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DESCRIPTIVE REPRESENTATION MATTERS: THE CONNECTION BETWEEN ACCESS TO LEGAL EDUCATION AND NONWHITE LAWYER-LEGISLATORS IN THE UNITED STATES

Angelique M. Davis*

I. INTRODUCTION

Amidst much international fanfare the first Black President of the United States, Barack Obama, was elected in 2008 by a large Electoral College margin and a majority of the popular vote. As the fifth-elected Black Senator in United States history, his racial background made his ascent to the White House unprecedented; however, his background as a lawyer-politician from an elite law school did not. This relationship between the legal profession and electoral politics has long been recognized and is, in many ways, a cornerstone of the American political tradition—a tradition that has historically excluded most people of color.

Since the inception of the U.S., lawyers have played an integral role in the leadership, administration, and maintenance of its democracy. Lawyers are represented throughout all three branches of government and remain omnipresent in the upper echelons of the private sector. In the nineteenth century, Alexis de Tocqueville characterized lawyers in the U.S. as "intellectual aristocrats" and noted that they are "naturally called on to occupy most public offices." More recently,

* Assistant Professor of Political Science and Affiliated Faculty Member of the Global African Studies Program at Seattle University. Thanks to the Seattle University Center for Excellence in Teaching and Learning for supporting this project and to its Director David Green. I would also like to thank the members of my writing group Mako Fitts, Christina Roberts, and Kathryn Rickert; my Seattle University Scholarship of Teaching and Learning Writing Retreat group members Marianne LaBarre and Danuta Wojnar; and my departmental colleagues Yitan Li and Rose Ernst for their feedback on this project. This article was inspired by a number of presentations at the Fifteenth Annual LatCrit Conference in Denver, Colorado, particularly the "Race and Lawyering: Slave Lawyers, Black Lawyers & the HBCU" panel. The panel moderated by Catherine Smith included the following three presentations: "Slave Lawyers," by Jason Gillmer; "The Impact of the HBCU Law School: An Analysis of True Diversity in the Legal Academy and Profession," by Kamille Wolff; and "From Cottonfields to Courtrooms; The Evolving Path to the Legal Profession for Black Lawyers," by Carla Pratt. These presentations and the ensuing discussion caused me to reflect upon my current research regarding lawyer-legislators of color and the role they play not only in the legal profession, but also in our nation’s political leadership.

1. The term “Black” refers to people of the African Diaspora living in the U.S., and is interchangeable in meaning with “Black” and “African-American.”
Justice Sandra Day O'Connor writing for the majority in *Grutter v. Bollinger* recognized that law school is "the training ground for a large number of our Nation's leaders. Individuals with law degrees occupy roughly half the state governorships, more than half of the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives."\(^5\) *Grutter*, in evaluating the constitutionality of the University of Michigan Law School's admissions policy, held that student body diversity is a compelling governmental interest and the consideration of an applicant's race/ethnicity is permissible when assessed with a variety of other considerations in admissions review.\(^6\)

The *Grutter* decision embraced democratic legitimacy as a justification for student body diversity in law schools and noted:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools 'cannot be effective in isolation from the individuals and institutions with which the law interacts.' Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.\(^7\)

According to the Supreme Court, accessibility to law school for every race and ethnicity is crucial to the legitimacy of our nation's leadership.\(^8\) Here, the Court drew much of its energy from the public character of educational institutions, such as law schools, and the role they play in developing our democracy.\(^9\)

Despite an assertion from the U.S.'s highest court that facilitating the development of diverse political leadership in elite law schools is important,\(^10\) access to legal education has become increasingly difficult for students of color. Students of color are historically underrepresented in law schools, with access and the burdens of affordability becoming increasingly acute in the face of the greatest financial recession since the Great Depression.\(^11\) Further, the recession has disproportionately impacted people of color given the complex intersectionality of race, gender, and class within communities of color.\(^12\) For example, a recent American Bar

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6. Id.
7. Id. at 332-33.
8. Id.
9. Id.
10. Id.
12. See Ange-Marie Hancock, *When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research Paradigm*, 5(1) PERSPECTIVES ON POL. 63, 63-64 (2007); see also Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of*
Association (ABA) report found that the recession is “drying up monies for diversity initiatives and creating downsizing and cutbacks that may disproportionately and negatively affect lawyer diversity thereby undoing the gains of past decades.” This report also acknowledged the cost-prohibitive nature of law school for underrepresented students noting that:

[T]he increasing cost of legal education makes attending law school and the debt burden exceedingly difficult for poor and working class people. Because income and wealth converge disproportionately with race, ethnicity, gender, sexuality, and disability, the cost of legal education in our current economy must be a central site for advocacy in the interest of a diverse legal profession.14

Additional evidence asserts that student loan debt for law school graduates has increased by 50% since 2000. In 2010 the average student loan package was $68,827 for public law students and $106,249 for private law students.15 For those students of color who overcome the educational inequities embedded in primary, secondary, and post-secondary institutions, many are reticent or simply unable to assume the financial responsibility of a legal education, particularly when their employment prospects upon graduation are limited.16 The insidious effects of educational inequity, law school affordability, and the disparate impacts of the recession on communities of color severely undermine the promise of Grutter as a pathway towards student body diversity and jeopardizes the political legitimacy of a demographically changing U.S.

