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# Defending the Aristocracy: ABA Accreditation and the Filtering of Political Leaders

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# DEFENDING THE ARISTOCRACY: ABA ACCREDITATION AND THE FILTERING OF POLITICAL LEADERS

*George B. Shepherd*†

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## INTRODUCTION

Blacks are underrepresented at every level of U.S. politics. Although approximately 13% of the U.S. population is black, only 9% of

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† Professor of Law, Emory University School of Law. This article builds on two earlier papers. For a detailed discussion of law school accreditation’s discriminatory impact on blacks, not focusing on political participation, see George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools*, 53 J.L. EDUC. (forthcoming 2003). For a thorough analysis of accreditation’s economic impacts, see George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091 (1998).

the U.S. House of Representatives is black.<sup>1</sup> There are currently no black U.S. senators and no black governors. The process for becoming a judge is often political, whether consisting of a politically charged appointment process or an initial or retention election. Again, the fraction of black judges is low. Only 4% of state-court judges are black,<sup>2</sup> and blacks are only 7% of judges at all levels.<sup>3</sup> Even in states with large black populations, the fraction of black judges is small. For example, Georgia's population is 29% black.<sup>4</sup> Yet only 6% of Georgia's state-court judges are black.<sup>5</sup> Some of blacks' difficulties in politics may be due to residual racism among voters. Likewise, another partial explanation may be the winner-take-all nature of many elections.<sup>6</sup>

This paper suggests an additional cause: the bar exam and ABA accreditation of law schools. Although I focus on accreditation, I will discuss how both the bar and accreditation disproportionately exclude blacks from entering the legal profession. However, being a lawyer is often the easiest and best way to enter politics.<sup>7</sup> Indeed, many political jobs are open only to lawyers: examples are prosecutors, attorneys general, and judges. Thus, the bar exam and accreditation have the effect of excluding a disproportionate fraction of blacks from politics.

Although accreditation's limiting of blacks' political opportunities is dramatic, the harms are similar for other disadvantaged groups whom the bar exam and accreditation exclude. These include Hispanics, as well as those whites who lack either wealth or top test scores or grades.<sup>8</sup> Thus, accreditation maintains in politics a wealthy, white, intellectual elite.

I proceed as follows: Part I describes how the bar exam and law school accreditation disproportionately exclude blacks from the legal

<sup>1</sup> U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2001, at 16 tbl.14 (2000 data) [hereinafter STATISTICAL ABSTRACT]. In the 107th Congress, thirty-nine of the 435 representatives were black.

<sup>2</sup> Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 95, 101 n.26 (1997) (1985 data). *But see* ELIZABETH CHAMBLISS, AM. BAR ASS'N, COMM'N ON RACIAL & ETHNIC DIVERSITY IN THE PROFESSION, MILES TO GO 2000: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 16 [hereinafter MILES TO GO] (noting lack of recent data on race of state-court judges).

<sup>3</sup> MILES TO GO, *supra* note 2, at 16 (reporting data from 1990 census). Blacks did best at the federal level. As of 1999 in the federal system, blacks made up 11% of district court judges and 7% of court of appeals judges, plus one black justice on the Supreme Court. *Id.* at 18 tbl.42.

<sup>4</sup> STATISTICAL ABSTRACT, *supra* note 1, at 27 tbl.24.

<sup>5</sup> Walter C. Jones, *Black Judges Remain Rare*, AUGUSTA CHRON. (Ga.), May 20, 2002, at B1 (providing 2002 figures).

<sup>6</sup> See Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 222 (1989) (arguing that winner-take-all elections are exclusionary).

<sup>7</sup> See *infra* Part II.A.

<sup>8</sup> See *infra* notes 142 & 143 and accompanying text.

profession. Next, Part II suggests that this exclusion from the legal profession also excludes blacks from politics. In Part III, I suggest that both blacks and the country as a whole would benefit from eliminating the bar exam and accreditation as barriers to the legal profession.

### I. ACCREDITATION AND THE EXCLUSION OF BLACK LAWYERS

The American Bar Association (ABA) acknowledges the national scandal of the low number of blacks in the legal profession:<sup>9</sup> blacks are only 5.7% of lawyers, yet they make up 13% of the population.<sup>10</sup> Blacks are less represented in the law than in most other professions, including physicians.<sup>11</sup> The ABA professes to be dedicated to increasing the number of minority lawyers. For example, it claims that one of its main missions is “to increase racial and ethnic diversity at all levels of the legal profession.”<sup>12</sup> The ABA has proceeded on many fronts, creating commissions, diversity initiatives, action groups, councils, “diversity days,” and scholarships.<sup>13</sup>

However, the ABA’s diversity efforts ring hollow, for it is the ABA itself that has caused blacks to be excluded from the profession. The ABA, collaborating with state governments and courts, has created and maintains two barriers that prevent blacks from entering the legal profession in larger, fairer numbers. The first is the bar exam. A long literature describes both how the bar exam excludes blacks at a much higher rate than it excludes whites and how the bar exam fails to test real lawyering ability.<sup>14</sup>

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<sup>9</sup> See, e.g., MILES TO GO, *supra* note 2, at ix–x (“Minorities continue to be under-represented in the legal profession relative to their representation in other professions. . . . Thus, the legal profession—already one of the least integrated professions in the country—threatens to become even less representative of the citizens and society it serves.”).

<sup>10</sup> STATISTICAL ABSTRACT, *supra* note 1, at 380 tbl.593, 16 tbl.14. The percentage of black lawyers is an increase from 3.4% in 1990. MILES TO GO, *supra* note 2, at 1, 2 tbl.2 (2000).

<sup>11</sup> MILES TO GO, *supra* note 2, at 2 tbl.2.

<sup>12</sup> William G. Paul, *Foreword to AM. BAR ASS’N, AMERICAN BAR ASSOCIATION RESOURCES GUIDE: PROGRAMS TO ADVANCE RACIAL AND ETHNIC DIVERSITY IN THE LEGAL PROFESSION* 3 (July 2000); see also ABA Goal IX (“To promote full and equal participation in the legal profession by minorities, women and persons with disabilities.”), *id.* at 13.

<sup>13</sup> See Shepherd, *supra* note †, at n.8.

<sup>14</sup> See, e.g., Deborah J. Merritt et al., *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929, 965–68 (2001) (citing empirical studies of disproportionate impact on minorities); Daniel R. Hansen, Note, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1191 n.3 (1995) (collecting literature on criticism of bar exams); Alex M. Johnson, Jr., Symposium, *Representing Race: The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist’s Perspective*, 95 MICH. L. REV. 1005, 1033 (1997) (arguing that the market, rather than state regulation, should govern legal education and the sale of legal services).

This paper focuses on the second high barrier to blacks' full entry into the legal profession: the ABA's elaborate system for accreditation of law schools. Almost all states grant licenses to practice law only to students who have graduated from ABA-accredited law schools; unless a school satisfies the ABA's accreditation standards, its graduates cannot practice law.<sup>15</sup> The ABA has chosen accreditation standards that operate generally to grant accreditation to law schools that serve white students but that deny accreditation to law schools that would serve black students. After providing a brief history of accreditation's racist roots, I discuss accreditation's two discriminatory impacts: academic discrimination and financial discrimination.

#### A. ABA ACCREDITATION'S RACIST HISTORY

Until the 1920s, entry into the legal profession was relatively open. In 1923, no state required an applicant to the bar to have attended any law school at all.<sup>16</sup> Instead, in all states, a person could become a licensed lawyer by clerking for a specified period in a law firm and then passing the bar exam. Bar exams were "casual, local, and undemanding."<sup>17</sup> If one chose to learn the law by going to law school, admissions at law schools were not selective. Until 1927, anyone who could pay the tuition could study at any law school, including Harvard and Yale.<sup>18</sup> Moreover, one could attend law school with little academic preparation. Indeed, forty-three states required no formal education whatsoever beyond high school; thirty-two states did not even require a high school diploma.<sup>19</sup>

During this period when the profession was wide open to whites, overt discrimination caused the profession to include almost no blacks. In 1910, the United States had only 795 black lawyers.<sup>20</sup> This was only 0.7% of the profession, although blacks were 11.1% of the population.<sup>21</sup> In 1914, the ABA accidentally admitted its first three blacks. Recognizing its mistake, the ABA rescinded their admission, stating that "the set-

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<sup>15</sup> See Shepherd & Shepherd, *supra* note †, at 2114–27.

