

NOTES

BEYOND “VALID AND RELIABLE”: THE LSAT, ABA STANDARD 503, AND THE FUTURE OF LAW SCHOOL ADMISSIONS

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For nearly a century, the American Bar Association (ABA) has overseen the standards governing accredited law schools, which in turn constitute the primary pathway to the practice of law in the United States. ABA Standard 503 requires that all such schools use a “valid and reliable” examination to assess candidates for admission. Currently, the Law School Admission Test (LSAT) is the only examination that the ABA has officially recognized as satisfying the standard. However, the LSAT—now approaching its eightieth year—has strayed far from the purposes it was originally designed to serve. Once a simple tool to aid in the assessment of diverse applicants, it has in recent decades become a significant barrier to entry with disparate negative impacts on women, racial minorities, individuals of low socioeconomic status, and, perhaps most egregiously, those with disabilities. This Note argues that Standard 503 should be rescinded. Such a step is necessary both to stimulate innovation in law school admissions and to fulfill the ABA’s mandate of promoting diversity in the legal profession and serving the larger public good.

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INTRODUCTION

For nearly eighty years, the Law School Admission Test (LSAT) has been the one of the primary gatekeepers to legal education in the United States. It is a rite of passage undertaken by the overwhelming majority of American lawyers and one that has increasingly come to set the trajectory of an individual’s legal career. At a societal level, the LSAT plays a significant role in shaping the social demography of the nation’s law schools, which in turn shape the legal profession and, indirectly, our judge-made common law. Further, in a nation largely led by lawyers, the LSAT has an outsized influence not just on the composition of the American judiciary, but on the political branches of government as well.¹

Developed in 1947 to serve the needs of a vastly different legal academy, today the LSAT’s role in law school admissions has expanded far beyond that which its creators originally envisioned.² Factors such as population growth, the extension of civil rights to minority groups and women, and the increasing globalization of education have radically altered the demographics of the applicant pool the LSAT assesses.³ Beyond this, the all but disappearance of alternative models of legal education, the passage of legislation requiring transparency in standardized testing, and the rise of rankings have

¹ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (“[L]aw 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.”).

² See *infra* Section I.B (describing the origin of the LSAT and its creators’ intention for its use).

³ See *infra* notes 51–53 and accompanying text (describing the demographic changes of the mid-twentieth century and their relationship with law school admissions).

combined to produce a social context unrecognizable when compared with the one for which the LSAT was designed.⁴

Against a backdrop of rising social inequality and an overwhelming need for affordable legal services, both the LSAT and the larger system of “meritocratic” legal education have become ever more hotly contested. In the past three decades, the LSAT’s critics have proffered empirical evidence indicating that the test is a poor predictor of professional success, an exercise that distinguishes based on speed rather than skill, a discriminatory barrier to entry for women and minorities, and a sorting mechanism that entrenches existing wealth and power within the legal system.⁵ To address these shortcomings, recent scholarship has proposed altering the LSAT to align with universal design principles.⁶ Other scholars have experimented with entirely new test methods, which are significantly more inclusive than the LSAT.⁷ And some law schools have even sought to open their admissions procedures to alternatives such as the Graduate Record Exam (GRE) or even the Medical College Admission Test (MCAT).⁸

Still, despite these attempts at innovation, the LSAT remains the only exam officially sanctioned by the American Bar Association (ABA). This is because of ABA Standard 503, which requires all accredited law schools to use a “valid and reliable” test as part of their admissions procedures and designates the LSAT as the only test officially recognized to fulfill this criterion.⁹ In combination with the ABA’s Standard 509, which requires law schools to disclose the

⁴ See *infra* Section I.A (describing the rise of the three-year post-undergraduate model for legal education); *infra* notes 63–74 and accompanying text (describing the Truth in Testing movement and the rise of rankings).

⁵ See *infra* Section II.A (describing scholarly criticism of the LSAT’s speeded element); *infra* note 194 and accompanying text (discussing criticism of the LSAT based on its disparate negative impact on women and minorities); *infra* note 73 and accompanying text (describing the LSAT’s role in channeling financial aid to wealthy applicants).

⁶ See *infra* Section II.B (discussing arguments in favor of altering the LSAT to remove its speeded element and otherwise bring it into accord with universal design principles).

⁷ See *infra* notes 206–12 and accompanying text (discussing the Shultz-Zedek test).

⁸ See *infra* Section III.B.1 (discussing attempts to expand the use of alternate admissions tests to the LSAT).

