

Commentary

Of Rankings and Regulation: Are the *U.S. News & World Report* Rankings Really a Subversive Force in Legal Education?

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INTRODUCTION

The description for this symposium on *The Next Generation of Law School Rankings* begins with the following statement: “The *U.S. News & World Report* annual law school rankings are the 800-pound gorilla of legal education . . . affect[ing] virtually all aspects of law school operations.”¹ The image is one of vigorous, even ruthless, competition among law schools to be number one. Although the symposium participants disagree about whether this competition is healthy or destructive, they all largely accept that it is a robust phenomenon. There is an occasional reference to the highly regulated nature of legal education,² but these are mere asides, not the heart of the argument. By accepting competition as the dominant motif, a number of puzzles arise: Why are the rankings relatively stable over long periods of time despite vigorous competition? Why has a plethora of alternative rankings systems not emerged? Why do schools limit their strategies to gaming the *U.S. News & World Report* (“*U.S. News*”) rankings, even when there are perverse consequences, rather than undertake bold reforms to gain prestige and value in the marketplace?

These puzzles become far less vexing when the dominant paradigm is one of cooperation rather than competition. In fact, norms of uniformity and standardization have dominated the world of legal education, substantially limiting law schools’ ability to compete against one another. To advance law’s professional stature, the accreditation process has regulated legal training so that students receive a quality education and clients get competent lawyers. Given this framework of comprehensive rules and regulations, no law school has been able to pursue radical innovations without jeopardizing its accreditation, its reputation, and its future. In a world of highly constrained competition, schools have few ways to improve their standing through strategies that upset the prevailing wisdom about how best to deliver legal education. As a result, law school rankings largely remain stable over time, and different methods of ranking overall quality yield similar results. With full-bodied competition curbed by the accreditation process, schools rely on gaming to influence the *U.S. News* rankings rather than strike out in novel directions to gain prominence.

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1. Indiana University School of Law—Bloomington, Symposium on *The Next Generation of Law School Rankings* Homepage, http://www.law.indiana.edu/front/special/2005rankings_nextgen/ (last visited Oct. 15, 2005).

2. Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law Schools*, 81 IND. L. J. 359, 366 (2006).

I. RANKINGS, COMPETITION, AND MARKETS: THE KEY THEMES OF THE SYMPOSIUM

Throughout this symposium, there has been an emphasis on how rankings promote competition, for better or worse, in a market-based system. Consider, for example, the first panel designed to frame the rankings debate. Richard A. Posner, Cass R. Sunstein, and Russell Korobkin all characterize the rankings as a way to mediate market choices by students about where to go to law school. Posner worries that the *U.S. News* rankings are too crude a measure for students to rely on in making a decision as significant as choosing a law school.³ After considering alternative approaches, which do not substantially alter the ordering of individual schools, he concludes that a rational law student should use the rankings to identify a tier of prospective schools, which can then be investigated in greater depth without undue additional expense.⁴ Sunstein, too, worries about whether the rankings are a sensible way to evaluate institutions. He suggests as an alternative “a market test, one that relies on the choices of the people directly involved: students who apply to law schools.”⁵ Sunstein believes that a revealed preference ranking based on students’ actual choices would be extremely useful because “[w]hen choosing among schools, students would probably care what other students choose.” In his view, the “information is intrinsically valuable . . . [insofar as] it provides a clue to which schools have the most desirable students” and thus “provides a good heuristic for which school is best.”⁶ After reviewing possible distortions in a revealed preference ranking, Sunstein arrives at an “[a]mbivalent [v]erdict” that these preferences are “a highly imperfect proxy for law school quality” but “of considerable interest in themselves” and less prone to gaming “not to improve quality, but to obtain a better ranking.”⁷ For that reason, he urges that a revealed preference ranking be used to supplement but not supplant other ranking systems.⁸

Unlike Posner and Sunstein, Korobkin thinks it is wrongheaded to worry about whether rankings accurately reflect educational quality because “students place a high value on the school’s rank for its own sake,”⁹ regardless of how well it measures underlying indicia of excellence. For Korobkin, revealed preferences are everything, not just another way to measure quality, because legal education is a status good, and “[t]he best way for a student to signal his high quality . . . is to matriculate at a school where only high-quality students can gain admission.”¹⁰ The rankings serve as a signal to students about which law schools confer the kind of prestige that ensures opportunities to obtain the most desirable jobs upon graduation.¹¹ As a result:

3. Richard A. Posner, *Law School Rankings*, 81 IND. L.J. 13, 13 (2006).

4. *Id.* at 24.

5. Cass R. Sunstein, *Ranking Law Schools: A Market Test?*, 81 IND. L.J. 25, 27 (2006).

6. *Id.* at 29.

7. *Id.* at 34.

8. *Id.*

9. Russell Korobkin, Keynote Address, *Harnessing the Positive Power of Rankings: A Response to Posner and Sunstein*, 81 IND. L.J. 35, 41 (2006).

10. *Id.* at 42.

11. *Id.*

Rankings need not attempt to measure the quality of the education offered by the institution, because, regardless, students will seek out highly ranked schools and schools will compete for high rankings.

