

Winter 2006

# Harnessing the Positive Power of Rankings: A Response to Posner and Sunstein

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## Recommended Citation

Korobkin, Russell (2006) "Harnessing the Positive Power of Rankings: A Response to Posner and Sunstein," *Indiana Law Journal*: Vol. 81: Iss. 1, Article 4.

Available at: <http://www.repository.law.indiana.edu/ilj/vol81/iss1/4>

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## Keynote Address

### Harnessing the Positive Power of Rankings: A Response to Posner and Sunstein<sup>†</sup>

RUSSELL KOROBKIN<sup>\*</sup>

#### INTRODUCTION

Ranking things—from restaurants, to retirement communities, to attractive celebrities—seems to be a peculiarly American preoccupation. Faculty and students are no exception; within the academy, educational rankings are a common source of discussion and debate. This is perhaps even more so in law schools than in most other academic departments, as the Association of American Law Schools and law school deans regularly protest the publication of law school rankings, especially those compiled by *U.S. News & World Report* (“*U.S. News*”).<sup>1</sup> Surprisingly, however, given the amount of interest in the topic, the discussions and debates tend to be drawn quite narrowly. The common implicit assumption in such debates is that educational rankings ought to reflect educational quality. Disagreement usually centers around whether educational quality is possible to measure and if so, how best to do so.<sup>2</sup>

Articles prepared by Judge Richard Posner<sup>3</sup> and Professor Cass Sunstein<sup>4</sup> for this symposium on *The Next Generation of Law School Rankings* offer useful insights within the parameters of the conventional rankings debate, but they fail to break free from its implicit boundaries. In this response to these articles, I first address the authors’ contributions within the framework in which they are situated. I then go on to argue for an expanded vision of the future of educational rankings—one that views rankings as instrumentally useful to the purpose of encouraging socially beneficial competition among educational institutions. When designing rankings, the primary goal should be to harness this positive power.

#### I. POSNER AND SUNSTEIN

Both Judge Posner and Professor Sunstein propose normative approaches to ranking law schools, implicitly or explicitly using the *U.S. News* rankings methodology as their point of departure. Judge Posner begins by claiming that some of the variables that

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1. The deans of nearly all accredited law schools are signatories of a letter posted on the Law School Admission Council’s website that calls ranking methodologies, such as those of *U.S. News*, “inherently flawed.” LAW SCHOOL DEANS SPEAK OUT ABOUT RANKINGS (Law School Admission Council 2005), available at <http://www.lsac.org/pdfs/2005-2006/RANKING2005-newer.pdf> [hereinafter DEANS SPEAK OUT].

2. See, e.g., Nancy B. Rapaport, *Ratings, Not Rankings: Why U.S. News and World Report Shouldn’t Want to be Compared to Time and Newsweek—or The New Yorker*, 60 OHIO ST. L.J. 1097, 1098–99 (1999) (arguing that factors measured by *U.S. News* are not “good indicator[s] of quality” (emphasis in original)).

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

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

*U.S. News* uses to measure law school quality are not of value to law students and that the weights assigned to the various factors by the magazine are arbitrary<sup>5</sup>—familiar criticisms, to be sure.<sup>6</sup> Posner then puts together a set of measurements he believes better reflect educational quality from the perspective of potential students—Law School Admission Test (LSAT) scores of a school's students, job placement rates, clerkship placement rates, and business law faculty quality.<sup>7</sup> He then ranks the top forty-five law schools according to this methodology.<sup>8</sup>

A few schools move up and a few move down in Posner's rankings as compared to *U.S. News*, and although this will no doubt be of interest to the students and faculty of those institutions, the finding of broader interest is that the differences in outcomes between the Posner and the *U.S. News* approaches are relatively minor. These minor differences occur because, as Posner explains, many of the variables utilized in his approach and the *U.S. News* approach are highly correlated with one another.<sup>9</sup> In fact, Posner finds that *U.S. News*'s complicated mathematical formula that utilizes many factors does not produce significantly different results than would a ranking of schools on the basis of mean or dispersed student LSAT scores,<sup>10</sup> a statistic that Posner believes is relevant to student choices.<sup>11</sup> In the end, Posner thus concludes that the *U.S. News* rankings, while far from perfect, are essentially adequate for the purposes of prospective students (as he sees their purposes), at least for the goal of narrowing down their lists of prospective institutions.<sup>12</sup> Once the list is whittled to a particular tier of schools, Posner believes that students must make an individualized investigation into the relative merits of those schools and that no general ranking system can be very useful in doing that—his included.<sup>13</sup>