⁹ See *infra* Section III.B.1. ABA Standard 503 requires that schools use a “valid and reliable admission test to assist the school . . . in assessing the applicant’s capability of satisfactorily completing the school’s program of legal education.” ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2019-2020, at 31 (AM. BAR ASS’N 2019) [hereinafter ABA STANDARDS], https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-chapter5.pdf. Interpretation 503-1, which is binding, requires schools not using the LSAT to “demonstrate that such other test is a valid and reliable test.” *Id.*

median LSAT scores of their incoming first year classes,¹⁰ this requirement effectively binds law schools not just to use the LSAT, but to use it in ways that are often contrary to interests of students, law schools themselves, and the general public. The cumulative effect of these factors is widely misunderstood—even at the highest levels of the legal profession.¹¹

This Note is structured in three Parts. In Part I, I chart a brief history of the LSAT, focusing on how its role in legal education has shifted due to larger social, economic, and legal changes. This Part examines the purpose the test was originally designed to serve and the historical context in which it was created, as well as how the events of the past eight decades have radically shifted that context. In Part II, I look at *Department of Fair Employment & Housing (DFEH) v. Law School Admission Council, Inc. (LSAC)*,¹² which prohibited LSAC’s practice of “flagging” the scores of test takers who had received accommodations pursuant to the Americans with Disabilities Act (ADA).¹³ I address how the aftereffects of the settlement in *DFEH v. LSAC* complicate the larger framework of “meritocracy” in higher education, canvass the arguments for a universal accommodations policy, and discuss the shortcomings of a status quo under which innovation is spurred primarily by litigation. In Part III, I analyze barriers to the potential solutions outlined in Part II and argue that because of these impediments it is necessary that the ABA rescind Standard 503. I argue that rescission of Standard 503 is a critical step toward promoting sorely needed innovation and experimentation in law school admissions testing—and that rescission of the Standard is essential both to fulfill the ABA’s stated mission and to the larger public good of ensuring a fair and open legal profession.

¹⁰ ABA Standard 509 requires that each law school “publicly disclose on its website” a number of statistics, which include admissions data, bar passage rates, and employment outcomes. See ABA STANDARDS, *supra* note 9, at 33–34.

¹¹ See *infra* notes 143–44 and accompanying text (discussing Judge Griffin’s concurrence in *Binno*, in which he posited that the majority “misperceive[d]” the way *Binno*’s injury was attributable to the ABA); *infra* notes 218–27 and accompanying text (discussing how Thomas’s dissent in *Grutter* criticizing law schools’ failure to innovate their admissions policies overlooked the limitations placed on them by ABA Standards 503 and 509).

¹² 941 F. Supp. 2d 1159 (N.D. Cal. 2013) (order granting a motion to proceed with class relief).

¹³ Consent Decree at 1, 19, *DFEH v. LSAC*, 941 F. Supp. 2d 1159 (N.D. Cal. 2013) (No. C-12-1830-EMC).

I

THE LSAT IN ITS HISTORICAL CONTEXT

It is perhaps impossible to understand the modern LSAT without first considering the context that shaped its creation. Subsequent developments—the demographic and social changes of the mid-twentieth century, the “truth-in-testing” movement of the 1970s, and the rise of rankings, to name but a few—have radically altered this context, and with it the LSAT’s social function. The LSAT’s complicated history is undoubtedly one of the reasons its current role in shaping the legal profession is so widely misperceived—and also why Standard 503’s role in supporting it is so often misunderstood.

A. The Pre-LSAT World

Despite the current ubiquity of standardized testing in modern American higher education, the admissions test is a relatively new development in the history of legal education. In fact, law schools themselves did not become the primary form of legal training until the late nineteenth century. Robert Stevens, the preeminent historian of American legal education, notes that as of the 1890s “the majority of lawyers . . . had seen the inside neither of a college nor of a law school”; indeed, several states did not require even a high school diploma to join the bar.¹⁴

In the colonial era and for the better part of the nineteenth century, apprenticeship was by far the predominant path to becoming an attorney.¹⁵ Under the apprenticeship system, aspiring lawyers would pay a fee to work for an established attorney in his law office and receive academic instruction from him on the side.¹⁶ Another popular method of entry to the legal profession was simply to “read law”—that is, to engage in self-study and then sit for the bar exam.¹⁷ Abraham Lincoln is the paradigmatic example of this method: An

¹⁴ ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 95–96 (1983).

¹⁵ See Susan Katcher, *Legal Training in the United States: A Brief History*, 24 *WIS. INT’L L.J.* 335, 339, 347 (2006) (noting that apprenticeship was the standard means of legal education during the colonial period and nineteenth century).

