving example of core curriculum).

<sup>21</sup> See generally Geoffrey C. Hazard Jr., *It's Time Law Schools Listen to the Profession*, NAT'L L.J., Sept. 22, 1997, at A23 (discussing differences in types of law schools and how they affect their core curricula); Klein, *supra* note 1, at 13 (discussing what core curriculum should be).

<sup>22</sup> See generally Edward J. Conry, *Meta-Jurisprudence: The Epistemology of Law* (Meta-Jurisprudence: *The Epistemology of Law*, 33 AM. BUS. L.J. 373 (1996) (discussing way law is taught today and suggesting how it should be taught in future); Peggy Cooper Davis, *A Dialogue about Socratic Teaching*, 23 N.Y.U. REV. L. & SOC. CHANGE 249 (1997) (discussing Socratic method and its use in modern teaching practices); Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 113 (discussing changing teaching practices at Harvard Law School).



their initial professional roles competently and ethically.

*B. The argument that the higher cost of ABA accredited law schools is necessary to provide law faculty with the time and resources to publish scholarship.*

The second pro-accreditation argument is that by insulating accredited law schools from competition with lower cost, teaching focused schools, accreditation serves the public interest by allowing accredited schools to channel their increased revenues into the production of legal scholarship.<sup>23</sup> I find it hard to believe that very many of our colleagues actually believe this rationale to be true; it does not come near to withstanding the kind of scrutiny minimal scholarly standards require.

First, it is disingenuous as a rationale for restricting market entry. The Supreme Courts of the States do not restrict entry to the bar to graduates of accredited law schools because those law schools produce an approved amount of legal scholarship.<sup>24</sup> If accreditation is to screen schools for adequate production of legal scholarship, deficient schools should, perhaps, be barred from American Association of Law Schools', ("AALS"), membership, but not from graduating students otherwise qualified to take bar examinations.<sup>25</sup>

Second, the notion that legal scholarship is worth the increased tuition which substantially funds its production not only lacks any empirical support, it cannot withstand the test of common sense for several reasons. Here, I have four different arguments against the proposition that the production of legal scholarship justifies the ABA's limitations on entry to the legal education market, but because of time constraints I can just briefly outline them.

<sup>23</sup> See generally Carrington, *supra* note 18, at 39 (discussing factors taken into consideration when ranking law schools); Phillip C. Kissam, *The Evaluation of Legal Scholarship*, 63 WASH. L. REV. 221 (1988) (discussing legal scholarship and its merits); Myers, *supra* note 18, at A15 (discussing relationship between scholarly output and prestige).

<sup>24</sup> See *Diaz v. Florida Bd. of Exam'rs*, 252 So. 2d 366, 367-68 (Fla. 1971) (denying petitioner's request for relief since he failed to produce evidence necessary to sustain his application to take bar examination); see also *Massachusetts Sch. of Law v. Supreme Ct. of Fla.*, 705 So. 2d 898, 900 (Fla. 1998) (holding law degree must be obtained from accredited law school). See generally *Hale v. Supreme Ct. of Fla.*, 433 So. 2d 969, 970 (Fla. 1983) (outlining Florida Supreme Court bar admissions rule).

<sup>25</sup> See BLACK'S LAW DICTIONARY 13 (6th ed. 1991) (defining "accredited" to mean law school has been given "official authorization or status" and has been recognized having "sufficient academic standards to qualify graduates for higher education or for professional practice"); see also Bennett, *supra* note 10, at 382 (discussing Association of American Law Schools accreditation requirements).

First, most legal scholarship is consciously directed to other academics, rather than policymakers or voters, and it is a commonplace that few articles are read by more than a few academics. Second, if legal scholarship were to be justified by its public benefit, we would expect the degree of such benefit to be a significant criterion in how academics judge the worth of their colleagues' legal scholarship. Yet, in hiring and promotion decisions, it would seem naïve, odd, or too political to suggest such a criterion as a measure of the merits of a scholar's output.

Third, even if one were to infer primarily from the fact of judicial citations that legal scholarship does play a role in shaping legal decision making, there is no basis for concluding that it is either an important or a benign influence. Here the arguments are both empirical and epistemological and there really isn't time to do them justice. As the sorry history of academia in Nazi Germany well illustrates, however, scholarly credentials are no guarantee of enlightened decision-making on issues of distributive justice or on matters of moral principle in general; indeed, it would be profoundly anti-democratic to suggest otherwise.<sup>26</sup> Since the point of the great majority of law review articles is to urge prescriptive solutions to morally problematic social issues, there is no principled basis for privileging legal scholarship over the campaign rhetoric of politicians. The difference, of course, is that citizens have a choice as to whether or not to contribute to and vote for politicians; law students wishing to take the bar have no choice but to contribute much of their tuition to their faculty's scholarship production.

Fourth, in light of modern epistemology's invalidation of any objective basis for judging the intrinsic value of prescriptive scholarship, it is legitimate to look to the market for at least some indication of such scholarship's utility from the point of view of its potential users. In this regard, I suggest a thought experiment: assume law faculty are to be compensated for the time they spend producing legal scholarship only from the revenues paid by those

<sup>26</sup> See Myers, *supra* note 18, at A15 (criticizing legal education, Judge Richard A. Posner said legal education is "falsely prosperous seeming by virtue of eating crumbs from the table of the nation's wealthiest profession"); see also John S. Elson, *The Case Against Legal Scholarship, or if the Professor Must Publish, Must the Profession Perish*, 39 J. LEGAL EDUC. 343, 346 (1989) (arguing law school education neglects some necessary lawyer competencies); Ronald H. Silverman, *Weak Law Teaching, Adam Smith and a New Model of Merit Pay*, 9 CORNELL J.L. & PUB. POL'Y 267, 299 (2000) (citing Paul Savoy argument legal education and law teachers discourages "creativity by humiliation and criticism").

willing to purchase or fund such scholarship. How much scholarship would then be produced? To ask the question is to answer it. Just as several universities have closed down their sociology departments because no one wanted to buy or subsidize the information they were producing, so the bulk of the legal scholarship industry would dry up for lack of a market for its product.

