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Accreditation Reconsidered

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Accreditation Reconsidered

Judith Areen*

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*  Paul Regis Dean Professor of Law, Georgetown University. From 2001 to 2005, I served as a member of the Council of the Section on Legal Education and Admissions to the Bar of the American Bar Association. I am grateful to Caroline Van Wie for her research assistance.
Accreditation, like tenure and academic freedom, is a term of art widely used in higher education, yet often misunderstood. To evaluate the way American law schools are accredited, therefore, it is necessary first to understand what constitutes accreditation in higher education generally. The first Part of this Paper reviews the praxis of accreditation as it has developed in American higher education and considers recent challenges to its structure, governance, and mission. The second Part compares the process for accrediting law schools with higher education accreditation and identifies three major conceptual deficiencies with the former. The Paper suggests two particular reforms for legal accreditation. First, to strengthen peer review, which is central to effective accreditation, arbitrary limits on the participation of legal educators should be removed. Second, in applying accreditation standards, the process should enhance (and not merely assess) the quality of legal education, while respecting institutional diversity among law schools.

I. ACCREDITATION IN HIGHER EDUCATION

A. DRIVERS OF EXCELLENCE IN AMERICAN HIGHER EDUCATION

It is widely recognized that the K–12 system of education in the United States has serious problems. At the same time, the nation’s system of higher education is the envy of the world—whether measured by international rankings (forty of the fifty top universities in the world are American according to some rankings), the number of Nobel Prize winners educated in America, or the number of students from other nations who attend an American college or university. How can one part of America’s system of education be so much more successful than the other?

Part of the explanation is a tradition of investment. The United States has devoted more resources, public and private, to education for a longer period of time than any other nation. As early as 1785, the Continental Congress set aside land in the Northwest Territory for the benefit of public education, including higher education. In 1862, President Lincoln gave a
significant boost to higher education when he signed the Morrill Act, which underwrote the establishment of land-grant colleges and universities around the nation and increased competition in higher education for everything from students to faculty to research grants. In part because of its early and significant investment in higher education, the United States leads all nations except Canada in the proportion of thirty-five- to sixty-four-year-old adults with college degrees.

Despite an unprecedented commitment of public lands and dollars, for most of America's history, the government has played a fairly limited role in overseeing higher education. Federal restraint was apparent from the earliest days. Education is not mentioned in the Constitution because it was thought best left to the states or to the private sector. In 1802, the territorial legislature of Ohio chartered a new university (later named Ohio University) using land set aside by Congress as its principal source of income. When Ohio became a state, that land was given to the state, establishing the precedent that the federal government would not supervise the management of land, or later, funds, granted for education.

States generally have followed a similar pattern of restraint. They soon discovered that restraint could enhance the quality of their institutions of higher education. For example, under the Michigan Constitution of 1835, the state legislature was given complete control and management of the University of Michigan. The Michigan Constitution of 1850, however, as


4. NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., MEASURING UP 2008: THE NATIONAL REPORT CARD ON HIGHER EDUCATION 6 (2008), available at http://measuringup2008.highereducation.org/print/NCPHHEMUNationalRpt.pdf. In the last two decades, however, other nations have invested more in higher education. The United States is now only tenth in the world in the proportion of young adults ages twenty-five to thirty-four with associate or bachelor degrees. Id.


7. Id. at 40–44.

8. It took a decision of the Supreme Court to stop the State of New Hampshire from taking control of Dartmouth College. See Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). In recent months, however, states have begun to intervene more directly. See Eric Kelderman, State Lawmakers Seek More Say Over College, CHRON. HIGHER EDUC., Mar. 4, 2011, at A1 (describing bill recently passed by the Iowa legislature "limiting sabbaticals to 3 percent of the faculty at any" of the state's three public universities).

well as all subsequent constitutions, conferred the general supervision of the university on an elected Board of Regents. According to the Michigan Court of Appeals, before control was given to the Board, the university was “practically a failure,” while after, it became “one of the most successful, the most complete, and the best-known institutions of learning in the world.”

The court concluded:

It is obvious to every intelligent and reflecting mind that such an institution would be safer and more certain of permanent success in the control of such a body [of eight regents] than in that of the legislature, composed of 132 members elected every two years, many of whom would, of necessity, know but little of its needs, and would have little or no time to intelligently investigate and determine the policy essential for the success of a great university.

This hands-off approach by federal and state government has provided American colleges and universities with a degree of autonomy not found in most of the world, where ministries of education oversee institutions of higher education. It also has encouraged institutional diversity and competition and, thereby, promoted quality.

In addition to robust traditions of investment and governmental restraint, higher education in the United States has benefited from three governance innovations: (1) citizen governing boards; (2) shared governance; and (3) accreditation.

1. Citizen Governing Boards

Citizen governance developed more from necessity than design. When the Puritans of Massachusetts Bay Colony founded Harvard College in 1636, they emulated Oxford and Cambridge as much as possible, from admission requirements to the curriculum. There were not enough scholars in the colony, however, to adopt the English system of governance by the faculty. Rather than turn control of the college over to fellows, who did most of the teaching (today they would be considered graduate students), the colony established a lay (i.e., nonfaculty) governing board. The first Harvard Board of Overseers was a mix of public officials and ministers from neighboring areas. Over time, the early choice of control by church and

10. Id.
11. Id. (quoting Sterling, 68 N.W. at 255).
12. Id. (quoting Sterling, 68 N.W. at 256).
14. AMERICAN HIGHER EDUCATION, supra note 2.
state gave way to boards elected, at least in part, by alumni. By the early twentieth century, most governing boards at major universities were made up of businessmen, bankers, and other community leaders.