¹⁶ *Id.* at 339 (“The quality of the clerkship varied; as Friedman has noted, ‘At worst, an apprentice toiled away at drudgery and copywork, with a few glances . . . at the law books . . . [but] others . . . found the clerkship a valuable experience.’” (quoting LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 56 (3d ed. 2005))). Much depended on the attorney overseeing the clerkship and the quality of his instruction. *Id.* at 341 (“For a fee, the lawyer-to-be hung around an office, read Blackstone . . . and copied legal documents. If he was lucky, he benefited from watching the lawyer do his work, and do it well. If he was very lucky, the lawyer actually tried to teach him something.” (quoting LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 238 (3d ed. 2005))).

¹⁷ *Id.* at 342.

avid reader with almost no formal education, Lincoln passed the bar after a course of self-study.¹⁸ According to Lincoln, the “cheapest, quickest, and best” way to become a lawyer during this period was to “read Blackstone’s Commentaries, Chitty’s Pleadings’s [sic]—Greenleaf’s Evidence, Story’s Equity, and Story’s Equity Pleading’s [sic], get a license, and go to the practice, and still keep reading.”¹⁹

The first law school in the United States is generally considered to be the Litchfield Law School, formally established in 1784 by the prominent colonial attorney Tapping Reeve.²⁰ There were other similar schools at the time; however, they were generally outgrowths from the apprenticeship programs of attorneys who had proven to be skilled, or popular, as teachers.²¹ Even still, these structured programs were the exception rather than the rule: As late as 1840, there existed fewer than ten university-affiliated law schools in the United States, with a combined enrollment of 345 students.²² This was in part due to the prevailing trend of liberalizing legal practice—during the populist heyday of “Jacksonian Democracy,” many states reduced apprenticeship requirements or did away with such requirements altogether.²³ The natural result of these loosened standards was a diminished need for formal legal education.²⁴

However, beginning in the mid-nineteenth century, the trend of liberalization began to reverse.²⁵ While there were just over 20 law schools in existence in 1860, the number had risen to 61 by 1890 and reached 146 by 1920.²⁶ During this period, legal education took many forms: The older models of apprenticeship and “reading law” continued to hold appeal, but newer models were also gaining ground.²⁷

¹⁸ See *id.* at 342–43 (explaining Lincoln’s belief that reading was both the “best way” to enter the legal profession and vital for subsequent practice).

¹⁹ Letter from Abraham Lincoln to James T. Thornton (Dec. 2, 1858), <http://www.abrahamlincolnonline.org/lincoln/speeches/law.htm>.

²⁰ See STEVENS, *supra* note 14, at 3.

²¹ *Id.*

²² *Id.* at 7–8 (describing the declining requirements for entry to the legal profession during the first half of the nineteenth century and the corresponding lack of demand for formal legal education).

²³ Katcher, *supra* note 15, at 345–46 (describing the rise of “Jacksonian Democracy” in the 1830s–60s and noting that whereas fourteen of nineteen U.S. jurisdictions required a clerkship prior to admission to the bar in 1800, by 1860 only nine of thirty-nine jurisdictions retained such a requirement).

²⁴ *Id.* at 346.

²⁵ See STEVENS, *supra* note 14, at 10 (“As early as the 1850s, the pendulum began to swing back. . . . Law was beginning once more to be seen as a learned profession.”).

²⁶ See Katcher, *supra* note 15, at 348.

²⁷ *Id.* at 347 (describing the standards of “legal training and admission” near the end of the nineteenth century as slowly becoming “more institutionalized with the gradual movement towards formal law schools and the establishment of national associations for

Law schools at this time were diverse: They ranged from one to three years of full-time study, some serving as university-affiliated training grounds for elites, while others—often practitioner-led trade, correspondence, or night schools—prided themselves on “open[ing] the door of legal training to poor, immigrant, or working-class students.”²⁸ The new law schools were also diverse in their curricula and teaching methods: Some favored a theoretical approach based on the “case method,” while others focused on professional or even vocational training.²⁹ Some of the schools required a year or more of college before entry, while others required only a high school diploma or even no formal education at all.³⁰

But beginning in the late nineteenth century, pressure to standardize and reform legal training began to increase.³¹ One of the primary drivers of this movement was the ABA, founded in 1878, which formalized its reform agenda at its 1921 Annual Meeting.³² There, the association passed a resolution that “(1) set minimum standards for law school admissions, courses of study, faculties, and libraries; (2) established an accrediting program to encourage compliance with these standards; and (3) declared that only lawyers who were graduates of accredited law schools should be allowed to practice law.”³³ Thus the accreditation process was born. Two years later, in 1923, the ABA published its first list of accredited schools.³⁴ Over the following decades, its standards would prove instrumental in shifting legal education from a motley mixture of differing programs, curricula,

lawyers”); see also STEVENS, *supra* note 14, at 24 (summarizing the rise of formal legal education and noting that up until the turn of the twentieth century, “[t]he vast majority” of the legal profession experienced only “on-the-job legal education”).

