The Destruction of the Holistic Approach to Admissions: The Pernicions Effects of Rankings†

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* Dean and William S. Pattee Professor of Law, University of Minnesota Law School. Perhaps more importantly I would like to note that from 1989 until 2004 I was a volunteer for the Law School Admission Council (LSAC), the non-profit entity that produces the LSAT and that is "owned" by the American Bar Association (ABA) accredited law schools, and fifteen Canadian law schools that are also voting members of the LSAC. Over that fifteen-year period I rose from a member of the Minority Affairs Committee (a standing committee devoted to increasing the percentage of students of color in law school) to chair the Minority Affairs Committee and the Test, Development and Research standing committee (the Committee within the LSAC eharged with monitoring and assessing the efficaey of the LSAT), ultimately becoming Chair of the Board of Trustees (2001–03), the highest position a volunteer can attain within the LSAC administrative structure. During my odyssey with the LSAC I learned much about the LSAT test, its use in admissions, and its impact on matriculants of color to law school. I have called upon much of that knowledge in writing this Article. I also want to thank Peter Pashley, the Principal Research Scientist and Director of Testing and Research at the LSAC, Joan Van Tol, Corporate Counsel and Associate Executive Director for Couneil Governance, and lastly, Phillip Shelton, the President and Executive Director of the LSAC, each of whoin read earlier drafts of this Article and corrected the numerous errors and misstatements that I made when addressing psychometric and other issues beyond my level of expertise. This Article is immeasurably better as a result of their close read of the drafts, although any remaining errors are a result of my inability to accept their wise counsel and suggestions.

INTRODUCTION

Recently, to the relief of many (but not all) in legal academe,[1] the United States Supreme Court ruled in favor of diversity by allowing affirmative action to continue in higher education, including law school admissions,[2] by affirming, with some modification, its earlier opinion in *Regents of University of California v. Bakke*.[3] Although scores of articles, books, and editorials will be written regarding the wisdom of *Grutter v. Bollinger*[4] and *Gratz v. Bollinger*,[5] the pair of cases that establishes the continued use of affirmative action in legal education for at least the next twenty-five years,[6] this Article is premised on the assumption that *Grutter* and *Gratz* were correctly decided and will remain the law of the land for at least the next quarter of a century. More importantly, this essay also posits and assumes that the assertion embraced by the majority in *Grutter*, that achieving racial and ethnic diversity in the student body of a law school is a laudable and productive end which all law schools and institutions of higher education should seek to achieve.

Hence, this Article is not about the merits or demerits of the Supreme Court's opinions in these two landmark cases. Quite the contrary, this Article is written from the perspective that achieving a diverse student body is a positive goal and one that can and should be accomplished through the use of affirmative action.[7] To be more precise, I assert that a diverse student body can only be achieved by taking into account the race or ethnicity of the applicant as a "soft variable" from which positive evaluations can ensue if the applicant is a member of an underrepresented group. Thus, I reject a race-blind admissions process in favor of a process in which the race of the applicant for admissions is self-identified[8] and those evaluating these candidates for admission can

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1. Indeed, two members of my faculty signed an amicus brief opposing the use of affirmative action and urging the Supreme Court to overturn its opinion in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). Brief of Amici Curiae Law Professors Larry Alexander, Robert A. Anthony, et al. as Amici Curiae Supporting Petitioner, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 164181.

2. Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

3. 438 U.S. at 265.

4. 539 U.S. at 306.

5. 539 U.S. at 244.

6. *Grutter*, 539 U.S. at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."); *See infra* note 62 and accompanying text.

7. Indeed, the case can be made that the only way to achieve an ethnically diverse student body is through the use of affirmative action. *See, e.g.*, Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1 (1997). For a more complete discussion of this point, see *infra* notes 88–96 and accompanying text.

8. Race is a social construct as opposed to a scientific classification and is determined in large part by the person or entity asked to make the racial determination. *See infra* notes 103–109 and accompanying text. Surprising though it may seem, in the case of applicants to law schools, it is the applicant who makes the decision as to which racial category he or she belongs. Further, since the information regarding racial classification is voluntary and typically not subject to verification, the applicant's self-determination of his or her racial classification is dispositive on this issue. For further discussion of the fluidity of racial identification and its self-

take race into account as a positive non-quantifiable factor in the admissions process in making the decision to admit or deny. With that as my explicit context, this Article then examines the impact of rankings—in particular the infamous annual *America's Best Graduate Schools*, published by *U.S. News & World Report* ("*U.S. News*"), which ranks American Bar Association (ABA)-accredited law schools—on that process and the goal of achieving diversity of law schools. To be blunt, I conclude that the use of the *U.S. News* rankings, which relies heavily on objective actuarial data—including the school's median Law School Admission Test (LSAT) score[9]—to form a subjective judgment of school quality, is inimical to the stated goal of achieving diversity in law schools and must be eliminated if we are to achieve diversity in our law schools.

To be more precise, I contend that the Supreme Court's decision in *Grutter*[10] requires that law schools use an "holistic" approach in evaluating candidates for admission. That holistic approach entails evaluating the "whole person" to determine if the candidate is to be admitted to the law school. As part of that whole-person evaluation process, the race of the applicant can and should be taken into account, along with other factors including the applicant's LSAT score and the applicant's undergraduate grade point average (UGPA). As discussed in detail below,[11] members of underrepresented groups—African Americans, Hispanics, Native Americans, and Puerto Ricans—score below that of similarly situated white and Asian-American test-takers.[12] The reasons for this "score-scale differential" are beyond the ken of the author and the subject of this Article. Nevertheless, the score-scale differential produces minority test-takers who score lower than similarly situated whites.[13] That, unfortunately, is fact, not supposition.

As is well known, the *U.S. News* ranking uses the median LSAT score of the law school in forming the subjective evaluation of the quality of the law school; the higher the median LSAT, the higher the quality and the ranking of the school.[14] The continuing correlation between the median LSAT and the ranking of the respective law schools has been apparent for several years. This fact, coupled with the realization that there are very few variables over which the law school has some input or control,[15] puts

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referential aspect, see Alex M. Johnson, Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887 (1996).

9. *See infra* note 15.

10. *Grutter*, 539 U.S. 306.

11. *See infra* note 73–143 and accompanying text.

12. For an in-depth discussion of this "score-scale differential," see *supra* note 73–143 and accompanying text.

13. "Similarly situated" in this context means that, controlling for socio-economic status, these candidates score one standard deviation below that of whites. *See infra* notes 88–96 and accompanying text.

14. In recent years, there has been a strong correlation between the law school's median and its place in the *U.S. News* ranking. Over the last three years, there is no law school with a higher ranking than another law school with a lower median LSAT in the ranking of the top 50 law schools. Although this is one of the objective indices used to evaluate and form subjective judgments about these schools, it is quite shocking to see that none of these other so-called variables are apparently important enough or weighted heavily enough to cause a school which is superior in all other respects to be ranked higher than a law school with a higher median LSAT.

15. The *U.S. News* ranking at last count uses twelve factors to make its annual evaluation of law schools. Two of these are subjective: the ratings by academics and the ratings by lawyers

tremendous pressure on law schools to improve their median LSAT score in order to improve their relative rank. In other words, of the objective and subjective variables that are used to evaluate the law schools there are very few that a dean can control with some degree of certitude. The one variable that can be reliably improved (but not without cost) is the median LSAT. Given the near-perfect correlation between the median LSAT score and the school's ranking, a school may raise its median LSAT score and presumably ranking by rejecting students with lower LSAT scores.

Some strategies to improve one's median LSAT score are rather obvious: admit only students with higher LSAT scores. This is easier said than done when all highly selective law schools are chasing the same high-scoring students. The result is often, if not inevitably, that only a certain number of these high-scoring students can be recruited to matriculate at the law school in question. At some point, the matriculation of lower-scoring students will result in a drop in the median LSAT—a drop that will not be countenanced by these schools. As a result, these schools enroll a smaller number of first-year matriculants than other schools in order to maintain their lofty median LSAT score. The cost is fewer dollars generated by smaller tuition revenue produced by a smaller 1L class; the solution is raiding other law schools in the area for transfer students who are subsequently enrolled as 2L students whose LSAT scores are not reported to the *U.S. News* Ranking and therefore have no detrimental impact on the lofty median LSAT.[16]

Another strategy employed by schools in metropolitan areas is to recruit students who do not have LSAT scores and therefore cannot be factored into the computation of the median LSAT score. This would, at first glance, appear to be an impossible strategy given that the ABA Section of Legal Education, the accrediting body for law schools,[17] requires all applicants to take a standardized test that has some predictive

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and judges. The other ten factors are based on objective actuarial data. *See* STEPHEN P. KLEIN & LAURA HAMILTON, THE VALIDITY OF THE U.S. NEWS AND WORLD REPORT RANKING OF ABA LAW SCHOOLS (1998), http://www.aals.org/validity.html.

16. Alex Wellen, *The $8.78 Million Maneuver*, N.Y. TIMES, July 31, 2005, § 4A, at 18.

17. The foreword to the ABA Section of Legal Education's Standards states:

> Since 1952 the Council of the Section of Legal Education and Admissions to the Bar has been approved by the U.S. Department of Education as the recognized national agency for the accreditation of professional schools of law. It is the Council and not the [American Bar] Association which is so recognized.

SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, AM. BAR ASS'N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2004–2005, at 4 (2004). ABA approval is important because once a law school is approved, its graduates can take any state bar examination:

> The majority of the highest courts of the states rely upon the Association approval of a law school to determine whether their legal education requirement for admission to the bar is satisfied. Obviously, whether a jurisdiction requires education at an ABA approved law school is a decision made by a jurisdiction's bar admission authority and not by the Council nor by the ABA.
>
> The American Bar Association believes that every candidate for admission to the bar should have graduated from a law school approved by the ABA, that graduation from a law school alone should not confer the right of admission to the bar, and that every candidate for admission should be examined by public authority to determine fitness for admission.

Id.

validity or correlation to performance in the first year of law school.[18] The solution to the quandary is the recent explosion of LL.M. programs at our leading law schools pursuant to which foreign lawyers and law students are admitted. Little if any scholarship or financial aid is provided and, more importantly, no LSAT score is required for these largely unregulated programs.[19] As a result, some of our more prestigious law schools have larger LL.M. classes than first-year classes.

The last "cost" of the *U.S. News* ranking, with its focus on the median LSAT score, is less obvious, but more pernicious: it is the impact that rankings have on applicants from underrepresented groups. If these students, for whatever reason, score approximately one standard deviation[20] below other applicants it stands to reason that they will not be admitted to law schools at the same rate as whites due to their lower scores. Now, that may be an acceptable outcome if the score difference is the sole or predominant metric in evaluating or predicting performance of applicants for admission. However, no high-stakes standardized test, like the LSAT,[21] is that accurate. Further, since the LSAT exhibits only a modest correlation with first-year law school grades (on average about .4) small differences in LSAT scores should not be treated differently by evaluators.[22] In other words, small differences in LSAT scores are largely irrelevant to the evaluation of the applicant's ability to perform in law school.

Yet the *U.S. News* ranking uses that median score in evaluating law schools in a way that exacerbates the very small differences between the median scores of schools. For example, a school with a median score of 160 is inevitably ranked higher than a school with a median score of 159. Further, a school with a median of 159 is ranked higher than a school with a median of 158 and so forth. To obtain and maintain that median score of 160, a school with 150 matriculants has to admit enough students with an LSAT score above 160 to guarantee actual enrollment of seventy-five students with

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18. See ABA Standard 503, which states: "A law school shall require each applicant to take a valid and reliable admissions test to assist the school in assessing the applicant's capability of satisfactorily completing the school's educational program."
SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, *supra* note 17, at 40.

19. ABA Standard 308, which governs the establishment of advanced legal degree programs, includes no LSAT requirement.

> A law school may not establish a degree program other than its J.D. degree program without obtaining the Council's prior acquiescence. A law school may not establish a degree program in addition to its J.D. degree program unless the school is fully approved. The additional degree may not detract from a law school's ability to maintain a J.D. degree program that meets the requirements of the Standards.

SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, *supra* note 17, at 32.

20. One standard deviation on today's test equals roughly ten points. An LSAT score of 153 is the median for white applicants and an LSAT score of 143 is the median score for African-American applicants. *See infra* note 89.

21. Similar high-stakes tests include the Graduate Record Examination (GRE), the Graduate Management Admission Test (GMAT), and the Medical College Aptitude Test (MCAT).

22. *See* LINDA F. WIGHTMAN, LAW SCHOOL ADMISSION COUNCIL, BEYOND FYA: ANALYSIS OF THE UTILITY OF LSAT SCORES AND UGPA FOR PREDICTING ACADEMIC SUCCESS IN LAW SCHOOL 16 tbl.4 (2000), *available at* http://www.lsacnet.org/research/Utility-of-LSAT-Scores-and_UGPA-for-Predicting-Academic-Sucess-in-Law-School.pdf.

scores above 160; this ratio of admitted students to enrolled students is the yield. Students who score 159 or below may not be admitted because of their impact on the median score even though a student who scores 160 (and is admitted) is largely indistinguishable in terms of his or her ability level from the student who scores 159 (and is rejected solely or predominantly because the score is below the desired median score).

Thus, the *U.S. News* ranking forces law schools to increase their median LSAT score in order to raise their rank, disproportionately affecting those who score lower on the test. If those underrepresented in law schools (students of color) score lower as a whole than their similarly situated white peers, these students will be disproportionately negatively impacted by the emphasis on the median LSAT score in the *U.S. News* ranking and, as a result, will be admitted—all other things being equal—less frequently than students with higher scores. The focus on LSAT scores is problematic because the Supreme Court has endorsed affirmative action and a concomitant holistic approach to admissions which incorporates the race of the applicant as a positive or neutral variable.

Thus, in announcing the law of the land the Supreme Court said that it is legal to use race in our admissions process to achieve a positive societal goal. We, as gatekeepers to our profession, may *choose* not to use race in that process—to reject the holistic approach trumpeted by the Supreme Court—because of its impact on our rankings (hence, the title of this Article, *The Destruction of the Holistic Approach to Admissions: The Pernicious Effect of Rankings*). Given the import of the rankings and the pressure that we as deans feel to maintain if not improve our rankings, we may have won the battle (i.e., the ability to engage in affirmative action), but have lost the war (the actual use of the holistic approach in admissions to achieve diversity), given the impact the use of the holistic approach (lower median LSAT score) will have on our school's rank in the *U.S. News* ranking.

Consequently, I advocate that, consistent with the Supreme Court's opinion in *Grutter*, we embrace the holistic approach to admissions in which the race of the applicant and other variables, not quantified or evaluated by the *U.S. News* ranking, are taken into account. I do so as a realist recognizing that deans will not embrace such an approach if it will have a detrimental impact on the ranking of their school. Thus, I make two proposals, each of which is consistent with my call for the use of an holistic approach, but each of which solves the dilemma of the rankings. The first is that we as deans join together to eliminate this one variable as an objective variable in the rankings. This can be accomplished in one of two ways that I detail below. The second proposal, which at first glance seems counterintuitive, is that we continue to use the LSAT score in our admissions process, but we do so in ways that are consistent with the explanatory power of the test and the Supreme Court's embrace of the holistic approach to admissions. In other words, I explicitly reject the elimination of the LSAT in admissions as a solution to this problem.[23]

To accomplish my goal, I have divided the remainder of this Article into three parts. In Part I, I briefly review and analyze three apparently disparate and unrelated factors,

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23. Quite the contrary, I contend in Part II of the Article that the elimination of the LSAT test in the admissions process will be inimical to the interest of applicants from underrepresented groups (i.e., students of color). *See infra* note 25 for further discussion.

which coalesce to produce the issue that is the subject of this Article. Consequently, I first summarize *Grutter* and establish the fact that the Court has embraced the holistic approach in admissions that I have advocated. I also briefly summarize the history and use of the LSAT and the score-scale differential that produces a lower score for similarly situated members of some underrepresented groups. In the last section of Part I, I explain the methodology employed by the *U.S. News* ranking and demonstrate the weight given to the median LSAT score of a school and its concomitant impact on the admissions process.

In Part II of this Article, I take the three disparate and discrete factors—affirmative action, the LSAT and its use in the admissions process, and the production of the rankings—to demonstrate the pernicious effect the rankings have on the holistic approach employed in most law school admissions programs. The aggregation of individual matriculants' LSAT scores for the *U.S. News* ranking destroys the holistic approach to admissions, because it causes admissions decisions to be made with the median LSAT score in mind rather than considering the inherent value of the individual score and its usefulness in evaluating each applicant.[24]

I also reject the easy argument presented by many when this issue is addressed, that is, that the LSAT is discriminatory and is harmful to members of underrepresented groups and should therefore be jettisoned from the admissions process. Not only is such a claim factually inaccurate, the elimination of the LSAT could detrimentally affect the ultimate goal of increasing the number of students of color[25] in law schools.[26]

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24. I owe this insight, which neatly captures the problem discussed herein, to my colleague Professor Susan Wolf and the participants at the University of Minnesota Squaretable Luncheon Workshop series.