*C. The argument that ABA accreditation does not significantly increase the cost of legal education.*

It might be argued that even if the increased costs resulting from ABA accreditation cannot be justified by public need, elimination of the governmental privileging of accreditation would not in fact lower the cost of legal education. Prospective students, it is argued, would still opt for the pricier schools because, given a choice between low cost unaccredited and high cost ABA accredited law schools, both of which would allow entry to the bar, most law students would choose the high cost alternatives because of their superior teaching, superior amenities, and most important, their opportunities for securing better jobs. This is a dubious argument. No doubt there would be a significant lag time before the advantages of some of the unaccredited schools became known and their prospective students could gain confidence that they would not be disadvantaged in the pursuit of employment.

Over time, however, there would seem little doubt that very strong law school applicants already saddled with heavy college debt would prefer some of the lower cost unaccredited schools, especially in light of the fact that the teachers at such schools would be required to focus all of their attention and effort on preparing them for the challenges they will face in practice. Once employers realized that equally bright students who were better prepared for the initial challenges of practice could be found at the cheaper unaccredited schools, market pressure would compel the ABA accredited schools to compete for such students through reducing the differential in both cost and the attention their faculty members pay to preparing students for practice.

*D. The argument that ABA accreditation provides students and employers with information needed to make informed choices among law schools.*

The initial fallacy in this argument is that law schools, at least those not subject to governmental disclosure requirements, can choose to keep secret all of the findings that form the basis for accreditation decisions.<sup>27</sup> Accreditation is, therefore, virtually useless to anyone who would like to have information for purposes of comparative shopping among accredited law schools. The goal of providing consumer information and of, thereby, supporting a more competitive market for legal education, could, thus, be far better achieved through a voluntary certification program that would not permit schools to conceal critical information.<sup>28</sup> By freeing the informational goals of accreditation from governmental restrictions on the admission to practice, certification would avoid the paternalism and anti-competitiveness inherent in the present system. By directing its efforts specifically to the collection and dissemination of consumer relevant information, it could also avoid some of the conflict of interest that is now inherent in a system in which most of the inspectors who would have to reveal unfavorable information about the programs they inspect are themselves academics subject to the same risk of unfavorable publicity when their own schools are inspected.<sup>29</sup>

### III. THE EFFECTS OF ELIMINATING THE ABA'S ACCREDITATION MONOPOLY

My analysis thus far leads to the following conclusions. By making the market for legal education more competitive through abolishing the near monopoly ABA accredited schools have on graduating students eligible for the bar, the public would be advantaged by lower cost legal services and better trained lawyers

<sup>27</sup> See Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367, 404-5 (1990) (noting difficulties with peer evaluation of law school faculty).

<sup>28</sup> The American Bar Association's Role in the Law School Accreditation Process, at <http://www.abanet.org> (stating accreditation process requires each law school to file a detailed questionnaire); see also Bennett, *supra* note 10, at 379 (stating reason behind accreditation process is to maintain minimum standards of instructional competence). *But see Florida Bd. of Bar Exam'rs*, 705 So. 2d at 899 (stating accreditation process ensures uniform standards throughout U.S.).

<sup>29</sup> See Shepherd & Shepherd, *supra* note 11, at 2128 (1998) (explaining process for gaining and retaining accreditation creates obstacle to admission since it is time consuming and expensive).

while law students would be advantaged by being better prepared for practice and by having to pay substantially less in tuition.

It is true that the public and prospective law students would be subjected to a somewhat greater risk that unaccredited law schools would provide substandard legal education. However, as already noted, because the present law school accreditation system does not effectively monitor for educational effectiveness, this risk would not likely outweigh the countervailing disadvantages of the present paternalistic regime, which, as noted, denies consumers and students the right to make their own benefit-risk calculus as to the expensiveness of the legal services or legal education that would best suits their individual needs.<sup>30</sup> As to the familiar argument that consumers and prospective law students do not have the knowledge and sophistication to make such determinations, a voluntary certification process could supply far more information than the present accreditation system which gives the public no qualitative distinctions to differentiate among the accredited schools.<sup>31</sup> Of course, were ABA accreditation effectively to monitor for and report on the comparative degrees to which accredited law schools actually prepared their students for the challenges they are likely to meet in practice, this calculus would likely be quite different.

While benefiting law students and the public, abolishing the mandatory ABA accreditation system would make lawyers as a class financially less well off since the influx into practice of many more lawyers, including many with smaller investments in their legal education, would lower the cost of legal services generally, and, therefore, reduce the incomes of lawyers.<sup>32</sup> In addition, law faculty would also be less well off since competitive pressures would lower tuition revenues to a point where they could be

<sup>30</sup> See Bennett, *supra* note 10, at 380 (stating accreditation process does not confine itself to ensuring uniform standards); see also John S. Elson, *The Regulation of Legal Education: The Potential for Implementing the MacCrate Report's Recommendation of Curricular Reform*, 1 CLINICAL REV. 363, 370 (1994) (explaining challenge facing law schools is preparing students for legal practice).

<sup>31</sup> See Myers, *supra* note 18, at A15 (reporting ABA task force recommends giving prospective law students more information, at earlier stage, about legal profession). But see *Florida Bd. of Bar Exam'rs re: Mass. School of Law*, 705 So. 2d at 899 (acknowledging ABA's criticism but pointing out ABA is best equipped for evaluating quality of education).

<sup>32</sup> See Denise Rothbardt, *ABA Accreditation: Educational Standards and Its Focus on Output Requirements*, 2 J. GENDER RACE & JUST. 461, 468 (1999) (discussing MSL allegation ABA accreditation standards restrict competition in law school market); see also Shepherd & Shepherd, *supra* note 11, at 2135 (stating ABA accreditation standards only benefit law school's faculty while law students have to bear cost).

compensated primarily for the effectiveness of their teaching.<sup>33</sup>

#### IV. WHY THE PUBLIC CONTINUES TO ALLOW THE ABA TO INCREASE THE COSTS AND REDUCE THE EFFECTIVENESS OF AMERICAN LEGAL EDUCATION.