<sup>16</sup> RICHARD L. ABEL, *AMERICAN LAWYERS* 42 (1989); ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 99 (1983).

<sup>17</sup> ABEL, *supra* note 16, at 62–63.

<sup>18</sup> *Id.* at 59. However, elite schools weeded out many students through attrition; in 1926–27, Harvard failed about 250 of the 700 first-year students. STEVENS, *supra* note 16, at 160.

<sup>19</sup> ABEL, *supra* note 16, at 48–49.

<sup>20</sup> *Id.* at 99–100.

<sup>21</sup> *Id.*

tled practice of the Association has been to elect only white men to membership.”<sup>22</sup> The ABA formally excluded blacks until 1943.<sup>23</sup>

During the late 1920s and 1930s, the organized bar began to be economically harmed by competition from an influx of new lawyers, many of whom were minorities.<sup>24</sup> The main new route to the legal profession was the large number of for-profit, part-time night law schools that began opening around 1900.<sup>25</sup> These schools, with cheap tuition, undemanding admissions requirements, and lower academic standards, had been founded primarily to serve ethnic minorities.<sup>26</sup> In the early 1900s, the country’s largest law school was Boston’s Suffolk Law School, a for-profit night school with 4000 students.<sup>27</sup> Ethnic minorities exploited the new opportunity; for several years during this period, more than 80% of bar admissions in New York were Jewish.<sup>28</sup> Despite oppressive racial discrimination in law schools and the legal profession, the number of black lawyers doubled between 1900 and 1940, both in absolute numbers and as a proportion of the profession—although the number of black attorneys was still small.<sup>29</sup>

Expressing both bigotry and economic self-interest in eliminating competition from new lawyers, the bar acted to stop the influx of new minority lawyers in two new ways: decreasing bar exam pass rates and tightening law-school accreditation. Although the ABA sometimes asserted that the tough bar exams and accreditation were necessary for consumer protection,<sup>30</sup> it was no coincidence that the calls for consumer protection came only when many new minority lawyers were beginning to compete effectively with the ABA’s members.

The first new approach that the bar employed was to lower the pass rate on state bar exams.<sup>31</sup> The reason that many state bar officials stated for decreasing the pass rate was to eliminate “overcrowding” in the profession—that is, to reduce competition for existing lawyers.<sup>32</sup>

The second means that the bar used to reduce competition from new minority lawyers was to close law schools that served minorities and to

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<sup>22</sup> GERALDINE R. SEGAL, *BLACKS IN THE LAW: PHILADELPHIA AND THE NATION* 17 (1983).

<sup>23</sup> *Id.* at 19.

<sup>24</sup> See Shepherd & Shepherd, *supra* note †, at 2116–18.

<sup>25</sup> *Id.* at 2115.

<sup>26</sup> *Id.* at 2115; see also STEVENS, *supra* note 16, at 74; ABEL, *supra* note 16, at 57.

<sup>27</sup> ABEL, *supra* note 16, at 54.

<sup>28</sup> *Id.* at 85–86 (from 1930 to 1934).

<sup>29</sup> *Id.* at 100 (in 1900, there were 730 black lawyers, 0.5% all lawyers; in 1940, there were 1952, 1.1% of the profession).

<sup>30</sup> For example, ABA representatives often argued that higher standards were necessary to eliminate lawyers who behaved unethically. See STEVENS, *supra* note 16, at 100, 102.

<sup>31</sup> See ABEL, *supra* note 16, at 64, 75.

<sup>32</sup> *Id.* at 65.

do this by imposing accreditation requirements that disfavored those schools. The ABA imposed requirements that prohibited for-profit schools, that required law school students to have obtained expensive undergraduate education, and that eventually required expensive buildings and libraries and expensive full-time faculty rather than less expensive adjunct professors.<sup>33</sup> More directly, the ABA eventually began to refuse to accredit law schools whose students lacked either high scores on standardized tests or high undergraduate grades.<sup>34</sup>

The words of bar officials and law school representatives make clear that a main reason that the bar sought to impose the new requirements was to rid the legal profession of minorities who were now competing with nonminority lawyers. Among many other examples,<sup>35</sup> the dean of the University of Chicago Law School, John Henry Wigmore, wrote that a requirement of two years of college would be “a rational, beneficent measure of reducing hereafter the spawning mass of promiscuous semi-intelligence which now enters the bar.”<sup>36</sup> Likewise, an ABA official indicated in the ABA Report that many of the lawyers who came before the local bar grievance committees were “Russian Jew Boys.”<sup>37</sup>

During the Depression, the ABA was able to convince state and federal governments to grant licenses to practice law only to graduates of law schools that received ABA accreditation. In 1923, no state required graduation from law school, much less from an ABA-accredited school.<sup>38</sup> In 1935, only nine states required a degree from an ABA-accredited school; by 1938, twenty-three states did.<sup>39</sup> Today, almost all states require graduation from an accredited law school.<sup>40</sup> The bar also succeeded in convincing states to require substantial education before law school. In 1927, only six states required any college; only Kansas

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<sup>33</sup> See ABEL, *supra* note 16, at 48–58; Shepherd & Shepherd, *supra* note †, at 2129–52.

<sup>34</sup> Although the requirements of high average LSAT scores and undergraduate grades do not appear in the written accreditation standards, accreditors in practice impose the requirements as an interpretation of Standard 501’s prohibition against admitting students who cannot be expected to pass the bar exam. AM. BAR ASS’N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS (2000) [hereinafter ABA STANDARDS], standard 501; see Shepherd, *supra* note †.

<sup>35</sup> Shepherd, *supra* note †.

<sup>36</sup> ABEL, *supra* note 16, at 47.

<sup>37</sup> STEVENS, *supra* note 16, at 176.

<sup>38</sup> ABEL, *supra* note 16, at 42; STEVENS, *supra* note 16, at 99.

<sup>39</sup> ABEL, *supra* note 16, at 55.

<sup>40</sup> NAT’L CONFERENCE OF BAR EXAMINERS & AM. BAR ASS’N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 16–17 (2002) [hereinafter COMPREHENSIVE GUIDE], available at <http://www.abanet.org/legaled/publications/compguide/compguide.html>.

required more than one year of it.<sup>41</sup> By 1942, almost all states required at least two years of college.<sup>42</sup>

The ABA's campaign of racist self-interest succeeded. As it shut law schools that served blacks,<sup>43</sup> the accreditation campaign had the desired impact of reducing the number of black lawyers. Between 1940, when most existing lawyers had received their educations before accreditation was imposed, and 1960, after accreditation's full impacts were felt, the fraction of U.S. lawyers who were black fell from 1.1% to 0.8%.<sup>44</sup> Between 1940 and 1950, the number of black lawyers fell even in absolute numbers, from 1952 to 1450.<sup>45</sup> Only in 1970, after affirmative action began, did the fraction of black lawyers again achieve its level of 1940.<sup>46</sup>

## B. THE ABA'S ACADEMIC DISCRIMINATION

ABA accreditors grant accreditation only to law schools that admit high-quality students.<sup>47</sup> In practice, this means schools that serve whites but not blacks. Of the ABA's accreditation requirements that discriminate academically, the three most harmful are high LSAT scores, high undergraduate grade point averages, and high bar-pass rates.

### 1. *Requiring High LSAT Scores*

None of the ABA-accredited law schools has students with an average LSAT score below approximately 142.<sup>48</sup> This is because the ABA denies accreditation to any law school with average LSAT scores below this level; indeed, as many examples of accreditors' communications with law schools show, the usual requirement is an average LSAT score of approximately 143.<sup>49</sup>

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<sup>41</sup> ABEL, *supra* note 16, at 49.

<sup>42</sup> *Id.*

<sup>43</sup> The accreditation campaign quickly caused the closing of three black law schools: Freylinghuysen in Washington, D.C., in 1927, Virginia Union in 1928, and Simmons in Kentucky in 1932. ABEL, *supra* note 16, at 101.