25. Students of color in this context include: African Americans, Hispanics (including Latinos, Chicanos, and Puerto Ricans), Asian Americans (including Pacific Islanders), and Native Americans (including Alcuts, etc.). I also use the term African American to refer to people I would prefer to call "black" because that appears to be the term of art in the admissions and other literature to which I am referring throughout this Article. If you are interested in my take on this issue, that is, African American versus black, see Johnson, *supra* note 8, at 888–89, n.6. The term "student of color" is used interchangeably with the term minority (although some object to this latter nomenclature as belittling the group and assigning dominance to the whites who are labeled the "majority"). Also used interchangeably with "students of color" and "minority" is the term "member(s) of underrepresented groups," which is the term used by the Supreme Court in *Grutter* to describe the beneficiaries of affirmative action. Grutter v. Bollinger, 539 U.S. 306 (2003). I have a slight quibble with the term underrepresented group and its inclusion of Asian Americans since I believe a powerful case can be made that they are no longer underrepresented in law schools given that the percentage of Asian Americans currently attending law school is about triple their percentage of U.S. population. Asian Americans comprise only 3.6% of the U.S. population. *See* U.S. CENSUS BUREAU, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS 2000, 1 tbl.DP-1 (2001), *available at* http://www.census.gov/prod/cen2000/dp1/2kh00.pdf. But their percentage in law school is approaching 10%. Asian/Pacific Islander applicants to law schools have increased from 7.1% to 8.4% from 1999–2000 to 2004–05 while African-American applicants have decreased from 11.4% to 10.6% during the same time period. Law School Admission Council, Volume Summary by Ethnic and Gender Group, http://www.lsacnet.org/data/volume-summary-ethnic-gender.htm (last visited Oct. 26, 2005) [hereinafter LSAC Volume Summary]. *See also infra* note 168.

Instead, I embrace the view that the appropriate use of the LSAT is consistent with the Supreme Court's opinion in *Grutter*. Finally, in Part II I also detail the appropriate use of the LSAT in admissions and how that appropriate use increases diversity in law schools.

In Part III of this Article, I directly confront the issue of why the rankings have an inimical effect on the appropriate use of the LSAT in law school admissions. In order to accomplish this task, however, I first detail how to use the LSAT appropriately in an admissions process that embraces an evaluation of the whole person. Next, I confront the factors that make it impossible for a dean to seriously affect any metric used in the *U.S. News* ranking besides the median LSAT score. These factors, that ultimately do result in the destruction of the holistic approach to the rankings, are: (1) the affirmative action needed to counterbalance the lower scores obtained on average by students of color; (2) the misuse and overreliance on the LSAT score in the admissions process; (3) the *U.S. News* ranking; and (4) the perception by deans that the median LSAT score is the only variable they can realistically "control" in the process.

Lastly, in Part III I briefly present my proposed solution to this problem that, consistent with my earlier thesis, appropriately uses the LSAT in the admissions process. I make my (some would call radical) proposals recognizing three factors. First, deans will never reach voluntary agreement to ignore or minimize the rankings.[27] Second, I recognize and have experienced as a dean the frustration created by the existing use of the median LSAT score in the *U.S. News* ranking that causes the

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26. In Part I of this Article, I demonstrate that the LSAT was designed as a tool of inclusion, not exclusion, and it has served that function admirably during its fifty-plus years in existence. Although this is an hypothesis and cannot be verified at this time, I have made the contention that the elimination of the LSAT from the admissions process will result in less African Americans and students of color because there will be one less objective index to review to satisfy admissions officers and committees that a student from a relatively unknown school with what is perceived as a less-than-optimal major will be able to excel in or complete a juris doctorate program. In other words, I predict that admissions officers and committees are "risk averse" when it comes to admitting students with lesser or unknown credentials and that these students are disproportionately minorities and, hence, will not be admitted to law schools at the same rate that they are today with the LSAT. Stated positively, and based on my many years of experience with the LSAC, *see supra* note * (Author's Note), and on admissions committees, the LSAT, more often than not, helps minority candidates because it proves or demonstrates to the evaluator or evaluative group that the student can and will do the work and complete the program. The absence of that metric will return us to an era in which subjectivity reigned in the admissions process and admissions committees acted in a risk-averse fashion by selecting those students from known entities whose reputations were and are well established, such as Ivy League colleges.

27. Aside and apart from the issues raised by their "prisoner's dilemma," *see infra* note 174–77 and accompanying text, there is not unanimity within the academy among the deans regarding the value of the rankings. Although most deans do believe the rankings may have a "pernicious" effect on the way they operate, not all deans believe the rankings are harmful. As to voluntary agreements amongst the deans who do believe that the rankings are harmful, this has been tried previously without success. Many deans who said they would not participate in supplying *U.S. News* with data not supplied to the ABA Section on Legal Education, found themselves in the minority and at a disadvantage in the ranking because of the way that *U.S. News* attributed numbers to schools that failed to supply data, and because other deans did not keep their promises and instead supplied data to *U.S. News*. This made compliant deans look better than non-compliant deans.

inappropriate use of the LSAT in admissions decisions. Schools value the LSAT score above all else, therefore, the score alone becomes the predominant factor in the admissions process, detrimentally impacting the admission of members of underrepresented groups. Third and finally, whatever the fate of the LSAT in the admissions process and, just as importantly, in the *U.S. News* ranking, *U.S. News* will continue to publish an annual ranking of graduate and professional schools that includes a ranking of law schools.[28]

With those three assumptions as given, I propose two alternatives, which reconcile the appropriate use of the LSAT score and the continued existence of the *U.S. News* ranking. First, one way to eliminate the use of schools' median LSAT scores from the *U.S. News* ranking is to undermine the accuracy of the data that *U.S. News* uses to compile its ranking.[29] As matters currently stand, *U.S. News* is able to verify the median LSAT data produced by the law schools because that information can be found in data accumulated by tbe ABA Section on Legal Education. If the ABA Section on Legal Education does not make that data publicly available, I predict that the *U.S. News* ranking will no longer use it in their calculus, thereby removing the pressure on deans to increase the median LSAT score in an effort to improve rankings.

My second proposed strategy to produce the appropriate use of the LSAT in the admissions process is radical and complicated. Given the Law School Admission Council's (LSAC) current technology and access to the data of past applicants, 1

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28. *See* Wellen, *supra* note 16.

> Playing with the numbers is part of academia: with a high ranking, a college stands to gain more prestige, competitive students, gifted faculty and alumni donations. But the problem is magnified in legal education, partly because U.S. News faces no significant competition. Unlike M.B.A. applicants, who can choose from a range of commercial ranking systems with varying emphasis and methodologies, U.S. News has maintained a virtual monopoly in the law school realm since it started its annual ranking 16 years ago. In the prelaw community, U.S. News rankings are gospel, so law school deans find themselves under tremendous pressure to adopt policies to improve their standings.

Id.

29. Although at first glance this seems counterfactual, if *U.S. News* cannot verify the accuracy of the data it is reporting, its rankings become meaningless. In other words, if every school reported a median LSAT of 180—which, is impossible—this metric would have no place in the components that are weighted to produce the rankings. This assumes that *U.S. News* would not then directly contact matriculants to obtain their LSAT scores and compute the median independent of the school—a fairly safe assumption given the access to information that *U.S. News* would need to contact a student. Moreover, although the Family Educational Rights and Privacy Act (FERPA, also known as the Buckley Amendment) allows schools to disclose "directory" information such as a student's name, address, and telephone number, the student must be consulted before the information is released and the student may request that the information not be disclosed. Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2000); *see also* 34 C.F.R. § 99 (2005). More importantly, there is nothing in FERPA that requires the school to disclose any information, a la the Freedom of Information Act, should it choose not do so. *See id.* Furthermore, even if the student could be identified and contacted, there would be no way to verify the student's report of the LSAT score attained unless the Law School Admission Council (LSAC) is able to do so. I am quite comfortable stating that if the LSAC received such a request from *U.S. News*, it would not agree to do this even if there is no legal impediment to the release of the data.

propose calculating school-specific LSAT scores that change for the applicant depending on the particular school to which the applicant applies and the quality of the pool of all other applicants applying to that law school. Law schools would then attain median LSAT scores that would not be comparable, reducing the reliability of the median LSAT as a measure for producing rankings.[30]

Moreover, and as explained below, given the correlation between a law school's median LSAT score and its rank in the *U.S. News* ranking, it stands to reason that if the LSAT score given to applicants is non-comparable and school-specific, *U.S. News* will no longer use it as part of its ranking. This is because its absence will literally have no impact on the rankings. Hence, I predict that *U.S. News* will not expend any effort to compute the median LSAT score of a law school if that score is either non-comparable or not reported to the ABA Section on Legal Education (or, in the worst-case scenario, reported to the ABA Section but then not made publicly available and therefore not accessible to *U.S. News*). The cost to *U.S. News* of computing a median LSAT score if non-comparable scores are used or scores are not reported is too high (both in terms of absolute cost and also in terms of its validity or reliability) considering the lack of additional information or impact on the rankings.

I. THE CURRENT STATE OF AFFAIRS

A. Grutter v. Bollinger[31] *and* Gratz v. Bollinger:[32] *Preserving Affirmative Action*

I assume the reader has some familiarity with the opinions in *Grutter* and *Gratz*, so I will not summarize the opinions in great detail.[33] Further, because this Article's focal point is not on the merits or demerits of those opinions or the efficacy of affirmative action, I will for the sake of brevity focus only on the points made that are cogent to this Article.[34] *Grutter*, as is well known, upheld the continued use of affirmative action in the admissions process in undergraduate and graduate educational institutions. To be more precise, *Grutter* allows the race or ethnicity of the applicant to be considered positively as a "soft variable"[35] in the admissions process when the law school engages

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30. *See infra* notes 180–84 and accompanying text.

31. 539 U.S. 306 (2003).

32. 539 U.S. 244 (2003).

33. For an excellent article discussing the opinions in great detail, see Leslie Talof Garfield, *Back to* Bakke*: Defining The Strict Scrutiny Test for Affirmative Action Policies Aimed at Achieving Diversity in the Classroom*, 83 NEB. L. REV. 631 (2005).

34. Although, I do discuss what I perceive to be the three justifications for the continued use of affirmative action in our society. *See infra* notes 73–143 and accompanying text.

35. The Court in *Grutter* wrote:

> The [admission] policy [at the University of Michigan Law School] makes clear, however, that even the highest possible [LSAT] score does not guarantee admission to the Law School. Nor does a low score automatically disqualify an applicant. Rather, the policy requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School's educational objectives. So-called "'soft' variables" such as the "enthusiasm of the recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection"

in what the court termed a "highly individualized, holistic review of each applicant's file"[36] in order to achieve the goal of diversity.[37]

Moreover, even the Supreme Court learned via the briefs and oral arguments to recognize that the LSAT score of an applicant, although an important part of an applicant's file (perhaps even the most important measure in an applicant's file), is not the sole criterion for admission to law school and should not be used as such in the admissions process:

> In reviewing an applicant's file, admissions officials must consider the applicant's [UGPA] and [LSAT] score because they are important (if imperfect) predictors of academic success in law school. The policy stresses that "no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems."
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> The policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School. Nor does a low score automatically disqualify an applicant. Rather, the policy requires admissions officials to look

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are all brought to bear in assessing an "applicant's likely contributions to the intellectual and social life of the institution."

Grutter, 539 U.S. at 315 (citations omitted).

36. *Id.* The Court in *Grutter* wrote:

> Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable. Unlike the program at issue in *Gratz* v. *Bollinger* the Law School awards no mechanical, predetermined diversity "bonuses" based on race or ethnicity.

Id. at 337 (citations omitted).

37. *Id.* The Court in *Grutter* wrote:

> The policy aspires to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." The policy does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions." The policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." By enrolling a "'critical mass' of [underrepresented] minority students," the Law School seeks to "ensur[e] their ability to make unique contributions to the character of the Law School."
>
> The policy does not define diversity "solely in terms of racial and ethnic status." Nor is the policy "insensitive to the competition among all students for admission to the [L]aw [S]chool." Rather, the policy seeks to guide admissions officers in "producing classes both diverse and academically outstanding, classes made up of students who promise to continue the tradition of outstanding contribution by Michigan Graduates to the legal profession."

Id. at 315–16 (citations omitted) (alterations in original).

> beyond grades and test scores to other criteria that are important to the Law School's educational objectives.[38]

Just as important, the Court acknowledged that without affirmative action, and if students were admitted based solely on objective indices like LSAT and UGPA, the University of Michigan Law School would not be able to enroll a critical mass of "historically discriminated against [students], like African-Americans,"[39] based upon their objective numbers. The Admissions Director at the University of Michigan Law School admitted this fact.

> Erica Munzel, who succeeded [Dennis] Shields as Director of Admissions, testified that "'critical mass'" means "'meaningful numbers'" or "'meaningful representation,'" which she understood to mean a number that encourages underrepresented minority students to participate in the classroom and not feel isolated. Munzel stated there is no number, percentage, or range of numbers or percentages that constitute critical mass. Munzel also asserted that she must consider the race of the applicants because a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on [UGPAs] and LSAT scores.[40]

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38. *Id.* at 315 (citations omitted).

39. *Id.* at 316.

40. *Id.* at 318 (citations omitted). This conclusion was buttressed by the testimony of the dueling expert witnesses:

> In an attempt to quantify the extent to which the Law School actually considers race in making admissions decisions, the parties introduced voluminous evidence at trial. Relying on data obtained from the Law School, petitioner's expert, Dr. Kinley Larntz, generated and analyzed "admissions grids" for the years in question (1995–2000). These grids show the number of applicants and the number of admittees for all combinations of [UGPAs] and LSAT scores. Dr. Larntz made "'cell-by-cell'" comparisons between applicants of different races to determine whether a statistically significant relationship existed between race and admission rates. He concluded that membership in certain minority groups "'is an extremely strong factor in the decision for acceptance,'" and that applicants from these minority groups "'are given an extremely large allowance for admission'" as compared to applicants who are members of nonfavored groups. Dr. Larntz conceded, however, that race is not the predominant factor in the Law School's admissions calculus.
>
> Dr. Stephen Raudenbush, the Law School's expert, focused on the predicted effect of eliminating race as a factor in the Law School's admission process. In Dr. Raudenbush's view, a race-blind admissions system would have a "'very dramatic,'" negative effect on underrepresented minority admissions. He testified that in 2000, 35 percent of underrepresented minority applicants were admitted. Dr. Raudenbush predicted that if race were not considered, only 10 percent of those applicants would have been admitted. Under this scenario, underrepresented minority students would have comprised 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent.

Id. at 320 (citations omitted).

The prior head of psychometrics at the LSAC, Dr. Linda Wightman, has made an even stronger, more convincing argument that, due to their lower LSAT scores, very few African Americans would be admitted to so-called "elite" or "selective" law schools if the admissions

At the end of the opinion, the Court acknowledged that although the members of these underrepresented and historically discriminated against groups do score better today than they did twenty-five years ago when *Regents of the University of California v. Bakke* [41] was decided, they still fail to score well enough to be proportionately represented in the applicant pool in an elite law school like the one at the University of Michigan.

> We take the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable. . . . It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.[42]

What the Court fails to address, but I do,[43] is why these members of underrepresented groups score lower than their peers, making affirmative action necessary. Further, I detail why the pernicious effect of the *U.S. News* ranking dooms to failure the "holistic" approach approved by the Supreme Court in *Grutter*. I contend that the *U.S. News* ranking's almost slavish adherence to median LSAT scores results in the law schools' concomitant rejection of the use of the soft variables in the admissions process as recommended by the Court.[44]

B. The Development of the LSAT and Its Impact on the Admission of Members of Underrepresented Groups

As indicated above, the continued use of affirmative action is premised in large part on the notion that without affirmative action, members of underrepresented groups, and especially African Americans, will not be admitted to law school, matriculate at law school, graduate from law school, and subsequently pass the relevant bar examination to produce for society enough leaders and lawyers from those underrepresented groups. Further, the alleged paucity of lawyers from underrepresented groups is not caused by any perception on the part of members of the group that law as a profession is less attractive than to members of other groups. Quite the contrary, recent data suggests that the percentage of members of underrepresented groups applying to law school has remained steady in recent years averaging approximately 28% of all applicants to law school.[45] Indeed, the data suggests that "Law" as a profession is as alluring to members of underrepresented groups as it is to whites.