The founders of the other eight colonial colleges followed Harvard’s example and put citizen boards in charge. Citizen boards remain the most common form of academic governance in the United States, in public as well as private institutions of higher education. Citizen governance worked well enough when faculty members were hired primarily to teach, and the curriculum was the same mix of classics and the Bible that had dominated European universities for centuries. But by the late nineteenth century, inspired by the very successful German universities that were the first to add research to the traditional university mission of education, American universities encouraged their faculty to conduct original research. Faculty, in turn, began to reshape the curriculum, and to speak out about the findings of their research. The result was a series of clashes between the newly empowered scholars and their citizen governing boards.

One of the most publicized disputes involved economist Edward Ross of the Stanford faculty. His criticism of the railroad industry and opposition to the exploitation of foreign labor offended Mrs. Leland Stanford, the sole trustee of the university that she and her late husband had founded. She demanded that Ross be fired, and in 1900, the president of the university forced him out.

2. Shared Governance

This dispute, along with other disagreements involving faculty at the University of Wisconsin, Vanderbilt University, and other schools, helped to spur the formation in 1915 of the American Association of University Professors (“AAUP”), which in its first year issued the pathbreaking Declaration of Principles on Academic Freedom and Academic Tenure. Although the title does not mention governance, its authors—the Seligman

16. In 1865, the power to elect the thirty members of the Board of Overseers, which had belonged to the State of Massachusetts, was given to the alumni of the College. Act of Apr. 28, 1865, ch. 173, 1865 Mass. Acts & Resolves 505.


Committee—understood that providing faculty with academic freedom in the classroom and for their research would mean little if the citizen governing boards could decide what would be taught and who would teach it. The committee’s solution was to give faculties primary responsibility for academic matters. The Declaration thus provides:

A university is a great and indispensable organ of the higher life of a civilized community, in the work of which the trustees hold an essential and highly honorable place, but in which the faculties hold an independent place, with quite equal responsibilities—and in relation to purely scientific and educational questions, the primary responsibility.

This allocation of primary responsibility for academic matters to faculties—which has come to be known as shared governance—is today honored by most colleges and universities in the United States. Shared governance has played an indispensable role in protecting higher education from the “tyranny of public opinion,” enabling American colleges and universities to become intellectual experiment stations “where new ideas may germinate,” as envisioned by the Seligman Committee. Although not without its faults, shared governance fostered institutional cultures that encourage innovation, and thereby contributed to the success of both the research and teaching missions of American higher education. As Derek Bok has explained, “No one ever raised the level of scholarship by ordering professors to write better books, nor has the quality of teaching ever improved by telling instructors to give more interesting classes. In these domains, good work depends on the talent and enthusiasm of professors.”

Shared governance kindles faculty enthusiasm by reducing hierarchy in the academic workplace and ensuring that academic freedom protects their research and teaching. Even the Supreme Court has recognized the value of shared governance. In \textit{NLRB v. Yeshiva University}, the Court held that the National Labor Relations Act did not apply to private universities because it was designed for the “pyramidal hierarchies of private industry” and not for the “shared authority” of higher education, which divides authority between

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22. The committee was chaired by Edward Seligman, a professor of economics at Columbia. Its members included philosopher Arthur Lovejoy, who had resigned from Stanford when Ross was forced out, and Roscoe Pound, who would be named dean of Harvard Law School one year later. \textit{Id.} at 878.

23. \textit{Id.} at 866.

24. \textit{Areen, supra} note 18, at 793.

25. \textit{Am. Ass’n of Univ. Professors, supra} note 21, at 870.

26. Derek Bok, \textit{President Bok’s Annual Report}, \textit{Harvard Mag.} (June 6, 2007), \url{http://harvardmagazine.com/breaking-news/president-boks-annual-report}. Bok added: “It is certainly true that professors can resist change and that, like most human beings, they are often loath to give up their prerogatives. For all that, however, American universities have fared quite well over the past 50 years, the very period when faculty power reached its zenith.” \textit{Id.}
the central administration and one or more faculties.\textsuperscript{27} The Court further observed: “the ‘business’ of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions.”\textsuperscript{28}

Shared governance should not be confused with divided governance. Faculties are to have primary, but not exclusive, responsibility for academic matters. Even the AAUP acknowledges that there are times when governing boards should reject faculty recommendations. In 1966, the AAUP and the American Council of Education (“ACE”), which represents more than 1600 of the nation’s college and university presidents, issued a jointly formulated Statement on Government of Colleges and Universities to clarify the roles of faculties, boards, and presidents in shared governance. According to the Statement, presidents and boards should overrule faculty decisions about academic matters “only in exceptional circumstances, and for reasons communicated to the faculty.”\textsuperscript{29} The Statement offers as examples of such circumstances: “budgets, personnel limitations, the time element, and the policies of other groups, bodies, and agencies having jurisdiction over the institution may set limits to realization of faculty advice.”\textsuperscript{30}

3. Accreditation

Citizen governing boards generally have done a good job of managing the business side of American colleges and universities, with their members contributing funds, overseeing the management of endowments, and ensuring that institutions of higher education are prudently managed. And, by placing responsibility for academic matters in the hands of those with the most knowledge and expertise, shared governance has increased the willingness and ability of faculty to develop new inventions and ideas. These two governance innovations, together with a national environment that favors competition and limited government, contributed significantly to the success of American higher education.