This broad claim is subject to some limitation, to be sure, because when students select a law school they presumably do not value only the status that attending a highly ranked law school conveys—they also want a good education and an enjoyable experience.¹²

Korobkin finds little cause for concern on this score, though, because “most schools are perceived as meeting a threshold of educational quality and environmental amenities, which is essentially guaranteed by ABA [American Bar Association] accreditation requirements and the strong demand among smart lawyers for jobs as law professors”¹³

Whatever the differences among these three scholars in framing the rankings debate, they certainly all agree that competition in the market for legal education is the foundation for the analysis. The discussion of ranking methodologies does not undercut this orientation. In their contribution to the symposium, Scott Baker, Stephen J. Choi, and Mitu Gulati argue that even if the *U.S. News* rankings are not an accurate measure of educational quality, they serve a valuable role in forcing law schools to generate information that would not otherwise have been produced.¹⁴ According to Baker, Choi, and Gulati:

Before *U.S. News*, most schools did not share information about faculty scholarship and hiring, the bar-passage rate and employment status of recent graduates, the number of books in their library, or student-faculty ratios For obvious reasons, schools that fared poorly on these measures did not publicize the fact; schools that anticipated a poor performance did not bother to collect the data at all. In the case of schools that performed well according to a variety of measures of school quality, we believe that, prior to the *U.S. News* ranking, there was a social norm in the law school community against public bragging.

. . . .

Because of our hypothesized social norm against bragging and the reluctance of poorly performing schools to publicize data, much information about law schools remained hidden before the *U.S. News* rankings broke the norm. As a result of these rankings, otherwise hard-to-obtain information flowed into the market.¹⁵

In evaluating methodologies, other contributors look at the impact that rankings have had as law schools attempt to game the criteria to improve their position.¹⁶ For

12. *Id.* at 43.

13. *Id.* (citation omitted). Korobkin has made similar arguments elsewhere. See Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403 (1998).

14. Scott Baker, Stephen J. Choi & Mitu Gulati, *The Rat Race as an Information-Forcing Device*, 81 IND. L.J. 53 (2006).

15. *Id.* at 78–79 (citations omitted).

16. Indeed, it was the theme of gaming the rankings through various ploys, some quite questionable, that dominated a *New York Times* article reporting on the proceedings of this Symposium. Alex Wellen, *The \$8.78 Million Maneuver*, N.Y. TIMES, July 31, 2005, § 4A, at 18.

example, William D. Henderson and Andrew P. Morriss offer empirical data to demonstrate that law schools other than those in the first tier have engaged in strategic behavior to raise the median LSAT scores of entering students and thereby boost their rankings.¹⁷ Jeffrey E. Stake offers a comprehensive catalog of the perverse effects that the rankings have had on law schools, ranging from how to make admissions decisions to how to structure the curriculum and allocate law school resources.¹⁸ Stake argues that “*U.S. News* may unwittingly be homogenizing legal education”¹⁹ because schools are striving for the optimal mix of inputs that will boost their rankings. Stake believes that “[a] corollary of this homogenization effect is that schools will find it unrewarding to seek a market niche.”²⁰ As a result, Stake fears that: “Law schools are in danger of losing the freedom to create first-class products for the needs of varying consumers and stakeholders.”²¹ He calls on “those who publish rankings . . . to try to anticipate [perverse] consequences” and “do what they can to mitigate them.”²² He also urges others to develop alternative rankings that “more accurately reflect the quality of education offered, or create fewer harmful incentives, or both.”²³ Finally, Stake offers a sobering assessment of the gravity of the situation. In his view, “[t]here are deep national interests in what happens in law schools. The nation should therefore be concerned about the changes being wrought in the quest for higher ranks.”²⁴

Another group of symposium participants ponders the importance of alternative ranking systems and how such alternatives might best be constructed. Michael Sauder and Wendy Nelson Espeland contrast the dominance of the *U.S. News* rankings in the law school world with the proliferation of business school rankings.²⁵ According to Sauder and Espeland, “there are five or six influential business school rankings and a host of others that receive some attention.”²⁶ The multiple ranking systems offer a number of benefits. First, with several independent evaluations, the impact of small changes in a school’s position on any one measure becomes less significant than if a single rank ordering were of paramount importance.²⁷ Second, the multiple rankings allow business schools to adopt different strategies to enhance their reputations. As a result, the rankings do not chill and indeed may even encourage innovation, differentiation, and experimentation.²⁸ In contrasting this “variety and openness” with the uniformity and standardization seen in legal education, one business school dean observes that:

17. William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 IND. L.J. 163 (2006).

18. Jeffrey E. Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L.J. 229 (2006).

19. *Id.* at 242.

20. *Id.* at 243.

21. *Id.*

22. *Id.* at 267.

23. *Id.*

24. *Id.* at 268.

25. Michael Sauder & Wendy Nelson Espeland, *Strength in Numbers? The Advantages of Multiple Rankings*, 81 IND. L.J. 205 (2006).

26. *Id.* at 218.

27. *Id.* at 220–21.

28. *Id.* at 222–23.

Maybe law schools, because of the nature of law, maybe it's better for them to be more stable and have one curriculum for everybody. It's hard to measure, but I do think after looking at this for a long time that the rankings of business schools have created a lot of experimentation²⁹

Finally, the variability among the rankings undermines the authoritativeness of any one standard of educational quality. No single measure can become the sine qua non of excellence.³⁰ Despite these salutary effects, Sauder and Espeland caution that the legal education community may not be willing to endorse a proliferation of law school rankings. Multiple rankings could lead to consumer confusion, increased gaming to improve a school's position on various measures, and further entrenchment of rankings as the way to analyze a school's worth.³¹

Despite these reservations, some symposium contributors have followed Sunstein's lead in considering alternative ways to rank law schools. In an earlier article, symposium participant Theodore Eisenberg and coauthor Martin T. Wells sought to assess scholarly impact by counting the number of times a professor's name appeared in online legal sources.³² They then used this measure to assess the overall influence of different law school faculties in shaping the academic debate. Based on this analysis, Eisenberg and Wells concluded that there were four schools at the top in the mid-1990s: Chicago, Harvard, Stanford, and Yale. A second cluster of seven schools included Berkeley, Columbia, Cornell, Michigan, Northwestern, NYU, and Virginia.³³ As Eisenberg and Wells themselves noted, their methodology produced results not terribly dissimilar to those published by *U.S. News*. During the same time period, the magazine rated Yale, Chicago, Stanford, and Harvard as the top four schools, while Columbia, Cornell, Michigan, NYU, Virginia, Northwestern, and Berkeley occupied the next seven slots.³⁴ In short, Eisenberg and Wells's ranking corroborated rather than countered *U.S. News*'s assessment of the country's most elite law schools.