What then accounts for the alleged underrepresentation of these students in our law schools and subsequently the legal profession? Anyone with passing familiarity with legal education will point to the admissions process, which, although incredibly

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decision were based solely or predominantly on the objective indices of LSAT and UGPA. *See infra* notes 88–96 and accompanying text.

41. 438 U.S. 265 (1978).

42. *Grutter*, 539 U.S. at 343 (citations omitted).

43. *See infra* note 98–128 and accompanying text.

44. *See infra* notes 130–185 and accompanying text.

45. *See* LSAC Volume Summary, *supra* note 25.

complex and variegated among the over 191 ABA-approved schools, is cited overwhelmingly as the reason that underrepresented groups continue to be underrepresented in law schools and especially highly selective law schools.[46]

In particular the use of the LSAT in the admissions process is cited as the predominant reason why members of underrepresented groups do not fare well in highly competitive law school admissions, especially at the most selective law schools. In order to fully understand this assertion (and my argument that eliminating the LSAT from the admissions process would be inimical to the interests of members of underrepresented groups), one must have some familiarity with the LSAT, its history, its intended purpose, and use.

Although law schools used aptitude tests to screen applicants many years prior to the development of the LSAT,[47] the LSAT's origin can be traced to a meeting that took place in Princeton, New Jersey, on November 10, 1947, which was attended by several law school deans.[48] Even at that early date there was discussion involving the test's purpose and the material to be tested. It was decided very early on, for example, not to test aptitude or knowledge for "general culture" or "general background."[49] Indeed, one of the founders, George Braden of Yale, stated that a candidate is "eligible from a cultural point of view if you have a college degree and a good college record plus a

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46. For the purposes herein, I define highly selective law schools as those law schools who receive more than ten times the number of applications than seats available in the 1L class. I would be remiss if I failed to note that there is a long-standing debate over whether African Americans and others who are admitted to highly selective law schools (for my purposes those ranked in the top 50 of the *U.S. News* ranking) as a result of affirmative action would be admitted and attend less selective schools (those not in the top 50) with the absence of affirmative action thereby, so the argument goes, maintaining the number of African Americans attending law schools. Under this argument, these African Americans not "aided" by affirmative action would simply be attending less selective and lower-ranked schools. *See* Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 468 (2004). *See generally* Stephen Thermstrom, *Diversity and Meritocracy in Legal Education: A Critical Evaluation of Linda F. Wightman's "The Threat to Diversity in Legal Education"*, 15 CONST. COMMENT. 11 (1998). I find more persuasive Linda Wightman's research and statistics, which conclusively prove that African Americans would not be admitted to law schools if affirmative action is not used. *See infra* notes 88–96 and accompanying text; *see also generally* Wightman, *supra* note 7.

47. Although it is not much discussed, the use of standardized tests as a part of the law school admissions process antedates the LSAT by decades. Two tests were well known and used. In the mid-1920s, George D. Stoddard, a psychologist at the University of Iowa, and Merton L. Ferson, dean at North Carolina and then at Cincinnati, collaborated on a test published by West. Starting in 1930, Yale Law School used a test developed by the university's Department of Personal Study. Both these tests were consciously and explicitly designed to supplement other criteria and especially to provide some control on the wide variation in the meaning of college records.

William P. LaPiana, Rita and Joseph Solomon Professor, N.Y. School of Law, A History of the Law School Admission Council and the LSAT, Keynote Address 1998 LSAC Annual Meeting, at 3 (May 28, 1998).

48. *Id.* at 6.

49. *Id.*

legal aptitude test."[50] Although applicants to law schools were overwhelmingly (if not exclusively) white and male at the time the test was developed, there was no intent or desire to prefer the privileged or the wealthy over others in society. In other words, there was no attempt to benefit or maintain the hegemony of a dominant group.

Aptitude testing prior to and immediately after World War II was used as a screening device for those who would not be able to successfully complete the first year of law school. Although the norm at that time in legal education was "[l]ook well to the right of you, look well to the left of you, for one of you three won't be here next year[],"[51] the consequences of losing one third or more of an entering class was not an acceptable proposition for many law schools, including Yale, Rutgers, Northwestern, Syracuse, Stanford, Cornell, the University of Southern California, New York University, the University of Pennsylvania, and Harvard. These schools sent representatives to the meeting on November 10, 1947, which in turn led to the creation of the LSAT.[52]

As a result, from its inception the LSAT was designed not as a tool of exclusion, but as a tool of inclusion. With the return of veterans from World War II and their influx into colleges and universities across the country, law schools were facing a challenge regarding whom to admit and who, among those chosen, would succeed if admitted.

> With the end of the Second World War, American society found itself on the threshold of a new world. Returning veterans were promised educational benefits which would mean that young men who had never imagined gaining a college education now had the financial ability to do so. They may also have found the imagining somewhat easier. As the War continued and the need for trained enlisted men and officers increased, many young working class white men received training not only in technical specialties but also had the opportunity to become officers. Having had the experience of being leaders, they may have found it easier to believe that higher education was not beyond their abilities. For whatever reasons, white male veterans returned from the war with new possibilities for making their place in American society.[53]

The use of the LSAT as a tool of inclusion was somewhat limited because law, at that time, was a profession dominated (as it is today[54]) by white males. Women and people of color represented a very small percentage of those matriculating at law schools immediately after World War II. The LSAT's role as a tool of inclusion, therefore, was predominantly to allow white males from somewhat unfamiliar and unknown schools to apply and be admitted to the small number of existing law schools[55] and an even smaller number of elite law schools.

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50. *Id.*

51. W. Barton Leach, *"Look Well to the Right . . . "*, 58 HARV. L.REV. 1137, 1138 (1945).

52. LaPiana, *supra* note 47, at 6.

53. *Id.* at 8.

54. *See, e.g.*, Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005 (1997) (contending that minorities are underrepresented in the legal profession due to the intransigence of race and racial identification in contemporary American societies).

55. In 1951, there were only twenty-two LSAC-member schools. LaPiana, *supra* note 47, at 3.

It must be noted that even at its inception, however, the LSAT score was not meant to be used in isolation or to the exclusion of other relevant factors. Although the LSAT in its original form produced a "number" (i.e., a score), those who produced and designed the LSAT never recommended that it become the dominant factor in making admissions decisions.

> In addition, the founders of the test were adamant that it could not and must not be the only criterion for admission. The entire rationale for the test was the need to supplement the information supplied by the undergraduate record. The original understanding, John Winterbottom of [Educational Testing Services (ETS)] wrote in 1955, was that "scores on the test were to be used *along with* prelaw grades, recommendations, and other information as an aid in admissions." In addition, while some schools may have been in the position to be highly selective in admissions, [Ben] Schrader [of ETS] remembered that in the "early days" the mean score of those admitted to law school was not much higher than the mean score of all applicants.[56]

Even then, however, that did not prevent the score from becoming the most important factor in the admissions decision. One commentator stated that, "[f]rom the beginning the LSAT was meant to be a tool, and from the beginning the magic of the 'objective' numerical score exercised its power over the legal academic mind."[57] Nevertheless, the test represented a positive development for legal education, causing one historian to speculate that the power of the score had the effect of opening up the legal profession—if not to minorities and women—to immigrants and other non-Protestants for whom the legal profession had largely been out of reach.[58] In other words, achieving a good test score had something of a leveling effect, allowing all of those, of any background (assuming they were white and male in the 1940s and 1950s), to enter the legal profession.

> Those who thought about the matter, however, always knew that the number alone could not make an entering class. Yet the number may have had profound effects. I've given you my hypothesis that after [World War II] the LSAT may have made it more possible for white male ethnics to attend law school. Even more important may be what happened a generation later when the children of those veterans came of age. As the demographics changed and more and more of those included in the great demographic wave decided to go to law school, the LSAT became much more than a screen for sifting out those who had little chance of success. It became a sorting mechanism helping to control admission not to the legal profession but to its most remunerative levels. The Yale Law School has been described as America's equivalent of the great French institutions that train that nation's most powerful civil servants. One need not accept the literal accuracy of the comparison to accept the gist—graduation from one of the highly selective law schools was a ticket to economic success and maybe even to political power. As people whose grandparents had been the despised corruptors of old stock white Protestant America grew up in relatively homogenized suburbs, and attended well financed public schools (and in some instances private schools which their newly

56. *Id.* at 8–9 (emphasis in original).
57. *Id.* at 9.
58. *Id.* at 9–10.

> successful and ambitious parents could afford), they received the kind of training both at home and at school that prepared at least some of them to do well on that sort of test the LSAT is. In the end, the story may not be a totally sad one after all. The LSAT and standardized tests in general may indeed have helped in greatly broadening the possibilities for success for people whose grandparents could not even dream of the lives their grandchildren lead, bringing a kind of diversity to every facet of the American legal profession unimaginable before the Second World War.[59]

This may not seem to be all that important or revolutionary today, but the influx of people of color and women into the profession could not have occurred without first the influx of immigrants and others returning from World War II to open the profession to those other than white Protestants from upper-class Eastern families.

Fast forward to today, some sixty years after the creation of the LSAT and the end of World War II. The world and the legal profession are obviously very different places with very different challenges. The challenges facing those who use the LSAT are difficult and complex to describe in a brief article. To understand the problem created by the dominance of the LSAT as a factor in the *U.S. News* ranking, which I contend leads to the destruction of the holistic approach to admissions, some assumptions must be acknowledged. First, one must assume and agree that the underrepresentation of minority groups in law school is not due to its inherent unattractiveness as a profession. I start with the assumption that, all things being equal, members of these underrepresented groups would choose to attend law school in proportion to their white counterparts.

Second, one must assume that if African Americans and other members of underrepresented groups scored (tested) proportionally as well as their white peers there would be no need for the use of a "holistic" approach which takes race or ethnicity into account in the admissions process.[60] This is not to say that some portion of the holistic approach will not survive in this context. Put another way, even assuming African Americans and others scored as well as their white peers, I doubt if any law school would admit its students based solely on the numbers or use something like a lottery to determine who among qualified applicants are admitted.[61] Factors such as the rigor of the undergraduate program, geographic diversity, and others will still be taken into account. Race, however—that constitutionally suspect category—would no longer have a compelling justification for its use since a representative class of students could be enrolled without the use of race in the admissions process. Although it seems somewhat perverse and counterintuitive, it is only when you can measure and statistically prove statistically that applicants to law school are equal in these important

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59. *Id.*

60. For a discussion of the use of the holistic approach to admissions, see *supra* notes 36–39 and accompanying text. For a discussion of the destruction of the holistic approach in evaluating candidates in the admissions process engendered by the pernicious effect of the rankings, see *infra* notes 130–85 and accompanying text.

61. The possible use of a lottery and its basic fairness was addressed in Grutter v. Bollinger, 539 U.S. 306, 340 (2003).

metrics, regardless of race, that you can eliminate race from consideration in the admissions process.[62]

C. The Use of the LSAT in the U.S. News *Rankings or Why We Have a Problem*

The fact that law schools are ranked is not unique. Indeed, today in American society just about everything is ranked, sorted, ordered, compared, and judged vis-a-vis a group of peers. Moreover, given the competitive nature of American society it is easy to understand why everyone wants to be ranked number one. Further, since there is only one number one, it is also logical for those who cannot achieve that exalted status to want to be at least number two and so forth. Rankings are a natural byproduct of the desire to be the best. Hence, the purpose of this Part is not to quibble with rankings or to urge their elimination. That would be foolhardy and a waste of time.[63]

This Symposium is devoted to an examination of the ranking of law schools in general and by the *U.S. News* ranking in particular.[64] The impact of the *U.S. News* ranking on law schools and their resulting behavior are fascinating issues. Many of them are addressed in this Symposium.[65] I find it fascinating to debate and discuss why the *U.S. News* ranking has become the "800-pound gorilla" of legal education affecting just about everything we do. Indeed, I agree with several of the theories put forth in this Symposium that the *U.S. News* ranking is so powerful because law schools, unlike colleges, all tend to look alike. They essentially teach the same curriculum and are set up the same way with only minor differences in the delivery of "services."[66] I also find it plausible that the *U.S. News* ranking has so much power because we do not have the plethora of well-known entities ranking law schools on different metrics and diluting the power of any one such ranking—something that apparently occurs with business schools.[67] Hence, the purpose of this Part is not to address why law school rankings mean so much to law schools and why law schools, in this regard, are different from business schools or other entities. I will leave that task to others who have ably addressed this topic.[68]

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62. This is, I believe, what Justice O'Connor hopes will happen in twenty-five years after the *Grutter* decision. *Id.* at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

63. Some would say the genie is out of the bottle and that *U.S. News* will never voluntarily cease producing its very profitable rankings issue.

64. Paul L. Caron and Rafael Gely, Symposium Introduction, *Dead Poets and Academic Progenitors: The Next Generation of Law School Rankings*, 81 IND. L.J. 1, 4 (2006).

65. *See id.* at 4–8 (describing the organization of the symposium and describing the issues raised by its participants).

66. I also blame this similarity phenomenon on the regulations imposed on law schools by the ABA Section on Legal Education. *See supra* note 17. Their regulations and the way those regulations are uniformly imposed on all of the law schools discourages differentiation and also experimentation. Thus, it is easy for law schools to be grouped and to be ranked because we are very similar. Indeed, it is that very similarity that causes small differences in things like the median LSAT score to make a huge difference in the rankings.

67. Michael Sauder & Wendy Nelson Espeland, *Strength in Numbers? The Advantages of Multiple Rankings*, 81 IND. L.J. 205, 218 (2006).

68. *See id.*

Nor is it my task in this Part to address the validity of the methodology of the rankings. My purpose in this Part is succinct: to demonstrate the role that the LSAT score plays in that methodology. I do not intend to attack the methodology as ill-fitting or inappropriate for law schools or to critique it as producing erroneous rankings because of methodological flaws. That is a larger debate that I leave to others.[69] What is readily apparent and incontestable is the use of the median LSAT as part of the metric used to evaluate the quality of and to rank-order law schools based on this quality assessment.

Ranking law schools is not rocket science and *U.S. News* has made no secret about how their rankings are computed. Although there have been numerous articles in the press and in journals regarding how *U.S. News* compiles its rankings,[70] one does not need to refer to those articles to discern how the rankings are compiled. Quite the contrary, *U.S. News* is not reticent about publicizing how it computes the rankings. As the magazine has come under increasing attack for its perverse impact on law schools,[71] *U.S. News* has responded by being more open about how the rankings are produced.[72]

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69. *See, e.g.*, KLEIN & HAMILTON, *supra* note 15. Klein and Hamilton make the following contention:

> There are several problems with the [*U.S. News* ranking]. One of the most important of these is that [*U.S. News*] does not consider many factors, such as the educational benefits of attending a certain school or the quality of its faculty, that are just as important as the ones it does include. There also are problems related to the accuracy of data [*U.S. News*] relies on to measure a factor, intentional or unintentional biases in the subjective assessments of school quality, and the use of variables that may foster inappropriate school practices. For example, survey respondents may rate down some schools in order to make their own school look better and schools may try to raise their score on the "rejection rate" factor by encouraging applications from students who have virtually no chance of being admitted. In addition, the methods [*U.S. News*] uses to combine the values on different components (such as LSAT scores and undergraduate grades) into an overall factor score (such as for "student selectivity") does not really result in assigning the components the weight [*U.S. News*] says they should carry (and no rationale is provided for its weights). Other concerns relate to whether the persons who respond to the surveys are truly representative of their respective populations and how [*U.S. News*] imputed the values for missing data on certain variables.

Id.

70. *Id.*; *see also* Joanna Grossman, U.S. News & World Report*'s 2005 Law School Rankings: Why They May Not Be Trustworthy, and How Alternative Ranking Systems Compare*, FINDLAW'S WRIT, Apr. 6, 2004, http://writ.news.findlaw.com/grossman/20040406.html (discussing methodology used by *U.S. News*); Wellen, *supra* note 16 (discussing how the rankings are computed and how schools attempt to "game" the rankings by such devices as reporting, as the University of Illinois Law School did, that it paid $8.78 million for LexisNexis and Westlaw (over eighty times what they actually charged) in order to increase its student expenditures and in turn increase its position in the rankings).

71. The *U.S. News* ranking, as I have noted above, drives decisions made by schools (which students to recruit, admit, and, most importantly, entice with scholarship money) and by applicants (where to apply, where to matriculate, and whether to transfer). It turns out that they also drive decisions that are more central to the academic enterprise—decisions about resource

II. THE LSAT AND ITS IMPACT ON STUDENTS OF COLOR

What often goes unsaid in the debate over affirmative action is why affirmative action is still needed some fifty years after the decision in *Brown v. Board of Education*,[73] which eliminated de jure discrimination and almost thirty years after the *Bakke*[74] decision which established the legality of affirmative action and was affirmed in *Grutter*.[75] In *Grutter*, the Supreme Court addressed this fact obliquely by stating in dicta that the need for affirmative action may be limited temporally and, as a result, may expire in twenty-five years.[76] What is not addressed in great detail in *Grutter*, and largely goes unaddressed, is why there continues to be a societal need for affirmative action.