²⁸ Katcher, *supra* note 15, at 363.

²⁹ See *id.* at 357–61, 370 (describing the rise of Harvard professor Christopher Columbus Langdell’s “case method,” which caused an “outcry” when first introduced in the 1870s but by the early twentieth century had been taken up by a third of university-based law schools and was eventually accepted by nearly all schools); STEVENS, *supra* note 14, at 35, 38–41 (describing the shift from considerable variation in law school curricula to near universal acceptance of the “Harvard model” by 1920).

³⁰ See STEVENS, *supra* note 14, at 36–38 (describing different courses of formal legal study during the period between 1860–1920 and the convergence around the three-year, postgraduate model). Indeed, it was only around the middle of the twentieth century that the number of American lawyers who had attended college outstripped those who had not. *Id.* at 209.

³¹ See *id.* at 20–28 (describing the late nineteenth century expansion of formal legal education and the push to professionalize the bar).

³² See Katcher, *supra* note 15, at 362–64; see also STEVENS, *supra* note 14, at 172–80 (describing the ABA’s efforts, often in cooperation with the Association for American Law Schools to “raise standards” for entry into the legal profession).

³³ Donna Fossum, *Law School Accreditation Standards and the Structure of American Legal Education*, 3 AM. B. FOUND. RES. J. 515, 517 (1978).

³⁴ *Id.* at 520.

and entrance requirements to the standardized three-year, post-baccalaureate program of study that dominates American legal education today.

B. *The Creation of the LSAT*

The idea for the LSAT originated with Columbia University's admissions director, Frank H. Bowles. In 1945, Bowles wrote to a colleague proposing the creation of a "law capacity test" to aid in admissions decisions.³⁵ Bowles laid out several criteria for the new test, including:

- (1) high predictive value defined as a correlation coefficient of .70 or higher, (2) "discrete measure of capacity for law study insofar as that capacity can be isolated," (3) high reliability, (4) no more than one and one-half hours in length, (5) sensible and observable relation to the study of law, (6) "results easy to interpret," and (7) low cost.³⁶

The LSAT was born from a series of meetings in 1947 between Bowles, the representatives of several other law schools, and test developers from the College Entrance Examination Board.³⁷ The first administrations took place in February and May of 1948, during which more than 5600 students sat for the exam.³⁸ Subsequent validity studies indicated that while the LSAT's correlation to first-year grades was somewhat lower than the .70 Bowles had originally hoped for,³⁹ it was nonetheless statistically significant and large enough to make the test a useful aid in admissions.⁴⁰

Those responsible for creating and promoting the LSAT appear to have had multiple motivations, although the primary consideration appears to have been providing a neutral benchmark to assess potential applicants. With the end of the Second World War and the enactment of the GI Bill's educational provisions, the number of law school

³⁵ William P. LaPiana, *Merit and Diversity: The Origins of the Law School Admissions Test*, 48 ST. LOUIS U. L.J. 955, 962 (2004) (noting that Bowles wrote this letter to the then-president of the College Entrance Examination Board as a result of his dissatisfaction with Columbia's current admissions test).

³⁶ William P. LaPiana, Rita & Joseph Solomon Professor, N.Y. L. Sch., Keynote Address at the 1998 LSAC Annual Meeting: A History of the Law School Admission Council and the LSAT 1 (May 28, 1998) [hereinafter LaPiana, LSAC Keynote].

³⁷ See LaPiana, *supra* note 35, at 963-68 (discussing the series of meetings through which the LSAT was developed).

³⁸ *Id.* at 976.

³⁹ *Id.* at 963.

⁴⁰ *Id.*; see also W.B. Schrader & M.A. Olsen, *The Law School Admission Test as a Predictor of Law School Grades*, RB 50-60 EDUC. TESTING SERVS. RES. BULL. 1 (1950) (summarizing the results of a study indicating that the LSAT predicted first-year grades with a correlation coefficient of .40-.44).

applicants had surged.⁴¹ Prior to the development of admissions tests, many law schools had used complicated formulas to compare how grades from different undergraduate institutions could be measured against each other. By the conclusion of the war, however, many of these formulas had fallen out of date, and, in any case, law schools found themselves confronted with numerous applicants from far flung or otherwise unfamiliar institutions.⁴² The designers of the test sought a neutral benchmark to assess these diverse candidates.⁴³ From the beginning, however, LSAT scores were intended to supplement other criteria used in making admissions decisions.⁴⁴ The LSAT was conceptualized not as a tool to rank and sort, but “to furnish a common denominator of educative promise,”⁴⁵ to contextualize undergraduate GPA, and to “discourag[e] the manifestly incapable.”⁴⁶ Its modern role as gatekeeper to the legal profession would almost certainly have been unimaginable to its creators.

