ADMISSIONS AFTER *GRUTTER*

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MOST of us undoubtedly are applauding the United States Supreme Court's recent decision in *Grutter v. Bollinger*,[1] which held in part that diversity is a compelling interest that can justify the use of race as a factor in student admissions. I join the chorus; it is abundantly clear to me that substantial educational benefits are derived, both inside and outside of the classroom, from a group of students with diverse backgrounds and characteristics.

I have a confession to make, however. I was surprised, and disappointed to some degree, by the extraordinary deference the Court granted to the University of Michigan Law School, despite supposedly applying a strict scrutiny standard to the law school's admissions practices.[2] I am disappointed because I had hoped that a penetrating, critical analysis by the Court in *Grutter* would force all of us to undertake a serious reexamination of our admissions practices. Instead, I fear that the Court's decision will encourage many of us to continue to conduct "business as usual" without taking advantage of the grand opportunity provided by the Michigan cases to reevaluate the means by which we select our students.

My fundamental concern relates to the persistent use in law schools nationwide of "the numbers"—LSAT score and undergraduate GPA—as a proxy for merit. The Supreme Court accepted the Michigan Law School's assertion that it engaged in "a highly individualized, holistic review of each applicant's file."[3] Yet the law school's admissions policies explicitly stressed the importance of the numbers in the applicant review process. The policy at issue in *Grutter* stated that the law school's "most general measure" for selecting students for admission "is a composite of an applicant's LSAT score and undergraduate grade point average (UGPA) (which we shall call the 'index')."[4] The policy continued, "Bluntly, the higher one's index score, the greater should be one s chances of being admitted. The lower the score, the greater the risk the candidate poses.... So we expect the vast majority of those students we admit to have high index scores."[5] That policy

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1. 123 S. Ct. 2325 (2003).

2. I was not surprised that the four dissenters accused the majority of "an unprecedented display of deference under our strict scrutiny analysis." *Id.* at 2370 (Rehnquist, C.J., dissenting). *See also id.* at 2349 (Scalia, J., concurring in part and dissenting in part) ("'[D]eference does not imply abandonment or abdication of judicial review.'") (quoting Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)); *id.* at 2350 (Thomas, J., concurring in part and dissenting in part) ("Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of 'strict scrutiny.'"); *id.* at 2370 (Kennedy, J., dissenting) ("The Court ... does not apply strict scrutiny.").

3. *Id.* at 2343. Indeed, this "individualized" review is what distinguished the law school's policy from the undergraduate policy that the Court held to be unconstitutional. Gratz v. Bollinger, 123 S. Ct. 2411, 2431 (2003) (O'Connor, J., concurring).

4. Grutter v. Bollinger, 137 F Supp. 2d 821, 825 (E.D. Mich. 2001), *rev d en banc*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 123 S. Ct. 2325 (2003).

5. *Id.* at 826.

was supplemented by written guidance from the law school's admissions director, who stated that "we must begin with the numbers and go forward from there" and "we will ultimately be swayed in any case by the strength of the numbers so it makes sense to know what they are before one proceeds to judge the rest of the file."[6]

The results of these admissions practices made clear the predominance of the numbers in selecting any given class. The district court judge who reviewed the evidence in *Grutter* concluded, after looking at grids of law school applicants and admission offers, that "even a cursory review" of the grids revealed that an applicant's chances of being admitted increased "dramatically" as that applicant's numerical index score increased.[7] One certainly has to wonder, in light of such evidence, how "holistic" the review of *most* applicants was (and is).

Michigan, of course, is not unique in its approach to admissions. I'm sure most of our law schools overemphasize numerical "predictors." We do so by arraying our applicants in order by index score and, in many cases, by employing "presumptive admits" and "presumptive denies" for applicants who fall within certain ranges at the top and bottom of the applicant pool.[8] In other words, most of us rely on the numbers as heavily as Michigan does, just at a different (lower) level.