To move beyond citation counts like the one used by Eisenberg and Wells, Bernard S. Black and Paul L. Caron consider the possibility of using data about papers posted on the Social Science Research Network (SSRN) to measure law professors' scholarly performance.³⁵ Black and Caron argue that looking at either SSRN downloads or papers can generate useful information that supplements existing rankings of law school faculty. The SSRN rankings have a stronger interdisciplinary and international focus than traditional measures.³⁶ Moreover, the SSRN measures give greater weight to junior faculty and upwardly mobile schools than indicia that look at publication in the top law reviews.³⁷ Finally, the SSRN measures can easily be updated on a regular

29. *Id.* at 223.

30. *Id.* at 218.

31. *Id.* at 207, 225–27.

32. Theodore Eisenberg & Martin T. Wells, *Ranking and Explaining the Scholarly Impact of Law Schools*, 27 J. LEGAL STUD. 373 (1998).

33. *Id.* at 391 tbl.2.

34. *Id.* at 396 tbl.4.

35. Bernard S. Black & Paul L. Caron, *Ranking Law Schools: Using SSRN to Measure Scholarly Performance*, 81 IND. L.J. 83 (2006).

36. *Id.* at 85, 112–13.

37. *Id.* at 85, 113–14.

basis, while time-consuming citation counts are done at best sporadically.³⁸ Black and Caron acknowledge that their proffered alternative has weaknesses of its own, including biases that favor recent publications, established scholars, particular fields, industrious “drudges,” and white males.³⁹ Moreover, the SSRN download measure can be gamed by ambitious and enterprising professors.⁴⁰

Tracey E. George provides a very different approach to ranking law schools. Instead of looking at the overall productivity of a school’s faculty, she focuses on a particular type of scholarship—empirical legal scholarship—which she believes will be “the next big thing in legal intellectual thought.”⁴¹ She contends that her method “offers two contributions to law school rankings beyond merely providing intriguing substantive results: a quasi-prospective perspective and an intellectual-environment evaluation.”⁴² A number of the schools ranked highly by *U.S. News* continue to do well under her alternative system, but there are definitely some notable changes in position. For instance, two of her measures, one based on the percentage of faculties with Ph.D.s and the other an overall score, place Berkeley at the top.⁴³ Another scale, which looks at the percentage of faculty with secondary social science appointments, gives the University of Southern California the coveted number one position.⁴⁴ Even so, her third publication-based measure puts Chicago, Cornell and Harvard in the first, second, and third spots, respectively.⁴⁵ Although her method affords enough “upsets” to challenge the *U.S. News* rankings, there is good reason to wonder whether a focus on empirical legal scholarship will create the kind of ambiguity that multiple business school rankings generate. The biggest obstacle may be convincing skeptics that empirical legal scholarship is in fact the “next big thing” and therefore deserves the privileged place that George accords it. For example, in his symposium paper, Posner criticizes traditional rankings because they weigh all scholarship, including much that is “increasingly removed from the concerns important even to practitioners, let alone students.”⁴⁶ Far from embracing empirical legal scholarship, Posner argues that work on business law should receive increased attention in the ranking process.⁴⁷

Despite disagreements about how alternative ranking systems should be constructed, all of the symposium participants agree that the chosen methodology influences how law schools allocate resources in competing for students. Each contributor hopes to channel this robust competition in constructive ways by devising optimal evaluative criteria. Even the symposium discussion of “Other Voices in the Rankings Debate”

38. *Id.* at 85, 112.

39. *Id.* at 113–17.

40. *Id.* at 115–16.

41. Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Empirical Law Schools*, 81 *IND. L.J.* 141, 141 (2006).

42. *Id.* at 142.

43. *Id.* at 152 tbl.2; 158 tbl.6.

44. *Id.* at 153 tbl.3.

45. *Id.* at 157 tbl.5.

46. Posner, *supra* note 3, at 22.

47. *Id.* Professor Korobkin questions whether business law scholarship should be privileged in the rankings, noting that students probably are not any more interested in this area than in other areas of legal scholarship and that all scholarship is a public good, which should be encouraged through inclusion in the ranking system. Korobkin, *supra* note 9, at 36–37.

does not fully call into question this image of vigorous market-based competition. In his paper on how the *U.S. News* rankings have affected law school admissions, Dean Alex M. Johnson, Jr. argues that the emphasis placed on median LSAT scores could sound the death knell for holistic review, an approach central to achieving racial and ethnic diversity in America's law schools.⁴⁸ Johnson believes that the United States Supreme Court's recent decision upholding affirmative action in law school admissions⁴⁹ may prove a hollow victory if legal educators become caught up in an "arms race"⁵⁰ to boost their rankings by attracting students with high LSAT scores. According to Johnson, there is a persistent gap in the test performance of white and Asian applicants on the one hand and black, Latino, and Native American applicants on the other.⁵¹ As a result, overreliance on the LSAT necessarily undermines diversity and is antithetical to the "whole person" review that the Court deemed an essential feature of constitutionally permissible, race-based preferences.⁵²

Because *U.S. News* relies on the median LSAT score, it is not clear why a law school's ranking would be affected by affirmative action so long as diversity admissions remain below the 50% threshold. Johnson does point out that law schools direct considerable resources to recruiting students with high LSAT scores.⁵³ Perhaps these resources could otherwise be devoted to enhancing diversity. In addition, although Johnson does not explicitly address the issue, the drive to attract students with high LSAT scores may make diversity admissions appear to overemphasize race. To the extent that law schools rely heavily on LSAT scores in making admissions decisions, the greater the weight that must be given to race to overcome the gap in scores. As the magnitude of racial preferences grows, admissions programs become increasingly vulnerable to charges that race no longer operates as a mere plus but instead is the basis for an illicit quota.⁵⁴

Laying the blame for the LSAT "mess" squarely on the *U.S. News* rankings, Johnson urges the American Bar Association's Section on Legal Education to cease

48. Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L.J. 309, 314 (2006).

49. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

50. Johnson, *supra* note 48, at 349 (citing William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 977-78 (2004)).

51. *Id.* at 313, 332-33. Although Johnson emphasizes the gap in LSAT scores, there also appears to be a disparity in undergraduate grade point averages as well. Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 20 tbl.3 (1997); see generally WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 53-90 (1998) (analyzing the racial achievement gap in American colleges and universities).

52. Johnson, *supra* note 48, at 314, 357-58.

53. *Id.* at 350-51.

54. Consider, for example, Richard Sander's recent discussion of how the pluses accorded to race by the Michigan law school exceeded those used in the undergraduate program. Sander argues that the Court's decision in *Grutter* elevated form over substance. In Sander's view, whatever the law school's claims about its process, it was not engaged in holistic review but in a quota system. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 400-10 (2004).

making information about median LSAT scores publicly available. Johnson claims that without credible data, *U.S. News* will no longer be able to use this criterion in gauging student selectivity.⁵⁵ Alternatively, he proposes that the Law School Admission Council (LSAC) complicate the reporting of student scores by providing numbers that reflect an applicant's competitiveness at a particular law school rather than nationwide. Under this approach, the LSAT data for different schools will no longer be comparable, and it will not be feasible to include this factor in the rankings formula.⁵⁶ Because of his emphasis on the destructive competition that the rankings have spawned, Johnson does not consider other factors that might make the LSAT a heavily weighted factor in admissions. In particular, although he alludes in passing to the fact that "law schools, unlike colleges, all tend to look alike"⁵⁷ because of regulations imposed by the accreditation process, he says relatively little about the American Bar Association's requirement that law school applicants "take a valid and reliable admission test to assist the school in assessing the applicant's capability of satisfactorily completing the school's educational program."⁵⁸

To her credit, Dean Nancy Rapoport does challenge some assumptions about competition in the marketplace for legal education. In describing a strategic planning process at her own institution, the University of Houston Law Center, Rapoport notes that "[t]he rankings served as the focus of many of our discussions" because those involved in the process wanted to be among the top 50 law schools.⁵⁹ Despite this desire to move up, the law school faced significant obstacles:

Part of the reason law schools don't try to stand out from the pack is that they can't. The tight regulation that comes from the ABA Standards and university accreditation standards sets outside limits on experimentation. The ABA Standards regulate everything from the number of minutes of instructional time to the requirement of class attendance. University accreditation standards provide an overlay of additional regulation. Non-ABA-accredited schools have more freedom, just as privately held companies do, but the graduates of those schools don't have nearly as much flexibility in terms of bar admissions or employment opportunities.⁶⁰

Given this pervasive uniformity and standardization, Rapoport wonders, "why is there such an impassioned quest for 'top 50' status at so many schools, including ours?"⁶¹ Ultimately, she concludes that this quest is in many ways a quixotic one, even if the competitive impulse is deeply felt. She wonders whether those schools least able to alter their rankings spend a disproportionate amount of time worrying about them. Although Rapoport welcomes the strategic planning process at the University of Houston as an opportunity for introspection, she laments the possibility that change

55. Johnson, *supra* note 48, at 355–56.

56. *Id.* at 356–57.

57. *Id.* at 326.

58. SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, AM. BAR ASS'N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2004–2005, at 40 (2004) [hereinafter ABA STANDARDS].

59. Rapoport, *supra* note 2, at 361.

60. *Id.* at 366 (citations omitted).

61. *Id.* at 367.

will be at best superficial because legal educators tend to follow the leader rather than pursue bold reforms.⁶²

II. REGULATION, COOPERATION, AND LEGAL EDUCATION: CONSTRAINTS ON COMPETITION AND THE IMPACT ON LAW SCHOOL RANKINGS

In responding to the contributions to this symposium, I want to build on Rapoport's observations by showing that the image of untrammelled competition prompted by the *U.S. News* rankings is a mythical and misleading one. In my view, the overriding features of American legal education are standardization and uniformity, characteristics that result from a comprehensive accreditation process. By largely ignoring the ways that professional organizations, particularly the ABA and the Association of American Law Schools (AALS), monitor and enforce standards of quality, the symposium debate misses one of the most significant impediments to robust market-based competition. To explore the ways in which law schools coordinate the delivery of educational services, I will begin by briefly describing the history of the accreditation process. Though its origins are relatively recent, this process has become tremendously powerful in consolidating the definition of a good legal education. I will then explain how contemporary accreditation practices contribute to the long-term stability of law school rankings, the lack of alternative assessment measures, and the narrowly constrained forms of gaming that often result in response to the rankings.

A. How Law Schools Came to Be Regulated

The rise of the law school accreditation process is relatively recent. In 1927, no state required that an applicant to the bar be a law school graduate.⁶³ During the early part of the twentieth century, however, the number of law schools and law students increased dramatically. As George B. Shepherd and William G. Shepherd explain:

From 1890 to 1930, the number of law schools tripled, and the number of law students increased more than eightfold. Most of the new law schools were for-profit night schools; in 1928, two-thirds of law students studied part-time, up from one-third in 1889. Many of the new schools offered cheap courses of study of fewer than three years. Most of the new students were from large cities, and many were immigrants. The new law schools, which were extremely profitable, produced waves of new lawyers who competed with established lawyers.⁶⁴

62. *Id.* at 369–74.

63. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 174 (1983); see also Harry First, *Competition in the Legal Education Industry (I)*, 53 N.Y.U. L. REV. 311, 361 (1978); Marina Lao, *Discrediting Accreditation?: Antitrust and Legal Education*, 79 WASH. U. L.Q. 1035, 1041 (2001); George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2114–15 (1998).

64. Shepherd & Shepherd, *supra* note 63, at 2115. See STEVENS, *supra* note 63, at 74–81; First, *supra* note 63, at 347 n.208.

As a result, legal educators and lawyers began to worry about the impact of this unprecedented influx of practitioners into the profession.⁶⁵ In addition to concerns about overcrowding, there were racist, nativist, classist, and anti-Semitic overtones to the backlash against attorneys graduating from night, part-time, and proprietary programs.⁶⁶

To assuage anxieties about unrestricted access to the profession, the ABA and the AALS took steps to tighten admissions standards for law schools and limit eligibility to the bar.⁶⁷ In the 1920s, elite law schools began to require that applicants have some college education and experimented with aptitude testing.⁶⁸ Moreover, the AALS, which numbered among its members the most prestigious institutions, began to exclude proprietary schools. Proprietary schools played a large part in the expanding population of new lawyers, and the ABA felt that such schools contributed to overcrowding of the legal profession.⁶⁹ Perhaps the most effective step that the ABA and AALS took to limit entry into the profession was to lobby state legislatures and supreme courts to require bar applicants to be graduates of accredited law schools. This reform movement ensured that anyone who apprenticed in a law office or graduated from a proprietary school could not obtain a license to practice law.⁷⁰ The campaign was so successful that by 1941, forty-one states required students to have degrees from accredited law schools before they could sit for the bar examination; in 1935, only nine states had such a requirement.⁷¹ Today, all but a handful of states have adopted this prerequisite with California being the most notable exception.⁷²

As a result of these efforts, law schools found it almost impossible to survive unless they were accredited. Without accreditation, an institution's graduates were severely limited in their ability to obtain a license to practice law.⁷³ In order to remain competitive, most American law schools agreed to the curricular reforms proposed by

65. RICHARD L. ABEL, *AMERICAN LAWYERS* 40–48 (1989).

66. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 106–08 (1976); STEVENS, *supra* note 63, at 100–12; First, *supra* note 63, at 363; Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 758–61 (2000).

67. ABEL, *supra* note 65, at 48–68; STEVENS, *supra* note 63, at 160–61; Shepherd & Shepherd, *supra* note 63, at 2116–17.

68. Roithmayr, *supra* note 66, at 758–59; Thomas O. White, *LSAC/LSAS: A Brief History*, 34 J. LEGAL EDUC. 369, 369–70 (1984).

69. First, *supra* note 63, at 346–47; Shepherd & Shepherd, *supra* note 63, at 2116.

70. ABEL, *supra* note 65, at 46–48; STEVENS, *supra* note 63, at 99; Shepherd & Shepherd, *supra* note 63, at 2116–17.

71. Shepherd & Shepherd, *supra* note 63, at 2122.

72. ABEL, *supra* note 65, at 56; Shepherd & Shepherd, *supra* note 63, at 2122, 2124–25. California does not treat graduates of accredited and unaccredited schools identically. Students from unaccredited law schools must take a preliminary examination, or “baby bar,” before they can sit for the regular bar examination. Graduates of accredited law schools are not subject to this requirement. *Id.* at 2124–25.

73. ABEL, *supra* note 65, at 54–56; STEVENS, *supra* note 63, at 179–80; Lao, *supra* note 63, at 1035–36; Mark E. Dykstra, Note, *Why Can't Johnny Sit for the Idaho Bar? The Unfair Effect of ABA Accreditation Standards on State Bar Admissions Requirements*, 3 SAN DIEGO JUST. J. 285, 290 (1995).

the AALS in its push to standardize legal education.⁷⁴ Even during the campaign for accreditation and professionalization in the 1920s, however, prominent critics worried about the “homogenization” of legal education.⁷⁵ Over time, what began as minimal standards grew increasingly comprehensive, eventually addressing admissions practices, faculty, curriculum, physical facilities, library and financial resources, and governance practices.⁷⁶ The ABA and AALS relied and continue to rely on periodic site visits to monitor compliance and enforce these wide-ranging requirements.⁷⁷

By the 1950s, many of the non-accredited law schools had been overtaken or subdued by their accredited competitors. Law school enrollment and application numbers hardly changed during this time, which led to a stable market for legal education. There was little pressure for accreditation standards to accommodate growth or to restrict access.⁷⁸ In the 1960s, however, the number of law school applications grew dramatically. The heightened demand for legal education derived in part from the arrival of women and people of color in unprecedented numbers at colleges and universities.⁷⁹ Despite new market pressures, supply did not keep pace with demand, in part because growth in the number of law schools was modest. Indeed, existing institutions (particularly ABA-accredited schools), rather than new institutions, accommodated most of the expanded enrollment.⁸⁰ During this time, start-up schools denied entry by the accreditation process protested their exclusion. For example, Western State University College of Law, a proprietary institution in California, challenged the ABA’s ban on accreditation of for-profit schools. In 1977, the ABA responded by announcing that it would begin to consider proprietary schools’ applications for accreditation, but it did not accredit any of them in the years that followed.⁸¹ Meanwhile, existing schools demanded tighter standards for recognizing new schools, insisting that “the A.B.A. and the A.A.L.S. should somehow or other . . . enforce some system of birth control on American education institutions. They should be allowed to beget new law schools only if they can clearly show readiness to support their child in the style in which that child should be supported.”⁸²

In the early 1990s, the demand for legal education declined. As a result, deans at existing institutions, even elite ones, began to protest the strictures of accreditation requirements that unnecessarily drove up costs. Fourteen law school deans, including

74. First, *supra* note 63, at 366–69.

75. STEVENS, *supra* note 63, at 112–14 (citing a report for the Carnegie Foundation by nonlawyer Alfred Z. Reed, which questioned the propriety of a unitary approach to legal education in a pluralistic society); First, *supra* note 63, at 365–66 (noting concerns in the 1920s that the law school curriculum was too narrow and standardized).

