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Information Production and Rent-Seeking in Law School Administration: Rulses and Discretion

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INTRODUCTION

Legal scholars have devoted their energies to understanding the workings of a wide variety of social institutions—governments, corporations, families—but have rarely devoted comparable attention to the institutions in which they work: law schools. As a career academic pressed into temporary service as an Associate Dean, I was stimulated to consider how the insights about human behavior developed to explain the workings of other institutions might be applied to understand the administration of a law school.

Lobbying is ubiquitous in law schools. Students lobby for grades, for exam conditions, for seats in popular courses. Faculty lobby for salary and for attractive teaching loads. As I started my stint in administration, my intuition

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was that this lobbying generated little information that would improve the quality of law school decisions. My surmise was that opportunities for lobbying instead encouraged rent-seeking behavior.  

A year’s work in administration did not shake my basic thesis. Indeed, my first-hand experience left me somewhat surprised about just how ignorant I previously had been about the scope of rent-seeking within the law school community. At the same time, however, I had come to recognize that my initial conclusion (that rent-seeking is an evil to be minimized) required more careful consideration in the law school context, where many students expect to pursue careers as rent-seekers. In addition, I began to appreciate that in a few limited realms, lobbying could yield information that would improve the quality of administrative decisions.

This article explores the role of rent-seeking within law schools. In Part I, I explore the premises that underlie the thesis that rent-seeking in the law school context is inefficient. Part II examines a number of the opportunities for rent-seeking in law schools and suggests how institutional structures might (and sometimes do) reduce incentives for rent-seekers. Part III develops an alternative vision—that particularly within law schools, rent-seeking by students serves an important educational function—and demonstrates that even if a law school were to embrace that vision, institutional structures that discourage rent-seeking would generally remain desirable.

I. RENT-SEEKING IN LAW SCHOOLS: WHAT IS IT AND IS THERE ANYTHING WRONG WITH IT?

Suppose the federal government were to deal with a budget surplus not by cutting taxes or reducing the debt but by advertising that the surplus would be distributed to those persons or groups that make the most eloquent appeals for the money. The advertisement would undoubtedly spur some people to

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1 Rent-seeking is a term “designed to describe behavior in institutional settings where individual efforts to maximize value generate social waste rather than social surplus.” James M. Buchanan, Rent Seeking and Profit Seeking, in Toward a Theory of the Rent-Seeking Society 3, 4 (James M. Buchanan et al. eds., 1980).

2 As Gordon Tullock has observed, the government is more likely to offer interest groups benefits other than cash: “The reason this method [offering cash] is almost never used is that it would be too obvious. It is necessary to fool the average man, at least to a small extent, and hence a method of transferring funds to the special interest which is less efficient must be adopted.” Gordon Tullock, The Backward Society: Static Inefficiency, Rent Seeking, and the Rule of Law, in The Theory of Public Choice II 224, 229 (James M. Buchanan & Robert D. Tollison eds., 1984).

Moreover, the federal government would never run such an advertisement, nor would it have to. Interest groups and lobbyists understand that benefits are available to those with sufficient persuasive powers. As Richard Epstein has noted, “any grant of legislative power will invite ‘rent-seeking’ behavior; each group will try to use that legislative power to expropriate the wealth of its rivals.” Richard A. Epstein, Toward a Revitalization of the Contract Clause, 51 U. CHI. L. REV. 703, 713 (1984). Moreover, “[i]ndividuals will let their
devote time and money to preparing their appeals. Although there is no guarantee that any individual would be successful, for many individuals, the investment in lobbying would have a higher expected return than a comparable investment in other activity. For each of those individuals, a decision to lobby would be rational. But will the combined lobbying efforts of these individuals generate an overall social gain?

One possibility is that the lobbying efforts will produce information that enables decisionmakers to improve the quality of their decisions. Perhaps, for instance, the government has earmarked money for scientific research designed to generate a cure for disease or to generate some other public good. Lobbying, in the form of grant applications, may enable decisionmakers to make decisions that best advance those ends, generating an increase in social welfare.

On the other hand, the information derived from the lobbying process is inherently suspect. For many potential participants in the process, the expected return from lobbying is smaller than the return they can command by devoting their resources to productive activity. This will be especially true for potential participants who, individually, have small stakes in the outcome of the lobbying process. Because these potential participants, who may be large in number, may not find it worth their while to lobby, decisionmakers will find that their information base is skewed, making it less likely that government decisions will actually increase social welfare.

Even if the information produced by lobbyists were accurate, however, use of the information would not necessarily result in social gain. Frequently, lobbyists compete over a fixed pool of resources; no allocation by decisionmakers will result in the production of more goods and services. In these instances, any allocations made as a result of the lobbying constitute economic rents—payments over and above what the lobbyists could command by deploying their resources in any alternative use. The competitors are merely fighting over economic rents.

The cost of this rent-seeking behavior is two-fold. First, the resources of the

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3 Sometimes the decision is not rational. For a game-theoretic examination of the conditions in which it would be rational for a participant to engage in the rent-seeking process, see Gordon Tullock, Efficient Rent Seeking, in TOWARD A THEORY OF THE RENT-SEEKING SOCIETY, supra note 1, at 97, 101-12.

4 See Buchanan, supra note 1, at 8 ("Resources devoted to efforts to curry the queen's favor might be used to produce valued goods and services elsewhere in the economy, whereas nothing of net value is produced by rent seeking."")

5 James Buchanan offers the textbook definition of economic rent: "Rent is that part of the payment to an owner of resources over and above that which those resources could command in any alternative use. Rent is receipt in excess of opportunity cost." Id. at 3.
competitors are diverted from the production of goods and services to an activity that produces no goods or services. Moreover, rent-seeking begets more rent-seeking. Some potential participants in the rent-seeking process will initially calculate that their resources will generate maximum return in productive activities. As others engage in rent-seeking, however, the calculus may change. Persons who, at first, would have abstained from rent-seeking will enter the process to avoid becoming prey to less productive competitors.

Second, allocating the economic rents requires the time and energy of a class of decisionmakers; someone must read and evaluate those eloquent appeals for money and other resources. Rent-seeking generates these costs even if we assume no "corruption" in the process, that is, even if the decisionmakers were to make good-faith efforts to determine which appeals are most eloquent rather than allocating the surplus on other criteria that better promote their own self-interest.6

This analysis leads to the conclusion that legal regimes that promote lobbying for a fixed set of resources can be efficient only if the information generated by the lobbying has the potential to identify recipients who will use the funds in ways that will increase social welfare. Even in those situations, however, the costs associated with lobbying may overwhelm the increase in social welfare. In other circumstances, a regime that promotes lobbying will generally be inefficient; by reducing the incentive to lobby, the regime could increase the incentive to engage in productive activity and thus increase the aggregate wealth of society.7

Move, then, to law school administration. Like the federal government, the law school as an institution has a number of benefits it can confer on students and faculty. For students, the law school can offer (among other benefits) scholarship money, the opportunity to enroll in attractive courses with popular professors, high grades that will increase employment opportunities, and the opportunity to take exams in advantageous conditions. For faculty, the law school can offer high salaries or research stipends (within budgetary constraints), attractive (which often means non-demanding) teaching loads, physical amenities, titles, and freedom from institutional duties.

Unlike the federal government, however, every law school faces competition from other law schools,8 a fact that should (and does) reduce the

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6 The process of obtaining foundation grants is, perhaps, one of the best contemporary examples of rent-seeking. Because foundations solicit proposals for grants, universities and other institutions pay salaries and consultant fees to people whose specialty is not conducting the studies for which the grants are designed, but rather writing grant proposals. The efforts expended on these proposals do not in any way increase the aggregate funds available; indeed, the monies spent on soliciting grants reduces the total value of the grants themselves.


8 Increasingly, even the federal government faces competition from abroad, competition
opportunities for students and faculty to extract rents from the institution.\textsuperscript{9} For instance, a law school that pays faculty salaries above market rates may find it increasingly difficult to compete for students against other institutions with lower instructional costs. Similarly, an institution that routinely awards all of its students "A's" may find its graduates spurned on the job market, reducing the institution's attractiveness to applicants.