One point worth noting is that the LSAT, though labelled an “admissions” test, was from the very beginning a test of “aptitude” in that it was designed to assess probability of success rather than acquired knowledge.⁴⁷ This choice was very much one of its time: intelligence testing had expanded greatly in the decades since its first widespread use during the First World War, and aptitude tests were being deployed across a wide range of new educational and professional settings.⁴⁸ However, because the LSAT measured aptitude

⁴¹ LaPiana, *supra* note 35, at 962.

⁴² LaPiana, LSAC Keynote, *supra* note 36, at 5 (describing the problem, in the words of Harvard Law’s Dean Louis Toepfer, as “the return of the veterans and the flood of candidates from many places and many colleges” for which there was no existing data).

⁴³ *See id.* at 6 (“[T]he LSAT . . . gave [its creators] a tool to screen applicants at a time when the applicant pool and the credentials brought to the process by those in the pool were changing and difficult to judge by existing criteria.”).

⁴⁴ *Id.* at 2 (“All those who discussed these tests in print, however, acknowledged that they were not and neither could nor should be the sole criteria by which admissions decisions were made.”); *see also* LaPiana, *supra* note 35, at 956–57 (describing the roles that testing played in the application processes of different schools before the Second World War).

⁴⁵ *See* LaPiana, LSAC Keynote, *supra* note 36, at 1.

⁴⁶ *Id.* at 7.

⁴⁷ *See* LaPiana, *supra* note 35, at 957 (“The very use of the tests indicates a willingness to sort young men on the basis of probability rather than on an individualized judgment of the character, intelligence, and prospects of each individual.”); *id.* at 973–74 (“[Those present at discussions of a possible law school entrance exam] started . . . with the notion that a test that had some relationship to an IQ test would be appropriate.” (quoting Oral History Transcript of Willard Pedrick, in EDUCATIONAL TESTING SERVICE ORAL HISTORY PROJECT (on file with the LSAC))).

⁴⁸ *Id.* at 958–59 (discussing the development of the LSAT within the larger context of expanded aptitude testing following World War I); *see also* JOHN CARSON, THE MEASURE OF MERIT: TALENTS, INTELLIGENCE, AND INEQUALITY IN THE FRENCH AND AMERICAN

rather than achievement, its predictive validity needed to be clear in order to justify its use. Early on, it was decided that the LSAT's validity would be tied to first-year grades—this was in part due to the high attrition rates at the time, but also because this metric was both readily available and seen to be more rigorous than bar passage—the perhaps more obvious choice.⁴⁹ Even today, the LSAT's validity under Standard 503 is justified by its ability to predict first-year grades—even though this predictive validity is lower than it was at the time the test was created and significantly lower than its creators intended.⁵⁰

C. *The Post-LSAT World*

The years following the LSAT's creation brought significant changes to the demographics of law school applicants, the most marked of which was a sharp increase in the size of the pool. In the 1970s, the baby boomer generation came of age and the number of LSAT-takers doubled from one year to the next—from 60,500 during the 1968–69 cycle to over 121,000 in 1971–72.⁵¹ Over the following decade, the number of female law school students increased more than 285%, so that, by the early eighties, women made up nearly 40% of law students (in 1963, women had comprised just over 6% of degree candidates).⁵² Minority enrollment went up 73% in the same period.⁵³

These demographic changes shifted the role the LSAT played in the admissions process. At the time the LSAT was created, only a few law schools had competitive admissions—one commentator recalled that, in the “early days,” the mean LSAT score of admitted law students “was not much higher than the mean score of all applicants.”⁵⁴ But as the apprenticeship model faded into obscurity and the number

REPUBLICS, 1750-1940, at 253–57 (2007) (describing the expansion of intelligence testing after the First World War).

⁴⁹ LaPiana, *supra* note 35, at 963.

⁵⁰ Compare Schrader & Olsen, *supra* note 40 (placing the LSAT's initial correlation to 1L grades at .40-.44), and LaPiana, *supra* note 35, at 963 (indicating that the LSAT's creators considered correlations “in the realm of .50-.70 as acceptable and more than .70 as very reassuring”), with LISA A. STILWELL, SUSAN P. DALESSANDRO & LYNDIA M. REESE, LAW SCH. ADMISSION COUNCIL, LSAT TECHNICAL REPORT 11-02, PREDICTIVE VALIDITY OF THE LSAT: A NATIONAL SUMMARY OF THE 2009 AND 2010 LSAT CORRELATION STUDIES 18 (2011) (“The median validity for LSAT score alone is 0.35 for 2009 and 0.36 for 2010.”).