We all know, however, that members of underrepresented groups historically have underperformed on the LSAT in comparison with white and Asian students. Justice Thomas was correct in observing that "no modern law school can claim ignorance" of that fact.[9] The same is true for undergraduate GPAs. We also know that the performance gap is attributable not to differences in intelligence, work ethic, or ability to succeed in the legal profession, but primarily to substantial disparities in educational opportunities. As Justice Ginsburg observed in the *Grutter* case:

> It is well-documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals. As to public education, data for the years 2000-2001 show that 71.6% of African-American children and 76.3% of Hispanic children attended a school in which minorities made up a majority of the student body And schools in predominantly minority communities lag far behind others measured by the educational resources available to them.
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> However strong the public's desire for improved educational systems may be, it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities.[10]

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6. *Id.* at 828.

7. *Id.* at 826 & Exhibit A.

8. The LSAC stated in 1999 that "perhaps more than 90 percent" of American law schools employed such a presumptive admission model. LAW SCHOOL ADMISSION COUNCIL, NEW MODELS TO ASSURE DIVERSITY, FAIRNESS, AND APPROPRIATE TEST USE IN LAW SCHOOL ADMISSIONS 21 (Dec. 1999) [hereinafter NEW MODELS].

9. *Grutter* 123 S. Ct. at 2360 (Thomas, J., concurring in part and dissenting in part).

10. *Id.* at 2347-48 (Ginsburg, J., concurring) (citations omitted).

The district court judge in *Grutter* made similar observations in addressing the undergraduate GPA gap:

> While one must be cautious in making generalizations, the evidence at trial clearly indicates that much of the GPA gap is due to the fact that disproportionate numbers of Native Americans, African Americans, and Hispanics live and go to school in impoverished areas of the country It should not surprise anyone that students who attend schools where books are lacking, where classrooms are overcrowded, and where Advanced Placement or other higher level courses are not offered are at a competitive disadvantage as compared with students whose schools do not suffer from such shortcomings. An educational deficit in the K-12 years will, for most students, have a negative ripple effect on academic performance in college.[11]

Surely then, there is something troubling about law schools' heavy reliance on index scores formulated from LSAT scores and undergraduate GPAs.

Michigan argued in *Grutter* that it *had* to consider race in the admissions process because a critical mass of underrepresented minority students simply "could not be enrolled *if admissions decisions were based primarily on undergraduate GPAs and LSAT scores*."[12] The logical response, of course, is *why*, then, persist in using the same numerical formulas for most admissions decisions?

Michigan's answer, if not particularly compelling, at least was straightforward: we don't want to abandon our "academic selectivity" and "become a very different institution."[13] Frankly, I was disappointed that the *Grutter* majority accepted this answer uncritically· decreasing the emphasis on the numbers "would require a dramatic sacrifice of .. the academic quality of all admitted students, .. would require the Law School to become a much different institution[, and would] forc[e] the Law School to abandon the academic selectivity that is the cornerstone of its educational mission."[14] Thus, the Court concluded, the University of Michigan need not adopt alternatives to its standard admissions practices—its current process is "narrowly tailored" enough.

In other words, the Court appears to have concurred in the notion that "academic quality" can be equated with high "numbers." But are we as educators really convinced that the numbers make the difference? Aren't we all familiar with *many* students who have performed very well academically in law school—and *many* graduates who have become superb members of the legal profession—despite low numbers?

Ironically, the Law School Admission Council (LSAC), the very body that implements and administers the LSAT, has become one of the most vocal critics of law schools' overemphasis on the numbers. Of course, such criticism poses no serious threat to the LSAC's monopoly on the type of "valid and reliable admission test" mandated by the ABA for accreditation of law schools.[15] Nonetheless, the

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11. 137 F Supp. 2d at 864.
12. 123 S. Ct. at 2333 (emphasis added).
13. Brief for Respondents at 35-36, Grutter v Bollinger, 123 S. Ct. 2325 (2003) (No. 02-241).
14. 123 S. Ct. at 2345.
15. Interestingly, the ABA recently approved a change to Standard 503, which requires law

LSAC has repeatedly expressed its concern regarding law schools' misuse of its test. Not only has it issued "Cautionary Policies Concerning LSAT Scores and Related Services,"[16] but also it issued in December 1999 a remarkable publication designed to assist law schools that were willing to experiment with alternative admissions models. That publication, entitled "New Models to Assure Diversity Fairness, and Appropriate Test Use in Law School Admissions," should be regular required reading for all deans and admissions officials, but I'm afraid it may be relegated to a back shelf after the *Grutter* Court's stamp of approval on Michigan's admissions process.