In these tight economic times when students of color have increasingly limited access to legal education, it is critical for legal educators and those interested in representative political leadership to not lose sight of the role law schools play in this process. Much has been written about the importance of diversity within the law school pipeline and access to legal education for the legal profession itself,17 but there remains a dearth of research regarding its ramifications on U.S. legislative bodies and politics. Political science research reveals that one of the benefits of descriptive representation, when the representative belongs to an individual’s social or demographic group, includes a government that is more responsive to the diverse needs of the body politic, but this research does not focus on the role of legal education in developing diverse political leadership.

This article provides empirical evidence that supports the need to address descriptive representation of nonwhite lawyers within U.S. legislative bodies. This

13. CULBERTSON ET AL., supra note 11, at 11.
14. Id.
article draws upon an original dataset that includes demographic data for every lawyer-legislator in the 111th Congress (January 3, 2009 to January 3, 2011)\textsuperscript{18} and state representatives from the four majority-minority states—California, Hawai‘i, New M\textsuperscript{ex}co and Texas. Through original data analysis coupled with a review of leading legal and political science scholarship, this article demonstrates the urgent need for legal educators and those interested in representative political leadership to address the connection between access to legal education and descriptive racial representation in our nation's legislative bodies. Ultimately, this article seeks to stimulate further research and discourse regarding the causes, nature, and impact of past and present nonwhite lawyer-legislators on American democracy. The evidence to support this argument is divided into four sections. The first section addresses the need for more research on descriptive representation by nonwhite lawyers in our nation's legislative bodies. The second section argues that the lack of proportionate descriptive representation of nonwhite lawyers to their population in the United States is a problem that will persist without increased attention. The third section describes the article's research methodology and includes an in-depth analysis of the original dataset of lawyer-legislators in the 111th Congress and four majority-minority states. Next, the fourth section employs the original dataset to provide a profile of nonwhite and white\textsuperscript{19} lawyer-legislators. This article concludes with recommendations for reform and future research based on the findings presented in sections one through four.

II. NEED FOR MORE RESEARCH REGARDING DESCRIPTIVE REPRESENTATION OF NONWHITE LAWYER-LEGISLATORS IN OUR NATION’S LEGISLATIVE BODIES

Over half a century since the Brown v. Board of Education\textsuperscript{20} decision mandated the end of de jure segregation in public schools, the number of lawyers of color in the legal profession or in elected office remains disproportionate to the demographic composition of the United States. Despite numerous legal articles on the need for diversity in the legal profession, there remains a dearth of research that examines the causes and implications of the lack of proportionate descriptive representation of nonwhite lawyer-legislators on the democratic legitimacy of the U.S.\textsuperscript{21}

A law degree is one of the most predominate educational backgrounds of legislators in the United States.\textsuperscript{22} A study by Allan G. Bogue, Jerome M. Clubb,
Carroll R. McKibbin, and Santa A. Traugott found that the number of lawyers in the House fluctuated between forty percent and sixty-five percent between 1789 and 1960.23 Marc Miller, in his book The High Priests of American Politics: The Role of Lawyers in American Political Institutions, wrote that "it seems that the more important the political office, the more lawyers occupy that office."24 Miller suggests various explanations for lawyers' domination of political positions such as high status, special skills and training, the ability of political name recognition to bring in more clients, and familiarity with procedurally oriented systems of decision making.25 Another explanation proffered by Heinz Eulau is one of professional convergence, which posits that the profession of law and politics are structurally isomorphic.26

A study by Keith Eakins of lawyers in the Ohio General Assembly found that differences exist between lawyers and non-lawyer legislators, which necessitate a revision of the convergence theory to reflect the current realities of law and politics.27 The Eakins study found that Ohio lawyer and non-lawyer legislators "exhibit[ed] some distinct differences in their career paths, aspirations for higher office, and professionalization" when assessed by the following variables: career paths, aspirations for higher office, and professionalization of elected officials. Further, Eakins suggests that the convergence theory is unpersuasive because the norms and values ascribed to law and politics utilized in the formulation of these theories are outdated.28 Ultimately, Eakins suggests that much more research is needed to understand the impact of lawyers in legislative bodies.29

Similar to Eakins' study, which suggests a need to revise the convergence theory to reflect the modern realities of law and politics, Carrie Menkel-Meadow examined the lawyer's role in deliberative democracy and advocates for a different conception of the lawyer's role in assisting the practice of new forms of democratic discourse.30 Menkel-Meadow posits that lawyers may be particularly useful in performing functions outside of the traditional concepts of their role and that it is important to examine the role of lawyers in newer forms of structured democratic discourse.31 Menkel-Meadow suggests:

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24. Miller, supra note 22, at 1.
25. Id. at 57–72.
27. Eakins, supra note 22, at 717.
28. Id.
29. Id. at 723–24. Although this study controlled for race, gender, and party ideology, its focus on career paths, aspirations for higher office, and professionalization did not focus on lawyer-legislators of color.
31. Id. at 349–50.
If democratic participation is the means for achieving both public order and social justice, lawyers have a role to play in such processes, but the roles may be different from conventional roles of legal representation. Lawyers may represent parties or groups in democratic participatory events (like lobbying, negotiated rule-making and advocacy) but they may also be particularly well suited to facilitating such processes (and new ones), with perhaps some different orienting frameworks and some additional forms of training and education.32

Like most literature on this topic, Menkel-Meadow’s article does not disaggregate lawyer-legislators by race/ethnicity and does not comment on whether lawyer-legislators of color serve certain functions better than white lawyer-legislators in deliberative democratic processes.