Although the public injury caused by cartel rent-seeking activity has long been a favorite subject of economics-minded legal scholars,<sup>34</sup> the successful rent-seeking of the legal academy has escaped the public scrutiny of all but a few academics,<sup>35</sup> even after the Justice Department's anti-trust suit.<sup>36</sup> Although this neglect is, as noted, understandable in light of legal academics' economic self-interest, an important question, nevertheless, arises as to why there appears to be no significant ongoing pressure from government at any level to remedy the continuing anti-competitive effects of the accreditation process in light of the Government's anti-trust suit, the abundance of evidence of ABA accreditation's cartel-like rent-seeking activity and that activity's enormous impact on those who cannot now afford either legal education or legal services.<sup>37</sup>

<sup>33</sup> See Shepherd & Shepherd, *supra* note 11, at 2135-36 (discussing how ABA accreditation requires law schools to pay faculty more than necessary to retain them); Portinga, *supra* note 9, at 661-62 (1996) (discussing how ABA accreditation restriction on teaching hours increases professors' pay above market value). See generally Ronald H. Silverman, *Weak Law Teaching, Adam Smith and a New Model of Merit Pay*, 9 CORNELL J.L. & PUB. POL'Y 267, 268-69 (2000) (considering effects of allowing students to directly influence compensation of law professors with merit based pay system in effort to deal with monopoly of law professors).

<sup>34</sup> See William H. Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 DUKE L.J. 618, 619 (1987) (discussing issue of proper judicial response to problem of rent seeking by interest groups in political process, and noting it is subject of recent legal scholarship). See generally Mark Glick, *Is Monopoly Rent Seeking Compatible with Wealth Maximization?* 1994 BYU L. REV. 499, 499 (1994) (stating market based rent seeking activities of monopolies do not create social costs and questioning need for expensive antitrust enforcement); Barry E. Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 FORDHAM L. REV. 201, 201 (1982) (exemplifying legal scholarship concern with antitrust issues); Robert W. McGee & Yeomin Yoon, *Trade Policy in the Computer Industry: Time for a Change*, 8 TEMP. INT'L & COMP. L.J. 219, 231 (1994) (noting Japanese formed cartel to monitor computer chip prices in response to pressure from United States).

<sup>35</sup> See Harry First, *Competition in the Legal Industry II: An Antitrust Analysis*, 54 N.Y.U. L. REV. 1049, 1049 (1979) (outlining history of ABA accreditation and applying antitrust analysis); Shepherd & Shepherd, *supra* note 11, at 2095-96 (noting other papers have addressed ABA accreditation issues, yet have not considered economic analysis of ABA accreditation as cartel participating in successful rent-seeking activity); Portinga, *supra* note 9, at 635 (applying antitrust analysis to ABA accreditation).

<sup>36</sup> See Rothbardt, *supra* note 32, at 461 acknowledging ABA's great market power and discussing its effects on Massachusetts School of Law); Shepherd & Shepherd, *supra* note 11, at 2091 (discussing ABA accreditation as cartel); see also Portinga, *supra* note 9, at 635 (applying antitrust analysis to ABA accreditation).

<sup>37</sup> See Rothbardt, *supra* note 32, at 463, 476 (discussing financial constraints put on law

There are, of course, reasons why the public tolerates cartel rent-seeking behavior that apply to the ABA as they would to any trade group.<sup>38</sup> The chain of causation between the ABA's rent-seeking and the resultant economic losses to the public is difficult for members of the public to identify.<sup>39</sup> Equally important, the public has far less incentive to fight the rent-seeking than cartel members have to maintain it because the costs of the restrictions on competition in legal services are diffused across the general public.<sup>40</sup>

In this regard, respect of a sort is due the leaders of the cartel, mostly a segment of deans and former deans who dominate the ABA Section of Legal Education, for their skill in employing classic cartel strategies in order to ensure their governmental protection is not threatened. This has entailed basically a threefold strategy to assure, first, that judges and bar officials buy into their accreditation program, second, that other law schools do not defect from that program and, third, that meaningful dissent within the ABA generally and the Section of Legal Education in particular is neutralized.<sup>41</sup> Unfortunately, this cannot be the occasion to relate a

students as result of ABA accreditation requirements); Shepherd & Shepherd, *supra* note 11, at 2096-97 (noting power of ABA is enhanced by government enforcement of its rules and ABA accreditation rules have denied access of lower income persons to legal services and profession). See generally Mathew A. Finkin, *The Unfolding Tendency in the Federal Relationship to Private Accreditation in Higher Education*, 57 LAW & CONTEMP. PROBS. 89, 89 (1994) (outlining relationship between federal government and private accrediting agencies).

<sup>38</sup> See Finkin, *supra* note 37, at 90 (stating accreditation of higher education developed to provide structure and set standards for education); Rothbardt, *supra* note 32, at 482 (stating standards set by trade associations can be helpful, reliable standards upon which consumers can depend); Shepherd & Shepherd, *supra* note 11, at 2211 (noting ABA accreditation may increase quality of lawyers).

<sup>39</sup> See Shepherd & Shepherd, *supra* note 11, at 2105-06 (discussing how ABA accreditation requirements affect legal services market and create economic loss to public); Portinga, *supra* note 9, at 657 (stating accreditation increases costs of education, restricts output, and can enforce monopolies in other markets). See generally First, *supra* note 35, at 1098 (explaining economic repercussions of suppressing "non-elite" law schools).

<sup>40</sup> See Christopher T. Cunniffe, *The Case for the Alternative Third-Year Program*, 61 ALB. L. REV. 85, 101-02 (1997) (stating costs to society of legal education is borne by students, families, private donors, law schools, governments, and taxpayers); Shepherd & Shepherd, *supra* note 11, at 2096 (explaining ABA cartel system has impacted different legal markets and outlining how markets deal with resulting higher costs); Portinga, *supra* note 9, at 657 (stating accreditation increases costs of education, restricts output, and can promote monopolies in other markets).

<sup>41</sup> See Cunniffe, *supra* note 40, at 137 (noting reform over regulation of legal education seems less likely to be implemented by judiciary when considering judiciaries are influenced by lawyers or potential former legal educators); Elson, *supra* note 26, at 372-74 (noting power of law school deans and their general defense of regulatory status quo); Shepherd & Shepherd, *supra* note 11, at 2257 (noting prospects for reform are "dim" because of law faculty capturing ABA committees). *But see* Portinga, *supra* note 9, at 637 (noting letter written by fourteen law school deans to all ABA accredited law schools calling for accreditation process to be reformed).

plethora of anecdotes from my own and others' experiences with ABA accreditation to illustrate how effectively the Section leadership has used each of these strategies, although I must say that their latest maneuver to divest the ABA House of Delegates of any decision making authority over accreditation matters,<sup>42</sup> contrary to the ABA's own Constitution,<sup>43</sup> is an excellent example of such effectiveness.