\textsuperscript{27} 444 U.S. 672, 680 (1980).
\textsuperscript{28} Id. at 688.
\textsuperscript{29} AM. ASS’N OF UNIV. PROFESSORS, STATEMENT ON GOVERNMENT OF COLLEGES AND UNIVERSITIES (1966), reprinted in AAUP POLICY DOCUMENTS & REPORTS 135, 139 (10th ed. 2006). The Statement also allocates to presidents the responsibility and the authority to act to improve academic quality by using evaluations by faculty from outside the university: The president must at times, with or without support, infuse new life into a department; relatedly, the president may at time be required, working within the concept of tenure, to solve problems of obsolescence. The president will necessarily utilize the judgment of the faculty but may also, in the interest of academic standards, seek outside evaluations by scholars of acknowledged competence.
\textsuperscript{30} Id. at 138.
But by the beginning of the twentieth century, it became evident that something was missing: America’s decentralized system of higher education did not have an effective mechanism to assess or to enhance academic quality. Competition for faculty and students provided some encouragement, but most outsiders, whether applicants or employers, were not in a position to assess the quality of a particular college or university, much less to encourage improvement. In 1912, the University of Berlin announced it would not recognize the degrees awarded to graduates of any American institution that was not a member of the Association of American Universities (“AAU”), an association of research universities founded in 1900. In response, then-Harvard President Charles Eliot presented a report on behalf of a special committee of the AAU which concluded:

It is the duty of this Association either to standardize American Universities, and thus to justify the confidence which foreign governments repose in them, or to notify those governments that there are American Universities outside this Association whose work and standing are not inferior to universities now members of the Association.

After studying the matter, the AAU decided that it did not want to be in the business of reviewing the quality of colleges and universities. Nor would accreditation come from the government—President Taft stopped an earlier proposal by the U.S. Bureau of Education (the precursor to the Department of Education) to take on the task in 1912, following widespread public criticism of the idea. Ultimately, the job fell to six regional accreditors, although it took some time for each to adopt a formal accreditation program. The North Central Association adopted its first

32. Id. at 34.
33. Id. (quoting C.W. Eliot et al., Report of the Special Committee on Aim and Scope of the Association, 9 J. PROC. & ADDRESSES ASS’N AM. U. app. at 76 (1908)) (internal quotation marks omitted).
34. Id. For a time the AAU prepared a list of the institutions that were either members of the Association, or on the list of the Carnegie Foundation for the Advancement of Teaching. Even that limited form of accreditation was dropped in 1949. ANN LEIGH SPEICHER, ASS’N OF AM. UNIVS., THE ASSOCIATION OF AMERICAN UNIVERSITIES: A CENTURY OF SERVICE TO HIGHER EDUCATION 1900–2000 (2010), available at http://www.aau.edu/about/history_centennial.aspx (follow “AAU Beginnings” hyperlink).
35. ZOOK & HAGGERTY, supra note 31, at 19–21.
36. Id. at 41–43.
37. The six regional accreditors have seven accrediting commissions: (1) the Commission of Institutions of Higher Education of the New England Association of Schools and Colleges; (2) the Middle States Commission on Higher Education of the Middle States Association of
accrediting program in 1909; the New England Association, by contrast, did not use the term accreditation until 1952, although it adopted membership standards in 1929.38

In addition to these regional accreditors, there now exist national faith-based accreditors; national private career accreditors, which mainly accredit for-profit institutions; and programmatic accreditors for special programs and professions such as the Liaison Committee on Medical Education (“LCME”), which accredits medical schools, and the American Bar Association (“ABA”), which accredits law schools.39

Over time and through much trial and error, American accreditation developed six distinctive characteristics that have been central to its success. Three are procedural: (1) accrediting bodies are nongovernmental; (2) accreditation is conducted primarily by volunteers; and (3) accreditation is repeated at regular intervals. The other three are conceptual: (4) the accreditation process relies on self-studies and peer evaluation; (5) the goal of accreditation is quality enhancement, not just assurance; and (6) the accreditation process takes into account the mission of the institution being accredited.40

Colleges and Schools; (3) the Southern Association of Colleges and Schools Commission on Colleges; (4) the Higher Learning Commission of the North Central Association of Colleges and Universities; (5) the Northwest Commission on Colleges and Universities; (6) the Northwest Commission on Colleges and Universities’ Accrediting Commission for Community and Junior Colleges; and (7) the Accrediting Commission for Senior Colleges and Universities of the Western Association of Colleges and Universities.

38. Jennings B. Sanders, Evolution of Accreditation, in ACCREDITATION IN HIGHER EDUCATION, supra note 13, at 9, 10–11.
40. Cf. Barbara Brittingham, Accreditation in the United States: How Did We Get to Where We Are?, New Directions for Higher Educ., Spring 2009, at 7, 10 (“[N]o other country has a system like ours; among quality assurance systems, the American system stands out in three dimensions:

1. Accreditation is a nongovernmental, self-regulatory, peer review system.

2. Nearly all of the work is done by volunteers.

3. Accreditation relies on the candor of institutions to assess themselves against a set of standards, viewed in the light of their mission, and identify their strengths and concerns, using the process itself for improvement.”).
a. Accrediting Bodies Are Nongovernmental

The private nature of accreditation has protected the autonomy of American institutions of higher education from government control at the same time that they have became the best in the world. It also has been an important factor in judicial recognition of the power of accreditors. In North Dakota v. North Central Ass’n of Colleges, the Seventh Circuit upheld the authority of a regional accreditor to withdraw the University of North Dakota’s accreditation even though the conditions that triggered the withdrawal were the result of state action.\(^{41}\) The court reasoned that, as private associations, accreditors are free to establish their own standards.\(^{42}\) The court also remarked on the importance of accreditation to both tenure and academic freedom because they are indispensable to academic quality:

The Association’s declared purpose is to encourage the improvement of higher education and to recognize merit in educational institutions by admitting them to membership in the Association, thereby accrediting institutions which meet the standards of the Association. An educational institution is accredited for membership upon the basis of the total pattern which it presents as an institution. Among the factors considered are competency of the faculty, the number of the faculty in ratio to the number of students, salary schedule, and faculty tenure. The consistent policy of the Association has been to condemn arbitrary interference by governing boards with freedom of teaching, and to oppose any policy that makes tenure precarious for competent instructors. In support of its policy respecting tenure the Association insists as a condition of membership that staff members of educational institutions shall not be summarily dismissed, and that, in general, no appointee shall be removed before the expiration of his term of service without a fair hearing.\(^{43}\)

b. Accreditation Is Conducted Primarily by Volunteers

Most members of accrediting teams and of the governing boards of accreditors are educators from peer institutions who volunteer their time.\(^{44}\) This reliance on academic volunteers is essential to achieving true peer review, and it also operates to contain costs.

\(^{41}\) 99 F.2d 697, 699–700 (7th Cir. 1938).
\(^{42}\) Id. at 700.
\(^{43}\) Id. at 698.
\(^{44}\) Judith S. Eaton, Accreditation in the United States, NEW DIRECTIONS FOR HIGHER EDUC., Spring 2009, at 79, 80 (“In 2006 and 2007, accrediting organizations employed some 740 paid full- and part-time staff and worked with more than eighteen thousand volunteers.”).
The “trust-based, standards-based, evidence-based, judgment-based, peer-based process” otherwise known as accreditation is repeated every few years, to encourage continued improvement.\textsuperscript{45} Most regional accreditors, for example, visit institutions of higher education on a ten-year cycle.

\textit{d. The Accreditation Process Is Based on Self-Studies and Peer Evaluation}

Accreditation throughout higher education is grounded in peer review. As explained by one of the regional accreditors, the Higher Learning Commission of the North Central Association of Colleges and Universities (the “Higher Learning Commission”):

Peer review in accreditation is based on the fundamental assumption that quality in higher education is best served through a process that enables peers of the organization, informed by standards best understood and applied by professionals in higher education, to make the comparative judgments essential to quality assurance. At every step in the accreditation processes, higher learning professionals contribute their time and expertise to render the judgments and establish the policies that embody the Commission’s primary purposes: organizational improvement and public certification of organizational quality.\textsuperscript{46}

Accreditors generally require an institution or program seeking accreditation to prepare a self-study that examines how well it meets the accrediting organization’s standards. Following the self-study, a team composed primarily of peer faculty and administrators conducts a multi-day visit to the school. The visiting team meets with faculty, administrators, and students; attends classes; and inspects the facilities. It then prepares a detailed report on the institution that the accrediting body uses to decide whether to accredit (or reaccredit) the institution, and whether to attach any conditions to its decision.\textsuperscript{47}

The Higher Learning Commission has emphasized the important role those who govern an accrediting organization play in peer review: “[p]eer review means bringing expert judgment based on experience and knowledge to the evaluation process—from setting standards, to conducting...”\textsuperscript{47}
the evaluation, to making final decisions.” For this reason, most members of accrediting commissions or boards that make final judgments on whether to grant accreditation are peer educators—although accreditors recognized by the Department of Education are required to also include some public members on their boards.

One of the many benefits of the accreditation process is that team members who inspect an institution learn as well as judge. Moreover, they carry these lessons back to their own institutions and on future accreditation visits. Accreditation thus contributes to academic quality not only by assessing particular institutions, but by spreading knowledge of best practices throughout higher education.

e. The Mission of Accreditation Is Quality Enhancement as Well as Assurance

There would be little reason for most established institutions of higher education to participate in accreditation if the only goal were assurance of minimum quality. From the beginning, however, regional accreditors focused on quality improvement, and not only on quality assessment. In the words of the Commission of Institutions of Higher Education of the New England Association: “[T]he Standards represent the accrued wisdom of over 200 colleges and universities and interested others about the essential elements of institutional quality . . . .” The Middle States Commission on Higher Education agrees: “The accrediting process is intended to strengthen and sustain the quality and integrity of higher education, making it worthy of public confidence . . . .” The Higher Learning Commission confirms that “accreditation has two fundamental purposes: quality assurance and institutional and program improvement.”

Improving quality in institutions of higher education is not an easy task. Merely assessing whether a particular institution meets a series of minimum standards on a checklist, for example, does not encourage institutions to accomplish more than the minimum; nor does it push even the best colleges and universities to ask, “Is this the best we can do?” Peer review is an

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48. THE HIGHER LEARNING COMM’N, supra note 46, at 1.3-1.
49. Eaton, supra note 44, at 82.
50. See infra note 95 and accompanying text.
54. THE HIGHER LEARNING COMM’N, supra note 46, at 1.1-1.
55. Robert Oden, A College President’s Defense of Accreditation, NEW DIRECTIONS FOR HIGHER EDUC., Spring 2009, at 37, 39.
essential component of American accreditation because it has proven itself over the decades as an effective method for enhancing academic quality.56

f. The Accreditation Process Takes into Account the Mission of the Institution Being Accredited

Higher education accreditors take into account the mission of the institution being evaluated. The Middle States Commission on Higher Education, for example, specifically directs that “[e]ach standard should be interpreted and applied in the context of the institution’s mission and situation.”57 For this reason, more research will be expected at a doctoral-granting institution than at a community college. The mission-centered nature of accreditation has supported institutional diversity in American higher education, which in turn has added to its quality.