What I take to be the most important conclusion of Posner's exercise—that various plausible measures of school quality are sufficiently correlated so that we need not worry excessively about what measures are used—does not dissuade me from quibbling with one of the measures that Posner includes in his normative approach. Specifically, his decision to exclude an assessment of the quality of faculty scholarship in general from his ranking approach while including an assessment of the quality of scholarship in the area of business law seems difficult to defend. His two justifications are (1) that most faculty scholarship, concentrated in esoteric areas where few lawyers actually practice, is not of interest to the great majority of law students<sup>14</sup> and, (2) that business-law scholarship is probably a good proxy for the quality of education that students receive in business law, which is the area in which most will eventually practice.<sup>15</sup>

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5. Posner, *supra* note 3, at 13–14.

6. See, e.g., DEANS SPEAK OUT, *supra* note 1, at 1.

7. Posner, *supra* note 3, at 18–20 tbl.3.

8. *Id.*

9. *Id.* at 22.

10. *Id.* at 14.

11. *Id.* at 15.

12. *Id.* at 24.

13. *Id.*

14. *Id.* at 22.

15. *Id.*

Posner's two justifications are not equivalent, however, and taken together they do not provide a convincing rationale for taking into account in rankings the scholarship of a school's business-law faculty alone. If faculty scholarship in constitutional law, for example, is of little interest to students, it is probably the case that business-law scholarship itself is of little interest to students, even those who plan to practice business law. More to the point though, even assuming that scholarship does have value to students who plan to practice in a particular field, such scholarship is a public good—a point to which I will return later—and students everywhere can benefit from the scholarship of any school's scholars. One does not have to attend the University of Chicago Law School to read Judge Posner's work in law and economics, for example, or to learn from a professor who has read Judge Posner's work.

If the quality of faculty scholarship is relevant to students' choices of where to matriculate, it must be because there is a correlation between the quality of a professor's scholarship and quality of her teaching. If there is such a correlation, then the quality of faculty scholarship in constitutional law must matter as much as the quality of faculty scholarship in business law, unless we believe that all legal education outside of courses specifically related to one's future area of practice is a complete waste of time (in which case, huge curricular overhauls are called for at virtually all law schools). I don't believe this, and I doubt that Judge Posner does either. If a school's faculty scholarship creates little private value for students attending that school, then it follows that evaluations of scholarship should not play a role in rankings designed, as Posner's are, for the purpose of helping consumers to make purchase decisions. If doing scholarship informs and enhances teaching, which in turn benefits students, then evaluations of scholarship should be a part of such rankings. But under neither set of assumptions would the consideration of scholarship related to only one area of the curriculum be justified.

While Judge Posner implicitly assumes rankings systems should aggregate specific pieces of information relevant to consumers, Professor Sunstein proposes that law school rankings reflect the choices that past applicants have made. If Posner's approach, like that of *U.S. News*, is modeled on *Consumer Reports* magazine, Sunstein's approach, a revealed-preference ranking, is the equivalent of basing product rankings on sales receipts. Sunstein's starting assumption is that, because choosing where one spends three years obtaining one's professional education is a very important decision, students will acquire "a great deal of information about the various options," and therefore, "we have a strong presumptive reason to believe that their choices are correct."<sup>16</sup> That is, we have a strong reason to believe that students' decisions maximize their subjective expected utility. From here, Sunstein reasons that rankings would most accurately aggregate and properly weight the information about educational institutions that is relevant to potential students if they aggregate the choices that students have already made.<sup>17</sup> Sunstein does not specify how exactly such a revealed-preference ranking system would be implemented, but the basic idea is that a school's score would increase each time students chose that school over comparable schools.

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16. Sunstein, *supra* note 4, at 27.

17. *Id.* at 28–29.

Sunstein thoughtfully acknowledges a number of possible concerns with the revealed-preference approach.<sup>18</sup> I will not belabor each of these here, but I would like to focus attention on one of his concerns that I think should not be a concern and one concern that I have with his approach that I think he underappreciates.