An article by Ryan D. King, Kecia R. Johnson, and Kelly McGeever examined the extent to which the demography of the legal profession impacts criminal sentencing. King et al. found increases in racial diversity within the bar are correlated with less racial disparity in criminal sentencing.33 King et al. also noted that although socio-legal literature is “replete with studies of demographic change and stratification in the legal profession,” there is a “dearth of research [that is] symptomatic of a more general paucity of empirical work on the consequences of historically underprivileged groups attaining positions of power.”34 King et al. reiterate the need for more research to explore the impacts of subordinate group members gaining positions of power on the status of the subordinate group as a whole.35 Similarly, there is a need for more research about the societal implications of having more nonwhite lawyer-legislators.

Although there is a paucity of research that specifically focuses on nonwhite lawyer-legislators, political scientists have addressed the impacts of descriptive representation within U.S. legislative bodies. Political theorist Hanna Pitkin posits that constituents are represented in elected government in three ways: descriptively, symbolically, and substantively.36 Descriptive representation occurs when the representative belongs to the same social or demographic group as the constituent. Substantive representation occurs when representatives represent the political needs of a constituent in a given area. Symbolic representation is descriptive representation devoid of any substantive impact. Pitkin discounts the value of descriptive representation, concluding that the best political representation is achieved when legislators act in a way that is substantively responsive and in the interests of the represented.37 Yet substantive representation, as Heinz Eulau and Paul Karps note, can include many different activities such as policy, service, allocation and symbolism:

32. Id. at 350–51.
33. King et al., supra note 21, at 26.
34. Id. at 2 (quoting Philip N. Cohen & Matt L. Huffman, Working for the Woman? Female Managers and the Gender Wage Gap, 72 AM. SOC. REV. 681, 681 (2007)).
35. Id.
37. Id.
Representatives may respond to the policy wishes of constituents on roll calls (policy); they may respond to individual inquiries and problems (service); they may respond in a way that would obtain more public funds or projects for citizens in the district or state (allocation); or they may respond in a manner that would secure constituents' political support (symbolic).  

Kenny Whitby in his book, The Color of Representation: Congressional Behavior and Black Interests, provides evidence that the policy interests of most Blacks are substantively better represented by the legislative activities of Black legislators. Whitby notes that “where controversy and empirical work have emanated from questions about what descriptive representation might deliver in terms of substantive policies for minorities, uncertainty surrounds questions about how an increase in representation might affect other aspects of the political system, namely trust, efficacy, and participation.”

Some political scientists contend that positive impacts are associated with having more individuals of color in legislative positions. For example, Jane Mansbridge argues that disadvantaged groups gain advantage from descriptive representation in at least four contexts:

For two of these functions – (1) adequate communication in contexts of mistrust, and (2) innovative thinking in contexts of uncrystallized, not fully articulated interests – descriptive representation enhances the substantive representation of interests by improving the quality of deliberation. For the other two functions – creating a social meaning of “ability to rule” for members of a group in historical context where that ability has been seriously questioned, and (2) increasing the polity’s de facto legitimacy in contexts of past discrimination – descriptive representation promotes goods unrelated to substantive representation.

Mansbridge notes the tendency towards essentialism, but argues that this can be mitigated “by stressing the nonessentialist and contingent reasons for selecting certain groups for descriptive representation.”

Political scientists have found higher levels of communication, satisfaction, fair representation, and policy responsiveness when individuals of color are descriptively represented. Regarding legislator-constituent communication, Claudine Gay found that descriptive representation “plays a real albeit limited role in shaping constituents’ perceptions of their government” and that “both white and African-American constituents are more inclined to contact legislators who share their racial

38. Id.
40. Id. at 141.
42. Id. at 638–39.
Gay suggests that understanding the effects of descriptive representation on communication between constituents and legislators may also lead to a better understanding of the policy consequences that result when descriptive representation is not achieved. In addition, a study by Katherine Tate that controlled for the political party affiliation found that "blacks consistently express higher levels of satisfaction with their representation in Washington when that representative is black." Similarly, Robert Preuhs found a correlation between descriptive representation and positive political impacts in his study on Black state legislators. Specifically, Preuhs suggests "the election of African-American representatives to complex partisan legislative bodies leads to greater policy responsiveness to African-American interests and increases African-American influence within those bodies."

Melissa S. Williams expounds on these ideas in her book *Voice, Trust, and Memory: Marginalized Groups and the Failings of Liberal Representation*, stating "the fundamental intuition that when historically and marginalized groups are chronically underrepresented in legislative bodies, citizens who are members of those groups are not fairly represented." Williams argues that descriptive representation for marginalized groups is required to ensure fair representation within legislative bodies.