Ultimately, however, competition among law schools places only moderate limits on the ability of a law school to dole out rents. First, law school prestige, a critical factor in applicant choice, is often fixed by events and achievements in the distant past.\textsuperscript{10} A "brand name" law school, no matter how badly managed, cannot easily dissipate its power to attract able students.\textsuperscript{11} For many applicants, it is association with the brand name, rather than the education the student expects to receive or the cost associated with that education, that makes a school attractive.\textsuperscript{12} Harvard Law School could double


\textsuperscript{9} Competition, however, may be limited by the American Bar Association's ("ABA") accreditation process, which, by setting minimum standards for law schools, limits the ways in which law schools may compete. \textit{See} Ronald Cass, \textit{The How and Why of Law School Accreditation}, 45 \textit{J. Legal Educ.} 418, 422-23 (1995) (arguing that the accreditation process limits law school competition by increasing costs of legal education, and particularly by increasing the cost of faculty); George B. Shepherd & William G. Shepherd, \textit{Scholarly Restraints? ABA Accreditation and Legal Education}, 19 \textit{Cardozo L. Rev.} 2091, 2098 (1998) (asserting that ABA accreditation standards restrict innovations in law school administration).

Failure to become accredited is a serious handicap to a law school's ability to attract students. \textit{See} Harry First, \textit{Competition in the Legal Education Industry}, 53 \textit{N.Y.U. L. Rev.} 311, 328 (1978) (arguing that accreditation status affects a law school's ability to attract students because access to state bar exams and federal funding requires that students attend ABA-accredited institutions).

\textsuperscript{10} \textit{See} Brian Leiter, \textit{Measuring the Academic Distinction of Law Faculties}, 29 \textit{J. Legal Stud.} 451, 455 (2000) ("But as the old saying goes: 'Reputations die hard and are long in being born.' The suspicion is widespread that subjective reputational surveys report yesterday's news about faculty quality, not today's.").


\textsuperscript{12} For an excellent account of the coordination function played by law school rankings
tuition, or give all students "A's," or double the average class size to reduce faculty teaching loads without fear of losing many students to schools outside the "top 10."

Geography is a second factor that confers on most law schools some degree of monopoly power. For many law school applicants, the choice of law schools is limited by geographical factors often dictated by cost concerns or family commitments. Geography is especially important beyond the top twenty or so law schools where applicants may perceive that the lasting advantages of prestige will outweigh other issues. Many areas are served by only one law school or by one school in a particular "tier" in the law school hierarchy. Thus, prestige and geography together operate to increase the ability of law schools to dole out rents.

Finally, with respect to already-matriculated students, mobility is extremely limited. Transfer to another law school is possible, but it is difficult unless the applicant has a record demonstrating academic success. Moreover, transfer creates significant personal and professional costs, including reduced opportunities for mentoring, difficult-to-understand transcripts, and a signal that the student lacks commitment. As a result, so long as the law school administration doles out rents in a way that does not generate financial cost or outside publicity, competition will act as, at most, a modest constraint.

The analysis so far suggests that competition will not significantly constrain the rent-seeking process in law schools. By analogy to rent-seeking from the federal government, then, it would appear that the many opportunities for rent-seeking create inefficiency. Remember, however, that it is the opportunity costs associated with rent-seeking that leads to inefficiency; people who engage in lobbying, an activity that generates no social wealth, would instead engage in wealth-producing activity but for the prospect of economic rents that lobbying might generate. Before concluding that rent-seeking is inefficient in the law school context, one has to confront a preliminary question: what productive activity would take place if rent-seeking were eliminated?13

With respect to students, a reasonable hypothesis would be that time and the importance to prospective students of purchasing a "brand name" education, see Russell Korobkin, In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems, 77 TEX. L. REV. 403, 409 (1998) ("'High quality' students . . . need a way to signal their quality to employers that cannot be imitated by 'lower quality' students. They do this by responding to rankings. By choosing a school with a high ranking, the student sends an important signal to future employers: he is brainy or clever enough to be accepted by a more selective school.").

13 See David Gray Carlson, Debt Collection as Rent Seeking, 79 MINN. L. REV. 817, 817 (1995). Carlson's critique identifies an often-ignored assumption in the literature on rent-seeking behavior: the assumption that the second best alternative available to rent-seekers would not create negative externalities. He points out, however, that this assumption is not invariably true. In his words, perhaps the potential rent-seeker's next best alternative "is robbing banks or kidnapping children or something socially worse than the petty corruption at hand." Id.
devoted to lobbying is time diverted from some combination of studying and personal entertainment.\textsuperscript{14} Although reading novels and watching basketball games undoubtedly increase student happiness, it seems reasonable to assume that the inefficiency caused by less student leisure is \textit{de minimis}. Is the same true of lost study time? Study time in this context includes not merely time squirreled away in the library but also time spent in discussion with classmates and faculty about legal theory and practice.

Suppose legal education makes students better lawyers. On this assumption, fewer hours devoted to legal education would generate less capable lawyers. Therefore, if students devote time to lobbying rather than studying, they divert energies from productive activity to activity that generates no social wealth.\textsuperscript{15} If students recognize that studying contributes to their professional capacity, many will choose to study rather than to lobby even if rent-seeking opportunities are available. But for others, the benefits available from rent-seeking—higher grades, better or easier courses—will appear more attractive than the marginal benefits derived from additional hours of study.\textsuperscript{16} The decision of these students to lobby generates a social cost—fewer well-trained lawyers—with no corresponding social benefit.

Now suppose that legal education does not create better lawyers but merely provides a sorting mechanism for legal employers.\textsuperscript{17} Make the further assumption that employers prefer high grades because those grades generally predict strong lawyering abilities.\textsuperscript{18} On these assumptions, student lobbying generates social costs if studying would be helpful in obtaining higher grades. Only if studying were not helpful in obtaining higher grades—if some students are born to take law school exams and others are not—would time spent lobbying be free of social cost.\textsuperscript{19}

\textsuperscript{14} Another possibility would be that students would reduce the hours they devote to part-time work in order to pursue lobbying. Assuming that the opportunities for lobbying for any individual student are sporadic rather than continuous, the likelihood that a student would adjust his or her work schedule to accommodate increased lobbying appears slim.

\textsuperscript{15} The calculus changes somewhat if lobbying itself contributes to the student’s legal education. See discussion \textit{infra} Part III.

\textsuperscript{16} Indeed, the students least likely to succeed in the profession may be those most likely to engage in rent-seeking. For them, the gains to be derived from additional studying may be small, so the opportunity cost of rent-seeking will also be small.

\textsuperscript{17} See Korobkin, \textit{supra} note 12, at 409 (discussing the sorting function of legal education).

\textsuperscript{18} It is possible, of course, that law school grades do not correlate at all with lawyering skills but that employers need to sort applicants on some basis and use law school grades because they seem less arbitrary than other, equally irrelevant, criteria, such as skin color, eye color, or length of last name.

\textsuperscript{19} Beyond opportunity cost, a law school regime that encourages student rent-seeking generates another cost: demoralization of students. When lobbying efforts prove unsuccessful, the student lobbyist can become frustrated and demoralized by his failure; when lobbying efforts are successful in obtaining rents, classmates may become resentful.
Similarly, faculty rent-seeking would appear to divert time from more productive pursuits, such as scholarship and preparation for class. One might question the intrinsic global value of each additional work of legal scholarship, but at the very least, scholarship has value in sorting academic institutions. Moreover, from the institution’s own perspective, additional faculty scholarship brings distinction that assists in attracting new students and faculty.

Finally—and from the perspective of an Associate Dean, this is a critical part—rent-seeking by students and faculty does more than divert the energies of the rent-seekers; rent-seeking also requires time and energy to respond to the lobbying efforts by the various constituencies. This, in turn, could require hiring additional administrative personnel or diverting existing administrators from scholarship or teaching or, even worse from the institution’s perspective, from fundraising.

Rent-seeking, then, can be a drain on the resources of the law school—students, faculty, and administrators. Thus, the next question is whether rent-seeking is a constant or whether governance rules can reduce the incidence of rent-seeking within the law school community.

II. CONTROLLING RENT-SEEKING BEHAVIOR

Law school governance structures are not pre-ordained. Like other institutions, law schools can choose governance structures that confer on decisionmakers more or less discretion. The choice necessarily involves tradeoffs. Inflexible rules arguably increase the risk of error in administrative determinations because the rules may not contemplate all situations that subsequently arise. At the same time, broad grants of discretion—at least in the law school context—are likely to generate more rent-seeking than inflexible rules that leave the decisionmaker with little discretion.