Sunstein lists as a drawback of the revealed-preference approach the fact that student choices might reflect factors other than educational quality per se, including, principally, school location and cost.<sup>19</sup> That is, prospective students might choose, and revealed-preference rankings would therefore reflect, a school's desirable location or relatively inexpensive tuition. But to the extent that a school's environment and cost are the same for all matriculating students, the fact that a revealed-preference ranking would incorporate these factors seems to be a benefit rather than a drawback of the approach. Sunstein's approach implicitly assumes that the purpose of rankings is to help students make utility-maximizing matriculation decisions. Since location and cost, along with educational quality, are relevant factors in the matriculation decision, rankings are more useful if they incorporate these factors—and weight them in the way that most students do—than if they do not incorporate these factors. Sunstein observes that rankings that implicitly incorporate such factors can be misleading if used as a “heuristic for overall quality.”<sup>20</sup> This is true enough, but they will not be misleading if used as an approximation of overall *desirability*.

One might argue that rankings that implicitly aggregate preferences for variables like location are less useful to consumers than those that take into account only educational quality because location preferences are heterogeneous. Therefore, if a school's high ranking is location driven, the information might be useless or even potentially misleading to many would-be applicants. This is a potential problem, but it is equally true that consumer preferences for various factors that are seen as indicia of educational quality are also heterogeneous. A robust clinical program, a strong intellectual property faculty, or an excellent track record in placing students in clerkships, for example, would be important quality measures to some students but not to others; just as some students would prefer the energy of New York City and others would prefer the climate of southern California.

Along with the claim that market choices aggregate more relevant information than a consumer reports-type ranking system, Sunstein counts as a benefit of the revealed-preference approach that it reduces the incentive for schools to adjust their behavior merely to improve their rankings.<sup>21</sup> Of this, I am skeptical. The perverse incentive effects created by consumer reports-style rankings are well known.<sup>22</sup> Sunstein refers to the following one briefly: if admissions selectivity is a criterion in the rankings methodology, schools have an incentive to increase applications, even from uncompetitive applicants, simply to appear more selective.<sup>23</sup> Although Sunstein might be correct that it will be *harder* for schools to manipulate their scores in a revealed-

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18. *See id.* at 29–33

19. *Id.* at 30–31.

20. *Id.* at 31.

21. *Id.* at 34.

22. For a description of positively shameful tactics that some law schools employ in an effort to enhance their *U.S. News* rankings, see Dale Whitman, *Doing the Right Thing*, ASS'N AM. LAW SCHS. NEWSL. (Ass'n Am. Law Schs., Washington, D.C.), Apr. 2002, at 1–5.

23. Sunstein, *supra* note 4, at 28.

preference ranking than in a consumer reports-type ranking, the revealed-preference approach would undoubtedly create the same *type* of incentives for pernicious behavior.

For example, if schools are judged on the basis of their success in head-to-head competition for applicants with other schools, a school can improve its ranking by offering admission to students whom the school has reason to believe will choose it over the competition. This might suggest favoring applications from local students, non-local students who indicate a specific tie to the location of the school, or students who will commit to attending the school if accepted. If a revealed-preference approach to rankings were to become dominant, I would expect to see many law schools implement an “early decision” type of admissions program that has become common among many elite undergraduate institutions and (rightly) criticized for its distorting effects on application and matriculation decisions.<sup>24</sup>

To see how tactics could be expected to pay benefits, one must look no further than the model on which Sunstein relies for his revealed-preference proposal. This methodology, as applied to undergraduate institutions by Christopher Avery and his colleagues in a recent paper,<sup>25</sup> leads to a ranking that places Notre Dame above Swarthmore, Cornell, the University of Chicago, and the University of Michigan.<sup>26</sup> As Sunstein notes gingerly, it is sensible to attribute Notre Dame’s high ranking to its “particularly enthusiastic applicant pool, intensely drawn to the institution because of its distinctive characteristics.”<sup>27</sup> More generally, the problem is that the application and admissions processes produce a non-random set of head-to-head competitions between institutions that students face, and the lack of randomness can lead to systematic biases.

To understand the problem that most likely explains the ranking of Notre Dame, assume the following:

1. 90% of students who could be admitted to Colleges *A* and *B* would prefer *A*, while 10% would prefer *B*.
2. Of the 90% of students who would prefer *A*, only a few also apply to *B*.
3. Of the 10% of students who would prefer *B*, most apply to both *A* and *B*.