Similarly, in their study on the effects of minority legislators on minority voters in New Zealand and the U.S., Susan A. Banducci, Todd Donovan, and Jeffrey A. Karp argue that the minority empowerment thesis suggests that descriptive representation has positive effects on citizens of color. According to this thesis, "minority representation strengthens representational links, fosters more positive attitudes towards government, and encourages political participation." Banducci et al. also assert that:

[The] shortage of research on the consequences of minority representation is unsettling since there is a rival hypothesis to the minority empowerment thesis that suggests that methods to enhance minority representation through districting might actually


44. Id.

45. Katherine Tate, supra note 36, at 623.

46. Robert R. Preuhs, *The Conditional Effects of Minority Descriptive Representation: Black Legislators and Policy Influence in the American States*, 68 THE J. OF POL. 585, 598 (2006) (stating that "[t]he study also shows that the influence gained through representation is largely conditioned by racialization and party control. Specifically, black descriptive representation is subject to the effects of marginalization when racialization dominates the political context, while broad institutional incorporation is not. In less racialized context, both black descriptive representation and the attainment of formal leadership positions increase object policy influence.").


48. Id.


50. Id. at 534.
depress turnout. From this perspective, descriptive representation via majority-minority districts could thus lead to a downward spiral of minority engagement and participation. 51

Banducci et al. found, in contradiction of this rival hypothesis, that “in both countries descriptive representation matters: it increases knowledge about and contact with representatives in the U.S. and leads to more positive evaluations of governmental responsiveness and increased electoral participation in New Zealand.” 52 Put simply, Blacks in the U.S. are more likely to know the names of and report having contact with Black representatives, than with representatives who are not Black. 53

In addition to legal and political science literature on descriptive representation, demographic research of elected officials presents an additional layer of data in assessing lawyer-legislators. 54 On an annual basis, both the American Bar Association (ABA) and the Congressional Research Service (CRS) track the educational backgrounds of members of Congress. ABA data regarding the 111th Congress shows that 36% of Representatives and 58% of Senators hold law degrees. 55 CRS data for the 111th Congress reveals that there were forty-two Black members (one Senator and forty-one Representatives), constituting approximately 7.8% of the total membership of Congress. 56 CRS reported that there were twenty-nine Hispanic or Latino members (one Senator and twenty-eight Representatives), which constituted 5.4% of the total membership. An unprecedented thirteen members of the 111th Congress were of Asian, Native Hawaiian or other Pacific Islander ancestry, constituting 3% of the total membership—eleven serving in the House (including two delegates) 58 and two in the Senate. 59 There was one American

51. Id. at 540 (“For example, in the United States, some observers suggest that because ‘safe’ majority-minority districts would ensure minority representation, they might be associated with depressed turnout in the long run,” citing DOUGLAS AMY, REAL CHOICES/NEW VOICES: THE CASE FOR PROPORTIONAL REPRESENTATION ELECTIONS IN THE UNITED STATES (1993) and LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994)).

52. Id. at 534 (emphasis added); see also THE POLITICAL REPRESENTATION OF IMMIGRANTS AND MINORITIES: VOTERS, PARTIES AND PARLIAMENTS IN LIBERAL DEMOCRACIES (Karen Bird, Thomas Saalfeld & Andreas M. Wüst eds., 2011) (examining factors that explain differences in political participation and voter choice as well as the descriptive and substantive representation of immigrant and ethnic minorities both across and within states).

53. Id. at 544.

54. Note that this data includes elected officials’ educational and racial backgrounds but is not disaggregated to illustrate the number of nonwhite lawyer-legislators.


57. Id. at 5 n.22. When referring to “twenty-nine Hispanic or Latino members” of Congress, CRS wrote that, “This number includes three members of the House who are of Portuguese ancestry and belong to the Congressional Hispanic Caucus or the Congressional Hispanic Conference.”

58. Delegates represent territories of the United States in the House of Representatives and enjoy powers, rights, and responsibilities identical, in many ways, to those of House Members from the states. Similar to House Members from the states, Delegates can speak, introduce bills and resolutions and offer amendments on the House floor and they can speak, offer amendments and vote in House committees; however, they may not vote when the House is meeting as the Committee of the Whole nor when the House is operating as the House of Representatives. BETSY PALMER, CONGRESSIONAL
Indian member of the 111th Congress in the House. This data demonstrates that although lawyers are well represented in Congress, descriptive representation of people of color has yet to mirror the demographics of U.S. constituents as a whole.

At the state level, the data regarding educational backgrounds and racial composition similarly fails to disaggregate lawyer-legislators by race/ethnicity, as to adequately reveal the descriptive representation of this group. The National Conference of State Legislatures (NCSL) estimates that 15% of legislators hold law degrees, compared to 25% in the mid-1970s. Further, current data from NCSL shows that the overall racial and ethnic composition of all state legislative bodies combined is 86% White, 9% Black, 3% Latino, 1% Asian, and 1% Native American/Alaskan. Numerous other sources also track the racial and ethnic composition of state legislators such as the Gender and Multicultural Leadership Project, the National Association of Latino Elected Officials, the National Black Caucus of State Legislators, the Asian Pacific Institute for Congressional Studies, and the National Caucus of Native American State Legislators; yet there is surprisingly little data or research that has examined the numbers and roles of nonwhite lawyer-legislators.

III. THE LACK OF PROPORTIONATE DESCRIPTIVE REPRESENTATION IS A PROBLEM THAT WILL PERSIST WITHOUT INCREASED ATTENTION

In the midst of our current economic recession, it is imperative that legal educators and those interested in representative political leadership do not lose sight of how access to legal education impacts not only the legal profession, but also our democratic system of governance. And, despite the gains made since the civil rights movement, our nation's legislative bodies still do not descriptively mirror their constituents. Evidence that this problem will persist without increased attention is reflected in the current demographic breakdown of the legal profession and law school matriculation patterns.