I don't want to be misunderstood. As I stated at the outset, I believe very strongly that diversity is a compelling interest that supports the use of race as a factor in law school admissions. I find particularly unconvincing those arguments that contend that affirmative action programs rely on offensive stereotypes. In Grutter's brief before the Supreme Court, for example, her attorneys argued that Michigan s consideration of race "rest[s] on crude stereotypes: The Law School assumes that students are particularly likely to have experiences or perspectives important to the Law School's mission merely because of their membership in a particular racial or ethnic group."[17] As a criminal procedure professor, I do not believe such an assumption is misplaced at all. Indeed, issues such as racial profiling, in relation to the government's recent anti-terrorism initiatives and in law enforcement generally make it even more important for our students to be exposed to the experiences and perspectives of members of particular racial or ethnic groups.

The LSAC provides a good example in its "New Models" publication:

> Perspectives and prior experiences are key elements in this exchange of ideas. For example, a discussion of search-and-seizure law taught by a learned academic to a class of very bright, upper-middle class students who grew up in white suburbs could be a very engaging intellectual exercise. Consider, however, the impact on that discussion of introducing into the class the perspective of a student who, prior to law school, had spent ten years as a police officer in a big city police department. Add to that discussion the voices of inner city black males whose personal histories might include being stopped for no apparent reason, and it becomes more relevant and takes on a new dimension for every student in the classroom. Law schools have long recognized the value of all kinds of dynamic diversity within the educational setting.[18]

I submit that the black student need not be from the inner city or come from an impoverished background to have unique perspectives that would enhance the classroom discussion significantly And there are many similar examples, of

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schools to use "a valid and reliable test" in their admissions decisions. Prior to August 2003, the LSAT was mentioned specifically in the body of the standard. Now it has been relegated to an "interpretation," but that interpretation imposes an obligation on any law school that uses an admissions test other than the LSAT to "establish that such other test is a valid and reliable test to assist the school in assessing an applicant's capability to satisfactorily complete the school's educational program." ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 2003-2004, Interpretation 503-1, at 40.

16. NEW MODELS, *supra* note 8, at app. B.

17 Brief for Petitioner at 16, Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (No. 02-241).

18. NEW MODELS, *supra* note 8, at 3.

course, in which the value of such enhanced discussion does not rest on "crude stereotypes."

Again, I do applaud the *Grutter* Court's recognition of diversity, including racial and ethnic diversity, as a compelling state interest. Moreover, as an educator, I am pleased that the Supreme Court deferred to the University of Michigan's judgment that "diversity is essential to its educational mission."[19] Nonetheless, I find myself drawn to Justice Kennedy's observation that "[t]he Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal."[20] I still find remarkable the Court's cursory analysis of the "narrow tailoring" prong of its strict scrutiny standard. At one point it asserts that "[n]arrow tailoring does .. require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."[21] But it then quickly concludes that the University of Michigan "sufficiently considered workable race-neutral alternatives," such as a decreased emphasis on LSAT scores and undergraduate GPAs, and legitimately rejected those alternatives because they would "lower admissions standards" and force the law school to become "a much different institution."[22]

Might not the University of Michigan *want* to become a different institution if that meant a more readily attainable critical mass of underrepresented students? Would a reduced emphasis on the numbers necessitate "lower standards," or simply *different* standards, employed not only to acknowledge significant disparities in educational opportunities among different racial groups, but also to recognize the limited predictive value of numerical measures?