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24. For discussions of how early admissions programs undermine student choice, see Karen W. Arensen, *Early Admissions Are Rising as Colleges Debate Practice*, N.Y. TIMES, Dec. 23, 2002, at A18; Karen W. Arensen, *Youths Seeking Early College Entry Are More Likely to Get In, Study Says*, N.Y. TIMES, Dec. 24, 2001, at A12. Public pressure generated as a result of the perverse incentives that such programs create has recently caused some elite institutions to end them. See Karen W. Arensen, *Change on Early Admission Procedures Produces Application Shifts*, N.Y. TIMES, Nov. 13, 2003, at A27; David Leonhardt, *As Wealthy Fill Top Colleges, Concerns Grow Over Fairness*, N.Y. TIMES, Apr. 22, 2004, at A1; Tamar Lewin, *Harvard Adopts New Rules for Early-Admission Applicants*, N.Y. TIMES, Apr. 11, 2003, at A21.

25. Christopher Avery, Mark Glickman, Caroline Hoxby & Andrew Metrick, *A Revealed Preference Ranking of U.S. Colleges and Universities* (Nat’l Bureau of Econ. Research, Working Paper No. 10803, Sept. 2004), available at [www.nber.org/papers/w10803](http://www.nber.org/papers/w10803).

26. *Id.* at 26 tbl.3.

27. Sunstein, *supra* note 4, at 29.

As a result, *A* is actually preferred by most students, yet *B* will achieve the highest rating in a revealed-preference comparison because *B* wins a large majority of the head-to-head competitions with *A*.

As long as *A* and *B* do not care, this anomaly will have no pernicious effects. But if, as a result, *B* achieves a higher ranking and *A* suffers a loss of prestige, *A* might stop admitting qualified students who it believes are of the type who also would apply to *B*, and *B* might begin favoring the type of applicants who are likely to apply to *A* as a backup choice. If it turns out to be too difficult for schools to identify *ex ante* which students would choose them over competitor institutions, they might try *ex post* to buy students who hold a fist full of acceptance letters by targeting scholarships at the students who will aid the school's standing in the rankings rather than those who the school feels are the most deserving (based on academic merit, financial need, or any other plausible measure of desert), just as colleges currently attempt to bolster their standing in rankings by targeting their financial aid recipients specifically to improve their mean SAT score.<sup>28</sup>

## II. A BROADER VIEW OF RANKINGS

The specific criticisms that I have made of Posner's and Sunstein's articles are relatively minor. Both papers make useful contributions to the law school rankings debate within what I see as the dominant rankings paradigm. In my view, this paradigm is defined by two unstated assumptions: (1) that students use rankings as a mechanism that aggregates information that is itself relevant to the quality of education, and (2) that rankings ought, therefore, to reflect the quality of legal education. Posner's article tells us that the precise measures of quality that rankings studies use matter relatively little; Sunstein points out that a rankings approach that aggregates market choices can provide a different and perhaps more complete measure of quality than approaches that aggregate and weight objective, factual information.

My primary argument is not a criticism of Posner's and Sunstein's articles *per se*, but is addressed more broadly to the dominant paradigm that assumes rankings should reflect, directly or indirectly, the quality of education offered by the institutions that are ranked. My hope is that my critique will lead others to think more broadly about the uses of rankings beyond the relatively narrow confines of the usual debate—specifically, about the positive power of rankings and how to harness it.

### *A. Rankings as a Commodity: The Competition for Status*

As a point of departure, it is important to recognize that consumers view educational rankings not merely as an aggregate measurement of value, but as valuable in and of themselves. Put differently, for many students at least, school rankings—separate from objective information the rankings might reflect in the aggregate—are endogenous to matriculation choice.

Judge Posner's article calls it "odd" that the ranking of law schools in *U.S. News* would be a significant factor in the matriculation choices of law students because the

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28. See Robert H. Frank, *The Intense Competition for Students is Threatening Financial Aid Based on Need*, N.Y. TIMES, Apr. 14, 2005, at C2.

choice of a law school is so significant that it is cost-justified for every applicant to create his own composite ranking of schools, including the information relevant to his individual utility function.<sup>29</sup> If the only purpose of rankings were to aggregate information and if consumers have different utility functions (as they surely do), Posner would be correct to expect that consumers would rely on rankings only for relatively unimportant decisions that do not justify the investment in an individualized cost-benefit analysis. Posner's analysis is not correct, however, if students place a high value on the school's rank for its own sake. If the rank is valued, it is not at all surprising to observe that many students pay quite close attention to the *U.S. News* hierarchy even though the importance of the matriculation decision justifies an individualized cost-benefit analysis.