The lack of diversity in the legal profession is well documented. In 2005, an ABA report noted that "[w]hile racial and ethnic minorities make up approximately thirty percent of the U.S. population, they make up less than fifteen percent of the practicing attorneys in this country." A year earlier, in 2004, an ABA report found that the percentage of attorneys of color is the second lowest of all professional careers. In an April 2010 report, the ABA Presidential Initiative Commission on

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59. Id. at 5–6.
60. Id. at 6.
62. Id.
63. CRITICAL NEED, supra note 17.
64. ELIZABETH CHAMBLISS, AMERICAN BAR ASSOCIATION, MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION (2004) (noting that the percentage of the profession comprised by attorneys of color is 9.7 as compared to Accountants/Auditors (20.8%), Architects (14.9%), Chief
Diversity (the Commission) suggested that despite some progress in diversifying the legal profession, "the lack of genuine diversity remains a disappointment." The 2010 ABA report highlighted the need for those in the legal profession and society in general to be concerned with this issue, and the report also provided four rationales (democratic, business, leadership, and demographic) for creating greater diversity in the profession. All but one, the business rationale, supported the need for creating more diverse lawyer-legislators. For example, the democracy rationale highlighted the role lawyers and judges have in creating broad participation by all citizens and "greater trust in the mechanisms of government and the rule of law." The leadership rationale noted that individuals with law degrees "often possess the communication and interpersonal skills and the social networks to rise into civic leadership positions, both in and out of politics." And finally, the demographic rationale highlighted that our country is becoming more diverse, with the Census Bureau projecting that the United States will be a "majority-minority" country in 2042. Yet, despite these strong rationales in support of diversifying the profession, the 2010 ABA report noted that the recession "is drying up monies for diversity initiatives and creating downsizing and cutbacks that may disproportionately and negatively affect lawyer diversity thereby undoing the gains of past decades." The 2010 ABA report also found that the increasing cost of attending law school and the subsequent debt burden disproportionately impacts underrepresented groups necessitating their recommendation that "the cost of legal education in our current economy must be a central site for advocacy in the interest of a diverse legal profession." A study by Conrad Johnson for the Society of American Law Teachers (SALT) found that the numbers of Blacks and Mexican-Americans enrolling in law schools is decreasing at an alarming rate. Further, Black and Mexican-American law school matriculation is declining despite an increase in the size of law school classes (3,000 in the last fifteen years alone) and an increase in the total number of law schools nationally. This is remarkable in the face of the relatively constant numbers of Black and Mexican-American law school applicants between 1990 and 2008. Moreover, the overall quality of Black and Mexican-American law school applicants has increased, with increases in LSAT scores and undergraduate grade point averages (GPA) for both groups over the same eighteen-year time period. Despite the growth in the number and the quality of applicants, measured by LSAT

Executives (9.5%), Civil Engineers (16.7%), Clergy (16.2%), Computer Scientists (23.1%), Dentists (15.9%), Economists (20.3%), Managers (16.2%), Mechanical Engineers (14.5%), News Analysts/Reporters (15.6%), Physical Scientists (30.6%), Physicians/Surgeons (24.6%), Postsecondary Teachers (18.2%), and Psychologists (9.3%).

65. NEXT STEPS, supra note 11.
66. Id.
67. Id. at 5, 9-10.
68. Id.
69. Id.
70. Id. at 11.
71. Id.
73. Id.
74. Id.
and GPA, of Black and Mexican-American students, law school acceptance rates have been on a downward trend since 2003.\textsuperscript{75} Johnson's findings are not isolated; the ABA reported similar findings in the decreasing admission of eligible law student applicants of color in 2004.\textsuperscript{76}

These law school admission decisions are political acts.\textsuperscript{77} Lani Guinier wrote about the broad political implications of admission decisions to institutions of higher education:

The moment when admissions decisions are mailed is also fraught with political consequences that reach beyond the classroom to the boardroom, the legislature, and the kitchen table. At selective institutions of higher education, admissions decisions have a special political impact: rationing access to societal influence and power, and training leaders for public office and public life. Those admitted as students then graduate to become citizens who shape business, education, the arts, and the law for the next generation. Admissions decisions affect the individuals who apply, the institutional environments that greet those who enroll, and the stability and legitimacy of our democracy. They are political as well as educational acts.\textsuperscript{78}

Guinier noted that throughout students' educational careers they are subjected to a "testocracy\textsuperscript{79}" that falsely claims to select many students in terms of merit rather than inherited privilege.\textsuperscript{80} She called for those who defend affirmation action in higher education to "resist the temptation to simply defend the status quo\textsuperscript{81}" and to act boldly given the Supreme Court's expectation in \textit{Grutter} that considerations of race in admissions will no longer be needed by 2028 and the growing crisis of confidence in universities' ability to fill their public role and coffers.\textsuperscript{82} Written in 2003, before the current recession, Guinier predicted the current challenges facing public and private universities and signaled the need for continued vigilance in the quest to increase access to legal education.