76. ABA STANDARDS, *supra* note 58, at 16–19, 24–51.

77. *Id.* at 9, 133–34, 136.

78. First, *supra* note 63, at 399; Shepherd & Shepherd, *supra* note 63, at 2125.

79. ABEL, *supra* note 65, at 286 tbls.28 & 30; WILLIAM G. BOWEN, MARTIN A. KURZWEIL & EUGENE M. TOBIN, EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION 40–44, 74–77 (2005).

80. Harry First, *Competition in the Legal Education Industry (II): An Antitrust Analysis*, 54 N.Y.U. L. REV. 1049, 1057–58 (1979); Shepherd & Shepherd, *supra* note 63, at 2126.

81. First, *supra* note 80, at 1082–84; Shepherd & Shepherd, *supra* note 63, at 2147–48.

82. Shepherd & Shepherd, *supra* note 63, at 2126–27 (citing views of Professor Walter Gellhorn of Columbia Law School).

those at Chicago, Harvard, and Stanford, described the accreditation process as “overly intrusive, inflexible, concerned with details not relevant to school quality (perhaps even at odds with maintaining quality), and terribly costly in administrative time as well as actual dollar costs to schools.”⁸³ The deans went on to chide the accreditation process for focusing on inputs, such as the number of seats in the library, rather than outputs like “the sort of graduates we produce, . . . the sort of lives they will lead, [and] . . . the consequences of our writing and teaching.”⁸⁴

Meanwhile, the Massachusetts School of Law, created in the late 1980s to offer low-cost, streamlined, practice-oriented legal education filed suit against the ABA when it was denied accreditation. According to the complaint, the ABA’s practices were anticompetitive and violated the antitrust laws.⁸⁵ Although the lawsuit was not successful, it prompted the Department of Justice to investigate.⁸⁶ Ultimately, the ABA signed a consent agreement which eliminated accreditation policies related to compensation for faculty, restrictions on for-profit schools, and limits on the transfer of academic credits from unaccredited to accredited institutions.⁸⁷ After additional review, the ABA modified some other requirements as well; these included policies on faculty teaching loads, sabbaticals, and calculation of the faculty-student ratio.⁸⁸

Despite challenges to the accreditation process, it has survived largely intact. By enforcing standards related to so many facets of legal education, the ABA and AALS have restricted law schools’ ability to compete through the pursuit of innovative reforms. Although designed to protect law students from substandard educational practices, the accreditation process has not necessarily made applicants better-informed consumers. For instance, site visits generate substantial amounts of data, but this information has been largely unavailable to the general public. Indeed, the ABA and AALS consider themselves ethically obligated to keep their evaluations confidential.⁸⁹ In analyzing law school rankings as an information-forcing device, Baker, Choi, and Gulati attribute the dearth of information about the merits of law schools to embarrassment about mediocre performance or a customary norm against bragging. It seems just as likely that accreditation practices have contributed to the tradition of silence among law schools. Norms of nondisclosure coordinated through the ABA and AALS undoubtedly made it far more difficult to break ranks and boast of one’s successes than any informal norm of modesty could have.

Paul L. Caron and Rafael Gely argue that the *U.S. News* rankings “dragged [legal education] kicking and screaming . . . into establishing markers for organizational

83. *An Open Letter to the Deans of the A.B.A. Accredited Law Schools*, M.S.L. L. REV., Fall 1994, at 48, 49.

84. *Id.* at 50.

85. Thomas D. Morgan, *The Impact of Antitrust Law on the Legal Profession*, 67 FORDHAM L. REV. 415, 435–36 (1998); Shepherd & Shepherd, *supra* note 63, at 2153; Peter James Kolovos, Note, *Antitrust Law and Nonprofit Organizations: The Law School Accreditation Case*, 71 N.Y.U. L. REV. 689, 689–91 (1996); Andy Portinga, Note, *ABA Accreditation of Law Schools: An Antitrust Analysis*, 29 U. MICH. J.L. REFORM. 635, 635–39 (1996).

86. Lao, *supra* note 63, at 1043–44; Morgan, *supra* note 85, at 440; Shepherd & Shepherd, *supra* note 63, at 2154; Kolovos, *supra* note 85, at 692–93.

87. Shepherd & Shepherd, *supra* note 63, at 2154.

88. *Id.* at 2155.

89. ABA STANDARDS, *supra* note 58, at 137.

success.”⁹⁰ In response to institutions’ concerns about the pernicious effects of the rankings, the ABA proposed a standard that would promote reliable dissemination of information about law schools to prospective students. Although schools generally expressed support for the concept, many were concerned about the format for disclosure.⁹¹ In August 1996, the ABA began requiring schools to “publish basic consumer information” in “a fair and accurate manner reflective of actual practice.”⁹² Basic consumer information includes data related to admissions, tuition and fees, enrollment and graduation rates, composition and size of the faculty and administration, course offerings, library resources, physical plant, job placement, and bar passage.⁹³ Each school generates its own information, so no judgments on relative quality are made. As a result, the *U.S. News* rankings remain highly influential because they provide the specific information about status and hierarchy that students want and need. Indeed, only two years after the ABA adopted its current standard on consumer disclosure, a group of 164 deans recognized the ongoing power of *U.S. News* rankings and sent law school applicants a letter warning that “Law School Rankings May Be Hazardous to Your Health!”⁹⁴