Originally there were a variety of justifications for affirmative action, which I shall summarize very briefly. First, of course, was the remedial argument that African Americans and others who had been discriminated against are recipients of affirmative

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allocation, faculty hiring, curriculum, and so on. The *U.S. News* ranking, in many cases, is the impetus for concrete decisions, regardless of any pedagogical purpose or effect.

The result of such a system—both arbitrary to begin with, and subject to manipulation—is that a school could make a meteoric rise in the rankings without actually improving its quality, or take a dive without actually declining. The latter can be devastating, and given the reliance by law school applicants on the rankings, major downward shifts in rankings often become self-fulfilling prophecies.

Once a school falls in the rankings, students with higher numbers opt to go elsewhere, and, within a year or two, the student numbers match the school's new lower ranking. All this might happen even though the school is no worse than it was to begin with.

And students, the "consumer" for whom these rankings are ostensibly designed, fare no better. They may choose to attend a school that is not right for them, simply because it is ranked more highly than another one.

The exaggeration of differences in law school quality and the flaws inherent in techniques to measure them should make all of us in law school communities shy away from rankings. While law students are cautioned by many "authorities" to make decisions about where to matriculate based on self-knowledge and independent investigation of law schools, the *U.S. News* ranking remains, for many, the critical factor.

Legal education thus remains hostage to the *U.S. News* ranking. It is a loss to us all that standings in the rankings exert such an important influence on law schools, since money, time, and energy would be much better spent improving the quality of legal education we provide.

72. The publication of how the rankings are compiled arguably could lead competitors to perform similar rankings using exactly the same metrics. No competitors, however, have entered the law school ranking market. Unlike M.B.A. programs, which are ranked by a range of commercial ranking systems with varying emphases and methodologies, *U.S. News* has maintained a virtual monopoly in the law school realm since it started its annual ranking sixteen years ago. In the pre-law community, the *U.S. News* ranking is gospel, so law school deans find themselves under tremendous pressure to adopt policies to improve their standing. Wellen, *supra* note 16.

73. 347 U.S. 483 (1954); *see also* Symposium, *With All Deliberate Speed:* Brown II *and Desegregation's Children*, 24 LAW & INEQ. 1 (2006).

74. 438 U.S. 265 (1978).

75. Grutter v. Bollinger, 539 U.S. 306 (2003); *see also supra* notes 2–3 and accompanying text.

76. *See supra* note 6 and accompanying text.

action in order to compensate them for past harms they incurred as slaves, etc. This "compensatory" argument has not met with success recently because of a "nexus" requirement that mandates that the individual recipient of affirmative action (the beneficiary) demonstrate or prove the harm that warrants the benefit. Moreover, since the harm may have occurred centuries or decades ago, it is very difficult for any individual person of color to prove the societal harm that would warrant the benefit of affirmative action. This "past-looking" rationale, then, justifies affirmative action as a remedial vehicle to address past harms.

The second justification is more nebulous and philosophical in orientation. Pursuant to what I will call the "present-focused" justification for affirmative action, affirmative action is used today to produce the representation of persons of color (those previously discriminated against) in important areas like law school classes that correspond to their percentage of the general population. This present-looking approach to affirmative action presupposes that there are no biological and other differences based on skin color, phenotype, or physical appearance. In other words, there are no biological or other important differences between people who, for example, are classified by phenotype as white and those who are instead classified by phenotype as African-American.[77] Further, if there are no differences between different subgroups of the population, in the absence of racism members of different subgroups should be proportionately represented in all of the important categories, like law school populations. Hence, affirmative action is needed to eliminate the present day effects of racism.

On a related note, another justification for affirmative action in this context is that if the effects of past segregation and racial harms are allowed to continue to plague current society, society as a whole will never overcome its racist past because those present members of underrepresented or previously subordinate groups will never catch up to those members of groups who were the subordinators.[78] Put another way, nested within this rationale is the notion that present day or current beneficiaries of affirmative action will hasten the proportional representation of subordinated persons in all of the important classifications because they will lead the way and serve as examples for the other members of the group. At the very least, this rationale assumes that the time it takes for members of subordinated groups to become equal to their prior

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77. *See* U.S. CENSUS BUREAU, *supra* note 25, at A-2–A-4. Recently, to the dismay of many, the concept of race, which has largely been viewed as a social construct with no fixed or set biological component, is the subject of medical research and discussion that treats race as a biological category. *See* Alex M. Johnson, Jr., The Re-Emergence of Race as a Biological Category: The Legal and Societal Implications (2005) (unpublished manuscript, on file with author) (arguing that recent use of race in marketing drugs targeted at blacks has the effect of biologically reifying the concept of race). *See also* Maura Lerner, *Heart Drug for Blacks Gets OK*, MINNEAPOLIS STAR TRIBUNE, June 24, 2005, at A1.

78. Professor Roithmayr in her forthcoming book makes the compelling argument that whites are still beneficiaries of the legacy of past discrimination because of the economic benefits or "lock-in" effects of that discrimination which have passed intergenerationally from the original recipients/beneficiaries of racial discrimination to whites in society today. DARIA ROITHMAYR, LOCKED IN INEQUALITY: THE LOCK-IN MODEL OF DISCRIMINATION (forthcoming 2006). Professor Roithmayr also provides a primer of her "lock-in model of inequality" in her recent article, *Tacking Left: A Radical Critique of* Grutter, 21 CONST. COMMENT 191 (2004).

subordinators is too long and, as a result, continues to inflict harm on members of previously subordinated groups.

The problem with this rationale is with the remedy. In order to fully address the claims of members of previously subordinated groups that their presence in important categories should reflect their presence in the population, one would have to engage in imposing "dreaded" quotas. In other words, if African Americans currently comprise 12.3%[79] of the United States population, the presumption is that 12.3% of all law school students should likewise be African-American.[80] Although I have advocated that there is nothing wrong with the appropriate use of quotas,[81] that argument has fallen on deaf ears and is politically untenable in today's society.

The third justification is the one most often cited for the use of affirmative action in today's society. It is what I would characterize as the "future-based" justification for affirmative action. We must have affirmative action today so that future generations will not need affirmative action. At first glance, this does not seem to be a plausible argument. But it is actually the argument that has the most support in today's society. Under this argument it is assumed that society is suffering from the ill effects of past discrimination. It is also assumed that without affirmative action, society will never be able to effectively deal with those ills. Thus, in order to allow future society to get beyond race,[82] race must be taken into account "affirmatively" to allow those who would not otherwise excel to establish a pathway for other members of these underrepresented groups to follow. What is important is that future members of these underrepresented groups will excel because of the affirmative action received by their predecessors, and this future group will do so without the benefit or need for affirmative action.

This third justification, looks to a future in which there is no need for affirmative action and views the current use of affirmative action as a transitory and necessary stage, following which it is no longer needed. This view is closely related to the second or present-focused view of affirmative action but is subtly different in important ways. The third justification focuses less on affirmative action's effect on those receiving its benefits (the current generation) and more on those who will follow. Beneficiaries of affirmative action are viewed means to an end—a color-blind society in which race and

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79. U.S. CENSUS BUREAU, *supra* note 25.

80. It is hard to think of a plausible justification for the proposition that African Americans would not choose to be proportionally represented in a "positive" category like this. By that I mean there are reasons one would prefer not to achieve proportional representation in a category like percentage of prison population, etc. However, assuming that attending law school is a sought-after classification, it is plausible to assume that African Americans should and would seek proportional representation as members of this relatively elite and privileged group.

81. *See* Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043 (arguing that the implementation of mandatory quotas or strict numerical goals in the admissions process is a necessary remedial tool given the invidious nature of discrimination and the manipulation of the concept of "merit" to maintain the favored position of the dominant group (white males) in American society).

82. Johnson, *supra* note 8 (arguing that in order to get beyond race, society must destabilize or eliminate racial categories).

affirmative action are irrelevant. In this respect, those who are allegedly harmed[83] are similarly situated as transitional participants in the use of affirmative action.

A review of the *Grutter* and *Gratz* decisions reveals that the Court relies heavily on the future-based justification for affirmative action and to a lesser extent on the related, present-focused justification for affirmative action.

> Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.
>
> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institution that provide the training and education necessary to succeed in America.[84]

Having provided the various justifications for the societal use of affirmative action, my inquiry should be complete. I started this section with a question: why is affirmative action still necessary in American society today? These justifications mask a reality that is never addressed in articles like this and only obliquely addressed in cases like *Grutter* and *Gratz*,[85] that is, the factual predicate for affirmative action—or in other words, such facts that require the Court (and hence, society) to justify the use of affirmative action. Put another way, utilizing the forward-looking justification for affirmative action, what state of affairs in the future or in future society will by necessity result in the elimination or the need to use affirmative action?

In this context, the answer is simple: as addressed below, law schools (and other graduate and professional schools as well as colleges) attempt to employ a holistic

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83. I use the term, "allegedly harmed," intentionally because no one has proven that affirmative action harms whites. The same nexus requirement that dooms the past-looking view of affirmative action, *see supra* text accompanying note 77, likewise dooms the claims of whites who allege that they are "harmed" by affirmative action. I construe this argument as a political rather than a legal argument. In other words, the plaintiff in *Grutter* cannot prove that she was denied admission to the University of Michigan Law School solely or predominantly because an African American was admitted pursuant to affirmative action. Nor can the winning plaintiff in *Gratz* prove beyond a reasonable doubt that she was denied admission to the University of Michigan undergraduate program because affirmative action was employed. What she was able to prove is that the undergraduate admissions program at the University of Michigan and its use of affirmative action as part of that process was flawed.

84. *Grutter*, 539 U.S. at 332–33 (citations omitted).

85. *Id.* at 339–40.

approach when evaluating candidates for admission to their selective programs. These selective programs often serve as gateways to opportunities and lucrative careers. As part of this holistic approach, test scores generated from a standardized high-stakes test like the LSAT play a very important role.[86] These scores are important—rightfully so—because they provide the one metric pursuant to which all candidates may be judged equally.[87] Hence, the LSAT score is perhaps the most important variable in the admissions process to determine which applicants are admitted to selective law schools.

The problem with the use of the LSAT in the admissions process is that certain racial subgroups score lower than members of other groups. Assuming that whites are the dominant group, both in terms of numbers and test-taking abilities, they score approximately one standard deviation above certain subgroups. For example, African American test-takers score on average ten points less (143 versus 153) than white test-takers on this all-important standardized test.[88] Consequently, if African Americans and members of other subgroups score lower than whites and both groups are applying in proportionate numbers to law school, whites will on average have scores that are higher than those members of the underrepresented groups who are also applying.[89]

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86. Indeed, I make the argument that they are being misused and overemphasized in the admissions process, thereby negating the holistic approach as a result of the pernicious effect of the rankings by organizations like *U.S. News*. *See infra* notes 130–86 and accompanying text.

87. For example, over 100,000 students applied to law school during the last "admission cycle" to be admitted in the fall of 2005 for the class of 2008. These students attended thousands of different colleges and universities with scores of majors and thousands of different instructors. It is therefore impossible to rank order applicants based on their performance in undergraduate school. There are too many variables and not enough facts or information known about each to make reliable and rational decisions based solely on undergraduate classroom performance. That is why the LSAT and other standardized tests were adopted as part of the admissions process. They provide a level or equal playing field by whieh reliable information may be gleaned and applicants may be more fairly compared. *See supra* note 26 and accompanying text. This is not to say that one would have no rational preference in choosing between a student who attends Princeton and attains a 3.0 UGPA in philosophy and a student who attends the hypothetical Winnona State University, a recently accredited college, with a 3.0 UGPA and a major in recreational education. However, contrasts often are not that stark between applicants.

88. For those unfamiliar with the test, the current test has a score scale of 120–180 with a numerical median of 150. The actual median score for all applicants is roughly 153. Hence, the scores of African Americans, which are almost ten points lower on average, are in the bottom half of the test-takers. *See infra* note 88.

89. Note that Asian-American students score almost equal to white students, and they are not included in the underrepresented subgroups. I reproduce below table 8 of an article written by Linda Wightman.

Consequently, if the LSAT score is equated with "Merit" (and I use the capital M intentionally) and individuals who are otherwise equal in all other contexts are evaluated based on the strength of the LSAT score, members of the various subgroups who score lower than whites will not be offered admission to law schools when competing against stronger-scoring white students. Thus, if scores and grades are the predominant metrics used to make admissions decisions, African Americans and other members of the subgroup will not be admitted to selective or elite law schools.

This fact has been proven by recent research conducted by Linda Wightman.[90] Professor Wightman has analyzed admissions data compiled by the LSAC and has conclusively proven that an admissions process which relies solely or heavily on what admissions officers call "the numbers"—that is, a combination of the LSAT and the

Table 8. LSAT and UGPA means and standard deviations by race/ethnic group for 2000–01 law school applicants

	American Indian	Asian American	Black	Hispanic	Mexican American	Puerto Rican	White
Number	505	4,658	7,404	2,682	1,227	569	47,541
LSAT							
Mean	149.19	153.33	143.32	148.25	148.56	145.71	153.85
Standard deviation	9.11	9.49	8.07	8.71	8.11	9.42	8.30
UGPA							
Mean	3.06	3.20	2.87	3.05	3.03	3.05	3.23
Standard deviation	0.48	0.46	0.48	0.47	0.46	0.46	0.45
LSAT difference*	−0.56	−0.06	−1.27	−0.67	−0.64	−0.98	
UGPA difference*	−0.38	−0.07	−0.78	−0.41	−0.45	−0.40	

Source: Linda F. Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models with Current Law School Data,* 53 J. LEGAL EDUC. 229, 245 (2003).

NOTE: *The mean difference is in Cohen's d units; (race/ethnic group mean − white mean) / pooled group standard deviation. A minimum d value of +/− 0.20 is required to be considered a practically significant effect.

This table clearly demonstrates that for those applicants to law school in the fall of 2000 (at the time that Ms. Grutter was being denied admission to the University of Michigan Law School), African Americans scored 143.32 while whites scored on average 153.85. The differences in other subgroups were not as severe and disappeared entirely with Asian Americans who had an average score of 153.33, statistically insignificant from the white average of 153.85. I leave for others to explain, if possible, why Asian Americans, among all members of subordinated groups have now essentially eliminated the score-scale differential that is found among other subgroups. In a draft article, I make the argument that societal discrimination and stereotyping induces and makes it easier for African Americans to excel in sports and entertainment and Asian Americans to excel in academics because it comports with the majoritarian stereotype of Asian Americans. Alex M. Johnson, Jr., Why Shaquille Chooses to Play Basketball or Tell Jokes Instead of Going to Law School (unpublished manuscript, on file with author).

90. Wightman, *supra* note 7.

UGPA—would result in a sharp increase in the number of minority (African American, Hispanic, and Native American) applicants denied admission to law school.[91]

Without going into too much detail, Professor Wightman concludes that a numbers-only approach would result in the virtual elimination of African Americans from law school, given the score-scale differential between whites and African Americans.

> At the simplest level . . . the means on both LSAT score and UGPA are significantly lower for applicants of color than white applicants for every group except Asian American applicants. These differences are both statistically and practically significant. These data suggest that if these quantitative measures of prior academic attainment are used as the only input to an admission model, students of color as a group are likely to be systematically excluded from law school admission opportunities.[92]

Indeed, Professor Wightman comes to the rather shocking conclusion that if schools did not employ affirmative action and admitted all students based solely on the numbers only 20% (687 of the 3435) of the African-American applicants who were admitted to any law school for the fall of 1990 "would have been accepted if the LSAT/UGPA-combined model had been used as the sole means of making admissions decisions."[93] She buttresses this conclusion with her analysis of the admissions process as it affects white applicants.

Using these two metrics alone to determine who gets admitted to law school leads to the startling conclusion that if African Americans scored as well as whites on the LSAT there would be no need for affirmative action because African Americans would be proportionally admitted according to their representation in the eligible population of college graduates interested in law school.[94] That African Americans score lower than whites, and that this creates a barrier to the admission of African Americans into law school, has not gone unnoticed.[95] Indeed, some argue for the elimination of the LSAT in the admissions process because of its alleged discriminatory impact on applicants of color. Some even go further and suggest that the LSAT is a biased test discriminating against members of certain subgroups and therefore must be eliminated.[96]

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91. *See id.* at 15.

92. *Id.* at 19 (footnote omitted).