⁵¹ Thomas O. White, *LSAC/LSAS: A Brief History*, 34 J. LEGAL EDUC. 369, 371 (1984).

⁵² *Id.* at 372.

⁵³ *Id.*

⁵⁴ LaPiana, LSAC Keynote, *supra* note 36, at 8–9.

of applicants to law schools increased, admission to law school became ever more competitive.⁵⁵ In the United States, the legal profession has long been viewed as more than simply a trade, but a vehicle for social mobility; as competition for access to elite schools increased, so did the perception that there should be fairness in who was allowed access to the paths that led to the top tiers of the profession.⁵⁶ LSAT scores, with their claim to provide an “objective” metric of assessment (even perhaps the only “objective” metric in a typical admission packet), began to take on new prominence in lending fairness to the admissions process. As a result, the LSAT shifted away from its role as a screen for the potentially unsuccessful and toward its current role as gatekeeper both to the legal profession and its most prestigious and well-paid enclaves.⁵⁷

Originally, the creators of the LSAT had planned that LSAT scores should be kept entirely secret: Scores would not even be reported to the student sitting for the exam, but would instead be confidentially reported to the schools the student wished to apply to.⁵⁸ Although this strategy was rejected and it was instead decided that

⁵⁵ See NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 220 (2000) (“[T]he unusual size of the young-adult generation in the 1970s, had made admission to the best colleges and graduate schools intensely competitive. Slots in elite higher education seemed like a resource that was both much scarcer and more precious than before.”); Daniel J. Burns, *Truth in Testing: Arguments Examined*, 31 J. LEGAL EDUC. 256, 263 (1982) (quoting a report estimating that “the number of aspirants who are not able to gain admission to an ABA approved law school [had] increased eight-fold” in the previous fifteen years).

⁵⁶ See Burns, *supra* note 55, at 262–65 (canvassing contemporaneous arguments for exam disclosure based on equity of access considerations).

⁵⁷ The popular test prep provider PowerScore notes that “even a five-point increase in your LSAT score can ultimately produce a huge difference in your starting salary upon graduation.” PowerScore goes on to demonstrate that the difference between an LSAT score of 155 and 160 translates to an average salary increase of over \$34,000 in the first year of employment. Even a small improvement in score “can open doors to a future you may have never considered possible”—and indeed, the average first-year salary for a 170 LSAT scorer was more than double that of someone who scored 155. See *LSAT vs. Future Salary: The Importance of Test Preparation*, POWERSCORE, <https://www.powerscore.com/lsat/help/salary.cfm> (last visited June 15, 2020); see also Ruth Berkowitz, *One Point on the LSAT: How Much Is It Worth? Standardized Tests as a Determinant of Earnings*, 42 AM. ECON. 80, 83–84 (1998) (finding that a single point on the LSAT translated to \$2600 in first-year income—\$4090 adjusted for inflation—and noting that “since one LSAT point is worth thousands of dollars to the test-taker, it is obvious why the LSAT prep course industry is thriving”).

⁵⁸ See LaPiana, *supra* note 35, at 970–71. LaPiana observes that the temptation this raises to indulge in counterfactual speculation is “irresistible.” He theorizes that, had scores been kept confidential from test takers, “the schools might have found it possible to withhold information about the scores of candidates they did accept, and the entire modern ranking system might never have developed.” *Id.* He concedes, weighed against this possibility, that “the less information candidates have, the less accountable are the decision-makers.” *Id.*

scores should be released to students, the content of the exam itself remained strictly confidential up until the late 1970s.⁵⁹ Because the LSAT, like other standardized admissions tests such as the SAT and GRE, was conceptualized as an “aptitude” test that measured potential ability rather than mastery of a given skill, there was, at least according to the test administrators, no need to study for it. Indeed, the very idea that one *could* study for such a test was flatly rejected by test administrators, who released little information about the content of the exams and considered them to be “uncoachable.”⁶⁰ Stanley Kaplan, who founded one of the first test prep courses and claimed that studying (with his assistance) could help test takers improve their scores, was viewed as a charlatan.⁶¹ Nicholas Lemann, writing about the SAT, provides a vivid picture of the situation aspiring law students would have found themselves in up until the end of the 1970s:

[They] had no protection against a scoring error; they received their scores in the mail but were not allowed to see the graded tests they had taken. You had no option but to put yourself in the [testing service’s] hands, not ask questions, accept your scores trustingly—and, by extension, accept the fate to which your scores consigned you.⁶²

The “truth-in-testing” movement was in many ways an inevitable response to this situation. Beginning in the early 1970s, popular support began to grow around a movement to make standardized testing more accountable and transparent.⁶³ This momentum ultimately culminated in the passage of a “truth-in-testing” bill in 1979, which required testing services to publish old tests and allow test takers to see their graded exams.⁶⁴ Overnight, test prep became a legitimate enterprise, with Stanley Kaplan as one of its most respected leaders. Today, it is a multi-billion-dollar industry,⁶⁵ where some parents spend

⁵⁹ *Id.* at 971.