That students are concerned with rankings themselves, rather than merely with the underlying information reflected in rankings, highlights an important difference between educational rankings and rankings of other products, such as what you might find in *Consumer Reports* magazine. In education, rather than charging market-clearing price and allocating supply on the basis of willingness to pay, most institutions are selective about their customers.<sup>30</sup> Some material purchases have a status component, to be sure, but the status comes only from demonstrating that one has enough money to afford the item, such as a luxury car or a Rolex watch. The purchase of education has a different and significant status component, however, because it signals that the customer demonstrated enough intellectual acumen and achievement to be selected by the school at which he matriculated. Status achieved through selection by an educational institution, students might rightly assume, can be translated not only into esteem and ego gratification in the way of a Mercedes Benz, but also into an increased breadth of employment opportunities and greater long-term earning potential.

### *B. The Need for Coordination Mechanisms*

Since status derived from one's affiliation with an educational institution comes from its exclusivity, students achieve status by choosing a school at which gaining admission is difficult. The school's acceptance rate is a poor measure of this because the school might receive applications from many low-quality students.<sup>31</sup> Standardized test score averages are a somewhat better measure of a school's selectivity, but schools consider a range of factors, not just standardized test scores, and few employers believe that such test scores alone are good predictors of success in the workplace (although they might be). If this were not true, we would expect college graduates to place their

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29. Posner, *supra* note 3, at 13; accord Rapoport, *supra* note 2, at 1100 (“[R]ankings aren't really necessary, because all of the raw information that might be useful to prospective students is available in an easily accessible format.”).

30. For a thoughtful analysis of why law schools would want to discriminate amongst applicants based on their quality, see Jay Conison, *Financial Management of the Law School. Costs, Resources, and Competition*, 34 UNIV. TOL. L. REV. 37 (2002).

31. For a more detailed analysis of why acceptance rates and matriculation rates are both poor proxies for student quality, see David A. Thomas, *The Law School Rankings are Harmful Deceptions: A Response to Those Who Praise the Rankings and Suggestions for a Better Approach to Evaluating Law Schools*, 40 HOUS. L. REV. 419, 432–37 (2003).



SAT scores prominently on their resumes and law school graduates to do the same with their LSAT scores, although I have heard few reports of either.

The best way for a student to signal his high quality to the employment market is to matriculate at a school where only high-quality students can gain admission.<sup>32</sup> The school thus serves as a gatekeeper, certifying that the student satisfies the school's difficult entrance requirements, and employers rely on this certification, at least in part, when allocating desirable job opportunities.<sup>33</sup> In a world in which there is an ever-increasing disparity between the intellectual and pecuniary rewards offered by the most desirable jobs and all other jobs, this certification is more important than ever.

This state of affairs creates a coordination problem for students. The top-quality students want to attend an institution that the other top-quality students wish to attend. Students of slightly lower quality wish to attend that same group of schools as well because if they do, employers will perceive them as part of the top-quality group. If these students are unsuccessful at gaining admittance to that group of schools, their second choice will be schools where the other nearly top-quality students can be found. And so on down the line. Each cadre of students wants to send the best possible signal of quality, and all students best satisfy this goal by attending a school chosen by the highest-quality group of students to which they can gain admittance.<sup>34</sup>

The problem is, without the ability to communicate among themselves *ex ante*, where do students go to associate with students of similar (or, hopefully, even better) quality and thus signal their merit to employers? Students need a prominent, conspicuous focal point around which to coordinate their actions.<sup>35</sup>

If you could win a prize by meeting up with a particular stranger at a set time in Paris, you would be wise to go to the Eiffel Tower because it is the most obvious point of coordination. If you can earn job-market currency by attending the same law school as the "best" students and you have no way of making a joint matriculation decision with such students, where should you go? Just as the Eiffel Tower is the obvious coordination spot in Paris, the top-ranked law school (or, at a minimum, the top-ranked law school in your region) in the most notable set of rankings is the most obvious coordination location for top-quality students. Notice that the school that you would choose if you followed my advice will not necessarily provide you with the highest

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32. Cf. Mitchell Berger, *Why the U.S. News and World Report Law School Rankings are Both Useful and Important*, 51 J. LEGAL EDUC. 487, 492–93 (2001) (describing how law firms use law school rankings as a method of determining where to interview job candidates and which candidates to hire); Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403, 411–14 (1998) (finding a correlation between the *U.S. News* ranking tier and the number of law firms conducting on-campus interviews).