Finally, the ABA has successfully behaved in the tradition of cartels that have sought to gain legitimacy through the use of mythic images, such as "the family farm"<sup>44</sup> or the "scholar athlete,"<sup>45</sup> in order to convince the public that the cartel's immunities from competition are justified in order to protect the public from harm, or to preserve some fundamental shared moral values or to provide a remedy for or a deterrent against some past or impending injustice.<sup>46</sup> The public's failure to identify the rent-seeking activity of accredited law schools as a typical trade group rent-seeking operation, I believe draws upon the myth in our society of the law professor as a public intellectual who speaks with the objective authority of the law.<sup>47</sup> It is understandably difficult for

<sup>42</sup> See generally *American Bar Association Section of Legal Education and Admissions to the Bar: Standards for Approval of Law Schools*, 84 A.B.A. J. 121 (stating process of accreditation is decision of Accreditation Committee, Council, and House of Delegates); Steven Keeva, *Will Top Profs Who Instruct via Internet Dominate Teaching?* 83 A.B.A. J. 18 (1997); Robert A. Stein, *Ensuring High Quality Education*, 82 A.B.A. J. 96 (stating accreditation committee is comprised of lawyers, professors and public members of ABA, and not solely members of ABA's House of Delegates).

<sup>43</sup> See RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS BY THE ABA, R. 11 (1994) (stating House of Delegates governs ABA's policy making); Shepherd & Shepherd, *supra* note 11, at 2095 (stating House of Delegates has ultimate authority in which schools are awarded accreditation).

<sup>44</sup> See Richard L. Abel, *The Future of the Legal Profession: Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 752 (1994) (analogizing efforts of ABA shielding legal profession from outside competition with futile attempts to protect family farm from intrusion of global agribusiness). See generally Mark J. Roe, *Backlash*, 98 COLUM. L. REV. 217, 222 (1998) (discussing American family farm and its connotation).

<sup>45</sup> See Timothy Davis, *Sports Law as a Reflection of Society's Laws and Values: Balancing Freedom of Contract and Competing Values in Sports*, 38 S. TEX. L. REV. 1115, 1140-41 (1997) (discussing ideology of amateurism and scholar athlete with antitrust laws). See generally *Law v. NAACP*, 902 F. Supp. 1394, 1408 (D. Kan. 1995) (discussing claim against NCAA for antitrust violations, and how it affected student-athletes); Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2644-45 (1996) (discussing REC regulation which sought to protect scholar athlete).

<sup>46</sup> See Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 8 (1993) (discussing history of monopoly in law and how it has been perceived at times advantageous and harmful to public); Shepherd & Shepherd, *supra* note 11, at 2095 (stating ABA's accreditation system is monopoly). But see Henry Ramsey Jr., *The History, Organization, and Accomplishments of the American Bar Association Accreditation Process*, 30 WAKE FOREST L. REV. 267 (1995) (discussing many positive effects of ABA accreditation process on legal profession).

<sup>47</sup> See Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM.



those who are not actually familiar with law professors and their deans to separate this powerful image from their role as economically self-interested agents acting to protect their own incomes and perks.

There is also an argument to be made that legal scholars' long-standing failure to expose and critique the ABA's rent-seeking behavior in itself demonstrates the power of the rent-seeking dynamic to subordinate legal academics' mythic role as public intellectual to their group economic self-interest. It seems unlikely that economics-minded legal academics actually believe the ABA's rent-seeking behavior is consistent with the free market philosophy that is so pervasive among legal scholars.<sup>48</sup> They cannot be so narcissistic as to actually believe that their premium academic salaries,<sup>49</sup> their comparatively plush physical facilities, their comparatively lax tenure requirements<sup>50</sup> and their comparatively light and loosely evaluated teaching demands,<sup>51</sup> are due to their own virtues as academics rather than to the fact that they hold the keys to their students' entry into a lucrative profession. Given the pride many legal academics take in puncturing the hidden rent-

ECON. REV. 941 (1963) (noting professionals receive level of trust from public, creating opportunity for abuse); Posner, *supra* note 46, at 1 (stating, on average, attorneys are brighter than general public); see also Shepherd & Shepherd, *supra* note 11, at 2095 (describing misconception that ABA's system of accreditation has caused unfairness).

<sup>48</sup> See Portinga, *supra* note 9, at 638-39, 644 (discussing U.S. Justice Department's lawsuit against ABA for antitrust violations); see also Shepherd & Shepherd, *supra* note 11, at 2097. See generally Rudolph C. Hasl, *Legal Education and Accreditation*, N.Y. L.J., Aug. 1996, at 2 (discussing how ABA's accreditation system has been criticized for antitrust violations and has had adverse impact on legal profession).

<sup>49</sup> See Portinga, *supra* note 9, at 657-58 (stating ABA accreditation standard is almost price-fixing); see also Shepherd & Shepherd, *supra* note 11, at 2135 (describing three ways in which ABA's accreditation system increases compensation of law faculty, one of those ways being direct increase of faculty salaries); Daniel Wise, *ABA to Alter Accreditation Process: Federal Civil Antitrust Complaint Settled*, N.Y. L.J., June 1995, at 1 (discussing ABA's practice of measuring professor salaries by regional standards).

<sup>50</sup> See Shepherd & Shepherd, *supra* note 11, at 2135, 2140-41 (discussing decrease of professor workloads and expectations due to ABA accreditation system). See generally Richard C. Reuben, *An Alternative Law School Sues ABA Massachusetts Dean Challenges Association's "Monopoly Power" in Accreditation*, 80 A.B.A. J. 25 (discussing how "cartel" created by ABA has increased salaries and decreased workload of law professors).