<sup>44</sup> *Id.* at 100.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See Letter from James P. White, ABA Consultant on Legal Education, to Stanley M. Talcott, Dean of Barry University of Orlando School of Law, and Jeanne O'Laughlin, President of Barry University 3 (May 16, 2000) (on file with author) (indicating that accreditation would be granted only if law school attracted "higher quality students").

<sup>48</sup> See U.S. News & World Report, *America's Best Graduate Schools* (2000) [hereinafter U.S. News Graduate Rankings]. See also AM. BAR ASS'N, OFFICIAL ABA GUIDE TO APPROVED LAW SCHOOLS (2001) [hereinafter OFFICIAL ABA GUIDE]. Law schools usually report the LSAT scores of their students at the 25th and 75th percentiles. My admittedly inexact estimate of the school's average LSAT score is the mean of the school's scores for the 25th and 75th percentiles.

<sup>49</sup> See Shepherd, *supra* note †.



This standard discriminates against blacks. Perhaps because of fewer educational opportunities or culturally biased testing, blacks score much lower on the LSAT than whites do. In 1999–2000, the average LSAT score for white test-takers was 152.<sup>50</sup> In contrast, the average score for blacks was 141.6, more than ten points lower.<sup>51</sup> Applying the 143 cutoff, the ABA would accredit a school that served a completely average group of white students. Indeed, a school with students who scored in the bottom 16% for whites would still satisfy the accreditation standards.<sup>52</sup>

In contrast, the LSAT requirement prohibits the ABA from granting accreditation to a law school that serves the average black. Even a school with students with average LSAT scores in the fifty-fourth percentile for blacks would fail the accreditation requirements.<sup>53</sup>

## 2. *Requiring High Undergraduate Grades*

The ABA will not accredit a law school unless the school's students earned high undergraduate grades. None of the ABA-accredited law schools has students with an average undergraduate grade point average (UGPA) below approximately 2.7, or B-minus.<sup>54</sup> The ABA interprets its standards that demand that a law school's students be expected to pass the bar exam to require denial of accreditation to law schools with students with average UGPAs below this level. As with the LSAT cutoff, this is seen in the ABA's action letters.<sup>55</sup>

Again, the standard discriminates against blacks. Perhaps because of fewer early educational resources, blacks receive much lower undergraduate grades than whites. The average black applicant to law school received a B-minus UGPA; the average for whites was a B-plus.<sup>56</sup> As with the LSAT requirement, the ABA's B-minus UGPA cutoff would grant accreditation to a law school that would serve whites with below-average grades among whites, even far below average. In contrast, it would deny accreditation to a similar school for blacks.

<sup>50</sup> See LAW SCH. ADMISSION COUNCIL, LSAT PERFORMANCE WITH REGIONAL, GENDER, AND ETHNIC BREAKDOWNS: 1993–1994 THROUGH 1999–2000 TESTING YEARS (2000), and data obtained directly from the Law School Admission Council (on file with author) [hereinafter LSAT PERFORMANCE].

<sup>51</sup> *Id.*

<sup>52</sup> The standard deviation of LSAT scores for white test-takers in 1998–1999 was 8.96. *Id.* Thus, white students with scores of 143 would be in the 16th percentile for whites.

<sup>53</sup> This follows because the standard deviation for blacks in 1998–1999 was 8.52. *Id.*

<sup>54</sup> See U.S. News Graduate Rankings, *supra* note 48; see also OFFICIAL ABA GUIDE, *supra* note 48. As for LSAT data, schools usually report statistics on undergraduate grades at the 25th and 75th percentiles. To estimate average undergraduate grades, I calculated the mean of the 25th and 75th percentile figures.

<sup>55</sup> See Shepherd, *supra* note †.

<sup>56</sup> See LSAT PERFORMANCE, *supra* note 50.

### 3. *Requiring High First-Time Bar-Pass Rates*

A few states, such as California, Massachusetts, and Maine, permit students from schools without ABA accreditation to take the state's bar exam.<sup>57</sup> However, students from these unaccredited schools usually may not sit for the bar in other states; California is a central example.<sup>58</sup> Such an unaccredited school may seek ABA accreditation after many years of operation and after many of the school's students have taken the state's bar exam. For such law schools with an existing track record, the ABA denies accreditation if the school's students pass the bar at a low rate, either in absolute terms or in comparison with the accredited schools in the state.<sup>59</sup>

Again, this discriminates against schools that serve blacks. Blacks pass the bar at lower rates than whites, at least on their first attempt. For example, in the July 2002 California bar exam, the pass rates for first-time takers were 70% for whites and 39% for blacks.<sup>60</sup> The difference has been stark for many years. In California between 1977 and 1988, 73% of white first-time test takers passed, on average, compared with 30% for blacks.<sup>61</sup> In New York for the period from 1985 to 1988, the average pass rate for first-time takers was 73% for whites and 31% for blacks.<sup>62</sup>

### 4. *Excluding Blacks*

By closing law schools that would have served students with moderate academic credentials, the ABA's cutoffs have succeeded in ensuring that only a trickle of blacks will be able to enter the profession. A recent study suggests that but for affirmative action, only 1821 blacks would have had the qualifications in 1998–99 to be admitted to even the least-exclusive U.S. law school.<sup>63</sup> The ABA's academic standards create a

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<sup>57</sup> COMPREHENSIVE GUIDE, *supra* note 40, at 10–11; OFFICIAL ABA GUIDE, *supra* note 48, at 36–37.

<sup>58</sup> See *supra* sources at note 48.

<sup>59</sup> See Shepherd, *supra* note †.

<sup>60</sup> See CAL. BD. OF BAR EXAMINERS, GENERAL STATISTICS REPORT: JULY 2002 CALIFORNIA BAR EXAMINATION (2003), at 2, available at <http://www.calbar.ca.gov/calbar/pdfs/admissions/JULY2002STATS.pdf>.

<sup>61</sup> Stephen P. Klein, *Disparities in Bar Exam Passing Rates Among Racial/Ethnic Groups: Their Size, Source, and Implications*, 16 T. MARSHALL L. REV. 517, 519 (1991); Stephan Thernstrom, *Diversity and Meritocracy in Legal Education: A Critical Evaluation of Linda F. Wightman's The Threat to Diversity in Legal Education*, 15 CONST. COMMENT. 11, 31 (1998). For additional statistics, see ABEL, *supra* note 16, at 103–04.

<sup>62</sup> Edna Wells Handy, *Blacks, the Bell Curve, and the Bar Exam*, N.Y.L.J., Apr. 15, 1996, at 1 (evaluating July exams only).

<sup>63</sup> I obtain the estimate of 1821 black admittees for 1998–99 by extrapolating from estimates for 1990–91. See 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 Admissions Decisions*, 72 N.Y.U. L. REV. 1, 22 tbl.5 (1997). According to Wightman, in

system that, without affirmative action, would have allowed only 22% of the 8375 blacks who applied to law school to be accepted at even the least-selective law school.<sup>64</sup> The remaining 6554 blacks would not have been qualified to gain admission to any school. In contrast, the ABA standards permitted 75% of white applicants to gain admission: 35,967 of 47,787.<sup>65</sup> That is, the accreditation system excludes almost 80% of black applicants, compared with only 25% of whites.

The larger proportion of black students in undergraduate education gives some indication of ABA accreditation's impacts. In undergraduate education, where colleges may enter the market without meeting strict accreditation requirements, blacks make up 11% of enrollment, compared with 7% in law schools.<sup>66</sup>

### 5. *Shutting Black Law Schools*

In undergraduate education, the best route to success for blacks is often not the elite colleges and universities but a group of more than a hundred "historically black colleges" with primarily black students.<sup>67</sup> Examples are Howard University, Morehouse College, and Spelman College. The HBCs, not the elite colleges, have provided the training for many of today's black leaders. Although only 16% of black college students attend HBCs, of the thirty-three blacks that President Bill Clinton appointed to the federal judiciary, 40% attended HBCs.<sup>68</sup> In a list of the undergraduate institutions that produced the most black graduates who went on to earn Ph.D.s, nine of the top ten schools were HBCs.<sup>69</sup>

Although HBCs educate a large fraction of the blacks who achieve great success, HBCs are not selective by national standards. For example, Spelman, which a *Black Enterprise* survey ranked as providing the best education for blacks,<sup>70</sup> admitted 54% of its applicants in 1997–98, and the average combined SAT score for the school's students was only

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1990–91, only 1631 blacks would have had the LSAT scores and UGPAs to be admitted to even the least-exclusive U.S. law school. This compares with the 3435 total black students who were actually admitted, including because of affirmative action. *Id.* Multiplying this ratio of 1631 to 3435 by the 3835 total black admittees in 1998–99 yields an estimate of 1821 for the number of blacks who would have had the credentials to gain admission in 1998–99. See also LSAT PERFORMANCE, *supra* note 50.