93. *Id.* at 15.

94. For an in-depth discussion of the score-scale differential between whites and subgroups, especially African Americans, and an explanation of that differential as the root cause for the continued need for affirmative action, *see infra* notes 113–127 and accompanying text.

95. *See* William C. Kidder, *The Struggle For Access From* Sweatt *to* Grutter*: A History of African American, Latino, and American Indian Law School Admissions, 1950–2000*, 19 HARV. BLACKLETTER L.J. 1, 26–27 (2003); Roberto Rodgriguez, *Life After Hopwood*, BLACK ISSUES IN HIGHER EDUC., August 8, 1996, at 8 (detailing the experts who consider standardized tests like the LSAT as a major cause of discrimination against people of color and women); Edward Rincon, *Tests Put a Bias in College Admissions*, DALLAS MORNING NEWS, April 7, 1996, at 6J (arguing that test scores of African Americans and Hispanics have been negatively influenced by faetors having little to do with intelligence).

96. *See* Leslie Espinoza, *The LSAT: Naratives and Bias*, 1 AM. U.J. GENDER & L. 121 (1993) (arguing that item-type questions are biased as narratives).

In truth, at one point in my career—before I became affiliated with the LSAT and learned more about the test, its appropriate use, and the methodology employed by the psychometricians at the LSAT to insure that the test does not favor one subgroup over another[97]—I, too, harbored a sneaking suspicion that the test "discriminated" against African-American test-takers, which I once was.[98] How could one not believe that? It seems rather curious that one subgroup, with essentially the same relevant attributes (here I mean coming from the same socio-economic status, from the same or similar schools, with essentially the same undergraduate grade point average in the same or similar majors) would score statistically lower than their white counterparts.

At first glance, there would appear to be no logical explanation. The only potentially plausible explanation for the lower scores is that the test does indeed discriminate against African Americans. The only alternative is that African Americans score lower than whites because they are not as smart as whites. Although, unfortunately, this argument has been made in the past,[99] it has no currency for a variety of reasons given that there is no biological definition of race.[100] I take as a given for the purposes of this paper that scientists have demonstrated rather convincingly that there is no genetic definition of race. This has caused many (including myself) to conclude that when we refer to race or reify race we are referring to the social construction of race rather than a biologically defined definition.[101] Thus, as biologists have noted, apart from the visible morphological characteristics of skin, hair, and bone, which form the basis for racial classifications, genetic variability among races is not much greater than that within races.[102]

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97. For further discussion, *see infra* notes 113–129 and accompanying text.

98. I took the test once and only once in 1975. And although I graduated magna cum laude from Claremont Men's College in the top 5% of my class, my LSAT score, which I refuse to divulge, was clearly not in the top 5% of all test-takers. Nevertheless, it was good enough to secure my admission to my first choice law school, UCLA.

99. *See, e.g.*, RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994).

100. *See* Masatoshi Nei and Arun K. Roychoudhury, *Genetic Relationship and Evolution of Human Races*, 14 EVOLUTIONARY BIOLOGY 1, 44 (1983) (discussing race and morphology).

101. Furthermore, as Thomas Sowell has noted:

> The term "race" was once widely used to distinguish the Irish from the English, or the Germans from the Slavs, as well as to distinguish groups more sharply differing in skin color, hair texture, and the like. In the post-World War II era, the concept of "race" has more often been applied to these latter, more visibly different, categories and "ethnicity" to different groups within the broader Caucasian, Negroid, or Mongoloid groupings.

THOMAS SOWELL, RACE AND CULTURE: A WORLD VIEW 6 (1994); *see also* Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1239 (1994) (arguing that racial identity is largely a social rather than a biological construct).

102. A quote from Professor Anthony Appiah's work both summarizes and buttresses this observation:

> The evidence in the contemporary biological literature is, at first glance, misleading. For despite a widespread scientific consensus on the underlying genetics, contemporary biologists are not agreed on the question whether there are any human races. Yet, for our purposes, we can reasonably regard this issue as

As a result, I start with the assumption that "race" is not based on any established scientific definition. That, of course, does not mean that race has no meaning or power in our society. Quite the contrary, race is an intractable force in American society which touches all facets of day-to-day life. Race, in other words, continues to matter in our society whether its definitional base is scientific or not. In fact, race has become a powerful factor in American society because of its *social construction*. In sum, race, albeit socially constructed, continues to matter in American society. Indeed, on this point I find myself in rare agreement with Professor Sowell:

> Neither race nor related concepts can be used in any scientifically precise sense to refer to people inhabiting this planet today, after centuries of genetic intermixtures. The more generic term, race, will be used here in a loose sense to refer to a social phenomenon with a biological component, rather than make a dichotomy whose precision is illusory.
>
> Whatever the biological reality, race as a social concept is a powerful force uniting and dividing people. Whether visible on the physical surface or simply felt in the emotional depths, race provides the cohesive groupings in which cultures have been concentrated, transmitted and carried around the world.[103]

To conclude the premise I am establishing, I have written several articles advancing several theories regarding race[104] premised on historical reality, the existence of the "one drop of blood rule,"[105] and the idea that race is not a biological category but a

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> terminological. What most people in most cultures ordinarily believe about the significance of "racial" differences is quite remote from what the biologists *are* agreed on. . . . Every reputable biologist will agree that human genetic variability between the populations of Africa or Europe or Asia is not much greater than that within those populations, though how much greater depends, in part, on the measure of genetic variability the biologist chooses. . . . Apart from the visible morphological characteristics of skin, hair, and bone, by which we are inclined to assign people to the broadest racial categories—black, white, yellow—there are few genetic characteristics to be found in the population of England that are not found in similar proportions in Zaire or in China, and few too (though more) that are found in Zaire but not in similar proportions in China or in England. All this, I repeat, is part of the consensus.

KWAME A. APPIAH, IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE at 35 (citations omitted) (emphasis in original). For a more in-depth discussion of this issue, see Johnson, *Destabilizing Racial Classifications*, *supra* note 8, at 911.

103. Sowell, *supra* note 101, at 6; *see also*, Johnson, *supra* note 8; Alex M. Johnson, Jr., *Bid Whist, Tonk, and* United States v. Fordice*: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1420 (1993) (argning that African Americans have forged their unique "nomos" or community as a result of their racial history and that community is the transmitter of community norms or values that deserve recognition and protection when integrated into mainstream, i.e., white, society); Johnson, *supra* note 54 (arguing that racial differences cause African-American attorneys to have a different group identity than white male attorneys resulting in the underrepresentation of minorities in various aspects of the legal profession).

104. Alex M. Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1595 (1995); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991).

105. Pursuant to this rule if an individual has an ancestor who is a person of color, that individual is presumed to have at least one drop of that ancestor's blood. Moreover, if that

socially constructed category that can be deconstructed. I am not alone in this understanding and treatment of race. Critical race theorists[106] and others,[107] including neo-conservatives, like Thomas Sowell,[108] have professed similar views. Indeed, it is fair to say that the view that race is socially constructed—notwithstanding the historical development of the one drop of blood rule—is widely accepted, and apolitical in that it is accepted by the right, the left, the deconstructionists, etc. In fact, it is accepted by just about everyone in these debates except perhaps the hard-core racists who still believe that there are biological differences between the races that manifest themselves in individual and group behavior.[109]

Hence, any claim that African Americans (or Hispanics for that matter) score lower than whites because they are not as intelligent as whites, for a genetic or any other race-based reason, must somehow respond to the scientific hypothesis that there is no definition of race and no significant genetic differences between members of what are perceived to be different racial groups. That, coupled with the fact that these African-American test-takers may have grades which are equivalent to whites belies the assertion that African Americans should score lower on standardized tests than whites. Quite the contrary, all of the scientific and other evidence regarding the existence of race should predictably lead one to conclude that there should be no significant (or any) difference between whites and African Americans on standardized tests like the LSAT. Yet there is! What could explain the differential other than a biased test that discriminates against African Americans? Racism, of course!

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individual possesses but one drop of that ancestors blood, that one drop qualifies that individual as a person of color. This one drop of blood rule was enacted into law in many Southern states. Although not predicated on any currently acceptable scientific basis, the one drop of blood rule represented the law of the land and served as a vehicle to classify individuals by race and to establish whites and whiteness as the dominant racial category. Under the "one drop of blood" rule any individual with one black ancestor was assigned the status of black even if all of the other ancestors were white. White as a racial category can actually be viewed as the absence of black. Hence, individuals are categorized as either 100% white or black—there was no in between for individuals of mixed ancestry. *See* Paul Finkleman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2110 (1993).

106. *See* Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African-Americans and the U.S. Census*, 95 MICH. L. REV. 1161 (1997); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

107. Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995).

108. See *supra* note 101 and accompanying text.

109. Jimmy "The Greek" Snyder was fired from his job as Commentator for CBS Sports for saying, among other things, that the black athlete is "bred to be the better athlete because, this goes all the way to the Civil War when . . . the slave owner would breed his big women so that he would have a big black kid." Video clip: Jimmy "The Greek" Snyder Canned for Racist Remarks (CNN/Sports Illustrated 1988), http://sportsillustrated.cnn.com/almanac/video/1988/ (last visited October 9, 2005). One recent odious remark uttered by William Bennett demonstrates that racism is alive and well. William Bennett, a noted conservative pundit and radio commentator in response to a question to limit crime stated that aborting "every black baby in this country" would reduce the crime rate. CNN, *Bennett Under Fire for Remarks on Blacks, Crime*, CNN.COM, Sept. 30, 2005, http://www.cnn.com/2005/POLITICS/09/30/bennett.comments/index.html.

That is perhaps the knee-jerk reaction or the easily grasped answer to a complex question. A review of the facts reveals this is a complex issue and one that cannot be answered with charges of racism or discrimination. There are a number of factors, which must be considered when the question is raised regarding the differential performance of members of various subgroups. The first question has to do with the test itself: is there something about the test that causes African Americans to perform less well than whites?

Examining the test itself, one could make a plausible claim that the test is biased if it asked questions (called "item-types") that somehow favored whites over other members of subgroups. This notion, that the test is culturally or socially biased because the knowledge required to answer the questions correctly is possessed in more abundance by one race or subgroup than another, is predicated on an obsolete notion that access to information is differentially accessible or available to various subgroups and the test can be tailored to exploit that disjunction.[110] Alternately, one could prove the test resulted in differential scores for African Americans if some of the item-types were offensive to African Americans, causing them to lose their temper and focus while taking the test.[111] Although at one point there was a question regarding some of the item-types and their effect on African Americans,[112] and whether those questions caused whites to perform better than African Americans, those items were used almost 30–40 years ago when the items and the test were assembled by a sub-contractor, Educational Testing Service (ETS).

There are three independent reasons why the LSAT is not biased or discriminatory which have nothing to do with a historical review of old item-types and whether they are or are not offensive to African Americans. First, each scored question on each test is pre-tested twice during previous test administrations,[113] and, before it is used in an

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110. Moreover, due to "testing legislation" in New York State, items are publicly disclosed (three of four administrations annually) and therefore they may be examined by any party for cultural bias. This argument that the test is culturally biased might, and I say might, have more credence if the LSAT, as it once did, tested general knowledge as opposed to reading comprehension, analytical reasoning, and logical reasoning. I suppose it is possible to ask a question involving, for the sake of argument, swimming or, better yet, ice hockey in which I will assume there is more participation and knowledge amongst whites than African Americans.

111. A crude example of this would be a question or a reading passage that contains as its main protagonist or actor "Sambo." A more subtle variation would be multiple reading comprehension passages that portrayed criminal or anti-social behavior with the miscreant always either expressly identified as an African American or a name like Raheem or La Quanda which is more than likely to be associated with an African American. The problem with this idea is that although questions like this could be inadvertent, to truly make a demonstrable difference it would require a mens rea or intent to rig the test, which has yet to be proven. Indeed, it is hard to fathom what would motivate the producer or assembler of the test to do something like this. As an aside, it should be noted that the principal architect of the LSAT in most recent years, Richard Adams, is an African-American male; he assumed the position on October 1, 1987.

112. See Espinoza, *supra* note 96.

113. This is why the LSAT today has five sections even though the test is scored on four sections, analytical reasoning, two on logical reasoning, and reading comprehension. In each test administration, and there are four a year, there is a fifth section—either another section on analytical reasoning, logical reasoning, and reading comprehension—in which those items are used for pretesting to determine if they can later be used as scored items in an administration.

actual test, it must pass two differential item functioning analyses ("dif analyses") in which a statistical procedure is used to determine if item-level results differ significantly between members of different subgroups first matched on ability. The procedure is called the Mantel-Haenszel test,[114] and, put simply, it analyzes each item to determine if test-takers of equal ability from different subgroups answer the question in a different manner than members of other subgroups.[115] For example, if 63% of the white test-takers who score between 158–160 answer an item correctly, one would assume that approximately 63% of African-American test-takers with the same score range should also answer the item correctly. If, however, only 30% of these African Americans answer the question correctly, the item would be deemed suspect and would not be used.[116] All items used in an actual test administration are also vetted pursuant to the Mantel-Haenszel procedure to determine if there is any differential outcome for members of different subgroups. Hence, each item is tested three times to verify that members of different subgroups do not perform or respond differently with respect to each individual item: at the pre-test, pre-equating, and operational stages. Although each item is individually tested to verify that there is no difference in performance between members of subgroups matched on ability, in the aggregate (without matching on ability) there is a score gap related to the average score performance of members of the subgroups.

The second reason I make the claim that the test is not discriminatory is because the proof needed to verify its discriminatory impact is lacking. If the LSAT does discriminate against members of a subgroup, like African Americans, the effect of that discrimination would be observed via differential subgroup predictive validity or a grade/LSAT correlation of the members of the subgroup.[117] In layperson's terms, the LSAT would not be an accurate predictor of grades for these subgroups because in law school their performance would reflect their true ability not affected by the discrimination. In truth, if the LSAT intentionally discriminates against or has an unintentional discriminatory impact on African Americans or other subgroups, the LSAT would nnderpredict their performance in law school because the test scores

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Thus, if a test administration has two analytical reasoning sections, one of the two is not scored and is comprised of items that are being "tested" to determine if they can be used in a scored section of a test in a future administration.

114. The Mantel-Haenszel procedure is a statistical contingency table method for estimating and testing the association of item-level performance and subgroup membership, in which subgroup members are first matched on estimated ability.

115. The subgroups that are tested against each other, when sufficient size samples exist, consist of whites, African Americans, Native Americans, Hispanics (including Latinos and Chicanos), and Asian Americans. The test is only run when sufficient numbers of subgroup members are available. In addition, the results of men versus women are also compared to ensure that there is no gender differential. They also compare Amcrican and Canadian test-takers to determine if therc are differences between these two groups.

116. Indeed, a dif panel, which includes members from the affected subgroups, will convene to consider the item, that is, examine the differential response rates.

117. For a discussion of correlation and predictive validity, see *infra* notes 137–139 and accompanying text. A critic of the LSAT might argue that both the LSAT and first-year law school grades are equally biased. In fact, William D. Henderson, a critic of the LSAT, makes this exact claim. *See* William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 977–78. That thesis is beyond the purview of this article.

these students receive would be inaccurately and artificially depressed via the discriminatory test.

An analysis of the test scores of members of subgroups and their overall validity reveals data to the contrary:

> Questions about the overall validity of the LSAT often are raised in conjunction with concerns about its validity for racial and cthnic minority group applicants. Research into qucstions of differential validity of the LSAT have repeatedly dcmonstrated that LSAT scores used either alone or in combination with UGPA are as valid or more valid predictors of first-year grades in law school for black, Hispanic, and Mexican American students as they are for white students. The research also shows that, contrary to popular belief, when UGPA is used alone as a predictor, it is less correlated with first-year grades for black students than for white students. Concern about the magnitude of the validity coefficients for applicants of color is based on concern about how to most fairly evaluate test scores and undergraduate grades in making admission decisions. The research has shown consistently that when a regression equation is developed using combined data from white and minority students *the equation tends, on average, to overpredict law school performance for minority students.*[118]

The third reason that the test is not discriminatory is somewhat difficult to explain. Critics of the test attack it as though the LSAT is the only standardized test with a large score disparity between whites and various subgroups. Unfortunately the evidence does not demonstrate that the score-scale differential between whites and members of subgroups is unique to the LSAT. Quite the contrary, on every high-stakes[119] test used to determine admission to college or graduate school, there is a score-scale differential between white test-takers and members of underrepresented subgroups. It is fairly common knowledge that the score-scale differential that afflicts the LSAT test when subgroups are compared is also present in every large-scale standardized test given in the United States today.[120] Indeed, a review of the literature reveals that the score-scale differential between African Americans and whites is as low as or lower on the LSAT than most, if not all, other standardized high-stakes tests like the LSAT.[121] Finally, although this is not integral to my thesis, the LSAT can make the claim that at the very least its score-scale differential is shrinking so that it now represents one standard deviation of difference versus the one-and-one-half standard deviation between whites and comparably situated African Americans some fifteen years ago when I started my volunteer career with the LSAC.[122]

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118. Wightman, *supra* note 7, at 33–34 (citations omitted) (emphasis added).