The LSAT for example, is designed to measure "a *limited* set of *acquired* skills deemed relevant to a person's ability to perform well in the *first year* of law school."[23] Even with this very limited purpose, the LSAT is a reliable predictor in only a small percentage of cases. Expert testimony in the *Grutter* case suggested a correlation between LSAT scores and first-year law school grades of "only 16-20%, which is to say that 80-84% of first year law school grades are not predicted by the LSAT "[24] The same expert testified that on average, taking an LSAT preparation course improves an applicant's score by approximately seven points.[25] This factor, of course, disproportionately impacts underrepresented groups because more members of those groups cannot afford the high cost of such preparation courses.

The LSAC does not dispute these points; instead, it simply—and correctly—points out that there is no other measurement that "comes close to matching the predictive qualities of the LSAT "[26] (Undergraduate GPA, for

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19. 123 S. Ct. at 2339.

20. *Id.* at 2370-71 (Kennedy, J., dissenting).

21. *Id.* at 2345.

22. *Id.*

23. Philip D. Shelton, *The LSAT Good—But Not* That *Good*, LAW SERVICES REP (Law School Admission Council), Sept./Oct. 1997 (emphasis added).

24. 137 F Supp. 2d at 860.

25. *Id.*

26. Philip D. Shelton, *Admissions Tests: Not Perfect, Just the Best Measures We Have*, CHRON. HIGHER EDUC., July 6, 2001, at B15.

example, accounts for less than 7% of the variance in first-year grades, according to the LSAC.[27]) The fact that other measurements are *weaker* predictors than the LSAT, of course, is no reason to overemphasize the LSAT. To its substantial credit, the LSAC agrees: numerical criteria such as LSAT scores, while statistically significant, "*have never come close* to accounting for all the factors that contribute to an individual student's performance."[28]

The relatively weak predictive value of the LSAT is apparent even in the case of wide disparities among scores. One of the most instructive tools the LSAC uses to encourage law schools to de-emphasize the LSAT in admissions decisions is a chart showing the odds of students ending up in each quartile of the first-year class. Schools like Michigan, of course, seldom consider students with a 150 LSAT score, let alone a 140 LSAT score, but the LSAC's correlation studies suggest that 10% of students with a 140 LSAT score and about 25% of students with a 150 LSAT score will earn higher first-year grades than *half* of the students with a 160 LSAT score.[29] Do we make a serious effort to tease those "diamonds in the rough" out of the admissions pool, particularly if they bring unique life experiences and perspectives to the table?

I commend the LSAC on its efforts to educate law schools—and to back up those efforts with money. For several years it has offered to pay the expenses of consultants to travel to law schools to advise admissions officials on appropriate uses of the LSAT. The September 2003 conference on the Michigan cases, sponsored and heavily subsidized by the LSAC, is another good example of the organization's willingness to provide financial support for education initiatives. Similarly, in its "New Models" publication, the LSAC explicitly offers financial support to law schools that are willing to experiment with alternative admissions models.[30]

The LSAC has offered eight different models that essentially advocate true holistic approaches, taking into account *many* factors to ensure that the numbers do not predominate. It even includes a few specific examples, including one involving a hypothetical African American applicant who was raised in the inner city in severe poverty, helped to support his siblings since the age of 12, was the first in his family to attend college, and worked two jobs as an undergraduate to support his education and provide financial resources to his family.[31] This example stands in stark contrast to the Michigan admissions policy, which suggested the following: "The applicant may for example be a member of a minority group whose experiences are likely to be different from those of most students, may be likely to make a unique contribution to the bar, or *may have had a successful career as a concert pianist or may speak five languages*."[32]

We all know that the bar is high for applicants to Michigan. But when I see statements such as this, or examine the numbers involved in the *Grutter* case, I can't

27. *Id.* Therefore, even the combination of LSAT scores and undergraduate GPAs accounts for less than one quarter of the variance in first-year grades.

28. Shelton, *supra* note 23 (emphasis added).

29. NEW MODELS, *supra* note 8, at 9.

30. *Id.* at 30.

31. *Id.* at 26.