<sup>64</sup> See *supra* note 63.

<sup>65</sup> See *supra* note 63 for sources and methods.

<sup>66</sup> *Chronicle of Higher Education, 2000–2001 Almanac Issue*, August 2000, at 24; MILES TO GO, *supra* note 2, at 3 tbl.4.

<sup>67</sup> See Thomas LaVeist & Marjorie Whigham-Desir, *Top 50 Colleges for African Americans*, BLACK ENTERPRISE, Jan. 1999, at 71.

<sup>68</sup> *The Higher Education of President Clinton's Black Judges*, J. BLACKS IN HIGHER EDUC., Autumn 1996, at 29.

<sup>69</sup> See NAT'L RESEARCH COUNCIL, SUMMARY REPORT 1996: DOCTORATE RECIPIENTS FROM UNITED STATES UNIVERSITIES 42 tbl.9 (1998)

<sup>70</sup> LaVeist & Whigham-Desir, *supra* note 67, at 71.

approximately 1055—compared with approximately 1500 for Harvard. These figures placed it in the fourth of five tiers in the overall ranking in *U.S. News and World Report*.<sup>71</sup>

The ABA's academic accreditation standards kill off almost all of the black law schools that would otherwise resemble the HBCs; because their black students would have modest test scores and grades, the black law schools cannot obtain accreditation. For example, the ABA has persevered in a long campaign to close Georgia's only law school that serves a large proportion of black students, John Marshall Law School in Atlanta.<sup>72</sup> Forty-one percent of John Marshall's students are black, one of the highest proportions for law schools in the country.<sup>73</sup> Similarly, the ABA is now threatening to deny reaccreditation to Thurgood Marshall Law School at Texas Southern University, the only law school in Texas that serves large numbers of blacks.<sup>74</sup>

The ABA's academic cutoffs are equivalent to a rule that limits the total number of black law schools to five. Of the ABA-accredited schools, only Howard University in the District of Columbia, North Carolina Central University, Southern University in Louisiana, Texas Southern University, and the University of the District of Columbia enroll more than 40% blacks.<sup>75</sup>

The more than 4500 black law school applicants who each year do not receive admission to any school gives some idea of the large number of new black law schools that could arise if accreditation loosened. Eliminating the LSAT cutoff would allow the creation of more than eighty new 600-student, majority-black law schools, an average of more than one or two per state.<sup>76</sup>

## 6. *Affirmative Action is No Cure*

Affirmative action returns to blacks only a small fraction of the law school positions that accreditation takes away. We have seen that but for affirmative action, accreditation's academic requirements would have excluded from admission approximately 6554 of 8375 applicants; only 1821 would have been admitted purely on their LSAT scores and grades. Because law schools actually admitted a total of 3835 blacks, we see that

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<sup>71</sup> See U.S. News & World Report, *America's Best Colleges* (2000).

<sup>72</sup> Julia D. Gray, *Dean Touts New John Marshall with Upgrades*, Advertising Push, FULTON COUNTY DAILY REP. (Atlanta), May 30, 2002, at 1; Janet L. Conley, *Court Turns Hourglass Again for Marshall*, FULTON COUNTY DAILY REP. (Atlanta), June 13, 2001, at 1.

<sup>73</sup> See Shepherd, *supra* note †.

<sup>74</sup> See Ron Nissimov, *ABA Wants TSU Law School to Hike Entrance Standards*, HOUST. CHRON., July 25, 2001, at A1.

<sup>75</sup> See OFFICIAL ABA GUIDE, *supra* note 48.

<sup>76</sup> The 4540 black law-school applicants who were rejected from all law schools in 1998–1999 would fill ninety law schools with classes of 200 that included 50% blacks.

2014 were admitted due to affirmative action.<sup>77</sup> Although affirmative action doubles the number of black law students, the 2014 blacks whom affirmative action admits constitute less than one-third of the more than 6500 black law school applicants whom the ABA's accreditation program caused to be rejected. Even with affirmative action, the ABA system excludes a much higher proportion of blacks than whites—54% of black applicants are rejected by all law schools where they apply, compared with only 25% of white applicants.<sup>78</sup>

The need for eliminating accreditation is becoming more urgent because of current attacks on affirmative action. Court challenges, such as the *Hopwood* case in the Fifth Circuit,<sup>79</sup> and ballot initiatives, such as those in California and Washington,<sup>80</sup> have already eliminated affirmative action to varying degrees. The Supreme Court's upcoming ruling on the University of Michigan's affirmative action program<sup>81</sup> might restrict affirmative action further. Without affirmative action, blacks would suffer the full impact of the ABA's academic and financial discrimination.

### C. THE ABA'S FINANCIAL DISCRIMINATION

The ABA's accreditation requirements discriminate financially because they make entry into the legal profession more expensive, disproportionately excluding blacks.

#### 1. *Increasing the Price of Admission*

The ABA requirements increase the cost of becoming a lawyer by increasing law school tuition. The requirements impose many costs on law schools. For example, accreditation standards effectively fix and raise faculty salaries, limit faculty teaching loads, require high numbers of full-time faculty rather than less expensive part-time adjuncts, and require expensive physical facilities and library collections.<sup>82</sup> The requirements likely cause law schools' costs to more than double, increasing

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<sup>77</sup> See LSAT PERFORMANCE, *supra* note 50. Again, these calculations estimate 1998 statistics by extrapolating from 1991–1992 data. See *supra* note 63.

<sup>78</sup> In 1998–99, 3835 of 8375 black applicants were admitted to at least one law school, compared with 35,967 of 47,787 white applicants. See LSAT PERFORMANCE, *supra* note 50.

<sup>79</sup> *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) (striking down affirmative action program); see also MILES TO GO, *supra* note 2, at 22–23 (describing trend of eliminating affirmative action).

<sup>80</sup> Cal. Prop. 209 (1995) (prohibiting use of race as an admission criterion in public education); Wash. Initiative 200 (1998) (prohibiting consideration of race as a criterion in, among other things, university admissions).

<sup>81</sup> *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir.) (upholding law school's affirmative action program), *cert. granted*, 123 S. Ct. 617 (2002). (\*Eds. On June 23, 2003, the Supreme Court upheld the consideration of race as a factor for law school admission. See *Grutter v. Bollinger*, 123 S. Ct. 2325.)

<sup>82</sup> For a detailed discussion of accreditation's impacts on the costs of legal education, see Shepherd & Shepherd, *supra* note †, at 2176–89.

them by more than \$10,000 per year per student, with many schools then passing the increased costs along to students by raising tuition; to avoid bankruptcy, a private school with no endowment income must pass all costs along to students.<sup>83</sup>

The impact of the increased costs from accreditation can be seen by comparing tuition rates at accredited schools and unaccredited schools. Accredited private schools normally charge more than \$20,000 per year.<sup>84</sup> Unaccredited schools usually charge approximately half that amount. For example, the average tuition for ABA-accredited law schools in the Los Angeles area is \$21,135, compared with only \$9339 for the area's two unaccredited schools.<sup>85</sup> The one exception to this pattern is public accredited schools, which often charge less than private accredited schools, especially for in-state students; taxpayers rather than students pay some of the costs that accreditation imposes.

One example of the accreditation requirements that force tuition upward is the requirement that an accredited school have a large library and extensive library collection. The ABA sets forth detailed requirements for libraries' collections and physical resources.<sup>86</sup> The ABA requires a minimum expenditure on the library of approximately \$1 million per year.<sup>87</sup> Of the 179 schools that the ABA has been willing to accredit, all but seven have library budgets above this amount.<sup>88</sup>

The required library spending substantially increases the school's expenses and the tuition that it must charge. For example, if a law school has 200 students, the \$1 million yearly library expense is \$5,000 per student.