B. CHALLENGES TO THE STRUCTURE, GOVERNANCE, AND MISSION OF ACCREDITATION

The most significant challenges to accreditation have come from the federal government. Federal action accompanied the massive increase in federal funds that began flowing to higher education after World War II—particularly federal funding of student financial aid.58 After reauthorizing the G.I. Bill in 1952 and extending it to cover Korean War veterans, Congress for the first time required publication of “a list of nationally recognized accrediting agencies and associations which [the Commission of Education] determines to be reliable authority as to the quality of training offered by an education institution.”59

In 1965, Congress decided that as a condition to their students receiving federal financial aid, colleges and universities needed to be accredited by an accrediting association recognized by the Secretary of Education.60 The power to recognize, of course, contains the power to

56. Brittingham, supra note 40, at 17–18 (“Accreditation as practiced in the United States focuses heavily on the future, on quality improvement, unlike systems built solely or predominantly to ensure the quality of current operation[s] . . . .”).

57. MIDDLE STATES COMM’N ON HIGHER EDUC., supra note 53, at viii; see also Patricia O’Brien, Editor’s Notes, NEW DIRECTIONS FOR HIGHER EDUC., Spring 2009, at 1, 1–2 (“U.S. accreditation is a process that is mission driven . . . . To be accredited, institutions must fulfill accreditation standards, but they do so in light of their mission.”).

58. By 2005, the federal government provided $61 billion in student loans, $18 billion in grants to students, and $8 billion in tax support for a total of more than $90 billion. F. King Alexander, The States’ Failure to Support Higher Education, CHRON. HIGHER EDUC., June 30, 2006, at B16.


control. One serious federal challenge to private accreditation occurred in 1992, when Congress required that each state establish a State Postsecondary Review Entity ("SPRE") to review institutions identified by the Secretary of Education as having problems of concern to the Department, such as high default rates on federal student loans.\textsuperscript{61} The states were thus enlisted to police federal funding of higher education—an idea that inaugurated a series of battles over federal control of higher education accreditation.

The intrusion on institutional autonomy created by the 1992 SPRE legislation was significantly reduced in 1995 when Congress passed legislation that rescinded funding for the SPREs.\textsuperscript{62} In 1998, Congress eliminated the SPRE requirement entirely.\textsuperscript{63} In 2006, however, the federal government intervened in higher education accreditation again when the Department of Education began to press accrediting associations to require educational institutions to assess student achievement.\textsuperscript{64}

In response, Congress in 2008 prohibited the Department of Education from regulating the manner in which accrediting agencies assess student achievement.\textsuperscript{65} It also reorganized the body that recommends which accreditors the Department should recognize—the National Advisory Committee on Institutional Quality and Integrity ("NACIQI"). Formerly, the Secretary of Education appointed all members of NACIQI. Now, one-third of its eighteen members are appointed by Congressional Democrats, one-third by Congressional Republicans, and only one-third by the Secretary.\textsuperscript{66}

The newly constituted NACIQI has held only a few meetings.\textsuperscript{67} It is too soon to know, therefore, whether the new committee will resist or continue the trend toward federalization of higher education accreditation, cognizant of the risks this trend poses to the institutional diversity and quality of American colleges and universities.\textsuperscript{68}

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\textsuperscript{62} See Areen, supra note 18, at 726.

\textsuperscript{63} Id.


\textsuperscript{67} National Advisory Committee on Institutional Quality and Integrity, U.S. DEP’T OF EDUC. (Apr. 26, 2011), http://www2.ed.gov/about/odscomm/list/naciqi.html.

II. LAW-SCHOOL ACCREDITATION

A. THE EARLY YEARS

From the beginning, law-school accreditation has operated under a different governance structure than accreditation in most of higher education. The six regional accreditors began as membership organizations made up of the colleges and universities in a particular geographic region. Accreditation by the regionals thus has always been, at its core, a form of peer review. As discussed above, peer educators play the lead role in setting regional accreditation standards, inspecting member schools, and deciding whether particular institutions will be accredited. In contrast, the legal profession has always taken the lead in accreditation of law schools.

The ABA, which was founded in 1878, established a Committee on Legal Education and Admissions to the Bar in 1879, although it did not begin full-blown accreditation for another forty years. The committee was not satisfied with the law schools of the day, finding their courses of study too short, their examinations too shallow, and that degrees were being “thrown away on the undeserving and the ignorant.” On the other hand, the ABA at least preferred law school education to reading law. In 1879, for example, the Chair of the Commission on Legal Education and Admissions to the Bar reported:

There is little if any dispute now as to the relative merits of education by means of law schools, and that to be got by mere practical training or apprenticeship as an attorney’s clerk. Without disparagement of mere practical advantages, the verdict of the best informed is in favor of the schools.

In 1892, the ABA passed a resolution recommending that all new lawyers should be required to have at least two years of legal education. This initial effort met with little success, however, even after the Association of American Law Schools (“AALS”), founded in 1900, joined in its

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recommendation.\textsuperscript{73} As late as 1917, no state required law-school attendance to join the bar.\textsuperscript{74}

Many have criticized early twentieth century efforts to raise standards in legal education because of the questionable motives of some bar leaders.\textsuperscript{75} Robert Stevens, for example, found the attacks of the time on night and part-time schools to be “a confusing mixture of public interest, economic opportunism, and ethnic prejudice.”\textsuperscript{76} Some academics were no less biased. Dean Swan of the Yale Law School argued against using college grades in admissions on the grounds that it would result in the admission of students of “foreign” rather than “old American” parentage, and lead to an “inferior student body ethically and socially.”\textsuperscript{77}

In the midst of this heated environment, the ABA’s Section on Legal Education and Admissions to the Bar (the “Section”) adopted its first accreditation standards for law schools in 1921.\textsuperscript{78} The full ABA adopted the standards one year later, and agreed that the Council of the Section on Legal Education and Admissions to the Bar (the “Council”) would publish the names of law schools that were in compliance with the standards.\textsuperscript{79} Thus, law-school accreditation was born.