First, inflexible rules discourage rent-seeking because the rent-seeker’s probability of success is reduced. If the rent-seeker’s time has any value,

20 Scholarship plays a significant role in most law school rankings. *U.S. News and World Report*, for instance, includes scholarship indirectly by measuring academic reputation. Other influential rankings focus more directly on faculty scholarship as a basis for sorting schools. See, e.g., Leiter, *supra* note 10, at 455-56.

21 With respect to preparation for class, if we assume that more preparation leads to better teaching—as measured either by improved quality of lawyering by students in the class or by increased student satisfaction with the class—the institution as a whole benefits from improved teaching, either through improved employment opportunities or through increased alumni giving.


23 See id. at 73.

24 Gordon Tullock has made the point by noting that if Mayor Richard Daley of Chicago
why squander that time on requests that the decisionmaker cannot grant? By contrast, if the decisionmaker has discretion, the investment in lobbying has a greater expected return.\textsuperscript{25} In addition, when the decisionmaker has discretion, the rent-seeker has another weapon in his arsenal: skewed incentives for the decisionmaker. If the decisionmaker accedes to the rent-seeker’s request, the decisionmaker is, at least in the short run, finished with the rent-seeker. By contrast, if the decisionmaker says no, the rent-seeker may continue to lobby, forcing the decisionmaker to expend more time and energy considering the request. This fact itself increases the incentive for rent-seekers to lobby in a regime where decisionmakers have discretion.

Second, inflexible rules reduce the time spent on each lobbying effort even when rent-seekers persist in the face of a rule. Rather than explaining to the lobbyist why his or her request lacks merit, the decisionmaker can simply represent that her hands are tied—an answer that is short and sweet but also less threatening to the psyche of the rent-seeker.\textsuperscript{26}

Inflexible rules, of course, are no panacea. So long as rent-seekers face little opportunity cost, lobbying will continue even if the lobbyists perceive that the likelihood of success is small.\textsuperscript{27} Moreover, students, conditioned by undergraduate experience in which persistence has had a payoff, may overestimate the likelihood of success, reducing further the deterrent effect of a law school’s regime of inflexible rules. At the margin, however, inflexible rules will generate less rent-seeking than discretionary rules.

Of course, a regime of inflexible rules might shift some rent-seeking to the rulemaking process. But rent-seekers, especially in the law school context, will recognize that success will be more difficult to achieve in the rulemaking process. When a student lobbies for a higher grade or for more scholarship money, or a faculty member lobbies for a lighter teaching load, the lobbying is done in private. The rent-seeker’s hope is that the decisionmaker will yield without giving the opposition a chance to mobilize; indeed, the rent-seeker may hope that classmates or colleagues do not recognize the harm they have suffered as a result of rent-seeking. The rulemaking process, by contrast, is

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had confined all of his lucrative appointments to close relatives and made his nepotism policy well known, the social savings would have been considerable because non-relatives would not have wasted time rent-seeking. Tullock, supra note 3, at 103.
\end{quote}

\textsuperscript{25} Cf. Clayton P. Gillette, Expropriation and Institutional Design in State and Local Government Law, 80 VA. L. REV. 625, 633 (1994) (arguing that flexibility requires targets of regulation to invest more effort in ascertaining the scope of their authority because the measure of acceptable behavior is less certain).


\textsuperscript{27} If the opportunity costs for rent-seeking students are small, one might conclude that rent-seeking generates little inefficiency; if students did not engage in rent-seeking, they would not engage in any more productive activity. This conclusion, however, ignores the fact that student rent-seekers have power to impose costs on others—faculty or administrators—who must listen to their pleas.
inherently public, and building the coalitions necessary to change existing allocations is likely to be difficult. As a result, potential rent-seekers will often recognize that the effort is doomed, reducing the incentive to engage in rent-seeking to begin with.

None of this is to suggest that a regime of inflexible rules operates without cost. Lobbying has the potential to produce information of value to law school decisionmakers either because the information will improve the law school’s overall reputation or because the lobbying process will improve institutional morale by reducing the sense that decisions have been made arbitrarily.\(^{28}\) My point is threefold. First, the information generated by a discretionary governance regime is often low-quality information that will not significantly improve the decision-making process. Second, to the extent a discretionary system generates information that is useful at the margin, the information comes at a price measured in hours of lost productive time. Finally, the discretionary system itself has the potential for generating significant unfairness, albeit hidden from view by the private nature of many discretionary determinations.

With this as background, let us turn to common instances of rent-seeking in the law school environment to examine the impact of competing governance structures.

A. Student Rent-Seeking

1. Grades

Grades matter—both to law schools and to law students. The law school as an entity has an interest both in maintaining a grading system and in assuring that grades measure, with some accuracy, the likely success of students as lawyers. First, some grading system is almost certainly necessary for student placement purposes. Employers might reduce hiring from a school that refuses to sort students and from a school that reduces incentives for students to work.\(^{29}\) Moreover, the law school benefits when high grades correlate well with performance in practice because firms will be more likely to recruit at a school where grades have predictive value.

Second, prospective applicants, particularly strong applicants, might be reluctant to attend a law school with no grading system or an arbitrary grading


\(^{29}\) Cf. Philip C. Kissam, *Law School Examinations*, 42 Vand. L. Rev. 433, 436 (1989) (arguing that grading and ranking systems serve the hiring purposes of many law firms). Of course, a school that can be sufficiently selective in the admissions process may be able to convince firms to hire its students even if the school did not use grades to sort its students. Yale, for instance, can afford to provide less grade differentiation than most other schools because potential employers are aware that students admitted are, to an extent greater than at most other schools, self-motivated and talented.
system, because the absence of meaningful grades will reduce their opportunity to stand out. The result might be adverse selection: the students most likely to come to the school would be those who intend not to study or those who expect, for other reasons, to do poorly. In addition, even if a law school could overcome these problems, the absence of grades would create pressure for faculty to evaluate students in other, perhaps more time-consuming ways, such as by writing extensive recommendation letters. As a result, virtually every law school faces irresistible pressure to use a grading system that reflects student performance with some degree of accuracy. At the same time, law school grades are critical to students. The understandable student preoccupation with grades creates additional pressure to ensure that grades are assigned fairly rather than arbitrarily.

How, then, should law schools structure the process of gathering information relevant to assigning student grades? One possibility would be to have faculty weigh all information they accumulate about student ability during the course of the semester. This, however, would be an invitation to rent-seeking behavior by students. Because students perceive a significant correlation between high grades and professional success, they have an incentive to lobby for grades that improve their absolute grade point average ("GPA") or their relative rank in class. For instance, a student might impress upon a faculty member the importance of receiving a high grade in a course related to the practice the student hopes to pursue. Or the student whose first effort was inadequate might offer to do whatever the faculty member thought necessary to improve the grade the student earned.

Note the problem. This weigh-all-factors grading system places a premium on willingness to communicate information about performance rather than on performance itself. Of course, most discourse between students and faculty has little to do with lobbying for grades or favors; discourse both in and out of the classroom is an essential part of the educational process. Some students, however, have little interest in discourse but might nevertheless visit faculty members for the purpose of creating a positive mental impression that the faculty member will remember at grading time. The information that results from these encounters is not likely to enhance grading accuracy. First, because students will have differential incentives to lobby with faculty members, out-of-classroom discussions with students are likely to produce a skewed picture of student understanding and performance. Second, even if faculty members consider only information relevant to student understanding, some students will misperceive the factors that will lead to a higher grade and will attempt to curry favor in ways that do not reflect greater understanding of course material.

Anonymous grading of exams and papers, by contrast, reduces the incentive for student lobbying before exams and papers are graded. At the same time, anonymous grading does not in any way discourage students who consult faculty members to enhance their understanding of course material. There is, of course, a cost to anonymous grading: to the extent that some students perform better orally than in writing, their strengths may receive inadequate
consideration. A law school might plausibly conclude that this cost is insignificant in a profession where written expression is critical. Alternatively, the school might permit modest adjustments to reflect exemplary classroom performance. A regime that significantly constrains discretion without eliminating it is likely to reduce the incidence of wasteful lobbying efforts.