In addition, the ABA requirements increase students' cost of entering the legal profession in other ways. For example, the requirements force students to attend at least six years of expensive higher education: three years of college<sup>89</sup> and three years of law school.<sup>90</sup> Before 1927, people in some states could enter the legal profession as an apprentice

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<sup>83</sup> See *id.* at 2177. Although information on law schools' endowment size is scarce, the impact of lower-ranked schools' absence of endowment income can be seen in the small average financial aid awards that the schools can afford to offer. See Shepherd, *supra* note †.

<sup>84</sup> OFFICIAL ABA GUIDE, *supra* note 48.

<sup>85</sup> See IAN VAN TUYL ET AL., THE PRINCETON REVIEW, THE BEST LAW SCHOOLS (2000); Shepherd, *supra* note †, at nn.187 & 188.

<sup>86</sup> ABA STANDARDS, *supra* note 34, standards 601-06, 702.

<sup>87</sup> One head law librarian and member of many accreditation teams indicated that \$1 million was the minimum. Private discussion with Robin Mills, Law Librarian, Emory University School of Law (Nov. 2000).

<sup>88</sup> ASS'N OF AM. LAW SCHS., LAW LIBRARY COMPREHENSIVE STATISTICAL TABLE—DATA FROM FALL 1999 ANNUAL QUESTIONNAIRE, April 6, 2000 (on file with author).

<sup>89</sup> ABA Standard 502(a) permits law schools to admit students who have completed three-fourths of the work acceptable for a bachelor's degree.

<sup>90</sup> ABA STANDARDS, *supra* note 34, standards 304(b) (requiring at least six semesters of study), 502(a).

directly after high school, without college or law school. Now, a person can become a lawyer only if she can afford to take at least six years off from work after high school and pay six years of tuition.

## 2. *Excluding Blacks*

Because black families have lower incomes and wealth than most other groups, the high entry price that the ABA imposes is a filter, like the academic accreditation requirements, that eliminates blacks from the legal profession. The average income for a black family in 1999 was only \$31,778.<sup>91</sup> This was only 62% of the average income for white families, \$51,224.<sup>92</sup>

Because the ABA's system of legal training is expensive, many students can become lawyers only with financial assistance from their families. The system discriminates against blacks because far more white families than black families have the resources to provide the necessary assistance. More white families than black families can provide at least partial subsidies to support their children during the more than six years of training to become a lawyer when the child earns little income and makes large tuition payments.

Student loans do not solve the problem. Because most blacks have modest test scores, the lower-paying law jobs that most can expect after law school are insufficient to repay the large loans necessary to attend an accredited law school.<sup>93</sup>

## 3. *Eliminating Black Law Schools*

Like the academic discrimination, the ABA's financial discrimination destroys law schools that would serve average blacks. Students will attend a law school only if the jobs that they can obtain after graduation will permit them to repay their student loans from attending the school; a school that leads students to inevitable bankruptcy will attract few students.<sup>94</sup> Elite law schools can charge high tuition levels because the high-paying jobs that their graduates receive permit their students to repay their large student loans.

In contrast, low-ranked schools must charge much less; because graduates of these schools earn much less, the graduates can afford to repay only smaller student loans. However, because accreditation

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<sup>91</sup> STATISTICAL ABSTRACT, *supra* note 1, at 437 tbl.669.

<sup>92</sup> *Id.*

<sup>93</sup> See Shepherd, *supra* note †, at Part IV.C.

<sup>94</sup> The existing unaccredited schools survive because they can offer less expensive tuition; in states that permit them, unaccredited schools do not struggle under the expensive accreditation requirements that drive up costs and tuition at accredited schools.

doubles law schools' costs,<sup>95</sup> charging tuition low enough to attract these students would cause the schools to go bankrupt. The only schools that survive are those that obtain for their graduates jobs that pay enough to permit repayment of loans that cover high tuition charges. Accreditation causes inevitable failure for schools that can obtain for their graduates only jobs that pay less than this.

This explains why all of the law schools that predominantly serve blacks are public schools that charge tuition below \$10,000.<sup>96</sup> If the schools reduced the taxpayer subsidy and increased tuition above this level, then they would lose most of their students. Higher tuition levels would prevent graduates' jobs from repaying the graduates' student loans.<sup>97</sup> An accredited private school that attempted to serve average blacks without a state subsidy or large endowment would inevitably fail.

## II. EXCLUDING BLACKS FROM POLITICS

The ABA accreditation system's exclusion of most blacks from the legal profession inflicts many harms.<sup>98</sup> For example, accreditation directly damages those whom it excludes, by barring the door to a rewarding, lucrative career in the law; accreditation is one reason that blacks' average incomes are much lower than whites' incomes.<sup>99</sup> The accreditation system also closes an important path for blacks to improve their socioeconomic positions. Before accreditation began in the mid-1920s, the legal profession offered an important path for many immigrants and minorities to raise themselves from poverty.<sup>100</sup> Accreditation blocks this path, locking in the existing white-dominated social hierarchy.

Likewise, accreditation makes legal services unaffordable for most blacks. It reduces substantially the potential number of lawyers of all races, probably by at least a third.<sup>101</sup> Through the laws of supply and

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<sup>95</sup> See *supra* note 83.

<sup>96</sup> Although Howard Law School, the leading black law school, is nominally private, it receives subsidies from the federal government each year of more than \$200 million. See Charles Dervarics, *Students of Color Win in Final Education Budget*, BLACK ISSUES IN HIGHER EDUC., Dec. 23, 1999, at 8 (reporting subsidy of \$219.4 million for Howard in 2000). Although Howard's nominal tuition level is \$12,785, its median award for students who receive financial aid is \$9000, so that the average student obtains \$4890. OFFICIAL ABA GUIDE, *supra* note 48, at 203. The net cost to the average student, including the financial aid subsidy, is thus \$7895.

<sup>97</sup> Howard is the exception among the black schools, serving the black elite, not average blacks: its students' LSAT scores, UGPAs, and starting law salaries are much higher than for average blacks. See Shepherd, *supra* note †.

<sup>98</sup> For a detailed description of many of the harms, see Shepherd, *supra* note †.

<sup>99</sup> See *supra* text accompanying notes 91 & 92.

<sup>100</sup> See *supra* Part I.A.

<sup>101</sup> In 1998–99, more than 34,000, or 40%, of those who took the LSAT were not admitted to law school. LSAT PERFORMANCE, *supra* note 50. Even if we count only those who



demand, this reduction in the supply of lawyers leads inevitably to a sharp increase in the price of legal services.<sup>102</sup> In addition, high wages in a profession are necessary to compensate an entrant when great expense must be incurred for learning his or her trade. By raising the cost of law school and imposing other expensive academic requirements, accreditation further increases the price of legal services. The increases especially harm potential black consumers of legal services because of blacks' low average incomes. Legal services become services mainly for corporations, the wealthy, and horribly injured people who can attract a contingency lawyer.

Here, I will focus on another harm: accreditation's exclusion of blacks from politics.

#### A. A GOVERNMENT OF LAWYERS

Lawyers dominate politics in the U.S. more than in any other country.<sup>103</sup> As Tocqueville wrote of the United States in the 1830s, "the aristocracy occupies the judicial bench and the bar."<sup>104</sup> Tocqueville did not mean to criticize lawyers or to assert that they were elitist. He noted that because the U.S. had replaced hereditary nobility with democracy, lawyers, with their skills and intelligence, would naturally be elected by the populace to leadership positions:

The government of democracy is favorable to the political power of lawyers; for when the wealthy, the noble, and the prince are excluded from the government, the lawyers take possession of it, in their own right, as it were, since they are the only men of information and sagacity, beyond the sphere of the people, who can be the object of the popular choice.<sup>105</sup>

Lawyers' position of power was beneficial: "The authority [Americans] have entrusted to members of the legal profession, and the influence that these individuals exercise in the government, are the most powerful existing security against the excesses of democracy."<sup>106</sup>

Tocqueville's observation remains true today. Lawyers dominate politics, far out of proportion to their numbers. In general, the higher the

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actually apply to law schools and are rejected, the number of new lawyers declines by more than 23,000, or 31%. *Id.*

<sup>102</sup> See Shepherd & Shepherd, *supra* note †, at 2173-79.