*B. Cooperation, Conformity, and Constrained Competition:
Revisiting Law School Responses to the U.S. News & World Report Rankings*

There has been considerable debate about whether the accreditation process is a legitimate path to professionalism or an illicit cartel.⁹⁵ I do not intend to pass judgment on that question here. Instead, I want to consider how the analysis of law school rankings changes if cooperation, rather than unbridled competition, is the dominant paradigm in legal education. Once standardization and uniformity in legal education are acknowledged, many features of the rankings debate are clarified. The stability of the rankings, the lack of alternatives to the *U.S. News* approach, and the proliferation of gaming strategies to improve a school’s position all become readily understandable. As I will show, the accreditation process severely constrains competition even in the

90. Paul L. Caron and Rafael Gely, *What Law Schools Can Learn from Billy Beane and the Oakland Athletics*, 82 TEX. L. REV. 1483, 1514 (2004).

91. Frank T. Read, *Legal Education’s Holy War Over Regulation of Consumer Information: The Federal Trump Card*, 30 WAKE FOREST L. REV. 307, 307–13 (1995).

92. ABA STANDARDS, *supra* note 58, at 42–43.

93. *Id.*

94. Jan Hoffman, *Judge Not, Law Schools Demand of a Magazine That Ranks Them*, N.Y. TIMES, Feb. 19, 1998, at A1. For the text of that letter, see LAW SCHOOL DEANS SPEAK OUT ABOUT RANKINGS (Law School Admission Council 2005), available at <http://www.lsac.org/pdfs/2005-2006/RANKING2005-newer.pdf>.

95. For an essay by James P. White, a long-time Consultant on Legal Education to the ABA, on the historical importance of the accreditation process and coming challenges, see James P. White, *Rethinking the Program of Legal Education: A New Program for the New Millennium*, 36 TULSA L.J. 397 (2000). For critical accounts of the accreditation process, see John S. Elson, *The Governmental Maintenance of the Privileges of Legal Academia: A Case Study in Classic Rent-Seeking and a Challenge to Our Democratic Ideology*, 15 ST. JOHN’S J.L. COMM. 269 (2001); First, *supra* note 63; First, *supra* note 80; Shepherd & Shepherd, *supra* note 63.

quest for higher rankings. In fact, the *U.S. News* rankings are not the 800-pound gorilla in the room, but the monkey on legal education's back.

In framing the discussion of rankings, Posner, Sunstein, and Korobkin are all influenced by the history of law school accreditation in ways that they do not always acknowledge and may not even recognize. Pervasive regulation has created a monolithic image of good legal education. This homogeneity in turn makes it possible to imagine a measure of quality that can fairly apply to all law schools. This picture of the good law school is not complicated by institutional pluralism, that is, a range of diverse schools with distinct approaches to delivering legal education. Consequently, both Posner and Sunstein can posit a single objectively correct ranking methodology and then tweak real-world measures to approximate the ideal. Korobkin, though he is agnostic about measuring quality, is also influenced by the accreditation process. He makes what seems like a shocking claim: law school rankings can measure status without regard to the merits of an institution's educational process. In making this assertion, though, Korobkin rests secure in the knowledge that ABA standards will ward off the worst transgressions and preserve the integrity of the profession. His claim is not so shocking after all when quality at most schools is "essentially guaranteed by ABA accreditation requirements."⁹⁶

Accreditation requirements establish an apparent consensus about the ingredients of a good legal education. Because of pervasive standardization and uniformity, alternative rankings typically yield little in the way of fresh perspectives on quality. Law schools look so much alike that any overall ranking system generates similar results. For that reason, Eisenberg and Wells's methodology produced outcomes that closely approximated the *U.S. News* rankings of top schools.⁹⁷ Narrowly-constructed measures, such as those that gauge prominence in a particular field, can yield disparate rank orderings. For example, George's index of empirical legal studies places schools other than Harvard, Yale, and Stanford in the number one spot.⁹⁸ Even so, these narrow approaches are not likely to be as influential as overall measures of quality if most law school applicants remain generalists uncommitted to a specific area of scholarship.

The homogeneity of the law school world could explain why rankings have not proliferated, as they have for business schools. To compete with the established leader, *U.S. News*, an alternative ranking system would have to offer some added value for law students choosing among schools. In particular, the ranking would need to generate credible and meaningful distinctions, not merely corroborate what is already being reported. Such divergent results seem unlikely because of the standardization of law schools. Without going into detail, Sauder and Espeland suggest that there is greater pluralism among business than law schools. For instance, a business school dean describes how rankings have fostered experimentation, innovation, and differentiation. He then contrasts this situation with the stability and homogeneity he sees in law schools.⁹⁹ The dean's observations raise an intriguing question: did multiple rankings promote institutional diversity among business schools, or did institutional diversity create the market for multiple rankings? Sauder and Espeland do not provide enough information about the history of accreditation and professionalization in business

96. Korobkin, *supra* note 9, at 43.

97. *See supra* notes 32–34 and accompanying text.

98. *See supra* notes 41–46 and accompanying text.