For many years, bar and bench dominated the Council. In 1959, for example, the Council consisted of four officers and eight members, divided equally among practicing lawyers, members or former members of boards of bar examiners, and law-school administrators or faculty.\textsuperscript{80} The president and secretary of the AALS and the chairman of the National Conference of Bar Examiners sat with the Council, but did not vote.

Over the next several decades, however, the Council began to look more like the governing bodies of other higher education accreditors as the proportion of legal educators on the Council increased. In 1970, the Council consisted of nine lawyers or judges, and five legal educators. In 1982, there were ten lawyers or judges and eight educators on the Council, and the Section had formed an Accreditation Committee that had eight judges or lawyers and seven legal educators. By 1991, ten members of the Council were legal educators, while only eight were lawyers or judges. In

\textsuperscript{73} ASS’N OF AM. LAW SCHOOLS, 2009 HANDBOOK 1.
\textsuperscript{74} STEVENS, supra note 71, at 93, 99.
\textsuperscript{75} JEROld S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America 102–29 (1976).
\textsuperscript{76} STEVENS, supra note 71, at 101.
\textsuperscript{77} Id. (quoting John Henry Schlegel, American Legal Realism and Empirical Social Science: From the Yale Experience, 28 BUFF. L. REV. 459, 472 n.69 (1980)) (internal quotation marks omitted).
\textsuperscript{78} ABA STANDARDS & RULES preface, at iv.
\textsuperscript{79} Hervey, supra note 70, at 133.
\textsuperscript{80} Id. at 134.
addition, nine members of the Accreditation Committee were educators and only six were judges or lawyers.81

**B. THE DEPARTMENT OF JUSTICE ANTITRUST SUIT**

The movement toward peer governance in law-school accreditation stopped short in 1995 when the Department of Justice (“DOJ”) filed a civil antitrust suit against the ABA. The suit alleged that the ABA had allowed the law-school accreditation process to be used to restrain “competition among professional personnel at ABA-approved law schools by fixing their compensation levels and working conditions, and by limiting competition from non-ABA-approved schools.”82 The DOJ also alleged that academics with a direct interest in accreditation’s outcome had “captured” the process.83 The DOJ’s Competitive Impact Statement supported its capture allegation by noting that all members of the Standards Review Committee and a majority of the members of the Accreditation Committee were legal educators.84

The parties ultimately agreed to a final judgment that prohibited the ABA from collecting or disseminating salary information, and from adopting or enforcing standards that would prohibit law schools from enrolling graduates of non-ABA-accredited law schools in post-J.D. programs; recognizing transfer credits from such schools; or acting as for-profit institutions.85 The judgment also required that no more than fifty percent of the members of the Council, the Accreditation Committee, or the Standards Review Committee could be law school deans or faculty, and no more than forty percent of the Nominating Committee for officers of the Section.86

Although the provisions in the final judgment prohibiting ABA involvement with salary information were well-tailored to end illegal restraints on competition, the membership-limiting provisions reducing the participation of legal educators on the Council and its committees were not. Worse, the participation limitations placed legal accreditation out of step with most of higher education accreditation.

Of the six characteristics basic to higher education accreditation, law-school accreditation shares only the three procedural ones: (1) the ABA is nongovernmental; (2) legal accreditation is conducted primarily by

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81. E-mail from James P. White, Professor of Law, Ind. Univ. Sch. of Law & former Consultant on Legal Educ., to Judith C. Areen, Paul Regis Dean Professor of Law, Georgetown Univ. Law Sch. (Feb. 15, 2011) (on file with author).
83. Id.
84. Id. at 5.
86. Id. at 437.
volunteers; and (3) legal accreditation is repeated at regular intervals. Moreover, legal accreditation suffers from three conceptual deficiencies.

First, legal accreditation is not based on peer review because of the limited participation of legal educators on the Council and the committees on accreditation and standards, although it does require schools to prepare self-studies when they are evaluated.87 Only ten of the twenty-one voting members of the Council are legal educators.88 In addition, only nine of the nineteen voting members of the Accreditation Committee,89 and only seven of the fourteen voting members of the Standards Review Committee, are legal educators.90 By contrast, the governing bodies of all six regional accreditors are made up primarily of educators.91 Of the twenty-six current

87. ABA STANDARDS & RULES Standard 202, at 11.
88. Section of Legal Educ. & Admissions to the Bar, 2010-2011 Council, AM. BAR ASS’N, http://www.americanbar.org/groups/legal_education/about_us/leadership.html (last visited May 10, 2011). The Section’s bylaws provide that no more than fifty percent of the voting members of the Council may be persons whose primary professional employment is as a law school dean, faculty, or staff member. Section of Legal Educ. & Admissions to the Bar, Section Bylaws, AM. BAR ASS’N (Aug. 7, 2010), http://www.americanbar.org/groups/legal_education/about_us.html (follow “Section Bylaws” hyperlink) [hereinafter “Section Bylaws”] (art. IV, § 3).
89. Section of Legal Educ. & Admissions to the Bar, 2010-2011 Accreditation Committee, AM. BAR ASS’N, http://apps.americanbar.org/legaled/committees/comaccredit.html (last visited May 10, 2011). The Section’s bylaws provide that no more than fifty percent of the voting members of the Accreditation Committee may be legal academics. Section Bylaws, supra note 88 (art. 10, § 1(a)). The Accreditation Committee also has full authority to decide whether to reaccredit law schools. ABA STANDARDS AND RULES R. 5, at 72. Because there are many more law schools seeking reaccreditation than accreditation, the result is that most of the accreditation work of the ABA is performed by the Accreditation Committee.
members of the Middle States Commission on Higher Education, for example, all are educators apart from four public members.\textsuperscript{92} Moreover, peer governance is not limited to the regional accreditors. Of the fourteen American LCME members, all are medical educators except for two public members.\textsuperscript{93} Similarly, the Association to Advance Collegiate Schools of Business, the primary accreditor of business schools, has eight business educators and one public member on its governing board.\textsuperscript{94}