<sup>103</sup> ABEL, *supra* note 16, at 175 (citing DAVID PODMORE, SOLICITORS AND THE WIDER COMMUNITY ch. 3 (1980)).

<sup>104</sup> ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA ch. 16 (Phillips Bradley ed. & Henry Reeve trans., 1945).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

political office, the higher the proportion of lawyers. This is true for both elected and appointed political positions.

Lawyers' numbers dwarf other professions' in elective office. Many elected offices are filled completely by lawyers. For example, only lawyers can become state attorneys general. Almost always, only lawyers can become state judges.

Even in elected offices for which a law degree is not a prerequisite, lawyers prevail. Although lawyers are less than 1% of the population,<sup>107</sup> lawyers for many years made up approximately 25% of state houses and 40% of state senates.<sup>108</sup> They were 39% of the 2001–02 members of the U.S. House of Representatives and 55% of U.S. senators.<sup>109</sup> Similarly large numbers of governors have been lawyers.<sup>110</sup> Two-thirds of U.S. presidents have been lawyers.<sup>111</sup>

Lawyers similarly overshadow other professions in appointed political positions and in appointed positions that can lead to other political positions. Only lawyers can be appointed to law-enforcement positions such as district attorney, U.S. attorney, U.S. attorney general, and judge. Likewise, attorneys are overrepresented in appointed political positions for which being a lawyer is not a prerequisite. Considering top elected and appointed positions together, one early calculation indicated that since 1789, of presidents, vice presidents, cabinet members, Supreme Court justices, and speakers of the House, three-fourths had been lawyers.<sup>112</sup>

## B. LAWYERS' ADVANTAGES IN POLITICS

Lawyers' domination of politics has several causes. Their training and experience in advocacy and dispute resolution prepare them for political conflict.<sup>113</sup> In addition, four factors reduce lawyers' risks and

<sup>107</sup> STATISTICAL ABSTRACT, *supra* note 1, at 380 tbl.593 (placing fraction at 0.35%)

<sup>108</sup> Michael Cohen, *Lawyers and Political Careers*, 3 L. & SOC'Y REV. 563, 569 tbl.1 (1969) (although old, the study is the most complete reference). Recently, the proportion of lawyers in state legislatures has declined somewhat. According to the National Conference of State Legislatures (NCSL), 15.8% of state legislators are lawyers, down from 22% in 1976. NCSL statistical summary, on file with author. However, NCSL concedes that their data understate the true number of lawyer-legislators because some legislators who indicate that they are "full-time legislators" rather than lawyers were formerly lawyers or had legal training. Telephone conversation with Tim Storey, Statistical Director, National Conference of State Legislatures, Mar. 24, 2003.

<sup>109</sup> See Biographical Directory of the United States Congress, at <http://bioguide.congress.gov>. Historically, the percentages were even greater. See ABEL, *supra* note 16, at 175.

<sup>110</sup> Cohen, *supra* note 108, at 569 tbl.1.

<sup>111</sup> See *id.* at 569.

<sup>112</sup> Cohen, *supra* note 108, at 569.

<sup>113</sup> See David R. Derge, *The Lawyer as Decision-Maker in the American State Legislature*, 21 J. POL. 408, 432 (1959).

costs of obtaining political office, giving them a substantial advantage over nonlawyers.

First, lawyers dominate in higher political offices because only they qualify for many of the intermediate offices that are typical stepping stones to the higher offices. For example, a frequent route to a state governorship is prosecutor to state attorney general to governor.<sup>114</sup> Only a lawyer qualifies for the first two positions. In turn, a governorship is a common stepping stone to being a U.S. senator,<sup>115</sup> and lawyers have an advantage in reaching this stepping stone.

Second, the costs to lawyers of seeking political office are often lower than for those in other professions. Temporary political employment often promotes a lawyer's normal law practice; political office brings the lawyer visibility that leads to new clients.<sup>116</sup> In contrast, seeking political office can often derail other careers.

Third, further reducing lawyers' costs of seeking political office is the large number of backstop politically appointed jobs that are available only to lawyers. When deciding whether to seek elective political office, the lawyer recognizes that even if his political service harms his legal practice, he is still eligible to be appointed a judge or U.S. attorney as a safety net.<sup>117</sup> Alternatively, the lawyer can intentionally use elected political office as a route to a lawyers-only appointed position.<sup>118</sup>

Fourth, lawyers enjoy advantages for success within many elective bodies, aiding them in obtaining even higher offices. For example, within most legislative bodies, only lawyers are permitted to serve on the prestigious judiciary committee, and they are given preference in other committees, such as the rules committee.<sup>119</sup> Able service on these committees can lead to even higher office. Nonlawyers cannot traverse this route.

### C. ACCREDITATION AND POLITICAL ACCESS OF BLACKS

Because accreditation reduces the number of black lawyers, it reduces blacks' access to political office. It is no coincidence that blacks are underrepresented both as lawyers and, as discussed in the introduction, in politics; accreditation's barrier to the legal profession also blocks blacks from political office.

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<sup>114</sup> See generally Joseph A. Schlesinger, *Lawyers and American Politics: A Clarified View*, *MIDWEST J. POL. SCI.*, May 1957, at 26.

<sup>115</sup> See Cohen, *supra* note 108, at 566.

<sup>116</sup> *Id.* at 565-66; Derge, *supra* note 113, at 411.

<sup>117</sup> See Cohen, *supra* note 108, at 573; Paul L. Hain & James E. Piersen, *Lawyers and Politics Revisited: Structural Advantages of Lawyer-Politicians*, 19 *AM. J. POL. SCI.* 41, 45-46 (1975).

<sup>118</sup> See Cohen, *supra* note 108, at 573-74.

<sup>119</sup> See Derge, *supra* note 113, at 423.

Accreditation does not completely exclude blacks from the political aristocracy. The small number of blacks who become lawyers despite accreditation can enter politics through this easy, traditional route. In addition, even the blacks who are excluded from the law still have a chance of entering politics from other professions, although the chance is smaller than for lawyers. Accreditation severely constricts a major feeder artery for blacks into politics.

That the underrepresentation of blacks in politics is caused at least in part by accreditation and the bar is suggested by four factors.

First, we have seen that being a lawyer is more important in higher political offices. If accreditation were affecting black political careers, we would expect to see the lowest proportions of blacks in the highest political offices.

This is precisely the pattern that we observe. For example, although there are several black mayors of large cities,<sup>120</sup> and 9% of the U.S. House of Representatives is black, no U.S. senators are black, no state governors are black, and no presidents have been black.<sup>121</sup>

Second, the careers of individual black politicians suggest that accreditation excludes blacks from politics. Although leading white politicians are often lawyers, many black leaders are not attorneys. Many, such as Martin Luther King and Jesse Jackson, have been clergymen rather than lawyers. This may be due merely to different traditions in the black community.

However, it may be too that potential black leaders recognized that careers in the law were blocked off from them. For example, it appears that Martin Luther King scored in the bottom half of the GRE, the qualifying exam for graduate school.<sup>122</sup> An equivalent score on the LSAT would have prevented him from attending any law school. Thus, future black leaders instead have attempted to find other routes into politics, such as the church. Perhaps if the legal profession had not been so closed to blacks, they would have entered politics through law school rather than the pulpit. Despite the availability of the church as an alternate route into politics for a few extraordinary leaders, the main, most easily traversed route is all but closed to blacks. Accreditation is a major barrier that blocks it.

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<sup>120</sup> MILES TO GO, *supra* note 2, at 17 tbl.39 (identifying black mayors of the fourth-, fifth-, ninth-, tenth-, twelfth-, fifteenth-, eighteenth-, and twenty-third-largest cities in 2000).

<sup>121</sup> In the 107th Congress, thirty-nine out of the 435 representatives were black. There have only been four black senators (only two popularly elected in the 20th century, Edward W. Brooke of Massachusetts and Carol Moseley-Braun of Illinois) and only one elected black governor (L. Douglas Wilder of Virginia).

<sup>122</sup> Stephan Thernstrom & Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. REV. 1583, 1617.