<sup>51</sup> See George C. Christie, *Legal Education in an Era of Change: The Recruitment of Law Faculty*, 1987 DUKE L.J. 306, 314 (1987) (discussing need to keep law professors' load to minimum); Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367, 400 (1990) (illustrating several reasons why it is difficult to evaluate effectiveness of law professor's teaching). See generally Daniel Gordon, *Does Law Teaching Have Meaning? Teaching Effectiveness? Gauging Alumni Competence, and the MacCrate Report*, 25 FORDHAM URB. L.J. 43 (1997) (discussing ineffectiveness of law school professor evaluation methods).

seeking behavior of various segments of the American economy,<sup>52</sup> their relative silence as to the nature and consequences of their own group rent-seeking can be understood only as a natural desire not to jeopardize their own and their colleagues' economic well-being. That legal academics behave as members of any rent-seeking cartel should not be surprising. Recognition of that fact, however, should also entail recognition that they deserve, as a class, no more deference than any trade group seeking special government protection against free market competition.<sup>53</sup>

#### V. THE ANTI-DEMOCRATIC NATURE OF THE ABA'S RENT-SEEKING ACCREDITATION BEHAVIOR

There is, however, one critical difference between the rent-seeking conduct of legal academia and that of typical industry trade groups. To illustrate, if enough members of the public no longer believe that the public myth of the need to preserve the family dairy farm in non-Midwestern states justifies the higher milk prices, resulting from the federal law which sets minimum milk prices as a function of distance from Eau Claire, Wisconsin, they can support legislators who will vote against such supports.<sup>54</sup>

The same cannot be said in regard to the public's right to opt for lower costs in legal education and legal services by rejecting law school accreditation restrictions. Should the public no longer believe they are needed in order to subsidize legal scholarships or to graduate adequately prepared lawyers? Under their constitutional power to regulate admission to law practice, the State Supreme Courts, at least those of 45 States, have delegated this authority to the ABA Section of Legal Education.<sup>55</sup> Although in many States,

<sup>52</sup> See Frank B. Cross, *The First Thing We Do, Let's Kill the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System*, 70 TEX. L. REV. 645, 649 (1992) (stating lawyers engage in nonproductive, redistributive rent-seeking behavior); Jonathan R. Macey, *Chicken Wars as Prisoners Dilemma: What's in a Game?*, 64 NOTRE DAME L. REV. 447, 447 (1989). See generally Kenneth G. Elzinga, *The Interface of Trade/Competition Law & Policy: An Economist's Perspective*, 56 ANTITRUST L.J. 439 (1987) (giving recent examples of rent seeking).

<sup>53</sup> See Cross, *supra* note 52, at 664-65.

<sup>54</sup> See Matthew L. Spitzer, *Perspective on Direct Democracy: Evaluating Direct Democracy: A Response*, 4 U. CHI. L. SCH. ROUNDTABLE 37, 42 (1997) (stating democracy has some advantages when voters can choose policies by voting for legislators). But see Robert D. Tollison, *Symposium on the Theory of Public Choice: Public Choice and Legislation*, 74 VA. L. REV. 339, 350 (1988) (indicating elected representatives sometimes vote according to their own personal value judgments as opposed to their constituents' interests).

<sup>55</sup> See Dykstra, *supra* note 8, at 290 (1995) (noting current accreditation standards were

Supreme Court judges are periodically elected,<sup>56</sup> judicial elections are clearly not meaningful mechanisms for holding justices accountable for their ratification of ABA law school accreditation standards. Such elections are too few and far between and the issues too far embedded in technical detail to expect such elections to become a meaningful referendum on law school accreditation decisions.

Equally important, it will be difficult to disentangle the public image of the Court as an entity that should be trusted to exercise its independent legal expertise in its adjudicative role from that of its role as the regulator of the legal profession.<sup>57</sup> In the latter capacity, contrary to public expectations of the justices' independence and expertise, courts as an institutional matter do not possess the knowledge, the independence, the resources and the motivation to adequately protect the public interest.<sup>58</sup>

There is no question that because the State Supreme Courts do not presently have the resources to evaluate even a small fraction of the law schools that graduate applicants to their respective bars, the Courts must as a practical matter rely on a national accreditation body like the ABA.

The Justices I suspect are not only reluctant to evaluate the

implemented in 1970's and 49 jurisdictions immediately took part); Portinga, *supra* note 9, at 636 (stating 45 states require applicant to bar to have graduated from ABA accredited law school). *But see* Rothbardt, *supra* note 32, at 462 (indicating only 41 states rely on ABA accredited schools in determining who can sit for bar).

<sup>56</sup> See Kurt M. Brauer, *The Role of Campaign Fundraising in Michigan Supreme Court Elections: Should We Throw the Baby out with the Bathwater?*, 44 WAYNE L. REV. 367, 368 (1998) (stating Michigan's constitution mandates that supreme court justices be elected); Brenda Wright, *The Bench and the Ballot: Applying the Protections of the Voting Rights Act to Judicial Elections*, 19 FLA. ST. U. L. REV. 669, 670 (1992) (indicating Florida used at-large voting process for electing state judges since 1984). See generally Robert L. Brown, *From Whence Cometh Our Appellate Judges: Popular Election Versus the Missouri Plan*, 20 U. ARK. LITTLE ROCK L.J. 313 (1998) (discussing which states provide for election of judges).

<sup>57</sup> See Ippolito v. Florida, 824 F. Supp. 1562, 1565 (M.D. Fla. 1993) (claiming judiciary's encroachment on Florida bar's legislative function implicates constitutional doctrine mandating separation of powers and asserting that Florida Supreme Court lacks inherent power to regulate its own members); Robert B. McKay, *Law, Lawyers and the Public Interest*, 55 U. CIN. L. REV. 351, 365 (1985) (stating self-regulation of legal profession continues to be dominated by self interest often at expense of public interest). *But see* Board of Comm'rs of State Bar v. Peterson, 937 P.2d 1263, 1266 (Utah 1997) (claiming Utah supreme court has exclusive authority to regulate practice of law).

<sup>58</sup> See John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning from the Ohio Struggle to Reform Its Discipline System*, 684 CIN. L. REV. 65, 85-91 (1999) (noting Ohio court system lacks will and resources to carry out disciplinary measures); see also William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485, 563 (1995) (discussing lawyers natural tendency to protect his own kind rather than the public interest).

adequacy of the ABA as their surrogate evaluator because of their lack of resources, but also, because they recognize the practical problems that would result if each State Supreme Court were to impose its independent evaluative criteria on the ABA's national accreditation efforts.