Another grading issue involves student requests that faculty members re-read and re-grade their exams or papers. When a student asks a faculty member to review an exam, the student typically expects the faculty member to make sure that the faculty member did not miss some significant point in the faculty member’s initial reading of the exam. The underlying premise is that more information—derived from more careful reading—will result in a more accurate assessment of student performance. The premise, however, is flawed. If the complaining student’s analysis can be discerned only after more careful reading of the exam, then the student has probably not expressed himself as clearly as did his classmates. As a result, the original grade, not the one that results from more careful reading, may well be the better indicator of performance. More generally, awarding credit based on an isolated reading of one exam, out of context with others graded weeks earlier, is unlikely to result in a more accurate assessment than the original assessment. To assure that the complaining student is treated fairly with respect to his classmates, the faculty member would have to reread all exams, not just one, and there would be little reason to believe (once the exam is read in context) either (1) that the particular student’s performance would appear better rather than worse on second reading, or (2) that the second reading would be more accurate than the first.

If rereading a student exam is unlikely to yield useful information about the appropriate grade, how can law schools deal with student requests in a way that limits these requests? One way to deal with this problem is to impose a mandatory grading curve. Whether the school requires a particular distribution of grades (no more than 10% A’s) or a mandatory mean, a curve permits the faculty member to explain to the rent-seeking student that she cannot raise the student’s grade without lowering someone else’s grade, an alternative that even the rent-seeking student will recognize as prohibitively unattractive. As with anonymous grading, a grading curve reduces the incentive for students who consult faculty only for the purpose of rent-seeking

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31 Some educational literature concludes that grading on a curve is undesirable because it fosters competition among students, impeding a cooperative learning environment. See, e.g., Terence J. Crooks, The Impact of Classroom Evaluation Practices on Students, 58 REV. EDUC. RES. 438, 458 (1988) (finding that “competitive structures involve negative interdependence because success for one student reduces the chances that other students will succeed”). That disadvantage, however, must be weighed not only against the evils of rent-seeking but also against the potential unfairness of substantially different grading standards in different sections of the same course—a problem particularly important in law schools.
without discouraging in any way those students who seek to go over their exams as a learning experience. Moreover, not only does a curve discourage rent-seeking, but it also reduces the time faculty members must spend with students whose focus is rent-seeking: rather than debating the intrinsic merits of the student’s answer, the faculty member can explain that, whatever the answer’s merits, other students wrote still better answers. There are, however, two limits on the curve’s effectiveness in deterring student rent-seeking. First, any curve is likely to leave some discretion to faculty members, and second, student rent-seekers may not readily appreciate the connection between the curve and the faculty member’s inability to raise student grades in response to lobbying efforts.  

A system that precludes all grade changes once grades have been submitted to the registrar, or one that precludes all changes absent “computational error” or some similar mechanical standard, should be even more effective in discouraging rent-seeking. Consider first a system that gives individual faculty members complete discretion whether and under what circumstances to adjust grades. Some faculty members would change grades; others would not. The system has several immediate drawbacks. First, it prevents any faculty member from relying on an inflexible rule imposed by higher authority to justify her refusal to raise grades. Instead, the faculty member must justify her own rule precluding grade adjustments. Second, it permits faculty members who do raise grades to impose externalities on those who do not: the very fact that some faculty members raise grades will encourage students to lobby with all faculty members about grade changes.

By contrast, if grade changes are prohibited, each student understands, or quickly learns, that speaking with a faculty member about an exam is useful only to learn from mistakes, not to alter the student’s grade. This results in less wasted time, both by students and by faculty.

2. Course Openings

Suppose the size of available classrooms or the pedagogical objectives of the course require limiting enrollment to a number that excludes interested

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32 A mandatory grading curve may also reduce rent-seeking of a different sort: lobbying efforts to obtain seats in classes of faculty members who are known to be generous graders. A faculty member who offers the prospect of unusually high grades may find a shortage of seats in the classroom, inducing lobbying by students eager to fill them.

33 The text focuses only on drawbacks that lead to increased rent-seeking. The rule also has one other serious drawback: it decreases the accuracy of grades as evaluations of student performance. When a faculty member raises one student’s grade without re-reading all student papers, the chances are slim that the new grade—arrived at after reading a single paper in isolation with every incentive to buckle under student pressure—will more accurately reflect the student’s relative performance than did the original grade, arrived at after reading a series of exams and comparing each to the others.

In addition, when faculty members are bound by rules prohibiting grade changes, they are more likely to grade carefully than if they know errors can be corrected easily after the fact.
students. How should places in the class be allocated? Unlike the situation with law school grades, the law school as an institution has no significant stake in which students take particular courses. Presumably, the most efficient allocation is one that awards places in enrollment-limited courses to students who value those places most. But law schools (and universities in general) have universally been unwilling to allocate these scarce resources through a market-oriented willingness-to-pay system. A cynic might suggest that the resistance to market allocation reflects the ideological proclivities of university faculties, but the more likely explanation rests on the public relations disaster a university would face if students (and their tuition-paying relatives) understood that the payment of tuition to a school with a renowned faculty earned the student the privilege to pay additional tuition to take courses with that faculty.

A school could try to ascertain student interest by interviewing the applicants for places in an individual class. But an allocation system based on discretionary determinations of student need or interest constitutes an open invitation to rent-seeking. Every interested student has a story about why Entertainment Law is essential to his or her legal career. Neither an administrator nor a faculty member is in a particularly good position to assess the relative merit of these stories. As a result, student lobbying does not generate particularly reliable information about the value the student attaches to a place in the class. The decisionmaker could, of course, allocate spaces in the course based on perseverance, but that allocation system creates precisely the wrong set of incentives; it creates incentives to spend time lobbying for the scarce seats in the classroom.

Indeed, even if a particular decisionmaker were confident that he or she could assess the relative need or interest of the claims of applicants for positions in the class, the costs of hearing pleas by applicants who do not understand why they should be deemed less needy or interested than others would often overwhelm the marginal advantages of need or interest based allocations.

By contrast, mechanical determinations minimize opportunities for rent-seeking. A first-come, first-served system—like a recording system based on a “race to the courthouse” leaves little room for interpretation, and therefore

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34 Perseverance might be regarded as a surrogate for interest or need: the students who persevere are those most willing to commit their valuable time to lobbying for spaces in the class, and are therefore the students most interested in the class or most in need of the class. Time committed to lobbying, however, generates no intrinsic benefits. Only if there is no less costly means of sorting students by need or interest (such as use of prerequisites), and only if difference in need among students is significant, would it be sensible to allocate slots based on perseverance.

35 For a discussion of the historical development of recording statutes for real property beginning with the enactment of statutes focusing exclusively on the “race” to the courthouse, see Taylor Mattis, Recording Acts: Anachronistic Reliance, 25 REAL PROP. PROB. & TR. J. 17, 23-25 (1990) (discussing the evolution of various recording statute schemes). Mattis goes on to note how quickly equitable exceptions were engrafted onto pure race
little room for lobbying. The rule does have two drawbacks, however. First, it invites pleading based on justifications for lateness. Some students will plead lack of knowledge about the time for sign-ups; others will offer justifications for their failure to sign up on time. Second, a first-come, first-served system does cause students to allocate time inefficiently: should they leave summer jobs a day early or return from vacation in order to sign up early? No apparent gains result from inducing students to sign up at a particular time. A lottery system, by contrast, eliminates these difficulties. Students are free to sign up at their convenience within whatever period is designated for that purpose, and only students who failed to sign up at all—a group with weak equity claims—will be in a position to raise “notice” issues.

Moreover, an educational institution could fine-tune a mechanical system by developing rules that take into account student interest or need. At the most basic level, the institution could establish prerequisites for popular courses or could give an absolute preference to third-year students over second-year students. The institution could even introduce a more sophisticated market-like mechanism by allocating to each student a number of points the student could use to “bid” for courses that most closely match the student’s interest or need. Places in each class would then be allocated to students who bid the most for them. Any of these mechanical mechanisms for allocating places in courses would appear preferable to a system of individualized determination based on expressions of student interest.

There remains the possibility that an individual faculty member enjoys interviewing and evaluating applications for scarce spaces in her popular class. Moreover, in clinical classes, faculty members may owe an obligation to potential clients to select students with the maturity and competence to serve client needs. If the law school permits individualized selection in these situations, the law school would minimize any spillover effects by labeling the courses involved as requiring permission of the instructor. The objective would be to distinguish them from other classes and to make clear that in other classes, lobbying will be useless.