33. See Frank, *supra* note 28 (noting that competition for the elite post-college jobs is fierce, and employers often consider only applicants graduating from elite institutions).

34. See also Korobkin, *supra* note 32, at 407–14. One author has criticized my earlier defense of rankings as a coordination mechanism by claiming this function is only useful to "elite students" who need to choose between elite law schools. See Thomas, *supra* note 31, at 449–50. This criticism is misguided. All students, except perhaps the very worst, want to send as positive a signal of their quality as is possible, and they can do this by coordinating their matriculation decisions with students of equal or better quality.

35. Cf. THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 54–58 (1960) (discussing the problem of tacit coordination among people with common interests).

quality education or the most enjoyable three years, just as the Eiffel Tower is not necessarily the most intriguing tourist attraction in Paris.

If I am correct about why students value rankings, at least primarily, and if educational institutions value high rankings as well—because high rankings attract top students, top faculty, more alumni dollars, or for any other reason or combination of reasons—the purveyor of rankings has a whole new world of opportunities. Rankings need not attempt to measure the quality of the education offered by the institution because, regardless, students will continue to seek out highly ranked schools and schools will continue to 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. So if the highest-ranked law schools were known for having uniformly unqualified professors and abysmally low bar-passage rates, and if they held classes in portable trailers in Minot, North Dakota, my prediction is that they would not serve as a coordination point for the best students. In order to maximize overall utility, students would have to ignore the rankings and attempt to identify some other less precise means of coordination. But as long as most schools are perceived as meeting a threshold level of educational quality and environmental amenities, which is essentially guaranteed by ABA accreditation requirements<sup>36</sup> and the strong demand among smart lawyers for jobs as law professors, students will use rankings as coordination mechanisms even if they are based largely or even entirely on factors not directly related to educational quality.

Sunstein points out that schools will seek the status that a high ranking provides and thus will adjust their behavior solely for the purpose of gaining a higher ranking.<sup>37</sup> And he is not alone. Jeffrey Stake's contribution to this symposium, for example, is devoted almost entirely to this topic.<sup>38</sup> This is undoubtedly true, but whereas Sunstein and Stake see the competition for status as a necessarily pernicious by-product of rankings that should be minimized—recall that one of Sunstein's primary justifications for a revealed-preference ranking methodology is the claim that it is harder to game than other methodologies<sup>39</sup>—I see it as presenting an exciting opportunity. Rather than devising a rankings system that makes the inevitable attempts to game the system more costly for educational institutions, we should devise a rankings system that channels competition in a way that encourages the production of social benefits that exceed social costs. The problem with a rankings methodology that rewards schools for taking steps such as increasing the applications of low-quality students in order to make the school appear more selective is not the general fact that rankings cause schools to act in ways that they would not in the absence of status competition. The problem is that the specific type of competitive behavior that such methodologies encourage is socially

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36. See generally Michael Ariens, *Law School Banding and the Future of Legal Education*, 34 ST. MARY'S L.J. 301, 309–14 (2003) (chronicling the role of ABA accreditation requirements in creating widespread uniformity in legal education).

37. Sunstein, *supra* note 4, at 28.

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

39. See *supra* notes 21–23 and accompanying text.

wasteful, not to mention inherently dishonest: the marginal students that are now induced to apply must expend new resources to do so, and no one is benefited.

### *C. Status Competition and Social Welfare*

Our task, then, should not be to try to avoid status competition, but to channel the competition into welfare-enhancing activities. How can we identify and promote status competition that is socially efficient rather than inefficient? I offer two principles: First, rankings should encourage the production of public goods because, by definition, these are goods that would otherwise be under-produced relative to their social optimum as a result of collective action problems. Second, these public goods should be of a type that law schools have a particular competency to produce. Cleaning up litter on public thoroughfares is a type of public good, but a rankings methodology that gave the highest rating to law schools whose students and faculty engaged in the most hours of street cleanup would be inefficient, relatively speaking, because law students and law faculty are not uniquely suited for such an activity.