An equal, if not more important, disincentive against State Supreme Courts' assumption of a meaningful role in assuring that law school accreditation serves the public interest, instead of the self-interest of legal academia, is that it simply is not in the interest of the justices to reduce barriers to entry to the practice of law and, thereby, increase competition among lawyers, and, thereby, reduce individual lawyer's earnings.<sup>59</sup> The reasons are both economic and cultural.<sup>60</sup>

Judges' salaries are set in relation to the earnings of competent lawyers; when the differential becomes too great, legislators usually agree that the need for a competent judiciary requires an increase in judges' pay. Many judges also retire to carry on prestigious law practices, the prospective value of which would decrease with increased competition among lawyers.

There are also work-related reasons why Supreme Court judges might fear increased competition among lawyers, including overloading the court system as a result of the increased litigation that would result from the representation of more low income people. In addition, the prospect of more lawyers in practice, as well as that of increased competition among lawyers, would be perceived as potentially increasing the already over-stressed workload of most Courts' disciplinary agencies.<sup>61</sup> Finally, as a cultural matter, judges usually share with the organized bar a self image of their profession

<sup>59</sup> See Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1745-51 (1998) (discussing role of judges in preserving bar's special "guild" status through legal ethics which helps maintain or even increase lawyers salaries); see also Gallagher, *supra* note 58 (noting lawyers training and socialization have inculcated shared sense of professional community leading to purposeful protection of other lawyers interests).

<sup>60</sup> See Marvin L. Karp, *Some Reflections on Change - And Professionalism*, 24 BRIEF 9 (1995) (stating legal profession has changed from atmosphere of trust to one driven by competition and economic pressure); Martha Middleton, *Legal Scholarship: Is it Relevant?*, NAT'L L.J., Jan. 9, 1989, at 1 (discussing importance of scholarship to careers of young academics).

<sup>61</sup> See Karp, *supra* note 60, at 11 (noting animosities between counsel inhibit resolutions to conflicts contributing to increased lawsuits clogging courts); Doug Abrahms, *Three FCC Nominies Clear First Hurdle to Confirmation*, WASH. TIMES, Oct. 1, 1997, at B9 (noting competition between lawyers has clogged court dockets). *But see* Andy Dabilis, *Mediation Lacks Uniform Standards*, B. GLOBE, Oct. 30, 1994, at 1 (suggesting Alternative Dispute Resolution could reduce competition between lawyers and unclog court systems).

as more exclusive and more intellectual than typical trades.<sup>62</sup>

Law school accreditation requirements that promote faculty scholarship and impose costs that exclude those who are not willing or not able to make a substantial financial commitment to their preparation for the bar supports this aristocratic self-image and natural conservatism as to the legal order which judges and lawyers share and have shared since the early years of the Republic, as De Toqueville so perceptively noted.<sup>63</sup>

Thus, given that the rent-seeking of legal academia is not subject to the normal democratic checks on other cartels' rent-seeking activities and that the public is seriously harmed by academia's rent-seeking through its increase in the costs of legal education and legal services and its decrease in their effectiveness, I suggest that there is a need for some innovative strategy to seek fundamental reform of the law school accreditation system.

## VI. ONE AVENUE TOWARDS REFORM

For reasons I have discussed, such reform cannot be expected to come from State Supreme Courts or the ABA, although a revitalized House of Delegates might become a more potent force for improving the effectiveness, although not the costliness, of legal education.<sup>64</sup>

<sup>62</sup> See Neil K. Komesar, *Slow Learning in Constitutional Analysis*, 88 NW. U.L. REV. 212, 213 (1993) (stating judges are arrogant and consider themselves heroic figures); see also Marcia Coyle, *Ad Decision Could Spur A Rollback*, NAT'L L.J., July 3, 1995, at A1 (noting lawyers and judges have strong emotions about their own self-image and image of legal profession); Charles Fried, *The Trouble with Lawyers*, N.Y. TIMES, Feb. 12, 1984 (suggesting judges cannot remain immune to attitudes and self-image of lawyers who plead cases before them).

<sup>63</sup> Where lawyers are absolutely needed, as in England and the United States, and their professional knowledge is held in high esteem, they become increasingly separated from the people, forming a class apart. . . . (T)he lawyers from the political upper class are the most intellectual section of society. Consequently they only stand to lose from any innovation; this adds an interest in conservation to their natural taste for order. . . . The judge is a lawyer who, apart from the taste for order and for rules imparted by his legal studies, is given a liking for stability by the permanence of his own tenure of office. His knowledge of the law in itself has assured him already high social standing among his equals, and his political power as a judge puts him in a rank apart with all the instincts of the privileged classes.

DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 246-247; Middleton *supra* note 60, at 1.

<sup>64</sup> See Daniel B. Kennedy, *Fire and Brimstone: Legal Educators React to "Conspiracy Theory" Leveled at Them*, 79 A.B.A. J. 96 (1993) (noting in August 1993 ABA House Delegates adopted recommendation that ABA Standards for Approval of Law Schools be amended to require law schools to maintain educational programs designed to prepare students "to participate effectively in the legal profession" as well as to qualify them for admission to bar); see also Chris Klein, *Revolution from Above? A Judge Calls for a Two-Year J.D. Program*, NAT'L L.J., Oct. 14, 1996 at A12 (stating "[what] a student may gain intellectually, Judge Posner has said, he or she

State legislatures are a possible source of reform, but the lobbying power of state bars, state constitutional separation of powers provisions and the need for a national approach to law school accreditation make them an unlikely and inefficient vehicles for the needed reform.

Instead, I suggest that the most likely - and I'll admit, not politically; not very likely at all - source of meaningful reform is a federal statute that would prohibit any educational restrictions on the right to practice law in any State if those restrictions have not been validated according to professionally recognized methods of evaluation for the purpose of assuring that the restrictions are in fact needed in order to prepare lawyers for the competent and ethical practice of law.<sup>65</sup>

I think such a proposal would pass constitutional scrutiny for two reasons: first, restrictions on the ability to practice law have an obvious, pervasive impact on the national economy<sup>66</sup> and, second, the State Supreme Courts' entirely passive ratification of the ABA's accreditation standards demonstrate that federal intrusion into this area of state regulation would not be considered impermissibly intrusive on critical matters of state's rights.<sup>67</sup>

I doubt that my proposal in this regard will be seriously considered and debated by mainstream legal academia, but at least I would hope that those many legal academics who have been in the

loses in the pocketbook"); Ken Myers, *ABA Report Says Academia, Bar Need to Bolster Lawyering Skills*, NAT'L L.J., Aug. 17, 1992, at 4 (stating ABA "task force recommends giving prospective law students more information at earlier stage about law schools and about legal profession"); Ken Myers, *At Conference, Posner Blasts Academics for Weak Scholarship*, NAT'L L.J., Jan. 21, 1991, at 4 (stating legal academia is "rightly lacking confidence in its intellectual standards and quality, it is highly vulnerable to political assaults and seductions").