The ABA–DOJ final judgment created a second governance problem. In 1992, Congress amended the Higher Education Act to require that any accrediting association recognized by the Department of Education be “separate and independent” from an affiliated trade association.\textsuperscript{95} Yet, a provision of the final judgment expanded the oversight role of the ABA’s


The Association of American Medical Colleges (AAMC) and the Council on Medical Education of the American Medical Association ("AMA") each appoint six professional members [to the LCME]. The AAMC and the AMA each appoint one student member. The LCME itself appoints two public members, and a member is appointed to represent the [Committee on Accreditation of Canadian Medical Schools].

Overview: Accreditation and the LCME, LIASON COMM. ON MED. EDUC., http://www.lcme.org/overview.htm (last visited May 10, 2011). The LCME rules of procedure require that all professional members of the governing board “should currently hold, or have recently held, a faculty or administrative appointment at an accredited . . . medical school or teaching hospital, or hold other credentials indicated substantial understanding about the process of undergraduate medical education. LIASON COMM. ON MED. EDUC., RULES OF PROCEDURE 4 (2010), available at http://www.lcme.org/rulesjuly2010.pdf.


\textsuperscript{95} See 20 U.S.C. § 1092(b)(a)(3), (b) (1998); 34 C.F.R. § 602.14(a), (b) (2010). The Act was also amended to provide that one-seventh of an accrediting agency’s decisionmaking body must be members of the general public, and not members of the trade association. 20 U.S.C. § 1092(b)(a)(3), (b) (1998); 34 C.F.R. § 602.14(b)(a) (2010).
House of Delegates by giving it final decision-making authority over most accreditation matters.96

When the ABA applied for re-recognition in 1997, the Department of Education determined that this provision expanding the role of the House of Delegates violated the “separate and independent” requirement of the law, and notified the ABA that if it wished to continue to be the recognized accreditor for legal education, it would have to establish the Council’s final decisionmaking authority on accreditation matters, including setting policies, interpretations, and standards for the process.97 The ABA agreed to change its governance procedures and has done so.98 In 2000, the DOJ agreed to the changes in governance,99 and the final judgment was modified accordingly.100

A second conceptual difference between legal accreditation and the rest of higher education accreditation is the absence of commitment to enhancing, as well as assessing, quality. Although the Preface to the ABA Standards of Accreditation states that the Standards were promulgated to improve “the competence of those entering the legal profession,” the Council has apparently concluded that improving the quality of legal education will not improve the competence of new lawyers.101 The Preamble describes the ABA Standards as merely “minimum requirements” designed to provide only a “sound program of legal education.”102 In contrast to the approach taken by all of the regional and most of the professional accreditors, the Section of Legal Education and Accreditation leaves quality


98. Until February 2011, the Section’s Rules of Procedure provided that a school could appeal the Council’s decisions to deny provisional or full approval to the House of Delegates. The House of Delegates could then review the Council’s decision and remand it for reconsideration. Moreover, accreditation decisions could be remanded twice. After the Council reconsidered its decision following a second remand, however, the Council’s decision became final. See ABA STANDARDS & RULES R. 10, at 75. In 2011, the Section amended its rules to remove the House of Delegates entirely from the appeal process. Now, appeals go to a three-person Appeals Panel appointed by the Chair of the Section. Only one member of the Panel may be a legal academic. Changes to the Standards adopted by the Council are also subject to review by the House of Delegates and referral back to the Council. After two such referrals, the Council’s decision becomes final. Id.

99. United States’ Response to Public Comments About Proposed Modification of Final Judgment at 1, Am. Bar Ass’n, 934 F. Supp. 435 (No. 95-1211(RCL)).


101. ABA STANDARDS & RULES preface, at iv.

102. Id. preface, at viii.
improvement entirely to the law schools, and then only in the form of an advisory statement encouraging schools to “continuously seek to exceed these minimum requirements.” Even that encouragement was undercut in 2010 when the Council eliminated Standard 104, which had provided that “an approved law school should seek to exceed the minimum requirements of the Standards.”

The third conceptual difference between legal accreditation and accreditation elsewhere in higher education is that only some ABA standards take into account the mission of the school being accredited. This undoubtedly explains the lack of variation among law schools. By contrast, the regionals accredit all types of institutions, from two-year community colleges to major research universities, and American higher education is praised for its institutional diversity.

C. RECONCEPTUALIZING LAW-SCHOOL ACCREDITATION

In the 1915 Declaration of Principles, the Seligman Committee concluded that institutions that do not accept the principles of freedom of inquiry, opinion, and teaching should not be permitted to “sail under false colors.” In the committee’s words, “[A]ny university which lays restrictions upon the intellectual freedom of its professors ... should be so described whenever it makes a general appeal for funds ... and the public should be advised that the institution has no claim whatever to general support or regard.” Now that this Paper has examined the characteristics of accreditation in higher education, it seems appropriate to ask whether the ABA’s process of approval for law schools can appropriately be called “accreditation,” or whether it is something else entirely.