32. 137 F. Supp. 2d at 826-27 (emphasis added).

help but wonder if Justice Thomas wasn't correct to conclude that Michigan was grappling with "the self-inflicted wounds of [its] elitist admissions policy."[33] Similarly, Justice Scalia's assertion that Michigan's predominant interest was in "maintaining a 'prestige' law school whose normal admissions standards disproportionately exclude blacks and other minorities"[34] resonates with me as well. In the years examined in the *Grutter* case, white and Asian applicants who met Michigan's *median* LSAT score would place well within the top 5% of test-takers nationally. So we know why Michigan had to rely heavily on race, and daily minority-status reports, to achieve a critical mass of students in underrepresented groups—few members of those groups reach Michigan's normal range for admission.

Don't get me wrong. I do not begrudge Michigan's status as an elite law school.[35] But I do wonder whether normal admissions standards that, because of such a heavy focus on the numbers, knowingly exclude a disproportionate number of minority applicants should be entitled to the kind of deference that the *Grutter* Court accorded them.

Why do the rest of us rely so heavily on the numbers? First, it's easy—it does not require a lot of resources or a lot of work making hard decisions based on a myriad of admissions factors. But surely we should not persist in inherently unfair and unreliable admissions practices simply because alternatives are more burdensome.[36]

Second, higher LSAT scores and GPAs look good in the "rankings." A discussion of rankings will have to wait for another day. I recommend to readers a very thoughtful essay by Patrick Hobbs in a previous "Leadership in Legal Education" issue of this law review, in which he urges the "Top Five" law schools to set an example by refusing to participate in *U.S. News & World Report* surveys.[37] I would go further: I cannot understand why *any* of us participate in a system we uniformly decry, but whose rankings are based *more* on surveys of law deans and faculty (25%) than on LSAT scores and undergraduate GPAs combined (22.5%). And then whenever we get "good news" from *U.S. News*, we sound the trumpets. Talk about self-inflicted wounds.

Finally, some of us argue that we overemphasize LSAT scores in particular because the ABA requires us to use the LSAT in evaluating applicants. For all practical purposes, that is true, since there is no other "valid and reliable" test available that comes close to the standards of the LSAT. The important point here, however, is that the ABA accreditation standards do not mandate the *extent* to which LSAT scores are used. And with the LSAC telling us specifically that we rely too heavily on the LSAT—and offering alternative admissions models to help

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33. *Grutter*, 123 S. Ct. at 2350 (Thomas, J., concurring in part and dissenting in part).

34. *Id.* at 2349 (Scalia, J., concurring in part and dissenting in part).

35. Oh, heck, maybe I do. These observations, after all, come from a dean at a small, "third tier" (horrors!) law school.

36. *Cf.* Gratz v. Bollinger, 123 S. Ct. 2411, 2430 (2003) ("[T]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system.").

37. Patrick E. Hobbs, *Noblesse Oblige: Four Ways the "Top Five" Law Schools Can Improve Legal Education*, 33 U. TOL. L. REV. 85, 86-87 (2001).

us correct that error—it is doubtful that the ABA will object if we experiment with such alternatives. This is particularly true if our alternatives assist us in furthering our affirmative action goals through true holistic evaluations.

My biggest fear, again, is that the *Grutter* decision, in its extreme deference to the University of Michigan, will diminish any incentive for law schools to entertain alternatives. Michigan, after all, probably uses race more explicitly, with consultation of daily minority-status reports[38] and critical-mass targets for underrepresented groups, than most of us. If it has the Court's imprimatur to continue its admissions practices, most of us have that imprimatur as well.

Justice Kennedy suggested in his opinion that a more exacting standard of judicial review would encourage consideration of new models: "Were the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives."[39] What I advocate is different: I want us to explore race-*conscious* alternatives. I agree wholeheartedly with the *Grutter* majority that our society is one "in which race unfortunately still matters."[40] One of the many ways in which it matters is in disparities in educational opportunity and measures of academic "merit," such as LSAT scores and undergraduate GPAs.

A de-emphasis on the numbers in our admissions practices will benefit many deserving applicants, not just members of underrepresented groups. And, I dare say it may benefit the legal *profession* as well. Barbara Grutter is described in the Supreme Court opinion as "a white Michigan resident who applied to the Law School in 1996 with a 3.8 grade point average and 161 LSAT score."[41] But who *is* she? Is she the type of *person* we want in law school and in the legal profession? Surely she cannot be defined by her "numbers."