Given my two criteria, the most obvious candidate for channeling status competition among educational institutions is some measure of the quality of faculty scholarship. First, scholarship is either an entirely public good or a partially public good, depending on whether scholarly work increases the quality of teaching. Second, faculty members who teach a certain subject area are well suited to study and expound upon that subject in writing for the benefit of students, other scholars, and, in the case of legal scholarship, judges, policy makers, and practicing attorneys. There are, of course, different ways to measure the quality of faculty scholarship, ranging from subjective reputation surveys of experts<sup>40</sup> to more objective measures such as citations,<sup>41</sup> SSRN “downloads,”<sup>42</sup> or empirical publications in peer-reviewed journals,<sup>43</sup> all of which are discussed in other contributions to this symposium as well as elsewhere. I will not attempt to address the question of how best to operationalize the goal of evaluating scholarship. My point is that by using rankings to encourage schools to compete to produce quality scholarship, we can facilitate the production of a public good that we otherwise would expect to be underproduced by the market and which educational institutions are particularly competent to produce.

Should rankings of law schools be based entirely on measures of faculty scholarship, following the lead of Brian Leiter’s well-known rankings?<sup>44</sup> I think a strong case can be made for this both because scholarship so nicely satisfies the two requirements that I have laid out and also because ranking schools on a single factor,

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40. See Brian Leiter, Commentary, *How to Rank Law Schools*, 81 IND. L.J. 47, 58 (2006).

41. On the logic of using citation counts as a proxy for scholarly quality, see Russell Korobkin, *Ranking Journals: Some Thoughts on Theory and Methodology*, 26 FLA. ST. U. L. REV. 851, 864–70 (1999).

42. See Bernard S. Black & Paul L. Caron, *Ranking Law Schools: Using SSRN to Measure Scholarly Performance*, 81 IND. L.J. 83, 112–120 (2006).

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

44. Leiter’s most recent law school rankings are based on faculty scholarship and can be found on his webpage. Leiter’s Law School Rankings, <http://www.leiterrankings.com> (last visited Nov. 28, 2005).

even if the actual rankings are constructed by averaging several measures of that factor, will ensure that schools will clearly focus on this competition. But a plausible case can also be made for including faculty scholarship as just one of several variables in a rankings methodology that takes account of other public goods within the realm of law schools' institutional competence. For example, law schools might be rated according to the legal services that their clinical programs provide to underserved communities and/or the extent to which their students and faculty achieve legal reform through litigation advocacy or participation in legislative reform efforts. Or, law schools might be rated according to the per capita amount of pro bono legal service provided by alumni of the institution. It is unclear whether the quality of teaching has a public good aspect or whether its value is completely captured by students who receive it—this is a topic that needs more careful consideration.<sup>45</sup> But if we think that it does have a public good aspect, this would suggest that educational institutions produce teaching quality in insufficient quantity and, consequently, that including some measure of it in a rankings methodology could enhance social welfare.

#### CONCLUSION

Members of the legal academy and the legal profession need to think beyond the boundaries of the conventional rankings debate, which focuses on what measures best reflect educational quality. Rankings have inherent value to students who use them for coordination purposes and therefore to institutions that compete for students. This means that rankings need not merely attempt to reflect the private value that an institution provides its students; they can also be designed to encourage socially advantageous competition among institutions.

If the legal academy and the profession could agree on how to best harness this positive power of rankings, the specific methodology that would emerge could be the basis for a set of rankings that would overtake *U.S. News* as the authoritative source. However, agreement among the constituencies is critical. Without such agreement, two equilibria are possible. First, a first-mover such as *U.S. News* could maintain its dominance in the mind of prospective students because it is the established source of coordination and no individual consumer can switch unless he is reasonably certain most others will switch as well. Second, rankings could proliferate to the point at which none is commonly agreed upon as being dominant or focal, in which case rankings would lose their ability to serve a coordination function and, consequently, their ability to stimulate competition among schools. Unfortunately, neither of these equilibria is socially optimal.

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45. See Korobkin, *supra* note 32, at 425–26 (arguing that teaching quality is a private good).