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103. Id.
105. Only three standards even mention the mission of schools being accredited. ABA STANDARDS & RULES Standard 201(a), at 11 (“The present and anticipated financial resources of a law school shall be adequate to ... accomplish its mission”); id. Standard 202, at 11 (“Before each site evaluation visit, the dean and faculty of a law school shall develop a written self-study, which shall include a mission statement.”); id. Standard 401, at 29 (“A law school shall have a faculty whose qualifications and experiences are appropriate to the states mission of the law school . . . .”). Two interpretations also mention mission. Id. Standard 402 interpretation 402-2(3), at 31 (stating that in assessing the student-faculty ratio “the examination will take into account ... the ability of the law school to carry out its announced mission.”); id. Standard 605 interpretation 605-1, at 43 (describing that appropriate service from a library includes “creating other services to further the law school’s mission”).
108. Id. at 147.
There are many good things in the ABA’s process. In my years of service on the Council, I found that the Section’s staff and volunteers were all dedicated to doing their job well, and I was honored to work with them. I have no doubt that many site-visit teams have provided useful peer advice to the schools they have visited, and, in turn, the members of those teams have learned a great deal about legal education and have carried this with them to other law schools. At the same time, structural weaknesses in the ABA process have, at times, worked to block good intentions. Because the ABA–DOJ final order expired in 2006, now is a very good time to reconceptualize the ABA process.

To begin, it seems prudent for the Council to continue to bar the collection or dissemination of salary information and to prohibit standards that establish anticompetitive barriers like those involving transfer credits or recognition of for-profit law schools. Accreditation should not be used to restrain competition. To the contrary, accreditation can both increase the quality of education and the diversity of institutions when properly administered.

There is good reason, however, for the Council to stop arbitrarily restricting the role of legal educators in accreditation. Bringing more law faculty and administrators onto the Council and its committees would end the anomalous governance structure which places the accreditation of law school in the hands of a small group made up primarily of individuals with little or no experience as legal educators. The change would also enable the ABA to restore peer review to the accreditation process, and, as a result, to focus on quality improvement as well as assessment.

Of course, changes in participation alone will not necessarily lead to an accreditation process that is more responsive to differences in institutional missions. Some legal educators favor more intrusive regulatory approaches, and some lawyers and judges do not. But it would be a step in the right direction.

Changing the membership of the Council and its committees also would not restrict other ways in which the bench might impose controls on the content of legal education. In the 1970s, for example, the State of Indiana set forth detailed course requirements for any applicant who wanted to sit for the state bar exam, and the Second Circuit and Maryland State Bar Association have considered comparable requirements. State-imposed restrictions, however, are at least limited by competitive pressures.

109. One college president estimated that "half of the ideas I have attempted to insert into the colleges I have run are ideas I have learned while visiting other colleges as a member of an evaluation team." Oden, supra note 55, at 43.


More than three decades ago, the late David Vernon responded to efforts then being made by bar and bench to require more practical courses in law schools. His analysis is still pertinent:

The experiences the bench and bar bring to bear on legal education are important, but they tend to concentrate on the “now” and to disregard the fact that those enrolled in law schools now will be practicing law for thirty or more years. The reverse well may be true of many law faculty members, i.e., they tend to disregard the problems of the graduate representing clients within days or weeks of graduation and to concentrate on helping students gain sufficient background for a lifetime career. Obviously, it is necessary to strike a balance. . . . I urge that we are closer to striking a reasonable balance now than we have been for generations. We [in legal education] should be permitted to continue that process in cooperation with bench and bar rather than at the direction of the bench and bar. I want to make it clear, however, that I believe—and strongly—that if legal education is to err, it should err on the side of analysis and theory and preparation for the long term rather than on preparation for the first day, week, month or year of practice.\footnote{112}

Significantly, while the Section’s current bylaws restrict the proportion of educators on the Council and on the Accreditation Committee,\footnote{113} they do not restrict their membership on the Standards Review Committee.\footnote{114} This suggests that the Council understands that it has the authority to eliminate the remaining restrictions on participation of legal educators in the accreditation process since expiration of the final order; it has simply chosen not to do so.

III. CONCLUSION

Higher education remains one of the most successful sectors in the nation at a time when much of the economy is struggling. Its quality has been buoyed by a long tradition of investment, both public and private, and by a healthy degree of autonomy from governmental control. America’s three governance innovations—citizen governing boards, shared governance, and accreditation—have encouraged both quality and institutional autonomy in higher education.

Accreditation has made particularly important contributions to the diversity and vitality of American colleges and universities. Most nations have a ministry of education that oversees institutions of higher education. But

\footnote{112}{Id. at 21–22.}
\footnote{113}{See supra notes 88–89.}
\footnote{114}{Section Bylaws, supra note 88 (art. X, § 1(b)).}
such centralized control too often stifles innovation and quality. By contrast, the United States has long relied on private accreditors that use periodic peer assessments to support continuous quality improvement.

At the moment, law-school accreditation is out of step with accreditation in most of higher education because of arbitrary limits placed on the participation of legal educators by the Council of the ABA Section on Legal Education and Admissions to the Bar. It is time for legal education to embrace a system of accreditation that is grounded on peer assessment, dedicated to improving—and not just assessing—the quality of legal education, and guided by the same peer governance structure that has worked so well in the rest of American higher education.