119. High stakes standardized tests are those tests upon which something important turns, like admission to law school, admission to medical school, admission to the armed services, licensure as an architect or nurse, etc.

120. THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks & Meredith Phillips eds., 1998).

121. *See infra* notc 125 and accompanying text.

122. See, for example, the 1990 LSAT Research Report that indicated that the score gap between African-Americans and whites was 1.1. *See also* Jencks & Phillips, *supra* note 120, (indicating that the gap narrowed significantly during the 1970s and 1980s).

Although this "score gap" is the subject of numerous articles and discussions,[123] the score-scale differential between whites and African Americans is not unique to the LSAT, and any claim of discrimination leveled against the LSAT must, by necessity, be leveled against almost every standardized test used in America.

> Here are some of the facts that give us great concern—facts that we have been devoting much of our lives to addressing. According to Nettles and Perna (1998), in their statement of facts about racial inequality in educational testing, one of the most visible and pronounced areas of difference between African Americans and Whites is their standardized educational testing scores. These differences represent one of the nation's greatest educational challenges to equality of access and achievement. Differences in the test scores of African Americans and Whites are revealed at the earliest grade levels and they persist throughout the subsequent years of formal education. The following are just a few illustrations of the gaps that can be observed in some of the nation's most prominent assessments.
>
> - African American and White preschoolers achieve similar scores on tests of motor and social development (100.0 versus 102.6) and verbal memory (96.2 versus 97.7), but African-American preschoolers score much lower than Whites on tests of vocabulary (74.6 versus 98.2).
> - Only 9% of African American 4th graders achieve scores at or above the proficient level on the NAEP reading test, compared with 37% of Whites.
> - One-half (48%) of African Americans score below the basic level on the NAEP 12th reading test, compared with 19% of Whites.
> - Only 4% of African American, but 17% of White, 8th graders achieve scores at or above proficient on the NAEP history test.
> - Two-thirds (66%) of African Americans, but only 19% of Whites, score below basic on the 4th grade NAEP geography assessment.
> - Only 24% of African American 4th graders score at or above the basic level on the NAEP mathematics assessment, compared with 72% of Whites.
> - Two-thirds (66%) of African American 12th graders score below basic on the NAEP mathematics assessment, compared with only 28% of Whites.
> - Only one-third of African Americans who take an Advanced Placement examination receive a passing score, compared with about two-thirds of Whites.
> - Average scores on the SAT are about 100 points lower for African Americans than for Whites on both the verbal (434 for African Americans versus 526 for Whites) and quantitative components (423 versus 625).
> - African Americans average 17.1 on the ACT, whereas Whites average 21.5.
> - African Americans score about 100 points lower than Whites on the verbal, quantitative, and analytic components of the Graduate Record Examination (GRE).

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123. *See, e.g.*, Rebecca Zwick, *What Causes the Test-Score Gap in Higher Education: Perspectives on the Office for Civil Rights Resource Guide on High-Stakes Testing*, CHANGE, Mar.–Apr. 2001, at 32.

- Average scores are also lower for African Americans than for Whites on the [LSAT] (142.6 for African Americans, versus 153.7 for Whites in 1995).[124]

What does all this mean in relation to the claim that the LSAT is discriminatory? If the LSAT is discriminatory, then every standardized test is discriminatory.[125] Although that claim may be plausible to some, it is not plausible when one thinks of the animus and the resources that would be required to intentionally cause the discrimination against African Americans and other underrepresented groups on all standardized tests.[126] The sheer magnitude of such an endeavor dooms it to a quick failure.

In other words, it is easy to postulate that these tests are discriminatory or racist, but it is hard to think of a reason why someone or some entity would intentionally cause the tests' directors to operate in that fashion. Further, even if a plausible rationale could be produced, it is hard to believe that it could be successfully implemented and, just as importantly, kept relatively secret once the implementation is accomplished.

Which leads to the million-dollar question: what is causing this score-scale differential on essentially all standardized tests? If I had the answer to that question, I gnarantee you I would not be writing this Article. Instead I would be writing an article addressing that issue. Suffice it to say there are many theories regarding why certain subgroups, especially African Americans, score lower on standardized tests than whites. They range from the racist—African Americans are inferior to whites[127]—to social science explanations that attempt to explain the essentially unexplainable.[128] Perhaps the most salient theory put forth to date, in my humble estimation, is that espoused by Professor Claude Steele that African-American test-takers internalize their expected negative test performance and that internalization results in lesser test scores. This so-called "stereotype threat" hypothesis posits that, perversely, African Americans fear the threat of confirming the stereotype of their lack of academic ability, which leads to increased pressure on these students to perform on standardized tests. This increased pressure, which is characterized by Professor Steele as "intimidation" and which whites do not experience, allegedly causes African Americans to perform worse (called "spotlight anxiety") when they are told that they are taking an important test than when they are simply told they are performing a task that is not going to be correlated to their intelligence or lack thereof.[129]

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124. Arie L. Nettles & Michael T. Nettles, *Issuing the Challenge*, *in* MEASURING UP: CHALLENGES MINORITIES FACE IN EDUCATIONAL ASSESSMENT 1, 2–3 (Arie L. Nettles & Michael T. Nettles eds., 1999) (citing Press Release, Michael T. Nettles & Laura W. Perna (1998) (on file with the Frederick D. Patterson Research Institute)).

125. Indeed, that claim has been made. *See supra* notes 93–96 and accompanying text.

126. As detailed above in note 124 and accompanying text, the differential performance among subgroups begins as early as preschool and manifests itself in standardized testing as early as the fourth grade.

127. For a refutation of this claim, see *supra* notes 99–110 and accompanying text.

128. See *supra* text accompanying note 78 for a theory that attempts to explain, in another context, the persistent advantage that whites have in American society vis-à-vis persons of color.

129. Claude M. Steele, *Thin Ice 'Stereotype Threat' and Black College Students*, ATLANTIC MONTHLY, Aug. 1999 at 44, 47. Although Professor Steele did not succeed in eliminating the score gap when his experiment reduced or eliminated the stereotype threat, this thesis still has credence and is worthy of further exploration.

Further exploration of this precise question is beyond the parameters of this Article. Suffice it to say that the elimination of the score-scale differential between whites and African Americans and the other subgroups similarly affected would have the effect of eliminating the need for affirmative action.

III. THE DESTRUCTION OF THE HOLISTIC APPROACH TO ADMISSIONS

As noted above, the *U.S. News* ranking uses a self-determined methodology in ranking law schools that includes as a significant variable the law school's median LSAT score.[130] That variable is weighted so that it comprises 0.125 of the overall weight attributed to the ranking. Hence, it is simply one of many factors *U.S. News* uses to rank the law schools. Indeed, the fact that a school's median LSAT score correlates well with the school's ranking by the magazine, as demonstrated by Judge Posner in his article,[131] is perhaps explainable by the fact that the other important variables also correlate well with the law school's median LSAT score.[132] Thus, the logical question that arises is why I attribute the destruction of the holistic approach to admissions to the *U.S. News* ranking when there are many variables or metrics used by the magazine to produce the rankings.[133]

To understand my contention, a number of important topics must be addressed and understood. First and foremost, one must have a clear understanding of how the admissions process works today at most elite or selective law schools. Second, there must be a high degree of familiarity with the score-scale differential between members of various subgroups of applicants[134] and an acknowledgement that it is this score-scale differential that causes schools to look at variables other than a mechanical application of scores in making an admissions decision.[135] Third and finally, the admissions

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130. *See supra* notes 63–72 and accompanying text.

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

132. By that I mean it is logical and consistent that a school with better students would attract better faculty. Moreover, a school with better students and a better faculty will by and large have a better academic reputation and a better reputation among judges and practitioners. Finally, it is also logical to assume that a school with better students, better faculty, and a better reputation will, in the future, attract better students and more applicants. As a result, that school will be even more selective regarding which students it will admit, and those students admitted to this highly selective school are overwhelmingly going to matriculate there if admitted. Hence, the quality of the students, what I characterize as inputs, will have a strong correlation with many, if not all, of the other output metrics such as bar passage, placement, reputation among bench and bar, etc., that are used by the magazine to determine a law school's ranking. The reason that the median LSAT may correlate perfectly with a law school's ranking is because of the precision of the number which is easy to compute and is, as addressed *infra* note 136 and accompanying text, somewhat manipulable. Indeed, if there is a criticism of the rankings and its methodology as it pertains to the use of the median LSAT, it may be that, given the relationship between all of the variables, the *U.S. News* methodology may be too narrowly circumscribed to accurately capture the true differences among law schools.

133. For a discussion of the "holistic approach" to admissions see *supra* notes 36–41 and accompanying text.

134. *See supra* notes 88–96 and accompanying text.

135. This point either seems rather obvious or is totally obtuse given one's familiarity with the admissions process and the complex issues addressed herein. In brief, I contend that it is the

models I describe and use presuppose that there are many more "admissible" applicants than there are available seats in the law school. Hence, to some extent the admissions process is "manipulable," allowing the decision maker to choose whom to admit. At least with respect to this last point, I assume that law school admissions officers have some input regarding who applies, whether those applicants are admitted, and whether admitted applicants matriculate.[136]

The first variable in the admissions process, is the "presumptive admit/deny model" used by almost all law schools in the United States today. Without going into too much detail, most schools rank-order applications via the use of an admissions index that is created by a complicated mathematical formula that assigns weights to an individual's UGPA and LSAT score. The weight assigned to each variable, and the number generated by the index, is a decision made by the individual school, in consultation with the psychometricians at the LSAC, and is influenced in large part by the correlation studies produced by the LSAC which gives the school detailed information on how well its particular index is correlating to actual law student performance in the first year of law school, as measured by first-year law school grades.

Thus, a school might decide to use an index, which "weights" the UGPA at 55% and the LSAT at 45%, or it might "weight" them 50/50. However, since the LSAT is

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confluence of several variables that causes what I characterize herein as the destruction of the holistic approach to admissions. A crucial variable is the fact that African Americans and members of other underrepresented groups in law schools score significantly lower than white test-takers. Imagine, if you will, a homogenous society, for example Japan, in which there are no underrepresented groups. In such a society there is no need for affirmative action. Think further if you will about a heterogenous society in which there are no score-scale differentials that correlate with membership in an underrepresented group. Once again, even if diversity is highly prized or sought after by law schools for their matriculating classes, there would be no need for affirmative action as members of the minority groups would be proportionately represented in every quartile of test-takers when measured by score. If 10% of the test-takers are African-American, the assumption is that 10% of those with scores between 170–180 would also be African-American. Hence, it is the combination of minority groups or people of color as subgroups of applicants who perform worse than their white peers that creates the issue that leads to the use of affirmative action when diversity is viewed as both socially positive, as in *Grutter*, and as a goal to be attained by law schools in their matriculating classes.

136. There are three different admissions models employed at various law schools. The school may have what is characterized as an "open" admissions process (meaning that anyone who applies is admitted). Very few schools will admit they have an open admissions model because it means they are not selective. Second, instead of employing a presumptive admit/deny model a school may choose to employ numerical cutoffs to automatically admit or deny an applicant with limited or no review of the applicant's file. I am aware of no school that will admit to employing this process, a process that, based on the numbers—say the applicant's LSAT score—automatically admits or denies admission to applicants based on these hard cut-off scores. If a school did employ this process, then it would not be in a position to manipulate the median LSAT score to positively affect its *U.S. News* ranking. Another reason schools may not use this model is because it violates LSAC cautionary policies against using "cut-off" scores because their use arbitrarily creates distinctions with no psychometric basis. If the cut-off for an admit decision is a score of 150—that is, 150 you are admitted, 149 you are rejected—the distinction between an applicant who scores, a 149 and one who scores a 150 is psychometrically indistinguishable but the cut-off score makes the irrelevant difference positively dispositive. Most schools employ the third model—the presumptive admit/deny model.

scored on a scale of 120–180 and most UGPA's are on the 4.3–0 scale (with an A+ at 4.3 and an F at 0) the index, even if weighted fifty/fifty, a mathematical computation is necessary. At Minnesota our index produces numbers from the high one-hundreds to the mid two-hundreds. Hence, our applicants may produce a range of Index Scores between 190–250, with 250 being the highest score for an applicant with a 4.3 UGPA and a 180 LSAT score.

Each school can establish its own index weighting the variables as it chooses based on the "Correlation Study" that is provided annually to the law school by the LSAC.[137] That Correlation Study, as its names implies, correlates the first-year law school grades attained by students with their index values. If there is a perfect correlation between the index and the first-year grades, a student with a higher index, such as a 240 on the Minnesota scale, will achieve a higher grade point average than a student with a 239 index score, and a student with a 239 index score will achieve higher grades than a student with a 238, and so on. In this perfect world of correlation, one would admit students solely based on the index score because that index score would predict accurately how well the student would perform in the first year of law school.[138] Every year, a school receives a report from the LSAC recommending that the index be adjusted, if necessary, to provide a higher degree of correlation.[139]

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137. Several schools choose not to use an index in their admissions process and instead simply use the LSAT and the UGPA as separate and unweighted variables. The vast majority of schools, however, do employ an index.

138. Please note that I am intentionally referencing the fact that the LSAT and the index are designed to correlate with a student's first-year law school grades and not the final or third-year law school grades. However, as you might imagine, first-year grades correlate pretty significantly with third-year or final law school grades. This correlation is supported by data reported in the Law School Admission Council, LSAC Bar Passage Study, which is a national longitudinal study on legal education and entry into the legal profession that was sponsored by the LSAC. The study has followed a sample from the class that entered law school in the fall of 1991 through graduation and entry to the bar. Entering credentials, including extensive background data gathered at the time they entered law school (including information about their goals, aspirations, self-concepts, and perceptions, as well as their extracurricular activities, personal responsibilities, and employment aspirations); law school performance data; and bar examination data are available for the sample, which includes approximately 70% of the Fall 1991 entering class. The students from the sample remain in the active bar passage study file for three years after graduation (six bar examination administrations) or until they pass a bar exam, whichever comes first. *See* LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY (1998), *available at* http://www.lsacnet.org/research/LSAC-National-Longituinal-Bar-Passage-Study.pdf.

139. A rather lengthy quote will explain the import and value of correlation and standardized testing like the LSAT:

> The usual procedure for establishing validity with regard to the LSAT is to obtain evidence that there is a relationship between it and the outcome of interest—usually academic performance in law school or, more specifically, performance in the first year of law school. There has been and continues to be substantial statistical support for the claim of validity of the LSAT for use in this limited sense in the admissions process.
>
> Typically, this evidence is in the form of a correlation between LSAT and first-year grade point average in law school (FYA), or between LSAT/UGPA-combined and FYA. The correlation coefficient provides some information about how useful

Once the school has an established index, the admissions files are typically arranged by the index number with higher number files viewed as presumptively stronger than lower numbered files. Based on the school's applicant pool, its past experience with applicants, and its predictive index, most schools establish what is called a presumptive admit pool. This simply means that a file with an index number above a certain score is "presumptively admitted." Conversely, a file with a number below a certain level is "presumptively denied." Hypothetically, in the Minnesota system, a file with an index above 235 may be treated as a presumptive admit and any file with a number below 220 may be a presumptive reject. Files with scores between 220–235 carry no presumption and are evaluated as such.

The key to understanding this system is to focus on the word "presumption" and what it entails for the process. Although the weight given to the "presumption" may differ from school to school, in most contexts the presumption is similar to the operation of the burden of proof rules in a criminal trial. An applicant presumptively admitted is not automatically admitted, rather, the burden shifts to the file reviewer to justify why the applicant with that number should not be admitted. And, there may be several acceptable, rational reasons why a file that carries a presumptive admit label may be rejected from the obvious (the UGPA is very high in a weak major from a school that has a proven track record of producing applicants who do not do well at the school in question), to the not-so-obvious (the applicant's personal statement is replete with grammatical and other errors and calls into question the applicant's ability to write; the letters of recommendation are very weak and point out some not too flattering facts regarding the applicant; the law school has already admitted ten individuals from the applicant's school and chooses not to admit any more), to the difficult (the applicant has been convicted of a serious felony which raises questions about the applicant's ability to sit for the bar in the state in which the school is located).