⁶⁰ See LEMANN, *supra* note 55, at 112.

⁶¹ *Id.* at 112–14, 220, 222 (describing Kaplan’s rise to prominence and relationship with the testing industry).

⁶² *Id.* at 221.

⁶³ *Id.* at 221–30.

⁶⁴ *Id.* at 222–23; see also LaPiana, *supra* note 35, at 986.

⁶⁵ The test prep industry was reported to be worth over \$24.5 billion in 2016 and is projected to pass \$32 billion in 2021. See Richard Chang, *Top 3 Trends Affecting U.S. Test Preparation Market Through 2021*, JOURNAL (July 6, 2017), <https://rb.gy/3pu1dp>. Kaplan, “the clear leader” in test prep, brought in revenue of \$1.5 billion in 2018. GRAHAM HOLDINGS, 2018 ANNUAL REPORT 3 (2018), <http://www.ghco.com/static-files/8e179cbd-58a2-4c3c-b82c-6b3ebb491fe3>; Graham Holdings Co., Annual Report (Form 10-K) (Feb. 25, 2019).

up to ten thousand dollars on preparation for a single test.⁶⁶ In 2018, LSAC launched its own free test-prep service; alternatives range in cost from a few hundred to over two thousand dollars.⁶⁷

Another development that radically shifted the role the LSAT plays in law school admissions is the rise of the annual *U.S. News & World Report* (USNWR) Law School Rankings. USNWR weighs a number of different factors to assess a law school's rank—"quality" (as assessed by deans, faculty, practitioners, etc.), "selectivity" (determined by acceptance rate, median LSAT scores, and median undergraduate GPA), and "placement success."⁶⁸ LSAT scores, which account for 12.5% of a school's overall ranking, have come to play a disproportionate role in driving admissions decisions, partly because they are one of the few components of the rankings that schools can control themselves.⁶⁹ Many scholars have noted that LSAT scores are perhaps the most important component driving rankings placement,⁷⁰

⁶⁶ See Patrick Clark, *The Test Prep Industry Is Booming*, BLOOMBERG (Oct. 8, 2014, 5:16 AM), <https://www.bloomberg.com/news/articles/2014-10-08/sats-the-test-prep-business-is-booming>; see also James Wellemeyer, *Wealthy Parents Spend Up to \$10,000 on SAT Prep for Their Kids*, MARKETWATCH (July 7, 2019, 9:14 AM), <https://www.marketwatch.com/story/some-wealthy-parents-are-dropping-up-to-10000-on-sat-test-prep-for-their-kids-2019-06-21>.

⁶⁷ See *Khan Academy Launches Free LSAT Prep for All*, LAW SCH. ADMISSION COUNCIL (June 1, 2018), <https://www.lsac.org/about/news/khan-academy-launches-free-lsat-test-prep-all>.

⁶⁸ See Robert Morse, Ari Castonguay & Juan Vega-Rodriguez, *Methodology: 2020 Best Law Schools Rankings*, U.S. NEWS (Mar. 16, 2020, 9:00 PM), <https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology>.

⁶⁹ See LaPiana, *supra* note 35, at 988–89. The ABA requires that law schools record the LSAT scores of their entering classes, which it then publishes on its website. See ABA STANDARDS, *supra* note 9, at 33–34. This information is then drawn upon by USNWR and other outlets to compile law school rankings. This situation has led to occasional bad behavior—for example, fraudulent inflation of LSAT score reports. See, e.g., Jodi S. Cohen, *U. of I. Probe of Law School Reveals Intense Culture, Falsified Data*, CHI. TRIB. (Nov. 9, 2011), <https://www.chicagotribune.com/news/ct-xpm-2011-11-09-ct-met-uofi-law-college-20111109-story.html>; Jacob Gershman, *State Sanctions Ex-Villanova Dean Accused of Inflating Student Data*, WALL ST. J. (Aug. 21, 2013, 4:30 PM), <https://blogs.wsj.com/law/2013/08/21/state-sanctions-ex-villanova-dean-accused-of-sexing-up-admissions-data>. The practice has also led to gamesmanship such as, for example, the practice of transferring desirable candidates with lower LSAT scores after the first year at another, lower ranked school (once their scores no longer contribute to the rankings). See, e.g., Ry Rivard, *Poaching Law Students*, INSIDE HIGHER ED (Feb. 4, 2015), <https://www.insidehighered.com/news/2015/02/04/law-school-transfer-market-heats-getting-some-deans-hot-under-collar>.