Carla Pratt also noted the democratic role of law schools in shaping the democratic legitimacy of the United States. Pratt asserts that a significant proportion of the United States' wealth and political power is situated in persons who hold law degrees.\textsuperscript{83} Accordingly, Pratt advocates for a shift in the discussion surrounding diversity in higher education to instead focus on the "functional role of law schools in our democracy as the creators of democratic leadership."\textsuperscript{84} Finally, Pratt argues that "law schools should take greater account of their functional role in democracy

\textsuperscript{75} Id.
\textsuperscript{76} Chambliss, \textit{supra} note 64.
\textsuperscript{78} Id. at 114-15.
\textsuperscript{79} Id. at 132 n.79.
\textsuperscript{80} Id. at 132-33.
\textsuperscript{81} Id. at 222.
\textsuperscript{82} Id.
\textsuperscript{83} Pratt, \textit{supra} note 3 at 70.
\textsuperscript{84} Id. at 61.
when determining who to admit as students.\textsuperscript{85}

Despite strong justifications regarding the democratic function of law schools and the compelling governmental interest in increasing access to legal education for students of color, research confirms that the legal profession has a long history of entrance barriers based on demographic indicators (including race/ethnicity and socioeconomic status).\textsuperscript{86} Although there is a significant amount of scholarship regarding pipeline and access to legal education, there is little mention of the impact that access to legal education has on the pipeline to becoming a legislator for people of color. In these tough economic times, when many question the efficacy of diversity initiatives such as percent plans,\textsuperscript{87} it is even more important to understand the role legal education plays in the development of descriptive racial representation in our nation's legislative bodies.

IV. DATA AND METHODS

This article draws upon original data from the author's dataset of lawyer-legislators in the 111th U.S. Congress (January 3, 2009 to January 3, 2011) and the four majority-minority states of California, Hawai'i, New México, and Texas to determine the level of descriptive representation of nonwhite and white lawyer-legislators.\textsuperscript{88} The selection of the state sub-sample is based on the hypothesis that majority-minority states are the best indicators of the realities of descriptive representation regarding non-white lawyer-legislators because there are more nonwhite lawyer-legislators in the pipeline than in non-majority-minority states.

This original dataset is modeled after the Gender and Multicultural Leadership Project's national database of nonwhite elected officials and identifies the racial and ethnic composition of lawyer-legislators in the these legislative bodies.\textsuperscript{89} To determine the percentage of nonwhite and white lawyer-legislators in the 111th U.S. Congress, the ABA's list of lawyers in the 111th Congress\textsuperscript{90} was utilized and then disaggregated based upon race and ethnicity. CRS publications on the demographic composition of Congress,\textsuperscript{91} the National Asian Pacific American

\textsuperscript{85} Id. at 58.


\textsuperscript{87} Maurice Dyson, In Search of the Talented Tenth: Diversity, Affirmative Access, and University-Driven Reform, 6 HARV. LATINO L. REV. 41, 73 (2003); see also CULBERTSON ET AL., supra note 11, at 11 (discussing how the current economic recession is "drying up monies for diversity initiatives and creating downsizing and cutbacks that may disproportionately and negatively affect lawyer diversity thereby undoing the gains of past decades"); see generally Mexican American Legal Defense and Educational Fund (MALDEF), Americans for a Fair Chance, the Equal Justice Society, and the Society of American Law Teachers (SALT), Blend It, Don't End It: Affirmative Action and the Texas Ten Percent Plan After Grutter and Gratz, 8 HARV. LATINO L. REV. 33 (2005).

\textsuperscript{88} Angelique M. Davis, Database of Lawyer-Legislators in the 111th Congress and Four Majority-Minority States (2010) (on file with author). The lawyer-legislators in the database include only voting members.

\textsuperscript{89} See Gender and Multicultural Leadership Project (GMCL), National Database of Nonwhite Elected Officials, http://www.gmcl.org/ (last visited December 31, 2010). The GMCL database included data current as of 2006-2007 for nonwhite elected officials and was not used because it did not contain current data for the time frame of the 111th U.S. Congress (January 3, 2009 to January 3, 2011).

\textsuperscript{90} LAWYER-LEGISLATORS IN THE 111TH CONGRESS, supra note 55.

\textsuperscript{91} The publications of the Congressional Research Service that were utilized for this database include: LORRAINE H. TONG, ASIAN PACIFIC AMERICANS IN THE UNITED STATES CONGRESS
Political Almanac,\textsuperscript{92} the National Association of Latino Elected and Appointed Officials (NALEO) Directory,\textsuperscript{93} and the Black Americans in Congress database maintained by the U.S. Clerk’s Office\textsuperscript{94} were utilized to disaggregate the ABA dataset by race and ethnicity. The data was merged, verified for accuracy, and re-coded to ensure consistency across demographic groups and to ensure compatibility with contextual data from the U.S. Census Bureau. To determine the percentage of nonwhite and white lawyer-legislators in the four majority-minority states of California, Hawai‘i, New México and Texas,\textsuperscript{95} data was extracted from the National Conference of State Legislators and Adam R. Brown’s state legislator database for all lawyers serving in state congressional bodies during the same time period as the 111th U.S. Congress.\textsuperscript{96} This list was then disaggregated by race and ethnicity with data from the Asian Pacific American Political Almanac, NALEO Directory, the Directory of African American State Legislators, and the National Caucus of Native American State Legislators. In addition to these comprehensive sources, a number of state specific resources were utilized.\textsuperscript{97} The dataset was then verified for accuracy and re-coded for consistency with the same identifiers employed for lawyer-legislators in the 111th Congress.