The converse is also true. An applicant categorized as a presumptive denial is not summarily rejected. However, the presumption shifts to the file reviewer to overcome the presumption that the applicant should not be admitted, and there are several obvious reasons why such an argument can easily be made in many cases. For example, an applicant's grades may be depressed because the applicant majored in a very difficult field (such as biomolecular engineering, where a 3.0 UGPA may represent a significant accomplishment), or the applicant may have done poorly in school, but that experience is irrelevant as the student graduated twenty years before applying and has achieved significantly (that is, has a fascinating job at which the applicant has excelled) since that time. Or, the student has overcome a significant disadvantage such as working full time during the applicant's college career while raising three small

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> a predictor is—but there is no clear answer as to how large the coefficient should be in order for the predictor to be useful. National validity data for U.S. and Canadian law schools during the period 1990–1992 show that the LSAT is a substantially better predictor of first-year performance in law school than is the UGPA. . . . The data also show that the combination of LSAT and UGPA provides better prediction than either predictor alone. The average multiple correlation across 167 schools for whom three years of data are available is .49. These results are consistent with findings from earlier LSAT validity summary reports.

Wightman, *supra* note 7, at 31–32 (citations omitted).

children as a single parent.[140] The bottom line is that some students in the presumptive deny category may be admitted for a variety of reasons after the file is carefully reviewed.

What is left unsaid is what happens to those files that fall into neither category and carry no presumption. These files are in most cases read with an eye toward filling the class's vacant seats, and, more often that not, the reviewer is looking for "interesting" people. It has been my personal experience that files that carry no presumption will realistically be affected by the quality of the two other pools and their impact on the seats available. It stands to reason that, if the presumptive admit file pool is rather large and most of the seats in the entering class can be filled from this pool,[141] then the odds of someone being admitted who is not a member of this group is small. The converse is true as well.

What should be apparent is that in a well-run admissions process, no one is admitted or denied simply based on the numbers, whether they fall in the presumptive admit or deny pool, or somewhere in between. Each file should be read so that the reviewer, cognizant of the presumption assigned to the file, can change the presumption based on the file review. In the file review, since the numbers are obvious and have been indexed, the file reviewer is charged with reviewing factors other than numbers to assess the strength of the file. This is the so-called "holistic review" that is the title of this Article.

Indeed, one should not rely too heavily on the numbers in the admissions process because although the LSAT and UGPA provide reliable and comparable information, those numbers alone do not predict precisely (or anywhere close to precisely) how students will perform in the first year of law school.

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140. There may be other not-so-obvious, less compassionate reasons why applicants who fall into the presumptive reject category may be admitted such as they are a legacy (a student at least one of whose parents is an alumnus of the Law School), or the applicant's family is politically connected (the child of the governor, for example), or the applicant's family has provided a seven figure donation to the Law School.

141. This brief summary of the admissions process is not complete unless we take a brief detour to address the issue of yield rates. If one has 250 seats to fill in a first-year law school class, the admitting group must contain a minimum 250 students. Of course, not all of the students will matriculate at the law school given a variety of factors (if the student is admitted at more than one school the student must choose which school to attend, often basing that choice on the relative qualities of the competing schools, the financial aid or scholarship package offered, the location of the school, etc.). Based on historical experiences and averages, the admissions process should have a fairly good idea regarding how many students to admit to fill the class given the demographic composition of the admitted students. In other words, the admissions process should internalize the fact that if six students with an index of 245 or above are admitted, the odds are that only one, perhaps two will matriculate (the rationale in this case for this outcome is that these top-rated candidates will get into essentially every law school to which they apply and will have a variety of schools from which to choose). Conversely, if six students with an index score of 220 are admitted, the process should internalize the fact that all six are more than likely to matriculate given that these students will have less choice, and the law school admitting them (in this hypothetical, Minnesota) may be the best school to which they have gained acceptance given their relatively low scores and resulting index. For example, a school like Minnesota may admit three times the incoming class, or 750 students to matriculate 250 if the overall yield is one-third.

> The magnitudes of the correlation coefficients reported above are often the subject of criticism, particularly when considering that the square of the correlation coefficient is an indicator of the amount of the variation in the criterion that is accounted for by the predictors. Squaring the median validity coefficient for LSAT score and UGPA *shows that these two variables account for approximately 25% of the variance in first-year law school grades.*[142]

I cannot say it any better than Linda Wightman when it comes to the appropriate use of numerical indexes in the admissions process:

> The tension between commitment to the principles of racial and ethnic diversity and of competitive evaluation based on quantifiable indicators of individual achievement frequently results in questions about the appropriateness of the use of numerical indicators, especially the LSAT, in the admission process. These questions typically are raised by questioning the validity of the test, particularly the validity of its use with applicants of color. However, one does not need to argue that the test is invalid or a biased predictor against members of certain groups in order to substantiate the negative consequences of misuse or overuse of the test in the admission process. The LSAT is valid for a limited use and has a clearly defined, narrow focus: it is a test of acquired reading and verbal reasoning skills that have been shown to correlate with academic successes in the first year of law school. When it is used for a different and/or far broader purpose, not only is the use inappropriate, but calling on the test to do more than it was intended to do damages its validity. This distinction is important to keep in mind because misunderstanding it can detract from the more central issue. Specifically, several studies support the test as a valid measure for the limited purpose for which it was designed and indicate that it is as valid for applicants of color as it is for white applicants. However, a test that does a very good job of measuring a narrow, albeit important, range of acquired academic skills cannot serve as a sole determinant in the allocation of limited educational opportunity. Neither can it serve that purpose when coupled with UGPA. UGPA carries its own set of limitations, including the influence of factors such as leniency of graders, rigor of the curriculum represented by the grades, and students' motivation and application. In addition, the LSAT score and UGPA of law school applicants are correlated .38 with one another. Thus, there is some redundancy in these measures.[143]

A. The Dean's Role in This Mess

As detailed above, the presumptive admit/deny model used in most admissions processes does embrace the holistic approach, which allows the evaluator to take the race or ethnicity of the applicant into account in order to act affirmatively on the file to promote diversity. Indeed, as Professor Wightman capably demonstrates, the failure to act affirmatively will more than likely result in a paucity of members of underrepresented groups in the law school's student body. Moreover, the Supreme

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142. Wightman, *supra* note 7, at 32 (emphasis added).

143. *Id.* at 29–31 (citations omitted).

Court has given permission to the law schools to act affirmatively to diversify their school's student body.[144]

Consequently, one would think that the law schools, at least those seeking a diverse student body, would be able to easily produce a diverse student body as a result of the use of the holistic approach in the admissions process. Unfortunately, that is not the case given the pressure placed on deans to increase their median LSAT score, and, thereby, increase their ranking. The fact that there is an almost-perfect correlation between a school's median LSAT score and the *U.S. News* ranking[145] provides a strong incentive for deans to increase their median LSAT score by all legal means.[146]

What is often not stated is that law school deans, like anyone else, want their program or their school to be more highly rated. It is human nature.[147] Aside from human nature, there is also enormous pressure on deans from all of their constituencies to increase the ranking of their law school—and that, too, is human nature. No one wants to finish second:

> With each admissions season, the LSAT also creates a raft of winners and losers, as acceptance letters and scholarship money often turn on relatively small differences in test scores. Integrally related to this process is the ranking of law schools by [*U.S. News*]. Despite a methodology that attempts to consider a variety of substantive factors, including faculty reputation, library resources, faculty-student ratios, and bar passage, these rankings move in virtual lockstep with a school's median LSAT score. *Because students, legal employers, and alumni are often swayed by these rankings, competition between law schools has become an LSAT "arms race."*[148]

Just as importantly, when a dean, for whatever reason, decides that his or her paramount goal as dean will be to increase the school's rankings, that dean faces a question: how best to achieve that goal. Given the variables noted above, the dean in question can try to increase the school's academic reputation, and many do.[149] That

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144. *See* Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

145. *See* Posner, *supra* note 131.

146. Some commentators have gone so far as to allege, that "[90%] of the overall differences in ranks among schools can be explained solely by the median LSAT of their entering classes." *See* KLEIN & HAMILTON, *supra* note 15.

147. *See* Richard H. McAdams, *Relative Preference*, 102 YALE L.J. 1, 3 (1992).

148. Henderson, *supra* note 117, at 3 (citations omitted) (emphasis added).

149. As a sitting Dean, I am either fortunate or unfortunate to be the recipient of a slew, neigh a mountain of catalogues, brochures, letters, puff-pieces, and other promotional literature produced by almost every law school, including my own, in which the school's virtues and its aeademic excellence are extolled. All of this information arrives, not surprisingly, in late September/early October, around the same time that I receive my survey from *U.S. News* to evaluate the reputation of law schools. *See infra* note 158 and accompanying text. I don't think this stuff actually changes anyone's mind or positively influences one's ranking by one's peers. However, as with most things involving the rankings, we deans are a risk-averse group and if one is in, pretty much all are. "Although many within the legal academy lament the 'overreliance on the LSAT,' law faculties have generally been unwilling to bear the consequences of taking a different path, at least by themselves. As one law school dean aptly noted, the situation has become a 'classic "prisoners dilemma."'" Henderson, *supra* note 117, at 978 (citations omitted).

variable is extremely important, accounting for 40% of the rankings. "*U.S. News*'s methodology gives the greatest weight to a school's reputation, and to the LSAT scores of its incoming students. 25% of a law school's overall ranking is derived from its reputation among academics, and an additional 15% based on its reputation among practitioners and judges."[150]

Alternately, the dean seeking to improve the school's ranking may focus on other, less heavily weighted variables like expenditure per student, library size, employment rates for graduates, and bar passage rate—and some do. The bottom line, however, is that the preferred method of improving one's ranking, if that is the goal—and I guarantee you it is for every dean today—is improving the median LSAT score of the entering class. And, there are three very superb, excellent reasons why the focus is on improving the LSAT. They are the three "C's"—correlation, cost, and certainty.

1. Correlation

I have already discussed the almost perfect correlation between the median LSAT score and the school's ranking.[151] Now, I am not a psychometrician, statistician, or social scientist, so I am willing to concede that correlation may be coincidental and reflect a number of factors.[152] There may also be an echo effect created by the fact that *U.S. News* has been conducting this survey for over two decades and a school's reputation may be based on its ranking in the previous year, which in turn may have been based on the LSAT.[153]

My point, and it is a small one, is that a dean, sees the correlation between the median LSAT score and the rankings and comes to the quite rational conclusion that, should the correlation persist, to increase his or her law school's ranking, he or she should increase the median LSAT. It is that simple.

2. Cost

There is no doubt that recruiting the very best students, or even students with higher LSAT scores, costs some amount of money. What is unclear is the incremental cost imposed on law schools in seeking these students. I hazard an educated guess that most

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150. Joanna Grossman, U.S. News & World Report's *2005 Law School Rankings: Why They May Not Be Trustworthy, and How the Alternative Ranking Systems Compare*, FINDLAW, Apr. 6, 2004, http://writ.news.findlaw.com/grossman/20040406.html ("How is 'reputation' quantified? Four faculty members at each ABA-accredited law school (the dean, the academic dean, the head of the faculty hiring committee, and the most recently tenured faculty member) are asked to rank every law school on a scale of one to five, and to leave unscored any school about which they do not have enough information. They are told nothing about each school, but are instructed to take into account a wide variety of factors that may bear on academic reputation.") (hyperlink omitted).
Id.

151. *See supra* notes 131–132 and accompanying text.

152. *See supra* note 132.

153. *See* Denis Binden, The Changing Paradigm in Public Legal Education, (2005) (unpublished manuscript, on file with the Indiana Law Journal) (documenting rapid increase in tuition for public law schools).

deans do not view recruiting or attracting the best students as a separate "cost." Most, I assume, view that as part of, or integral to, the mission of the law school. Further, if it happens to result in an improved ranking because the students recruited produce a higher median LSAT, so much the better. So, clearly there is a cost in recruiting students with higher LSAT scores. And, that cost may be quantified.[154] More than likely, however, the dean or the faculty will *not* internalize that cost as a cost incurred to increase the ranking, or as an unreasonable cost. Who could quibble with the desire to obtain the best students?

Indeed, I posit that even if the costs of increasing the median LSAT are easily quantifiable and cost more than increasing the other variables that are used to produce the rankings, deans will still focus on increasing the median LSAT for several logical reasons. First, it is an internal metric that is not only important to the dean and the *U.S. News* ranking, it is just as important to the faculty at the law school. Faculty members, like nearly everyone else in legal education, are aware of the school's median LSAT and believe it matters, perhaps even more so than *U.S. News* ranking.[155] The faculty can "see" the median LSAT of the incoming class in a way they cannot "see" the academic reputation, which is more nebulous and external to their day-to-day affairs. Consequently, that median LSAT is tangible to the faculty and it matters.

Not only is it tangible and internal in a way that the other variables are not, it is certain, and that certainty makes it important in ways different from the other variables.[156] A comparison will prove my point. One can clearly make the argument that the reputation variables in the *U.S. News* ranking count more than the median LSAT and a school should do more to improve them than the median LSAT score.[157] Yet, the very "softness" of the variable of reputation creates incentives not to do so. What does "reputation" mean, and how does one go about changing it? How long will it take to do so? Is it finite or debatable?

Let us examine the costs associated with the other variables, starting with the school's reputation. How much would it cost to convince the other deans, practitioners,

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154. I can easily imagine a situation in which a dean authorizes an expenditure of resources to send a faculty member on a recruiting trip to a school that produces highly sought-after students with the higher LSAT scores, or a brochure or mailing is produced specifically to attract higher scoring LSAT applicants.

155. Although I am going to have to deploy an unverifiable anecdote to prove this point, I believe the deans reading this will agree this has occurred at their school. Once a class is admitted and orientation is concluded, the dean at the first faculty meeting provides the faculty with a statistical breakdown of that class, including median LSAT. On the rare occasion that the LSAT has declined by a point, there is much handwringing and consternation about that result and a heated discussion regarding whether certain personnel, usually the dean and the admissions director, should be replaced. What is even more interesting is that throughout the academic year the faculty will internalize the one-point drop in the median LSAT score and refer to that class of students as not as smart or as good as their predecessors. The fact that one or two students may have created the difference between a median LSAT of 160 and one of 159 is beyond the ken of the faculty. From their perspective, the class with a median of 159 is not as good as the one with a median LSAT of 160 and faculty cannot be convinced to the contrary.

156. For further discussion of this "certainty principle," *see infra* notes 162–170 and accompanying text.

157. *See* Posner, *supra* note 131, at 14 n.2.

and judges that the law school is better than it was ranked? How long will it take to achieve that goal? What does one do to accomplish the goal?

Examining the variables other than reputation,[158] placement success accounts for 20% of the weight used to rank law schools, and faculty resources counts for 15% of the total weight. How can a dean reliably insure that more, rather than less, of the school's graduates will be employed? To what extent does the dean control the employment market for her product, the interviewing process, the decisions made by the prospective hire, etc. Although this is a very important variable, it is one largely external to the dean's effort.[159]

Faculty resources are an even more problematic variable to improve. Faculty resources are, simply put, the expenditures per year, per student and are arrived at by dividing the year's budget by the number of students.[160] Consequently, this weight can be influenced by the dean to the extent that the dean can obtain additional revenues without increasing students. A one hundred million dollar gift will clearly improve the faculty resource weight of a school. The problem is that if deans could on a regular basis guarantee large gifts or infusions of capital that would result in an increase of faculty resources, tuition increases would not be as high as they have been in the last decade.[161] This is perhaps the most costly variable—in terms of improving a school's ranking relative to peers—and one, again, that is not without some degree of incertitude when focused upon by the dean.

3. Certainty

Focusing on the median LSAT score provides an enterprising dean with certainty in two respects. First, since the correlation between median LSAT and the ranking is so

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158. Reputation is called *peer assessment* or simply *assessment* by lawyers and judges. *See* Robert J. Morse, Director of Data Research, U.S. News & World Rep., U.S. News & World Report's *Law School Rankings: How and Why* U.S. News *Does Them*, Presentation at LSAC Annual Meeting and Education Conference (June 4, 2005) (copy on file with Indiana Law Journal).

159. Which is not to say that deans do not view this as important. Indeed, stories are legion about deans attempting to "game" the system by hiring their alums who are unemployed to produce better numbers, or to report as employed alums who don't reply to surveys, etc. My point is that if a dean is honorable and does not game the system, the dean has less control over this variable than the median LSAT score.

160. If, for example, a law school had a budget of one million dollars and a total of one-hundred students, that school would not be ranked very highly because that school would spend ten thousand dollars per year per student. That ten thousand dollars per year is supposed to be some indicia of quality because it reflects how much is spent on faculty, the library, administration, and the students (via scholarship). It is clear that schools with larger endowments are ranked higher than schools with lesser resources. Although this correlation is not as close to perfect as is the median LSAT, it is pretty close. Unfortunately, you will have to take my word on this, given the only way I can prove this would be to cite material provided confidentially to deans by the ABA Section of Legal Education in what are called the "Statistical Abstracts," which are provided annually and which we agree not to disclose.