3. Exam Conditions

The Americans with Disabilities Act (“ADA”) is designed to assure that students with disabilities enjoy, to every extent possible, a playing field level with that of other students. Moreover, even apart from federal law, many law
faculties want to assist students with disabilities to insure a “level playing field” for all students. As a result of the ADA, increasing numbers of students are seeking accommodations of various sorts. This presents law

participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” § 12132. A “public entity” is defined by section 12131(1)(B) as “any department, agency, special purpose district, or other instrumentality of a State or States or local government.” § 12131(1). State-run schools fall into this category. Section 12131 defines the term “qualified individual with a disability” as an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of . . . communication . . . barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Title III, section 12182(a) dictates that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” § 12182(a). Then, section 12181(7)(J), specifically lists “postgraduate private school[s]” as types of public accommodation covered under section 12182. § 12181(7)(J). Section 12182(b)(2)(A)(ii) includes under its definition of discrimination, “a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodation to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodation.” § 12182(b)(2)(A)(ii). Finally, section 12182(b)(2)(A)(iii) calls for the provision of auxiliary aids and services “unless . . . taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.” § 12182(b)(2)(A)(iii).

Law schools also fall under the Rehabilitation Act, 29 U.S.C. § 794 (2001), which mandates in subsection (a) that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” § 794(a) (2001). Section 794(b)(2)(A) includes “a college, university, or other postsecondary institution, or a public system of higher education” in the definition of “program or activity.” § 794(b)(2)(A).

Indeed, some scholars have argued that law schools should provide accommodations beyond those required by federal law. See, e.g., Kevin H. Smith, Disabilities, Law Schools, and Law Students: A Proactive and Holistic Approach, 32 Akron L. REV. 1, 8 (1999) (mentioning that the ADA creates a floor, not a ceiling, for protection of the disabled).

See, e.g., Phyllis G. Coleman et al., Law Students and the Disorder of Written Expression, 26 J. L. & EDUC. 1, 9 (1997). Coleman also notes that [f]or many years, law students did not ask for accommodations and frequently even attempted to disguise their disabilities to “pass” as part of the “normal” population . . . . Today, however, just the opposite is true, and even students who do not have disabilities are demanding—and receiving—differential treatment.
schools with a difficulty: how should the law school determine which accommodations should be made available to each student? Some accommodations are not problematic. For instance, the number of students seeking classroom accommodations—e.g. note-takers or particular seat locations—remains relatively small, and making these accommodations available does not generate significant rent-seeking opportunities. A note-taker is likely to be of little value to a student who does not suffer under a significant disability. As a result, few students will lobby hard for the right to a note-taker, no matter what qualification rules the school adopts.

With respect to exam conditions, however, the situation is materially different. Almost every law student, disabled or not, would benefit (or perceives that he or she would benefit) from extra time on exams. This presents law school administration with two challenges: first, determining whether a disability exists, and second, determining what accommodation is appropriate.

Law school administrators possess no special expertise in evaluating disability claims. And no law school wants to establish an internal administrative bureaucracy with the capacity to evaluate individual claims of disability. Moreover, any mechanism that accords substantial discretion to law school decisionmakers will induce rent-seeking activity by students seeking to benefit from the accommodations available. To combat these difficulties, law schools will gravitate toward mechanical rules or, where mechanical rules are difficult to codify, defer to some other decisionmaker. Thus, when the issue is language disability, the law school could provide accommodation only for students who can establish that they have lived in an English-speaking country for less than three years. Or the law school could provide that only students who have not received a degree from an English-language institution are entitled to accommodation. Either rule will generate less rent-seeking than a rule that permits students to demonstrate, individually, their language difficulties. Moreover, a regime of discretion is unlikely to produce more

Id. at 9 n.31 (citations omitted); see also Laura F. Rothstein, Symposium: The Americans with Disabilities Act: A Ten-Year Retrospective: Higher Education and the Future of Disability Policy, 52 ALA. L. REV. 241, 243-44 (2000) (arguing that “[t]he passage of the Americans with Disabilities Act in 1990 . . . opened a floodgate of complaints, both to the Department of Education and in the courts” and noting the American Council on Education’s 1998 report, indicating that one out of every eleven college freshman had a disability, a threefold increase from the number reported in 1978); Donald Stone, The Impact of the Americans with Disabilities Act on Legal Education and Academic Modifications for Disabled Law Students: An Empirical Study, 44 KAN. L. REV. 567 (1996) (reporting academic modification requests to law schools, primarily for extra exam time, but also for separate examination rooms, extension of time for degree completion, priority in course registration, and authorization to tape record classes, all by virtue of an entitlement under the mandates of the ADA). The results of Professor Stone’s empirical study show that within the eighty law schools surveyed in the 1994-1995 academic year, only two percent of requests for modification were denied. Id.
accurate information about whether accommodation is necessary to provide a level playing field; hence, little is lost by treating the problem mechanically.

With respect to physical disabilities, one alternative is to require students to demonstrate that they received accommodation on the LSAT. A second alternative—one that would be more attractive to students claiming disabilities—would be to require documentation from a physician. Whichever alternative the law school adopts, there would be little room for lobbying behavior because the law school would exercise no discretion in evaluating disability claims. Deference to physician evaluations might result in acceptance of some exaggerated claims of disability (resulting in potential unfairness to students without disabilities) but remains a more desirable alternative than one based on internal law school evaluation of disability claims.40 Moreover, because both physicians and LSAT administrators are likely to be better trained and more experienced than law school administrators when it comes to evaluating disability claims, deference to these decisionmakers is unlikely to interfere with the law school’s objective of providing a level playing field.41

Once the law school determines that a disability exists, the school must determine what accommodation is reasonable.42 Many accommodations do

40 Physicians at least have some expertise in the area, even if students will be “biased” toward consulting physicians more likely to find disabilities.

41 By contrast, the easiest rule to administer—no one receives extra time of special accommodations—would violate federal law and frustrate the law school’s internal objective of providing a level playing field. See supra note 37 (discussing applicable federal law concerning special accommodations).

42 34 C.F.R. § 104.44(a) (2000), a regulation promulgated pursuant to the Rehabilitation Act, requires that

[a] recipient [of federal financial assistance] to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student . . . . Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted. 34 C.F.R. § 104.44(a) (2000).

Title III of the ADA requires “reasonable” modifications “unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.” 42 U.S.C. § 12182(b)(2)(A)(ii) (2001). Although it can be argued that working within limited time constraints is fundamental to the nature of the law school program, most of the cases addressing extra exam time focus on whether the individual had learning or other disabilities to justify the accommodation and not whether additional exam time constitutes a fundamental alteration to the school’s program. See, e.g., Bartlett v. N.Y. State Bd. of Law Exam’rs, 156 F.3d 321 (2d Cir. 1998). Indeed, the generally accepted wisdom, as reported (disapprovingly) by Freedley Hunsicker, is that time extensions do not threaten essential standards. Freedley Hunsicker, Learning Disabilities, Law Schools and the Lowering of the
not invite rent-seeking at all. Few students would feign disabilities to obtain readers, scribes, or isolated test-taking environments. Offering these accommodations to disabled students may be costly to the law school but will not generate a flurry of applications for similar treatment.

Extra time on examinations, however, presents entirely different concerns. Because all students believe that they would benefit from extra time, a rule that gives substantially more time to disabled students will generate additional efforts to qualify as disabled. The law school as an institution has a limited number of strategies it can employ to deal with the issue. First, the law school could individually determine how much extra time each student should receive for his or her particular disability. But few law school administrators will be equipped to fine-tune the extra time available to a student’s particular disability. Information provided by individual students and their advocates will be unhelpful in making comparative evaluations, yet the prospect of individualized determinations will encourage individual students to lobby for as much time as possible.

Second, the law school could provide a blanket percentage of extra time for all disabilities or for all disabilities of a particular type. The first problem with this solution has nothing to do with rent-seeking; there is little reason to expect that such a blanket rule would advance the purposes of the ADA—leveling the playing field. On top of that, if the institution’s blanket extra-time provision is generous, it will create incentives for students to seek a disability diagnosis. A more stringent limit on the available extension of time—perhaps an additional ten or twenty percent of the time of the exam—would reduce the incentive to seek disability status but might also disadvantage students with particularly serious disabilities.