<sup>65</sup> See Klein, *supra* note 64, at A12 (noting legal profession and public fell educators may not be producing well-enough trained professionals within three years); Myers, *ABA Report Says Academia, Bar Need to Bolster Lawyering Skills*, *supra* note 64, at 4 (stating skills and values of competent lawyers develop along continuum starting before law school, reaching its most formative and intensive stage during law school experience, and continuous throughout lawyer's professional career); Myers, *At Conference, Posner Blasts Academics for Weak Scholarship*, *supra* note 64, at 4 (stating "legal education has been distorted by state regulation").

<sup>66</sup> See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975) (stating "activities of lawyers play an important part in commercial intercourse"); Roger J. Goebel, *The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States?*, 34 INT'L LAW. 307 (2000) (citing *New Hampshire v. Piper*, 470 U.S. 274 (1985), which states that practice of law is important to nation's economy).

<sup>67</sup> See *Reno v. Condon*, 528 U.S. 141 (2000) (holding Congress did not violate federalism principles when it regulated interstate commerce). *But see* *Printz v. United States*, 521 U.S. 898 (1997) (holding federal intrusion into state regulation requiring local law enforcement officers to conduct background checks on proposed handgun transferees unconstitutional).

forefront of the defense of free market principles and of the attack on cartel rent-seeking will at least explain how their opposition to my challenge to ABA accreditation is consistent with the legal theories they espouse.

## VII. POSTSCRIPT

I realize that the question of the long-term viability of the status quo in legal education is more problematic than my original pessimistic conclusions indicated. There are, of course, still good reasons for being pessimistic about the prospects for opening American legal education to competitive market conditions. As I have noted, by tying court-controlled bar admissions to ABA accreditation, the state supreme courts, legal academia and the organized bar have effectively insulated the legal education cartel not only from effective market competition, but also from the democratic reform process. Even if the leaders of the bench, bar and academia were to be persuaded that the ABA's rent-seeking accreditation efforts have disserved low income Americans' access to effective and affordable legal education and legal services, systemic change would be unlikely. Principles of free market competition, economic efficiency and equal access to justice are comforting ideals for professionals to espouse, but they are rarely sufficient to cause those who have been economically benefited by their violation to yield their benefits voluntarily.<sup>68</sup>

What does give some cause for optimism is the fact that the legal education cartel cannot insulate itself from the general economy. The competitive markets of an increasingly global economy have forced an ever-growing number of inefficient, hierarchical enterprises to streamline their operations by cutting costs and instituting evaluative measures to promote profit maximization.

<sup>68</sup> Cf. Roger C. Cramson, *Symposium: The Future of the Legal Profession: Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 564 (1994) (stating increased competition within legal profession would lower cost and therefore increase availability of routine legal services to general public, without reducing quality); Maimon Schwarzschild, *Class, National Character, and the Bar Reforms in Britain: Will There Always Be an England?*, 9 CONN. J. INT'L L. 185, 222-223 (1994) (characterizing England under Prime Minister Thatcher as having free market thinking, viewing traditional legal profession as obstacle to free competition and thus favoring more efficient practices). *But cf.* Stephano Agostini, *Advertising and Solicitation: A Comparative Analysis of Why Italian and American Lawyers Approach Their Profession Differently*, 10 TEMP. INT'L & COMP. L.J. 329, 369 (1996) (contrasting American legal profession's notions of free market economy and competition with Italy's system of stricter regulation consisting of severe dignity and honor requirements).

Our legal education system represents the antithesis of this movement toward efficient resource utilization, unless, of course, one views legal scholarship as a primary goal of legal education.<sup>69</sup> Of course, from the perspective of those who pay, it is not: students do not pay tuition and clients do not pay the fees that make students' investment in their tuition a worthwhile long-term investment because either group wants to support the scholarly enterprise. Rather, they pay the extra amount that subsidizes the scholarly enterprise because, even after factoring in the toll of academics' rent-seeking, such payments still appear to be profitable investments.<sup>70</sup>

Whether this calculus will be affected by the global economic trends that are making the competitive survival of all kinds of enterprises dependent upon more efficient resource utilization depends upon a variety of rapidly evolving and, therefore, still quite speculative, economic factors affecting the legal services marketplace. For example, on the one hand, the recent large increases in the pay of law firm associates have put pressure on both the associates and their firms to pay for such increases through greater productivity. One fall out of this cost increase could be more pressure on law schools to invest more in teaching and less in scholarship in order to improve students' preparation for law practice so that they can become productive more quickly.<sup>71</sup> On the other hand, if the commercial legal services industry continues to generate the surplus wealth that has enabled it to bear without

<sup>69</sup> Cf. Christopher T. Cunniffe, *The Case for the Alternative Third Year Program*, 61 ALB. L. REV. 85, 102-03 (1997) (recognizing third year of law school is of declining marginal utility to both law students through increased tuition and in taxpayer's contributions to subsidize federal loan programs).

<sup>70</sup> See Cunniffe, *supra* note 69, at 98 (stating law students invest in law school to buy "knowledge, and ultimately, a credential, which will then be resold in embodied form and for a profit to employers over the course of a lifetime," quoting Harry First, *Competition in the Legal Education Industry (I)*, 53 N.Y.U. L. REV. 311, 315 (1978)); Myers, *At Conference, Posner Blasts Academics for Weak Scholarship*, *supra* note 64, at 4 (quoting Judge Posner, "law schools have a captive audience, insulating [them] from a true market test of the value of the services they provide. . .The students recognize that they are paying for a credential, rather than an education").