Third, historical evidence suggests that the imposition of accreditation and the bar changed the composition of various elected bodies. The for-profit, night law schools of the early 1900s opened up the law to immigrants and the poor.<sup>123</sup> Graduates of these schools quickly exploited this route into politics. For example, the Massachusetts legislature in the 1920s included an average of more than twenty-five members from one night law school alone.<sup>124</sup> When accreditation closed or transformed these schools, it restricted an important path into politics for these groups.

Fourth, the disproportionate success in politics of the few blacks who succeed in passing through the ABA's accreditation gauntlet suggests the degree to which accreditation suppresses black political leaders. Black lawyers often succeed in politics at a much higher rate than lawyers from other groups. One indication of this is the large fraction of black lawyers who become judges.<sup>125</sup> Becoming a judge is often a political process. In many state jurisdictions, judges are elected. In other states and in the federal courts, judges are appointed in a system that often seems nearly as political as an election. The nominations to the Supreme Court of Robert Bork and Clarence Thomas are examples.

Blacks succeed in the political process to become a judge at a relative rate double that for other lawyers. More than 8% of black lawyers are judges, compared with only 4% of lawyers from other groups—although the absolute number of black judges is nonetheless small because there are so few black lawyers.<sup>126</sup> But for accreditation, far more blacks would achieve elected or appointed political office via the normal route of becoming a lawyer. If permitted to become lawyers, blacks succeed in the political process. But accreditation prevents them from becoming lawyers.

The reduction in the number of black politicians imposes large harms. Although nonblack politicians may strive to represent black constituents ably, the absence of many black politicians inevitably makes government less responsive to blacks. Accreditation silences the voices of black political leaders who would otherwise represent blacks' interests on the full array of issues that are crucial for the black community. Blacks may forcefully argue that accreditation and the bar operate as shackles, left over from a racist era, for excluding them from power.

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<sup>123</sup> See *supra* text at note 25.

<sup>124</sup> ABEL, *supra* note 16, at 54.

<sup>125</sup> *Id.* at 111.

<sup>126</sup> As of 1990, 2278 of 27,948 black lawyers are judges, compared with 32,394 of the nation's 779,471 total number of lawyers. MILES TO GO, *supra* note 2, at 1 tbl.1. Blacks are 3.4% of lawyers but 7.0% of judges. See *supra* notes 2, 3.

Likewise, the absence of black judges stifles the black voice in justice and the legal system. Many have suggested both that black judges represent blacks' interests in the legal system and that black judges decide cases differently than white judges do.<sup>127</sup> Without black judges, the legal system loses an important voice and perspective, and it fails to reflect black community values.<sup>128</sup>

It is unconstitutional for courts to exclude jurors because they are black.<sup>129</sup> Excluding black jurors unconstitutionally eliminates the black perspective from the jury box and increases the appearance of possible bias and unfairness.<sup>130</sup> It also may lead to different outcomes that disfavor blacks, decrease respect for the courts, and demean the excluded jurors.<sup>131</sup>

When the accreditation system excludes blacks from being judges, it causes these same harms, but magnified. Like jurors, judges influence the outcome of cases. Bench trials, motion practice, and a host of other decisions that are made during litigation are all decided by judges, not jurors. Indeed, because only a small fraction of cases are resolved by juries, judges decide many of the rest and wield much discretion in doing so. The elimination of many black judges and their unique perspective inevitably changes litigation outcomes.

### III. ACCREDITATION SHOULD BE ELIMINATED AS A BARRIER

Because of accreditation's many harms and few benefits, it should be eliminated as a barrier to the legal profession. The states should no longer restrict licenses to practice law to those who possess a diploma from an ABA-accredited law school. As others have suggested, the bar exam should also be eliminated as a barrier.<sup>132</sup>

A world without accreditation and the bar exam as barriers would have the following characteristics. Some states would choose to follow the California model, requiring lawyers still to have attended some law school, even if not an accredited one. In these states, as in California currently, many more law schools would exist, many of which would

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<sup>127</sup> See, e.g., Ifill, *supra* note 2, at 98–99, 102–03.

<sup>128</sup> *Id.* at 102–03.

<sup>129</sup> *Batson v. Kentucky*, 476 U.S. 79, 99 (1986).

<sup>130</sup> *Id.* at 87.

<sup>131</sup> *Cf. J.E.B. v. Alabama*, 511 U.S. 127, 141 (1994) (identifying the same harms that result from exclusion of black jurors to invalidate exclusion of women jurors).

<sup>132</sup> See, e.g., Shepherd & Shepherd, *supra* note †, at 2253–54; Johnson, *supra* note 14, at 1033; *cf. generally* Merritt et al., *supra* note 14 (arguing that empirical evidence does not support the need to raise the scores needed to pass the bar in order to produce competent lawyers).

serve high proportions of minorities.<sup>133</sup> Just as many predominantly black colleges now exist, new black law schools would open. Other new law schools, while not primarily black, would serve substantial numbers of minorities.

Without the cost increases from accreditation, the new schools could offer much lower tuition than present accredited schools and offer more flexible programs. The unaccredited schools in California provide examples of the schools that could arise. For example, the Monterey College of Law provides a program of entirely night instruction over four years. All instructors are practitioners. Tuition is \$6600 per year.<sup>134</sup>

The new schools would offer students much broader choices. Students who hoped to work on sophisticated legal matters at elite law firms would continue to choose expensive, full-service law schools with large libraries and full-time faculties. Students who hoped to have legal practices working with individuals on simpler matters, or who hoped to work as lawyers in local business or government, might choose a more basic law school. No longer would the ABA force a lawyer who sought a Camry legal practice to purchase a Mercedes legal education.

Other states might not require law school at all. Students would be able to choose several routes into the profession. Some would choose law school. Others would learn to be lawyers through apprenticeships. The market would match each job with a lawyer with the appropriate training.

This would not be a radical experiment. Instead, it would merely return the legal profession to the system that worked well for a century before the 1920s, the same system that many other professions now employ, such as business and accounting. As in business and accounting, some would enter the profession directly, without professional school. Others, who seek higher-level jobs, would voluntarily attend professional school. Some would combine both approaches, first entering the profession directly for a few years, and then attending professional school.

Regardless of whether a state chose still to require attendance at some law school, elimination of the accreditation and bar exam barriers would induce a large increase in the number of lawyers. Some of the new lawyers would be among the finest in the profession. Many people with excellent potential as lawyers are now excluded by the bar exam and the ABA's arbitrary accreditation standards.<sup>135</sup> Other new lawyers would possess varying levels of ability, as under the present system. A large part of the additional lawyers would be black. We have seen that

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<sup>133</sup> The proportion of black students in unaccredited schools in California is approximately double the proportion in accredited schools there. Shepherd, *supra* note †.

<sup>134</sup> Van Tuyl et al., *supra* note 85, at 526–27 (1999 figure).

<sup>135</sup> See Shepherd, *supra* note †; see generally Merritt et al., *supra* note 14.

accreditation disproportionately excludes blacks. Thus, the elimination of accreditation as a barrier would disproportionately allow blacks into the profession.<sup>136</sup>

The United States has too few lawyers. This is seen by the simple fact that lawyers are often available only for \$60 per hour or more; the insufficient supply of lawyers causes prices to rise to this high level. Obeying the laws of supply and demand, the large increase in the number of lawyers from the elimination of the ABA system would be followed by a dramatic decline in the price of some legal services. The competition from additional lawyers would push down prices. In addition, the reduction in tuition rates would now permit unsubsidized lawyers to thrive on lower salaries. If the requirement of attending law school were completely eliminated, then lawyers would be able to thrive on even lower incomes.

In the new unconstrained market, competent lawyers would be available for a variety of prices, from \$300 per hour or more for the finest representation, down to \$25 per hour or less for simple tasks. The \$25 rate is what qualified professionals with similar training earn in other fields, such as management of small businesses, bookkeeping, tax preparation, nursing, carpentry, plumbing, and physical therapy.<sup>137</sup> For example, a consumer can choose to have a complicated return prepared by a certified public accountant at \$150 per hour or more. Or she can have a simpler return done at H&R Block, which charges approximately \$25 per hour.<sup>138</sup>

The ABA system may protect some consumers in the market for legal services from incompetent or deceptive lawyers. However, the benefits of accreditation in protecting consumers of legal services appear to be small. Although many lawyers in California attend unaccredited law schools, California does not appear to have higher levels of lawyer malpractice or dishonesty.<sup>139</sup> Moreover, for a century ending only in the mid-1920s, consumers did fine with no accreditation and a perfunctory bar exam. Many sophisticated commentators recall this golden age of lawyering, when lawyers such as Lincoln were responsible professionals who delighted in public service.<sup>140</sup>

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<sup>136</sup> See Shepherd, *supra* note †.