V. PROFILE OF NONWHITE LAWYER-LEGISLATORS

This article assesses the descriptive representation of nonwhite lawyer-legislators in the four majority-minority states of California, Hawai‘i, New México and Texas. It is important to note that the states legislatures, including the states utilized in this study maintain different legislative session schedules and fall on a continuum of full or part-time status. For example, legislators in the state of California are essentially considered full-time in that they have large staffs, typically work what is considered 80% or more of a full-time job, and are paid enough to not require outside incomes. In contrast, the workload of legislators in the states of Hawai‘i and Texas fall between full and part-time status in that they have intermediate-sized staffs and work approximately two-thirds or more of a typical full-time position, but typically require other sources of income to make a living. Finally, legislators in the state of New México are considered part-time because they have relatively small staffs, the amount of time they typically spend doing their work in the equivalent of half a full-time job, and their compensation is quite low so it requires other sources of income to make a living. See National Conference of State Legislatures, Full and Part-time Legislatures, http://www.ncsl.org/default.aspx?tabid=16701.

\textsuperscript{92} National Association of Latino Elected and Appointed Officials, Directory of Latino Elected Officials (2009).
\textsuperscript{93} National Conference of State Legislatures, 2009 State Legislator Education Levels (2009).
\textsuperscript{96} It is important to note that the states legislatures, including the states utilized in this study maintain different legislative session schedules and fall on a continuum of full or part-time status. For example, legislators in the state of California are essentially considered full-time in that they have large staffs, typically work what is considered 80% or more of a full-time job, and are paid enough to not require outside incomes. In contrast, the workload of legislators in the states of Hawai‘i and Texas fall between full and part-time status in that they have intermediate-sized staffs and work approximately two-thirds or more of a typical full-time position, but typically require other sources of income to make a living. Finally, legislators in the state of New México are considered part-time because they have relatively small staffs, the amount of time they typically spend doing their work in the equivalent of half a full-time job, and their compensation is quite low so it requires other sources of income to make a living. See National Conference of State Legislatures, Full and Part-time Legislatures, http://www.ncsl.org/default.aspx?tabid=16701.
\textsuperscript{97} For the state of California, the Asian Pacific Islander Legislative Caucus, the California Legislative Black Caucus, and California Latino Legislative Caucus memberships were referenced. For New México, information from the Native American Election Information Program was also used. And, for the state of Texas, information from the Mexican American Legislative Caucus and the Texas Legislative Black Caucus was used.
legislators and critically examines the extent to which nonwhite individuals have achieved levels of political representation in Congress commensurate with their population share among the four majority-minority states of California, Hawai‘i, New Mexico and Texas. This article is unique in that it merges several sets of demographic data to examine the racial/ethnic background of lawyer-legislators within U.S. Congress and a sub-sample of state government to expound upon the intersections between access to legal education and descriptive racial representation.

Law continues to be one of the most dominant professions of legislator-lawyers and the 111th U.S. Congress is no exception. In the Senate, 58% of members are lawyer-legislators compared to 36% of Representatives in the House. Lawyering is the most-declared profession of Senators and the third most-declared profession for Representatives, behind public service/politics and business. It is no surprise that lawyer-legislators are well represented in U.S. Congress, but when the total numbers are disaggregated based upon race and ethnicity a new phenomenon emerges—the representation of nonwhite lawyer-legislators is not proportional to the U.S. total population. Table 1 illustrates the percentage of white and nonwhite lawyer-legislators in the United States Congress in relation to the total U.S. population.

**TABLE 1. Nonwhite and White Composition of Lawyer-Legislators in U.S. Congress, 111th Congress, 2010**

<table>
<thead>
<tr>
<th>U.S. Population</th>
<th>Lawyer-Senators</th>
<th>Lawyer-Representatives</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nonwhite</td>
<td>3</td>
<td>28</td>
</tr>
<tr>
<td>White</td>
<td>55</td>
<td>82.2%</td>
</tr>
</tbody>
</table>

*Source: For lawyer-legislators, Angelique M. Davis’ database of lawyer-legislators in Congress and four majority-minority states; for general population, U.S. Census Bureau.*

The high propensity of legislator-lawyers is replicated in the subset sample of four majority-minority states. In California, a juris doctorate is the third most represented degree in both the Assembly (22%) and Senate (20%), directly behind bachelors’ and masters’ degrees in both legislative branches respectively.

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100. Id.
101. The use of the term white refers to what the U.S. Census Bureau defines as non-Hispanic white. See *supra* note 19.
102. Only voting members are included.
Hawai‘i, a juris doctorate is the second most represented degree in the House (27%), directly behind bachelor’s degree (41%). In Hawai‘i’s Senate, a juris doctorate is the third most represented degree at 16%, behind a bachelor’s (44%) and master’s (24%). In New México, law was the fourth most represented degree in the House (7%) falling behind a bachelor’s (20%), a master’s (17%), and high school diplomas (11%). A juris doctorate was the third most represented degree in the New México Senate at 12%, right behind a master’s (29%) and a bachelor’s (24%) degree. Likewise, legislators with law degrees are well represented throughout the Texas legislature—a juris doctorate is the second most represented degree in both the House (30%) and Senate (35%), directly behind a bachelor’s degree for both legislative bodies. Table 2 illustrates the percentage of white and nonwhite lawyer-legislators in these states in relation to their state populations.