<sup>71</sup> See Michael M. Boone & Terry W. Conner, *Into the New Millennium: Change, Change, and More Change: The Challenge Facing Law Firms*, 63 TEX. B.J. 18, 22 (2000) (noting changes in law firm economics after 1970's have increased lawyer salaries and productivity demands in form of increased billable hour requirements); see also Henry Gesmer, *1000 Words: Changes in Massachusetts Law Practice - 1936-1996*, B. B.J. 4, 5 (1997) (recognizing such increase in compensation has led to law firm "peer review" of each partner's productivity). But see Vicki M. Huebner, *Increased Starting Salaries: What Have We Wrought on the Profession?*, ORANGE CO. LAW. 32, 32 (2000) (arguing salary increase leads to high degree of associate attrition, leading to decreased productivity).



serious complaint the costs that have been appropriated from student tuition in order to fund legal scholarship, there is unlikely to be significant added pressure on law schools either to lower their costs or improve their teaching.<sup>72</sup>

However, a substantial downturn in the profitability of law practice could stress the legal education-legal services marketplace in ways that could substantially restructure how the costs of legal education are allocated. Such a downturn could occur even if the general economy were to remain strong, if, for example, increasingly competitive market pressures were to cause clients to impose auditing methods that allowed firms' reimbursement only for the demonstrably productive work of associates or if, through the growing movement toward multi-disciplinary law practice, significant amount of traditional associate work were shifted to cheaper non-lawyers.<sup>73</sup>

Whether caused by a general economic downturn or a more competitive and cost effective legal services marketplace, a significant reduction in lawyers' income expectations could be expected to influence prospective law school applicants to apply to schools that have adapted to the new tighter legal marketplace in one or both of two ways: first, by lowering tuitions to a point where legal education would still appear a viable investment in spite of lawyers' reduced income projections and, second, by providing through their reputations and educational programs access to jobs which even under the new, tighter market conditions would project incomes that would make even high tuition investments appear worthwhile. While most schools do not have the funds to make a significant relative difference in their reputations, they could continue to compete in such a tightened market by means of

<sup>72</sup> Cf. Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 953 (2000) (stating "[d]riven by corporate demand, backed by corporate wealth, the legal system prices itself out of the reach of individuals except those of a claim wealth"). *But see* Boone & Conner, *supra* note 71, at 22 (recognizing maturity in today's clients in that they discriminate purchases of legal services, resulting in larger clients dividing up work among firms, leading to increased pressure on firms to consider legal costs).

<sup>73</sup> See Claire Hammer Maturro, *Auditing Attorneys' Bills: Legal and Ethical Pitfalls of a Growing Trend*, 73 FLA. B.J. 14, 14, 16-17 (1999) (noting new trend of auditing attorneys' bills by professional auditors and existence of comprehensive audit system which includes revision of attorney work product); Darlene Ricker, *Auditing Lawyers for a Living*, A.B.A. J. 65, 65 (1994) (noting growing number and demand of legal auditing firms, most of which are insurance companies). *But see* Jack F. Dunbar, *Point-Counterpoint - Multidisciplinary Practice Translated Means "Let's Kill All the Lawyers,"* 79 MICH. BAR J. 64, 67 (2000) (warning multidisciplinary practice, or putting economic power in hands of nonlawyers, would lead to compensation based on goal attainment rather than professional judgment).

reducing their tuition or by improving the preparation of their students for promising practice areas or by both means. If either the tuition reductions or the diversion of faculty resources and energy into teaching were significant, the resources devoted to the scholarly enterprise would suffer accordingly.

If the ABA accreditation cartel refused to respond to these more stringent economic conditions and maintained its costly input standards and scholarship requirements, it would be likely that schools faced with seriously falling enrollments would try to defect from the cartel through several means, including joining in more broadly focused anti-trust challenges to the ABA's rent-seeking activities<sup>74</sup> and seeking to influence state supreme courts to open bar admissions to graduates of law schools accredited by non-ABA accrediting organizations.<sup>75</sup> Such schools could also be expected to join with other constituencies in trying to reform the accreditation process from within the ABA itself. In response to all of these pressures, the ABA Section of Legal Education could engage in a serious standards review process that would eliminate accreditation

<sup>74</sup> See *United States v. American Bar Ass'n*, 934 F. Supp. 435, 435-36 (D.D.C. 1996) (prohibiting ABA from adopting minimum salary compensation for law school faculty due to antitrust violation). *But see Massachusetts Sch. of Law at Andover v. Am. Bar Ass'n*, 107 F.3d 1026 (3d Cir. 1997), *cert. denied*, 522 U.S. 907 (1997) (refusing to find antitrust violation for Massachusetts' failure to accredit law school).

<sup>75</sup> See COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 16-17 (1997-98) (listing Alabama, California, Washington, D.C., Georgia and Maine as only states not allowing bar admission to graduates of non-accredited law schools); Shepherd & Shepherd, *supra* note 11, at 2103 (stating almost all states require law degree from ABA accredited law school as fixed prerequisite to taking bar examination).

requirements that are not essential to the preparation of students for practice.<sup>76</sup> By thereby opening the legal education market to competition from legal educators who seriously want to experiment with cost efficient educational models directed entirely to the goal of preparing students for law practice, the reform of ABA accreditation could result in far-reaching improvements in both the cost and quality of the legal education and legal services available to all Americans. Although I would not predict that this is likely to happen in the near future, the trends in the global economic marketplace away from inefficient enterprises dependent upon governmental conferred rent-seeking privileges and towards enterprises that must compete in an open market on the basis of their cost-efficient delivery of high quality products does give a measure of hope for the future of American legal education.

<sup>76</sup> See STANDARDS FOR APPROVAL OF LAW SCHOOLS 41-42 (1999) (containing ABA Accreditation Standard 302); see also Stephen M. Johnson, *www.lawschool.edu: Legal Education in the Digital Age*, 2000 WIS. L. REV. 85, 106 (2000) (noting Standard 302's requirement of practical skills training and rise of law school courses in recent decades to reflect this, notably classes in advanced research and writing, trial advocacy, interviewing and counseling, and dispute resolution). But see Sandra A. Hansberger, *The Road to Tomorrow: How Much Practical Skills Instruction Should Law Students Get?*, OR. ST. B. BULL. 9, 10 (noting Standard 302(a)(4)'s requirement of offering professional skills instruction, but stating standard is left open as to how much of curriculum should be devoted to practical skills).