161. *See* Binden, *supra* note 153.

strong, a dean can rest assured that if the median LSAT increases, so, too, will the ranking.[162] The same cannot be said with any other variable.

Second, increasing the median LSAT has the certainty of "goal attainment" to a greater extent than any of the other variables. Deans can control this variable to a greater extent than they can control the other variables. Not only can a dean control the median LSAT through the manipulation of the admissions process,[163] but he or she can quantify that attainment in absolute terms. For example, if the University of Minnesota's median LSAT score last year was 160, I can develop a strategy with my admissions director and staff to increase that median to 161, which I can achieve with some degree of certainty by monitoring who is admitted, who places deposits, and ultimately, who matriculates in the fall at the law school.[164] Furthermore, I can, at least with this variable, verify that I have increased my median LSAT score to 161 if I successfully manipulate the process in a way that produces a median LSAT score of 161.

Compare that with the other variables, all of which are important, all of which will hopefully also be improved as part of a master strategy to increase the ranking of the law school. The law school may spend several hnndreds of thousands of dollars to improve its reputation among academics, practitioners, and judges, but given how it is quantified, through a survey of factors that are best characterized as "soft," how can a dean or anyone else reliably state that spending X or doing Y will result in an improvement of Z in the rankings? That certitude is lacking. Although other variables are important, at the end of the day most deans focus on increasing the median LSAT score if they are interested (as they all will be) in increasing the school's rankings.[165]

And what's the harm in doing all of this if the end result is an improved ranking in the all-important *U.S. News* ranking? The harm, as I have stressed throughout, is that since members of certain subgroups score lower than whites, members of those subgroups will not be admitted proportionately. Thus, those of us who are exhorted to act affirmatively to admit members of underrepresented groups in *Grutter*,[166] and who want to do so by taking a holistic approach to admissions, are forced to abandon that holistic approach when the predominant variable in the review of admissions applications becomes the LSAT score of the applicant because admitting that applicant affects the median LSAT score that will be reported to the ABA Section and then verified by the rankers at *U.S. News* since it is made available publicly. Moreover, this is not a recent phenomenon or problem. This issue has been with us for over a decade.[167] As a result, instead of our classes becoming more diverse, they have become

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162. *See supra* note 131 and accompanying text.

163. *See supra* notes 144–150 and accompanying text.

164. A simple hypothetical will explain my point. If you are seeking to achieve a median LSAT of 160 and plan on admitting a 1L class of 100 students you must insure that 51 of your matriculants have an LSAT of 160 or above. After 51 such students have placed deposits, students with LSATs below 160 may be admitted without affecting the median LSAT.

165. *See supra* note 131 and accompanying text.

166. Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

167. *See* Henderson, *supra* note 117, at 978 n.8 (quoting a Virginia law professor during an AALS panel discussion and reporting a "consensus" among conference participants that the *U.S. News* ranking had caused law schools to "put too much weight on the LSAT in their admission

less diverse.[168] Similarly, the focus is on the "detrimental" or "discriminatory" effect of the LSAT,[169] which legal scholars ultimately and mistakenly want to eliminate from the admissions process.[170]

B. The Solution to the Mess Created by Deans

Whenever I have addressed the problems created by the *U.S. News* ranking in a public forum like the symposium at Indiana University School of Law on April 15, 2005,[171] I am always asked why deans, as a group, continue to cooperate with *U.S. News* when most of them, but not all, vehemently object to the rankings and believe they undermine our educational mission.[172] Critics of the *U.S. News* ranking believe that the answer is simple: do not cooperate. That simplistic response has been tried and has failed due to what is best characterized as a "collective action" problem.[173]

Although I cannot provide a citation to this incident and therefore must offer it as anecdotal and not verifiably proven, I have been informed by a friend of mine who was a dean at a mid-level school in the late 1980s, that a discussion of rankings occurred

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decisions." Interestingly enough, I was the Virginia law professor quoted in that Article.); Deirdre Shesgreen, *Schools Look at the 'Whole Person'*, LEGAL TIMES, Jan. 13, 1997, at 2.

168. The LSAC's Official Guide to ABA-Approved Law Schools details a disturbing trend in which the number of African Americans attending law schools has remained essentially flat for the last eight years at roughly 9200–9400 enrolled in law schools down from an historic high of almost 9700 attending law schools in 1994–1995, even though total J.D. enrollment has increased by approximately 12,000 (due to the increase in the number of law schools and the increased size of law school classes) over the same time period. *See* Law School Admission Council, Official Guide to ABA-Approved Law Schools, Legal Education Statistics, http://officialguide.lsac.org/REF/Template/LegalEducationStatistics.pdf (last visited Oct. 26, 2005).

169. *See supra* notes 73–143 and accompanying text.

170. *See id.*; *see also* Richard Delgado, *Official Elitism or Institutional Self-Interest? 10 Reasons Why the UC–Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593, 600–02 (2001) (arguing that the LSAT should be abolished given that it predicts only 16% of the variation in first-year grades, and demonstrating that higher LSAT scores correlate with family income). This critique of the LSAT is flawed. *See supra* notes 88–96 and accompanying text. With respect to the socio-economic status (SES) correlation between score and income that fact is well known and demonstrated not only on the LSAT but other standardized tests as well. What is ignored in the Delgado thesis is that the same effect occurs in African-American test-takers, that is, the higher the SES, the higher the test score. The problem is that there remains one standard deviation difference between black and white test-takers across the SES spectrum. *See* WIGHTMAN, *supra* note 89. In other words, when similarly situated test-takers are compared, blacks on average score one standard deviation below that of their similarly situated white peers.

171. Indiana University School of Law–Bloomington, Symposium on *The Next Generation of Law School Rankings* Homepage, http://www.law.indiana.edu/front/special/2005_rankings_nextgen/ (last visited Nov. 28, 2005).

172. LAW SCHOOL DEANS SPEAK OUT ABOUT RANKINGS (Law School Admission Council 2005), *available at* http://www.lsac.org/pdfs/2005-2006/RANKING2005-newer.pdf. Only 174 of the 191 deans of ABA-approved law schools signed this letter.

173. *See* Henderson, *supra* note 117, at 978 n.10 (citing Terry Carter, *Rankled by the Rankings*, ABA J., Mar. 1998, at 46, 49 (quoting the dean of Boston University Law School)).

the Annual Deans' Workshop.[174] Following a heated discussion of the pain and suffering brought upon by the rankings, one dean asked his colleagues, "How many of you will elect not to cooperate with *U.S. News* by refusing to respond to their annual survey?" The hands of virtually every one of the 115 or so deans in the room shot up. My friend went home and declined to respond to the *U.S. News* annual request for data about his school. When the magazine hit the streets and his students prepared to hang him in effigy for his school's poor showing in the rankings, he learned that thirty deans had declined to provide information to *U.S. News* and their schools generally suffered by the "guesses" that *U.S. News* used to estimate what their answers might have been. Puzzled by this obvious betrayal by his trusted colleagues, he asked around and discovered that the overwhelming majority of deans in the room interpreted the request to have been: "How many of you will elect not to complete the *U.S. News* 'reputation' survey in which you are asked to evaluate other law schools?" Only the naïve thought it was about the survey, which sought publicly available data about their schools. Thus, the rebellion of the deans was short-lived.

Today, there is very little that individual deans can do to eliminate or lessen the pernicious effect of the *U.S. News* ranking has on the holistic approach in admissions. Notwithstanding the "prisoner's dilemma" problem, *U.S. News* has no trouble obtaining verifiable data about individual law schools.[175] That data is obtained directly from information published by the ABA Section of Legal Education.[176]

> The ABA collects quantitative data as part of the accreditation process using questionnaires completed annually during the fall academic semester. Standard 509 of the *Standards: Rules of Procedure for Approval of Law Schools,* as adopted by the ABA House of Delegates in August 1996, states: "A law school shall publish basic consumer information. The information shall be published in a fair and accurate manner reflective of actual practice."[177]

Hence, one suggested response to the *U.S. News* ranking would be for the ABA Section of Legal Education to quit publicizing individual data about law schools. As I detail in this part, one way to eliminate the use of schools' median LSAT from the *U.S. News* ranking is to undermine the verifiability of the data that is available to *U.S. News*.[178] As matters currently stand, *U.S. News* is able to verify the median LSAT data

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174. This two- or three-day meeting of deans of ABA-approved law schools is held annually in conjunction with the ABA mid-year meeting in late January or early February.

175. It did not take long for people to notice that certain things, like median LSAT scores, reported to *U.S. News* were higher than that same metric when reported to the ABA Section on Legal Education as part of the accrediting process. This "difference" in scores and other metrics eventually caused *U.S. News* to rely, at least for median LSAT scores, on that information reported to the ABA Section on Legal Education.

176. *See supra* text accompanying note 29.

177. LAW SCHOOL ADMISSION COUNCIL & AMERICAN BAR ASSOCIATION, ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS (Wendy Margolis et al. eds., 2006 ed. 2005). However, a review of Standard 509 reveals that it does not require the school to compute or publish a median LSAT. *See* SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, *supra* note 17, at 42–43 ("A law school shall publish basic consumer information. The information shall be published in a fair and accurate manner reflective of actual practice.").

178. *See supra* note 29–31 and accompanying text.

produced by the law schools because that data is published annually from data accumulated by the ABA Section of Legal Education.[179] If the ABA Section of Legal Education fails to make that data publicly available, I predict that the *U.S. News* ranking will no longer use that data in their calculus thereby removing the pressure on deans to increase the median to improve rankings.

The last strategy to produce the appropriate use of the LSAT in the admissions process is very radical and complicated. As matters currently stand, median LSAT scores can be computed for each law school because the range of scores (120–180) is standardized for each applicant irrespective of the school to which the applicant ultimately applies or matriculates. Given current technology and access to the data of past applicants, the LSAC has the capability of producing what are characterized as "non-comparable scores,"[180] that is, scores that in effect change for the applicant given the particular school to which the applicant applies and the quality of the applicant pool.

Hence, the LSAC has the capacity to provide one individual score—say, 163—to an LSAT test-taker, which is that applicant's individual score. The applicant, based on publicly available information and information supplied through the LSAC[181] can then choose which law schools to apply based on this knowledge. Law School *A* may then receive that applicant's file from the LSAC, which will report to Law School *A* an LSAT score of 168. That same applicant will apply to Law School *B* and the LSAC will instead report to Law School *B* an LSAT score of 158. The strength and quality of Law School *A* and Law School *B*'s matriculant pools will determine the score that the LSAC reports to each school. What is important is that the score will be accurate for each school, but different and therefore non-comparable. Because of the strength of Law School *B*'s pool, the applicant's "original" or "non-transformed" score of 163 may represent its median, which may be calculated arithmetically at 158. Because of the relative weakness of Law School *A*'s pool, that neutral score of 163 may represent the score of an applicant or matriculant in the 25th percentile of the entering class which is calculated arithmetically at 168 (these arithmetical calculations may be achieved to produce a true score scale where the range of applicants and, more importantly, matriculants are arrayed on a range, perhaps between 145 and 175.[182]

What is crucial to see is that the two scores, which represent the results of one test-taker taking one administration of the test, cannot be compared. If Law School *A*

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179. *See supra* note 17.

180. For the sake of truth in advertising, I am a member of the LSAC's workgroup examining this issue. That workgroup, the Alternative Score Reporting Workgroup, reports to the standing, Test Development and Research committee. Although I am currently a member of the Workgroup, I was Chair and initiated the creation of the Workgroup in 2001.

181. The LSAC provides an online calculator for applicants to determine the probability of admission to a given school. Law School Admission Council, Search for Schools Based on UGPA and LSAT Score, http://officialguide.lsac.org/UGPASearch/Search3.aspx?SidString= (last visited Sept. 5, 2005).

182. For example, a highly selective school may have a narrow range of matriculants who score between 163 and175 on the LSAT. That narrow range collapses the applicants into just twelve data points and does not truly capture the difference between a 163 (which is on the bottom) and a 175 (which obviously is on the top). Spreading that scale so that a 163 is the equivalent of a 150 and a 175 is a 180 may produce a median score of 165.

reports a median LSAT of 158 and Law School *B* reports a median of 158, those two medians are not comparable. A student who scores a true score of 158 will not get into Law School *B* but will have a decent shot at being admitted to Law School *A*. As long as these scores cannot be reverse-engineered,[183] the LSAT could not be used reliably in producing rankings because the data would not be verifiable even if it were made publicly available.

Although I have presented non-comparable scores as a possible solution to the problem created by the pernicious effect of the rankings on the holistic approach to admissions, caution requires me to notc that there are many issues that must be addressed before alternative or non-comparable scores can be produced and used by law schools. The issues include developing a process or methodology that cannot be reverse-engineered by *U.S. News* rankings (which would defeat the purpose), developing a methodology that is defensible and can be used in admissions exactly like comparable scores (i.e., can be used for validation and correlation studies), and finally, and perhaps most importantly, developing a system that can be taught and used appropriately by applicants, admissions professionals, faculties, and deans and used in a way that does not violate any ABA standard or rule. Hence, all things being equal, which they are not, perhaps the best solution to the problem of the *U.S. News* rankings is the simplest: a prohibition of publication of LSAT scores, be it the 75th and 25th percentiles or the law schools' median scores by the ABA Section on Legal Education under thc guise of producing useful consumer information.[184]

CONCLUSION

In this Article, I contend that the Supreme Court's recent decisions in *Grutter v. Bollinger* and *Gratz v. Bollinger*, affirming the continuing use of affirmative action in higher education in certain contexts, require selective educational institutions (law schools in particular) to use an evaluative admissions process or holistic approach. Per this approach, soft variables, including race and ethnicity, must be taken into account as part of the admissions process in order to produce a diverse student body. The reason why such an approach must be used in admissions is that members of underrepresented groups continue to score about one standard deviation below that of white applicants on high-stakes, standardized tests like the LSAT.

The use of the *U.S. News* ranking, which relies heavily on objective actuarial data, including an assessment of the 75th and 25th percentiles of the LSAT score for the law schools to produce a median score for the entering class, puts tremendous pressure on law schools to admit those with higher LSAT scores in order to maintain or improve

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183. The great fear of the Alternative Score Reporting Workgroup that I am a part of is that whatever metric or formula we devise to produce non-comparable scores, some math-savvy person, perhaps including one hired by *U.S. News*, will be able to find a key or formula that reliably informs them that the 168 at Law School *A* is a 163 and that the 158 at Law School *B* is a 163. If that key can be produced, and if *U.S. News* is provided with the non-comparable scores of matriculants, it could construct comparable scores if it chooses to do so.

184. Indeed, a case can be made that what ever benefit is derived by the consumer from using this information is more than outweighed by the harm created by the impact of *U.S. News* rankings on law school and law school behavior.

the law school's *U.S. News* ranking.[185] Indeed, the LSAT variable that is reported to the ABA Section of Legal Education and, as a result, to *U.S. News*, is one of the few variables that a law school dean can control to a certain degree. The impact of any attempt by law schools to maintain or increase the LSAT scores of their matriculants will fall disproportionately on those who score lower—and disproportionately on members of underrepresented groups.

Thus, although the Supreme Court recently affirmed the use of race and ethnicity in the admissions process to achieve the beneficial societal goal of diversity, the gatekeepers to the legal profession may *choose* not to use that information—to reject the holistic approach—because of its impact on the *U.S. News* ranking. Consequently, I advocate that law schools embrace the holistic approach, but do so in a fashion that does not affect their ranking. This, I contend, can be accomplished if the median LSAT scores are not used in the ranking, which can be achieved if *U.S. News* chooses not to include them as a variable. If *U.S. News* persists in seeking this data, however, I urge the ABA Section of Legal Education to no longer collect the data or forbid its dissemination to third parties (including *U.S. News*). Lastly, if that alternative fails, I urge the LSAC, deans, and others in law school administration to embrace the development of school-specific or "non-comparable" scores, which cannot be compared on a standard metric. This, I believe, will preclude the use of the median LSAT as a weighted factor in the *U.S. News* ranking and eliminate a very strong incentive for deans and others not to engage in the holistic approach when evaluating students for admission. Ultimately that holistic approach, given the goals set out in *Grutter*, will result in an increase in diversity in our law schools.

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185. Although at one point the law schools reported the median LSAT score to the ABA Section, in recent years the sehools have reported the 25th and 75th percentiles. *U.S. News* has compiled the median by averaging those two numbers. Morse, *supra* note 158 ("The data are from the most recent entering class. The medians used are the calculated midpoints of the 25th and 75th percentiles. 25 + 75/2 = CALC midpoint.").