99. *See supra* text accompanying note 29.

education to answer this question, but it seems entirely plausible that multiple rankings simply reinforce, rather than create, a differentiated system. Similarly, the dean's comments suggest that one dominant ranking has produced homogeneity in legal education. Again, though, it seems just as likely that a lack of differentiation among law schools hindered the development of multiple rankings. Indeed, the history of accreditation that I have described suggests a push for uniformity and standardization that took place long before *U.S. News* published its first law school rankings in 1987.¹⁰⁰

The role of accreditation in establishing common norms should temper any tendency to attribute widespread practices among law schools solely to the influence of the *U.S. News* rankings. For instance, Johnson contends that the weight given to student selectivity in the rankings has prompted general overreliance on LSAT scores as law schools vie to boost their standing. This account of the admissions process leaves out the important ways in which cartel-like practices among law schools have contributed to the test's central role in admissions. In *Barriers to Entry: A Market Lock-In Model of Discrimination*,¹⁰¹ Professor Daria Roithmayr argues persuasively that the dominant admissions standard of LSAT and grades does much more than enable law schools to signal their excellence in the rankings. This standard also permits institutions to benefit from a centralized admissions database operated by the Law School Admissions Council and to identify students who will conform to a traditional law school culture.¹⁰²

Schools that want to adopt alternative admissions criteria face substantial barriers, which Roithmayr describes as "switching costs."¹⁰³ One of these costs is a diminished position in the law school rankings, but it is far from the only one. Schools must invest in overcoming their own institutional inertia, the commonplace tendency to opt for the safety of sticking with the status quo.¹⁰⁴ In addition, a school that alters its policy would no longer benefit from the experience of other ABA-accredited institutions in applying and perfecting conventional admissions criteria.¹⁰⁵ Roithmayr notes that law schools using alternative techniques might have to retool their curriculum and pedagogy to serve a newly diverse student body, yet another costly and controversial change.¹⁰⁶ She ultimately concludes that standardization and uniformity in legal

100. Caron & Gely, *supra* note 90, at 1512–13; *see also* Michael Ariens, *Law School Branding and the Future of Legal Education*, 34 *ST. MARY'S L.J.* 301, 318–22 (2003). Although the first rankings were published in the late 1980s, they were not reported annually until the 1990s. Caron & Gely, *supra* note 90, at 1510.

101. Roithmayr, *supra* note 66.

102. *Id.* at 764–74.

103. *Id.* at 737.

104. *Id.* at 775–79.

105. *Id.* at 779–80.

106. *Id.* at 781–82. Curricular reform has been a notoriously contentious issue among law school faculty, and efforts to revamp course offerings have often led nowhere. Rena I. Steinzor & Alan D. Hornstein, *The Unplanned Obsolescence of American Legal Education*, 75 *TEMPLE L. REV.* 447, 447 (2002) (describing curricular reform as "tortuous, disruptive, and occur[ing] roughly on the schedule of a 50-year flood").

education have played a substantial role in limiting access for people of color, a problem that transcends the rankings and overreliance on the LSAT.¹⁰⁷

A model of cooperation among law schools sheds important light on the gaming that takes place to influence the rankings. Because schools are so thoroughly regulated, there are relatively few areas in which they have the flexibility to compete.¹⁰⁸ Many of these areas, such as the number of books in the library or dollars spent per student, involve incremental changes rather than profound innovation. Modest, gradual improvements are not apt to yield any dramatic change in a law school's standing. As a result, schools must exaggerate the magnitude of these gains to get noticed, and the seduction of gaming begins. A number of symposium contributors worry that this kind of manipulation is counterproductive, and they call on *U.S. News* to revamp its methods to put an end to these destructive practices. Yet, nowhere do these scholars take a hard look at the constraints on competition that pervasive regulation of legal education imposes.

This omission is especially disturbing because it seems clear that accreditation requirements have hampered innovation. A good example involves barriers to online legal education. Although there are good reasons to worry about abuses of distance education and virtual law schools, technological change seems destined to make inroads into the way that legal learning takes place. So far, the ABA's accreditation standards have taken a highly tentative approach to instruction in cyberspace.¹⁰⁹ Indeed, it is no accident that the first online law school was established in California. There, graduates of unaccredited schools can sit for the bar, and the state's population is sufficiently large to ensure demand for a range of legal educational services.¹¹⁰ So far, California remains an outpost for the virtual law school, as the ABA and AALS have rejected institutions that rely exclusively or primarily on distance education.¹¹¹ Surely this type of barrier to innovation should weigh as heavily on the minds of legal educators as the gaming that results from the *U.S. News* rankings.

In sum, then, a model of pervasive regulation offers at least as many insights into the rankings debate as a model of robust competition. By considering the role of accreditation in promoting standardization and uniformity, I have shown that many puzzles posed by this symposium can be solved. The largely undifferentiated nature of law schools explains the stability of the rankings, the lack of alternative measures, and the allure of gaming. In contemplating reform, scholars therefore must devote at least as much energy to critiquing lockstep practices in legal education as they do to decrying the invidious impact of law school rankings.

107. Roithmayr, *supra* note 66, at 789–99.

108. Johnson makes a similar point about intense competition regarding median LSAT scores in a footnote. Johnson, *supra* note 48, at 344 n.136.

109. See ABA STANDARDS, *supra* note 58, at 30–31 (imposing restrictions on distance education and limiting credits that can be awarded toward J.D. degree for this type of instruction); Nicolas P. Terry, *Bricks Plus Bytes: How "Click-and-Brick" Will Define Legal Education Space*, 46 VILL. L. REV. 95, 101–04 (2001) (noting obstacles to distance education created by law school accreditation requirements).

110. Robert E. Oliphant, *Will Internet Driven Concord University Law School Revolutionize Traditional Law School Teaching?*, 27 WM. MITCHELL L. REV. 841, 845–47 (2000).

111. Ariens, *supra* note 100, at 334–35; Oliphant, *supra* note 110, at 871–75.

CONCLUSION

This symposium starts from the assumption that the *U.S. News* rankings are a potent force in legal education because of the vigorous and even destructive competition that they engender. In fact, law schools are marked by considerable homogeneity. To a significant degree, the accreditation process creates a monolithic image of how legal education should be delivered. Any discussion of the market in legal education seems oddly lopsided when it focuses on the impact of rankings and ignores these other barriers to innovation. In the end, it may be easier to turn the rankings into an 800-pound gorilla in the room than to confront the walls that the legal profession has built around itself, confining its ability to imagine what the good law school looks like.