The third and perhaps best approach would be to increase the time available for all students. If all students were allocated six hours to take a three-hour exam, there would be reduced incentive to seek disability status even if disabled students were entitled to fifty percent more time on exams; for students without disabilities, the marginal benefit of the right to sit in an exam room for nine hours will approach zero. Moreover, if the law school removes artificial time pressure from exams, the school might be able to dispense with extra time altogether. Lawyers rarely have to provide clients or courts with a substantively correct answer to a complex legal question within the hour or two that might be allotted for a typical exam question, but lawyers, disabled or not, must have the ability to perform legal tasks within a reasonable time period. Hence, if law school exams give all students a reasonable time to analyze a legal problem, the law school may be able to avoid giving disabled students still more time by demonstrating that completion of the exam’s questions within the reasonable period available to all students is “essential to the program of instruction being pursued.”


43 See 34 C.F.R. § 104.44(a) (1996) (stating that accommodations need not encompass
4. Scholarships and the Market for Students

Not all of the benefits law schools confer on students constitute economic rents. Students are not fungible. If they were, law schools would not need admissions offices. Instead, law schools would allocate spaces in the entering class based on willingness of students to pay the highest tuition. All schools recognize, however, that strong students increase the institution’s reputation, both in terms of entry statistics examined by prospective students, and in terms of placement success. As a result, market forces play a significant role in where students attend law school. Institutional prestige and geographical location probably play primary roles in student decisions, but financial aid, or scholarship money, is also significant, especially in areas where law schools face competition from schools who are close substitutes in terms of geography and prestige. As a result, scholarship awards are not entirely rents paid by law schools but reflect the cost of luring valuable students to the institution in a competitive market.

If law schools award scholarship money to meet competition for strong students, the awards can be packaged in various ways. The school could guarantee scholarship money for three years, or could make continuation of the scholarship contingent upon performance in law school. Which alternative is preferable depends in large measure on the market preferences of prospective students. If 75% of scholarship recipients earn a 3.0 average in the first-year of law school, the law school should generally be indifferent—from a financial standpoint—between awarding a $10,000 scholarship guaranteed for three years, and a $12,000 scholarship whose renewal is contingent upon maintenance of a 3.0 average after the first year. If students prefer to bet on their own performance, the law school is better off providing conditional scholarships; if students are more conservative, the law school is better off not imposing conditions. Neither system, however, has any immediate impact on

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44 The institution’s reputation for serving the elite may, in fact, be the most significant academic measure of the institution’s success. See Harry First, Competition in the Legal Education Industry, 53 N.Y.U. L. Rev. 1328 (1978).

45 See Howard O. Hunter, Thoughts on Being a Dean, 31 U. Tol. L. Rev. 641, 643 (2000) (stating that law schools that want to remain competitive according to the generally accepted criteria will face continuing pressure to increase scholarships).

46 If the law school awards a guaranteed scholarship of $10,000 per year, the total cost over three years will be $30,000 per scholarship. If the law school offers $12,000 for the first year, and 75% of the first year recipients receive $12,000 in each of the succeeding two years, the total cost per scholarship will be $12,000 + (0.75 x $24,000), for a total of $30,000.

47 The effect of the two alternatives on future alumni donations might also be significant, but it is not clear what impact each rule would have. Students who lose scholarship money for inadequate performance are not likely to be significant donors (a disadvantage of conditional scholarships), but students who receive larger scholarships and keep them may be more likely to be generous (a corresponding advantage of conditional scholarships,
the incidence of rent-seeking.

If the institution awards scholarships conditioned on law school performance, however, rent-seeking problems may arise later, when some students fail to meet the performance standard. Those students will inevitably seek to retain their scholarship money, generally attributing their poor performance to some factor beyond their control—poor teachers, outside commitments, or ill health. These students will generally have no option to transfer; in light of their performance in the first year, they have less market value to all law schools than they had before they started. The law school may nevertheless decide to allocate some money to some of these students in order to cultivate better student relations (and, ultimately, better alumni relations). This would especially be true if an unexpected number of scholarship students performed poorly. But beyond the money allocated to promote student and alumni relations, any other scholarship money allocated to this group constitutes economic rent.

The law school could hear individualized appeals in which students offer explanations for unexpectedly poor performance. This course of action might make sense if law school administrators could reliably sort students whose poor performance was aberrational from those whose poor performance is likely to continue. But at most law schools, past performance, not the assessment of an administrator, is likely to be a better predictor of future performance. Moreover, even if administrators were confident in their ability to sort under-performing students, the sorting enterprise would encourage all students who have lost scholarship money to lobby with the designated decisionmaker. If, by contrast, the law school employs a mechanical standard (e.g. all students with GPAs of 2.9 or above retain 25% of their original scholarship money), both the volume of lobbying and the length of time expended on each lobbying session may be somewhat reduced.48

Law schools also face scholarship issues with students who have performed particularly well after a year of law school. Students near the top of the class may consider transferring to more prestigious institutions. If the law school wants to retain these students, additional scholarship money provides a significant inducement for students to stay. A policy awarding additional scholarships to persons who express an interest in transferring, however, creates perverse incentives. If the policy becomes known, all of the best students in the class, including those with no desire to transfer, will apply to transfer. A policy that gives the appropriate administrator discretion to award scholarships to particularly deserving students (or to students most likely to transfer) creates incentives both to fill out transfer applications and to lobby which permit larger initial awards).

48 Note, however, that lobbying will still occur. The marginal cost of the lobbying effort to the student is small compared to the potential gain. Even if the probability of success is very small, thirty minutes of lobbying will generally be worthwhile if the payoff would be retention of a $5,000 scholarship.
with the decisionmaker. In addition, if a particular student fails to secure a scholarship because he or she is deemed less worthy than other students, the adverse decision may cause more demoralization than if the decision were less subjective. As a result, the preferable course is to award scholarship money to all students who meet a certain well-defined threshold, such as all students in the top five percent of the class or all those who achieve a GPA of 3.6.

5. Discourse, Participation, and Group Rent-Seeking

The analysis so far has treated rent-seeking as an opportunity cost to the participants: if students were not involved in the rent-seeking process, they would be able to engage in more productive pursuits. Suppose, however, that for some participants, the rent-seeking process generates positive benefits. In particular, suppose that students enjoy lobbying for benefits. How, if at all, would the analysis change?

First, for those students who enjoy lobbying irrespective of result, a rule that discourages rent-seeking will have no impact. They can continue to enjoy lobbying; the rule assures only that the lobbying will be unsuccessful. The only students who would suffer a real loss from a system of mechanical rules would be those for whom lobbying with a prospect for success creates value apart from the gains actually realized from successful lobbying. But that loss may be more than offset by the gains to people who view lobbying as a cost and now receive assurance that they will not suffer when they exercise their preference not to lobby for benefits.

A more compelling argument is that many students value not lobbying per se, but participation in the governance of an institution that significantly affects their lives. But the desire for participation can be accommodated with less institutional cost and greater potential benefit by providing students with input in the process of developing institutional rules, for instance, through membership on faculty committees rather than by encouraging lobbying for personal benefits.

49 It is less plausible to assume that faculty and administrators enjoy listening to complaints; even if they do, it is not clear why it is good for the institution for them to spend time this way. Few enjoy the process so much that they would leave if they were forced to spend less time responding to student lobbying.

50 Civic republican theory emphasizes the value of participation in fostering a sense of community. See, e.g., Cass R. Sunstein, The Republican Civic Tradition: Beyond the Republican Revival, 97 YALE L.J. 1539, 1556 (1988) (“[O]n the republican view, political participation is not only instrumental in the ordinary sense; it is also a vehicle for the inculcation of such characteristics as empathy, virtue, and feelings of community . . . .”). But see Samuel Issacharoff & Daniel R. Ortiz, Governing Through Intermediaries, 85 VA. L. REV. 1627, 1636-37 (1999) (“Whenever we participate in the much-vaunted town meeting, our jobs and hobbies go untended and our friends and families go ignored. Direct democracy requires work. Worse yet, the town meeting itself can often turn nasty and unpleasant. Despite the hopes of civic republicans, the agora is no great fun for most people.”).
Beyond regular participation in the rule-making process, student participation can ease institutional tensions when unforeseen events create difficulties not covered by existing rules. One example from my tenure is illustrative. A visiting professor took much of an open-book Torts exam out of a student review book, one that the professor did not require students to purchase. The book also included an analysis of the question. A few students, but not many, had the book during the exam. When students discovered the situation, outrage surfaced over the resulting unfairness. One way to deal with the situation would have been to gather facts about the number of students who had the book and who read the analysis and then issue an edict providing an administrative resolution: students all earn “Ps” in the course, or students retake the exam, or students choose from these or other alternatives. The edict solution, however, would have been accompanied by two disadvantages. First, it would have deprived the decisionmaker—me—of student suggestions about optimal solutions I might not otherwise have considered. Second, however fair the ultimate resolution, the edict solution would have deprived students of a vehicle for expressing their collective anger about the injustice they had suffered and would have resulted in a series of individual visits both to the professor and to the dean’s office complaining about the nature of the choices available. Another alternative, and the one I chose, was to hold a structured meeting with all interested students, placing alternatives before the students but expressing openness to student proposals. This alternative provided students with an opportunity to vent and to participate in the process of selecting an appropriate remedy.