<sup>137</sup> For example, H&R Block charges approximately \$25 per hour for tax preparation services and pays its preparers approximately \$15 per hour. Interview with Theodora Shepherd, H&R Block tax preparer (June 17, 2000).

<sup>138</sup> *Id.*

<sup>139</sup> Although California does not require accreditation, it still requires passage of a bar exam. Indeed, Californians who bypass ABA-accredited schools must pass an additional "baby bar exam." See Shepherd & Shepherd, *supra* note †, at 2124–25.

<sup>140</sup> See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 3, 14–16 (1993); WILLIAM R. JOHNSON, *SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES* 174 (1978).



Furthermore, even if the ABA system provided some protections, many sophisticated consumers of legal services, such as corporate general counsel, do not need this protection. Instead, they will consider the professional reputations of various lawyers and their firms, their experience, and information from referrals and references. For them, the accreditation system increases the cost of legal services without any offsetting benefit. However, the poor and unsophisticated are less able to protect themselves. The accreditation system helps to eliminate at least some incompetent lawyers whom they might otherwise hire.

Yet the ABA system also harms the poor or unsophisticated by reducing the supply of legal services and increasing costs. The same poor or unsophisticated consumers who would benefit from the protections of the system may be unable to afford any lawyer at all because of the system. Accreditation may increase the quality of lawyers somewhat. However, it causes the lawyers to be too expensive for most low-income citizens to afford.

If the ABA system ended, the market would adapt by creating institutions that would protect consumers. Institutions like H&R Block would arise for providing low-cost legal services. Entrepreneurs would establish companies that would hire the new low-cost lawyers, train them, monitor the services that they provide consumers, and guarantee their performance. For these functions, consumers would be willing to pay the new companies a premium over the salaries of the individual lawyers. For elite lawyers, large law firms already serve this function. To provide a similar function at the new inexpensive end of the legal market, the new companies would probably be larger than existing law firms. To earn a reputation of which unsophisticated consumers would be aware, the new companies might need to operate on a national scale with national advertising.

Even if the accreditation system helps protect some consumers from incompetent or dishonest lawyers, better ways exist to protect consumers. The accreditation system protects consumers at best only indirectly, by indiscriminately excluding swaths of people from the profession. Instead, mechanisms should be created for attacking incompetence and dishonesty directly, without excluding people who would make able lawyers. Lawyers who act incompetently or dishonestly should be punished more severely. Perhaps responsibility for disciplining lawyers should be transferred away from bar associations, which tend to be lenient. Perhaps state governments should hire detectives and attorneys to investigate and prosecute errant attorneys.

To protect consumers further, states could establish nondiscriminatory, nonexclusionary versions of the bar exam and accreditation. The bar exam could remain mandatory, but everyone could still practice law,

regardless of her score on the exam. Instead of operating as a barrier to the profession, the exam scores, which would be publicly available, would provide consumers with information about each lawyer's skill and knowledge. Similarly, accreditation of law schools might continue, but on a voluntary basis, as with business schools and colleges. In order to attract better students, a law school might choose to obtain accreditation. Other law schools, to reduce costs and offer lower tuition, would forgo accreditation.

These changes would empower blacks, tilting the playing field back toward them. More legal services would be available to them, and their incomes would increase. In addition to gaining economic power, blacks would enlarge their political power. The elimination of the unfair and unnecessary barriers to blacks' participation in politics would expand their numbers in elected and appointed political offices, providing them additional authority in the courtroom, in legislatures, and in the executive branch.

### CONCLUSION

This article has shown that a major cause of the small number of blacks in both elected and appointed political office is the ABA's system for accrediting law schools. The system does this in two steps.

First, the system has been structured to exclude most blacks from the legal profession while welcoming most whites. The system exploits the differences in average academic performance for the two groups. For example, the system establishes cutoffs for a school's average LSAT scores and undergraduate grades that approve schools that serve whites but reject most that serve blacks. Likewise, the system exploits the differences in average wealth of blacks and whites. The system more than doubles law schools' costs by requiring expensive facilities and services, leading to equivalent tuition increases at many schools. Because blacks have much lower incomes and wealth than whites, the financial discrimination again excludes more blacks than whites.

Second, the absence of black lawyers leads to a similar absence of black politicians. Being a lawyer is an absolute prerequisite for many positions that are acquired either by election or through the political appointment process. These positions often lead to other political offices. In addition, being a lawyer is often of great benefit in obtaining even the political jobs for which a law degree is not a requirement. Accordingly, lawyers constitute a high fraction of politicians, especially at high levels.

It is no accident that accreditation disproportionately harms blacks. The ABA established the accreditation system in the 1920s in large part to reduce competition for existing lawyers by reducing the number of new minority attorneys.

Although this article focuses on blacks, they are not the only group that accreditation excludes from politics. Hispanics, Mexican-Americans, and other groups with relatively low test scores, grades, and incomes are also injured. Incomes for Hispanics and Mexican-Americans are far lower than for whites.<sup>141</sup> Likewise, their average LSAT scores and grades are lower than for whites, although the difference is not as great as for blacks.<sup>142</sup> Thus, although in 1990 Hispanics were approximately 9% of the population, they were only 2.5% of all lawyers and judges.<sup>143</sup> Similarly, accreditation excludes from political participation those whites with low scores, grades, or incomes.

Accreditation thus maintains in politics a wealthy, white, intellectual elite. Accreditation muffles the political voices both of people of color and of people without wealth or top scores and grades. That is, it muffles society's disadvantaged groups. As in the House of Lords in England, the disadvantaged must rely for representation on politicians whose backgrounds, interests, and incentives differ from their own. It is no surprise that with no House of Commons, the interests of the disadvantaged are often ignored.

Accreditation should be eliminated as a barrier to the legal profession. Some states could still require attendance at law school but permit unaccredited schools. Although the existing elite schools would continue to exist, many new law schools would open, competing with lower tuition and innovative programs. The number of schools for blacks would grow substantially, mirroring the large number of black undergraduate institutions. Other states might not require law school at all, reinstating the system that existed for a century before the mid-1920s. As in business and accounting, students could enter the profession through on-the-job apprenticeship, professional school, or a combination of both.

The number of lawyers would increase substantially, especially the number of black lawyers. This would lead to an increase in the number of black politicians. The price of legal services would decline, making affordable legal services available for the first time to the poor and middle class, especially blacks. Competent lawyers would now be available for \$25 per hour for simple tasks.

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<sup>141</sup> In 2000, the median income for Hispanics of all races was \$33,455, compared with \$30,436 for all blacks and \$44,232 for all whites. STATISTICAL ABSTRACT, *supra* note 1, at 433 tbl.653.

<sup>142</sup> In 1998-99, the average LSAT scores and undergraduate grades for Chicano and Mexican-Americans and Hispanic and Latino applicants to law school were 148/B and 147/B, compared with 153/B+ for whites and 142/B- for blacks. LSAT PERFORMANCE, *supra* note 50. Accreditation does not harm Asians and Pacific Islanders as a group. Their average LSAT scores, undergraduate grades, and incomes are all above the levels for whites. *Id.*; STATISTICAL ABSTRACT, *supra* note 1, at 478 tbl.750.

<sup>143</sup> STATISTICAL ABSTRACT, *supra* note 1, at 13 tbl.10; MILES TO GO, *supra* note 2, at 2 tbl.2.

Legal incompetence and fraud would increase little, if at all. Although the poor and middle class might benefit marginally from the protections that accreditation provides, accreditation tends to make legal services too expensive for these groups to afford. Moreover, the market would inspire new institutions that would protect these consumers. National law companies like H&R Block would arise to provide reliable, inexpensive legal services.