The representation of nonwhite lawyer-legislators is not proportional to the representation of nonwhites in the total state population when the state sub-sample dataset is disaggregated by race/ethnicity. For example, in California where the total state population is 58.3% nonwhite, only 37.5% of lawyer-Senators and 47.1% of lawyer-Representatives are nonwhite. This is also true in Texas, where the total state population is 53.3% nonwhite and only 18.2% of lawyer-Senators and 44.4% of lawyer-Representatives are nonwhite.

New México is different from Texas and California in that there is no proportional representation in the state Senate but there exists an overrepresentation of nonwhite lawyer-legislators in the state Assembly as compared to the nonwhite total population. In the New México Senate, nonwhite lawyer-Senators account for 18.2% of all lawyer-Senators even though the nonwhites account for 59.1% of the entire state population. Conversely, nonwhite lawyer-Representatives in New México represent 80% of all lawyer-Representatives in the state; representing a significantly higher level than the nonwhite state population.

Also noteworthy is the composition of the legislature in Hawai‘i where the nonwhite state population is 74.9%. In the Hawai‘i state legislature, 100% of the lawyer-Senators are nonwhite making them represented at a level much higher than their representation in the Hawai‘i total state population. Additionally, at 71.4% the nonwhite lawyer-Representatives are represented at a level substantially close to the nonwhite total population of Hawai‘i. It is important, however, when discussing nonwhite legislators to distinguish between Hawai‘i and the U.S. mainland. This is because in Hawai‘i the perception among Asian Pacific Americans is that they are the ‘mainstream’ in state and local politics.

This data suggests that even though lawyer-legislators are well represented

104. Id.
105. Id.
106. Id.
107. Id.
108. Id.
110. Id.
within the legislative branch overall, the same is not true for nonwhite lawyer-legislators when the data is disaggregated by race and ethnicity. Further, there remain notably different levels of descriptive representation of nonwhite lawyer-legislators across both federal and state legislative branches and between the upper and lower chambers. As would be expected, there is more descriptive representation in the lower chambers.\footnote{See Jason P. Casellas, \textit{Coalitions in the House? The Election of Minorities to State Legislatures and Congress}, 62(1) \textsc{Political Research Quarterly} 120, 123 (2009).} The data also shows there is more descriptive representation at the state level. With the exception of the lawyer-Representatives in New México, the mainland majority-minority states and U.S. Congress are not close to having proportional representation in their respective legislative bodies.
## TABLE 2. Nonwhite and White Composition of Lawyer-Legislators in Four Majority-Minority States, 2010

<table>
<thead>
<tr>
<th></th>
<th>California</th>
<th>Hawai’i</th>
<th>New México</th>
<th>Texas</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nonwhite</td>
<td>58.3%</td>
<td>3</td>
<td>8</td>
<td>74.9%</td>
</tr>
<tr>
<td>White</td>
<td>41.7%</td>
<td>5</td>
<td>9</td>
<td>25.1%</td>
</tr>
</tbody>
</table>

Source: For lawyer-legislators, Angelique M. Davis’ database of lawyer-legislators in Congress and four majority-minority states; for general state populations, U.S. Census Bureau.

112. The use of the term white refers to what the U.S. Census Bureau defines as non-Hispanic white. See supra note 19.
VI. DISCUSSION AND CONCLUSION

Although it is well documented that many lawyers become politicians, much needs to be done to advance descriptive representation of nonwhite lawyers across federal and state legislative bodies throughout the U.S. By disaggregating the lawyer-legislators in the 111th U.S. Congress and the legislatures of the four majority-minority sub-sample of states (California, Hawai‘i, New México and Texas) by race/ethnicity, this article provides empirical evidence that nonwhite lawyer-legislators are disproportionately underrepresented compared to their white counterparts. In addition, because the states selected for this study are those with the highest populations of people of color, one can infer significantly less descriptive racial representation in other states. Many scholars have written about the benefits and importance of diversity in establishing democratic legitimacy through descriptive representation, yet access to legal education has become increasingly difficult for students of color. Moreover, the disproportionate impact of the recession, coupled with the multitude of other obstacles facing students of color in the law school pipeline, provides a dire outlook for law school diversity and descriptive representation within all levels of U.S. legislative positions.

The primary objective of this article is to highlight the implications of legal education on the pipeline to develop U.S. political leadership, with special attention to diversity and racial/ethnic descriptive representation. The results of this study, that both state and federal legislative bodies lack descriptive representation, is a call to action that only grows louder in the face of the most severe economic crisis since the Great Depression that is expanding social and economic disparities for communities of color and changing law school affordability and access. Furthermore, recent Census data indicates that the U.S. will become majority-minority in 2042. This demographic reality underscores the need for legal educators, and those interested in representative political leadership, to recognize the connection between access to legal education and descriptive racial representation in our nation’s legislative bodies. This article raises questions concerning the causes, nature, and impact of past and present nonwhite lawyer-legislators and will hopefully serve as a catalyst for more attention to, and research in, this area. Due to the saliency of race and ethnicity to the “grand American experiment of democracy,” those interested in the future of our nation must not forget that descriptive representation matters.