The meeting was clearly an invitation for students to engage in rent-seeking behavior. Nevertheless, student participation in developing a solution to unusual problems like these has several advantages. First, encouraging rent-seeking in a group meeting undoubtedly reduces the numbers of students who will express their outrage and offer their proposed solutions in private meetings with faculty and administrators. On the whole, then, less time may be devoted to resolving the problem. Second, a group setting is less conducive to rent-seeking because whatever benefits may be derived from successful rent-seeking will be shared among a large number of recipients, thus reducing the differential advantage to any individual rent-seeker.\textsuperscript{51} This causes individuals to think twice about pursuing purely personal goals, especially ones that disadvantage others.

Perhaps most importantly, when students offer proposals in a group setting, each student is more likely to recognize that his preferred solution may be unacceptable to other students. For instance, raising the grades of all students...

\textsuperscript{51} Cf. Buchanan, \textit{supra} note 1, at 11-12 (arguing that if the differential advantages granted to persons as a result of a government allocation are eliminated, it becomes irrational for any persons to engage in rent-seeking); see \textit{Richard Epstein, Takings} 208-09 (1985) (discussing the advantages of a system in which any individual actor may only demand additional benefits if he tenders them to others as well).
who took the tainted exam would have been unacceptable to students in other Torts classes whose class rank might be adversely affected by such a solution. When students see, in an open forum, the various positions advanced by their peers, they are less likely to press extreme positions both because they may better see other perspectives on the issue and because they understand that the law school administration is unlikely to adopt a position strongly opposed by other affected students. As a result, the quality of the suggestions generated at such a session is likely to be higher than when a single student privately seeks a benefit from a single administrator or faculty member. Moreover, open discussion among students with differing points of view may increase the likelihood that students will accept a compromise solution.

The basic point is this: not all participation in governance matters is rent-seeking. When an unforeseen event at the institution creates a general sense of injustice, some resolutions of the problem do more than distribute rents among students. Although it is unrealistic to assume that students as a group can be dissuaded from engaging in rent-seeking behavior, some students will strive to reach solutions that improve the general morale of the student body. The challenge for the law school administration is to channel rent-seeking behavior in ways that give students a role in remedying the injustice, thus blunting hostility toward the institution, and generating better information in the process.

B. Faculty Rent-Seeking

The faculty plays a critical role in the quality of any law school. First, faculty scholarship enhances law school prestige, which in turn aids the law school in recruiting both good students and strong faculty. Second, high-quality teaching has an obvious impact on alumni support, but also on admissions, through word-of-mouth. As a result, every law school has an interest in promoting high-quality research and teaching and in retaining faculty who are strong scholars and teachers. Because of the important role faculty scholarship plays in evaluating the quality of a law school, a law school dean would ordinarily want to allocate scarce resources in ways that promote

52 See Sunstein, supra note 50, at 1549 (arguing that self-interested positions “should be revisable in light of collective discussion and debate, bringing to bear alternative perspectives and additional information”); see also Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 HARV. L. REV. 1512, 1529 (The civic republican position is that “the deliberative process, if properly structured, will transform . . . values and ultimately reveal commonalities shared by different citizens. It is this transformative power of politics that enables the polity to reach consensus about the common good.”).

53 There is, however, one significant countervailing cost. An open forum may lead some people to attend a meeting to protect their perceived interests even if they would ordinarily trust the law school administration to safeguard their interests. These students—who might be among the most diligent—would rather study than lobby unless the prospect of deal making leads them to fear that their interests will be ignored.
faculty scholarship. Among the benefits that are generally attractive to faculty are salary, research stipends, and reduced teaching loads. Each law school must determine how to allocate those benefits. In each case, a variety of allocation mechanisms are available.

1. Faculty Salaries and the Role of Markets

Faculty salaries—the most significant benefit received by most faculty members—could be set mechanically or the dean could retain discretion to set salaries. The advantage of a mechanical formula, such as one that sets salaries by some combination of years out of law school, years in teaching, and number of advanced degrees, is obvious: the formula leaves little room for lobbying by individual faculty members. The disadvantage, however, is equally obvious: the law school that sets salaries without regard to market value risks losing its most marketable (presumably its most productive) faculty members.

For many faculty members, a high percentage of salary is economic rent; tenure protects them in their current jobs, but, because they have few prospects of comparably attractive employment, they would not leave their current schools even if their salaries were cut drastically. For other faculty members, however, very little of their salary is economic rent; because they have other opportunities, their salary reflects market value not economic rents. The reason these faculty members have other opportunities is that law schools recognize that institutional reputation and the ability to attract students depends in part on the reputation of the law school's faculty, both as scholars and as teachers. A law school that loses its strongest faculty members risks a loss in reputation. As a result, any law school dean will want the flexibility to meet market competition for the school's strongest faculty members.

Once a dean asserts the discretion to meet the market, however, any lock-step salary system collapses. If the dean announced that he would depart from the lock-step system only for faculty members with other offers, the system would encourage other faculty members to waste time soliciting offers they have no intention of taking. This cost to the law school would probably exceed the cost generated by a system that gives the dean discretion over salary, and therefore permits lobbying by individual faculty members. Market forces, then, lead to a system that gives the dean discretion over salaries.

54 See Geoffrey Brennan & Robert D. Tollison, Rent Seeking in Academia, in Toward A Theory of the Rent-Seeking Society, supra note 1, at 344, 345-50 (arguing that the costs associated with changing teaching positions and the fact that geographical preference often plays a role in a teacher taking a university position deters professors from leaving their current positions).

55 See id. at 351 (arguing that a dean or other academic decisionmaker may "rationally seek to maximize the prestige of his department, because this in turn maximizes his own market value and his bargaining position in relation to his own salary")

56 See id. at 353 (discussing the costs to faculty members and schools of searching out offers to encourage an active bidding process for academics).
2. Other Faculty Benefits

If market forces make discretion preferable with respect to faculty salaries, the question is whether those same forces require discretion with respect to other benefits. If discretion over salary is sufficient to permit the dean to account for market forces, limiting discretion in other areas diminishes the opportunity for rent-seeking. For instance, if salaries and research stipends were both discretionary, the dean would face two pressure points for lobbying efforts rather than one. In most circumstances, discretion in salaries should be sufficient to meet market forces; from the individual faculty member's perspective, the dean's offer of an additional dollar is at least as attractive if it comes in salary as if it comes in research money. Similarly, with teaching loads, the school could set a fixed price at which faculty members might buy their way out of some of their teaching obligations. Then, giving the dean salary discretion would be sufficient to meet reduced-load offers from other institutions.

At that point, the question becomes whether a discretionary decision-making process generates information in a way that improves the quality of decisions or creates useful incentives for faculty members who are not candidates for departure to other institutions.

a. Research Stipends

Many law schools award summer research stipends to faculty members. The theory behind the research stipend is that faculty will be more productive if rewarded for devoting summers to research rather than to extended vacation or to consulting of some sort. In theory, then, research stipends are not economic rents; they are payments to induce faculty members to engage in work that is valuable to the institution.

In practice, however, research stipends do create economic rents for many faculty members because those faculty members would engage in research and publication whether or not stipends were made available. For these faculty members, love of scholarship or professional prestige provides adequate incentive for publication. Payments made to them for activities they would pursue in any event constitute economic rents.

If the law school's objective were to maximize productivity, the law school might concentrate on awarding stipends to those faculty who would produce scholarship if awarded stipends but not otherwise. Such a system, however, would entail significant cost. First, the system might cause demoralization of the institution's most productive faculty members. In addition, it would not be easy to sort those for whom stipends provide a necessary incentive from those for whom stipends constitute rent. Moreover, if it became clear that the law school sorted on that basis, the school would create an incentive for all faculty to disguise their inclination to write in order to qualify for stipends.