My fear is better expressed in another passage from Justice Kennedy's opinion: "By deferring to the law schools' choice of minority admissions programs, the courts will lose the talents and resources of the faculties and administrators in devising new and fairer ways to ensure individual consideration."[42] We as deans must assume a leadership role in this arena. Few of us have the time to get involved in the day-to-day mechanics of the admissions process, but we do have an obligation to establish admissions policy and to ensure that our admissions practices are fair.

I finish with three relatively modest suggestions. First, we should consider taking the LSAC up on its offer to experiment with alternative admissions models that reduce the emphasis on the numbers. Such models just might aid us in building diverse classes without using measures that have proven to have disproportionately negative effects on those groups we seek to assist. Evidence presented at the *Grutter* trial, for example, indicated that after California outlawed the use of race in higher education admissions by way of Proposition 209 the School of Education at the University of California-Berkeley was able to enroll a high percentage of

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38. One reasonably could question the credibility of the Michigan admissions personnel who testified that they "never gave race any more or less weight based on the information contained in these reports." *Grutter* 123 S. Ct. at 2343.

39. *Id.* at 2373 (Kennedy, J., dissenting).

40. *Id.* at 2341.

41. *Id.* at 2332.

42. *Id.* at 2373 (Kennedy, J., dissenting).

underrepresented minority students (28% of the entering class in 2000) "by decreasing reliance on the Graduate Record Examination (GRE), and by expending greater effort in recruiting new students."[43]

Second, we should resist reflexive pronouncements that tend to equate LSAT scores with student quality In one of the many law school publications I have received recently, for example, one dean highlights another double-digit increase in applications by stating that the increase "suggests our mean LSAT may rise another full point, the fourth such increase in as many years." Such statements, of course, imply both that student quality is measured by LSAT scores and that a greater pool of high-LSAT applicants automatically means more of these students will be accepted for admission, regardless of any other characteristics. I do not mention this to single out any particular institution—this is in fact a very mild statement in comparison to many others that use LSAT scores and "rankings" to appeal to alumni and friends. Nonetheless, the proliferation of such statements, in my view, does play into the *U.S. News* agenda and fly in the face of what the LSAC is telling us about appropriate use of the LSAT

Finally I would call attention to sage advice from our colleague Gene Nichol, which also appeared in an earlier version of this "Leadership in Legal Education" symposium series. Dean Nichol offered "Ten Small Lessons from the Campaign Trail,"[44] from his time campaigning for political office in Colorado. Included among those lessons were observations that we might take to heart in determining the kinds of law school classes that will serve us best:

> [R]unning a statewide political campaign hammers you with the reality that we still draw from but a tiny corner of the world around us. Most of the people I met campaigning, from welfare moms to beat cops to truck drivers to motorcycle helmet law activists to marijuana advocates, have no counterpart in the halls of the major American law schools. It is not because they are not smart enough, committed enough, or deserving enough. As ever, opportunity flows most generously to those who are already privileged. "Merit" is a complex and artificial notion. We should not be confused or flattered by it.[45]

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43. 137 F Supp. 2d at 862. Similarly, Justice Thomas noted in *Grutter* that "[t]he sky has not fallen at Boalt Hall .... Total underrepresented minority student enrollment at Boalt Hall now exceeds 1996 levels." 123 S. Ct. at 2359 (Thomas, J., concurring in part and dissenting in part).

44. Gene R. Nichol, Jr., *Ten Small Lessons from the Campaign Trail*, 33 U. TOL. L. REV. 131 (2001).

45. *Id.* at 132. *See also* Lani Guinier, *The Constitution is Both Colorblind and Color-Conscious*, CHRON. HIGHER EDUC., July 4, 2003, at B11-12 (noting that LSAT scores are not "truly objective measures of merit" because "racial and wealth preferences are embedded" within them; "tests ... correlate more with socioeconomic privilege than future performance").