57 Ultimately, unless these productive faculty members were compensated in some other way, as through salary, their demoralization might encourage them to leave the institution.
making the sorting process even more difficult.

In light of these difficulties, the emphasis of any allocation process will be on rewarding productive faculty members without assessing whether they would write without stipends. The result, however, is that many of the stipend payments will constitute economic rent. How, then, should these payments be allocated?

One approach is for the dean to solicit research proposals from interested faculty members. The dean, or a faculty committee, then evaluates the proposals to decide which merit financial assistance. This system creates significant incentive for rent-seeking by faculty members. First, faculty members may devote inordinate time to developing research proposals rather than to completing the research itself. Especially if the proposals are solicited well before the time for which the stipend is awarded, the faculty members' plans may change, making time spent on the proposal largely useless. Second, the dean or the committee must read and evaluate the proposals, and, if a committee is involved, debate their relative merits. Third, faculty members may lobby with the committee or the dean on behalf of their proposals, and, after decisions are made, the committee or the dean will have to explain their decisions to disappointed faculty members.

By contrast, the school could allocate stipends to faculty who meet predetermined mechanical criteria. For instance, stipends could be awarded to all faculty who have published at least one law review article within the preceding two years or one book within the preceding four years. This system is a less costly way of allocating stipends if we regard them as rents. At the same time, this method provides appropriate incentives to faculty members who might be induced into greater productivity: continued eligibility depends on continued productivity. The criteria could be made more stringent or more lenient or simply different, depending on the institution's aspirations. The mechanical system, as we have seen in other contexts, involves a smaller expenditure of faculty and administrative time.

One might object that the mechanical system places no premium on high quality scholarship. If stipends are simply economic rents, it is not clear why, from the institution's standpoint, the quality of the work should matter. Even if we assume more realistically that stipends do have some incentive effect, the objection ignores two facts. First, a mechanical system could be designed to reward quality, at least as measured by external criteria; that is, the stipend could be enhanced for faculty who have book contracts with top university presses or articles published at top law reviews. Second, if the goal of the stipends is to generate more faculty productivity, the goal might be better achieved by inducing weaker or more reluctant scholars to devote more effort to scholarship rather than by focusing heavily on those whose prior success predicts that they will continue to generate high quality work even without additional incentives.
b. **Reduced Teaching Loads**

Faculty members in the midst of a major research project often find it helpful to have a reduced teaching load during a semester of unusually intensive work. Unless pressing institutional needs conflict with the faculty member's preferences, most law faculties and most deans would want to accommodate an effort likely to result in significant scholarship. The question is how to do so. 58

One alternative is to allocate reduced loads to faculty members who request them whenever the dean or a faculty committee is convinced of the merit of the faculty member's request. Such a system, however, places a premium on lobbying. Those faculty members willing to bend the dean's ear obtain benefits not available to those who don't ask for them. That system, in turn, encourages more faculty members to bend the dean's ear when they could be reading, writing, answering student questions, or engaging in other productive activities.

An alternative approach is to create a "credit bank." If the ordinary teaching load at the institution is eleven credits per year, a faculty member who prefers to teach only eight credits in a particular year can earn the right to do so by teaching fourteen the previous year or twelve for each of the three preceding years. In this way, faculty members earn a reduced teaching load as a matter of "right" rather than by lobbying for the reduced load as a matter of grace. Rent-seeking would bring a faculty member no rewards.

Moreover, the teaching load need not be identical for all faculty members. That is, faculty members who meet a pre-determined publication requirement could be allocated a smaller load than those who do not meet that requirement. This system also allocates reduced loads a matter of right and reduces the incentive to engage in rent-seeking behavior.

### III. THE EDUCATIONAL VALUE OF RENT-SEEKING

In many educational institutions, rent-seeking skills are of little value to students. Few architects, physicians, or engineers will derive any professional advantage from a finely-honed ability to seek economic rents. But law schools train law students to practice law. Rent-seeking is the bread and butter of many areas of legal practice. Litigation, negotiation, and lobbying—activities central to the practice of law—require expertise at extracting economic rents. Is it misguided, then, to discourage rent-seeking, particularly among law students? Rather than treating rent-seeking as an evil that distracts students from their studies, should we treat rent-seeking as an occasion for education consistent with the mission of the law school?

One of my colleagues organized his course on this premise. The class was

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58 The assumption here is that the institution's teaching needs generally require faculty to teach a full load, and that the dean cannot simply permit anyone engaged in research to teach less or not at all. Hence, any reduction in teaching load for one faculty member requires someone else to pick up the slack.
limited to 24 students. Under the law school’s rules, classes of 25 students or more are subject to a mandatory grading curve. More than 25 students came to the first scheduled class. My colleague focused class discussion on a number of issues: should the limit on class size be removed to permit the extra students to take the class; should the students lobby with the Associate Dean for an exemption from the mandatory curve; should some students volunteer to drop out of the class as a formal matter and substitute an independent study, thus keeping the class size below 25 (as far as the Registrar would know), while permitting all interested students to remain in the class?

When I learned of this classroom exercise, my first reaction was anger. My colleague was wasting his students’ time—and mine—in what would be a fruitless effort to evade rules adopted by the faculty. On reflection, however, I recognized that the rent-seeking enterprise, while bad for the Associate Dean, was of considerable value to students who were honing skills that would be of value to them throughout their legal careers. In the course of lobbying with me, students would learn how to make an argument and, in light of my responses, how to sharpen that argument. They would also learn the importance of tailoring their arguments to the decisionmaker involved. These skills, while of marginal importance to a future engineer or musician, are central to the success of a future lawyer.

This insight, however, did not convince me that law school administrators should abandon rules for discretion in order to increase opportunities for education through rent-seeking. Students learn as much or more through unsuccessful rent-seeking as they would if the rent-seeking were successful. To the extent that my colleague’s enterprise could be treated as a clinical offering in supervised rent-seeking, students receive the same hands-on training if they fail as if they succeed.

Retaining mechanical rules has another advantage. In the outside world, lawyers engage in rent-seeking in a variety of legal environments. The strategies most likely to be successful when lawyers appeal to decisionmakers constrained by rules are different from those that would be optimal with decisionmakers who enjoy broad discretion. In an environment heavily shaped by rules, lawyers must focus their arguments more sharply. They are not finished when they convince the decisionmaker of the rightness of their position; they must also provide the decisionmaker a “road map” through the constraints the decisionmaker faces. Many decisionmakers—in particular, low-level administrative agency decisionmakers—operate in a rule-bound environment. Courts, especially inferior courts, also operate under significant constraints. If rent-seeking in law school is treated as training for the profession, the training will be better if the student learns to tailor her argument to the constraints faced by the decisionmaker.

Of course, if law students face a regime of mechanical rules, some of them will choose not to rent-seek at all. But that too is a learning experience, perhaps the most valuable one. Lawyers must know how to evaluate when rent-seeking is likely to be successful (and when it is not) so they can advise
clients whether the rent-seeking enterprise is worth the necessary expenditure of resources. And, given the few opportunity costs facing most law students who consider rent-seeking on their own behalf, it is hardly likely that they will err on the side of abandoning an enterprise that has little expected yield.

Finally, even if a regime that encourages student rent-seeking effectively trains law students, the training is not cost-effective. The training tends to be one-on-one; a single student—and no one else—learns from each encounter with a law school administrator. Too many such encounters would require employment of additional law school administrators, and it is unlikely that such expenditure would be preferable from an educational standpoint to hiring additional faculty members who might provide equivalent (or, more likely, better) training in a classroom or clinical setting.

CONCLUSION

This essay is not intended as a blueprint for the eradication of rent-seeking behavior in law schools. Indeed, because the opportunity costs facing student rent-seekers is often so low, rent-seeking will always be with us.

My objectives have been more modest. First, I have vented my personal frustrations at the hours I have spent dealing with rent-seekers, hours that could have been better spent dealing with more pressing student and faculty concerns. Second, I have distinguished those student and faculty lobbying efforts that are likely to produce information useful in improving the quality of law school decisions from those efforts unlikely to generate useful information. Many of these opportunities for rent-seeking had not been evident to me as a faculty member. Third, I have demonstrated that the policies a law school adopts can have an impact, albeit at the margins, on the frequency and duration of rent-seeking activity. Finally, I have explained why rules designed to control rent-seeking behavior may have a positive impact even on the education of future rent-seekers.