⁷⁰ See, e.g., William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 IND. L.J. 163, 163 (2006) (describing the role of USNWR rankings in shaping the student bodies of American law schools and arguing that the current status quo creates a "positional arms race" that undermines social welfare); LaPiana, *supra* note 35, at 989 ("[T]he LSAT has become the most important factor distinguishing one law school from another."); Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways*

and that schools’ desire to influence their position on the list “affect[s] virtually all aspects of law school operations.”⁷¹ This pressure to maintain or improve USNWR rankings position frequently has a negative impact on socio-economic diversity: Schools often end up offering “merit” scholarships to students with high LSAT scores to ensure they maintain their place in the rankings.⁷² Since the LSAT is highly correlated with wealth, such policies have the perverse effect of channeling scholarship money to the affluent, while low-income applicants (who are also those less likely to have had access to expensive test prep) end up carrying the full burden of increasing tuition costs.⁷³

One thing that emerges clearly from all this is that the LSAT’s role in law school admissions has changed tremendously in the seventy plus years since its inception. Whereas the LSAT was originally conceptualized to be one metric among many used to make admissions decisions, its current role is far more decisive than its creators ever imagined or intended. While LSAC still maintains that the LSAT should “be used along with pre-law grades, recommendations and other information as an aid in admissions,”⁷⁴ for most law schools this is simply not workable since the combination of mandatory ABA dis-

Rankings Mislead, 81 IND. L.J. 229, 233–37 (2006) (discussing the importance of LSAT scores to rankings and how this may have negative effects on the composition of the legal profession).

⁷¹ Rachel F. Morán, *Of Rankings and Regulation: Are the U.S. News & World Report Rankings Really a Subversive Force in Legal Education?*, 81 IND. L.J. 383, 383 (2006).

⁷² See, e.g., Diane Curtis, *The LSAT and the Reproduction of Hierarchy*, 41 W. NEW ENG. L. REV. 307, 314, 322–25 (2019) (discussing the intersection between rankings, LSAT scores, and financial aid and noting that over the last fifteen years law schools have largely “shifted their need-based scholarship money to ‘merit-based’” in order to “attract students whose numerical assets will help boost or maintain [their] target LSAT range”); Michael I. Krauss, *The Ethics of Law School Merit Scholarships*, FORBES (Apr. 3, 2014, 11:13 AM), <https://www.forbes.com/sites/michaelkrauss/2014/04/03/the-ethics-of-law-school-merit-scholarships> (“[A]t most law schools, price discrimination results in poorer, less well-educated students ‘subsidizing’ (paying higher tuition than) richer, better-educated students.”).

⁷³ Many commentators have referred to this as the “reverse Robin Hood” phenomenon. See, e.g., Aaron N. Taylor, *Robin Hood, In Reverse: How Law School Scholarships Compound Inequality*, 47 J.L. & EDUC. 41 (2018); see also, e.g., BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 96–103 (2012) (describing the relationship between LSAT-driven merit scholarships, student body demographics, and law school tuition); AARON N. TAYLOR, CHAD CHRISTENSEN, AMY RIBERA & JACQUELYN PETZOLD, *LAW SCH. SURVEY STUDENT ENGAGEMENT, 2016 ANNUAL SURVEY RESULTS: LAW SCHOOL SCHOLARSHIP POLICIES: ENGINES OF INEQUITY* 5 (2016) (reporting on the effects of linking financial aid to LSAT scores and arguing that the current system “reinforce[s] economic hierarchy”).

⁷⁴ LaPiana, *supra* note 35, at 977 (citing Memorandum from John A. Winterbottom, *The Policy Committee of the Law School Admission Test—Its Origin and Activities* (Jan. 14, 1955), *microformed on* Educational Testing Service Archives Microfiche, at Series 3, Box 8, Folder 11).

closure, USNWR rankings, and market competition forces them to place considerable weight on the LSAT scores of their incoming classes. The result is that for most law schools and aspiring law students, the LSAT is, for better or worse, “the single most important factor in determining admission.”⁷⁵

Another takeaway is that during the ABA’s tenure as the accrediting body for law schools, diversity in the forms of legal education and pathways to the bar has declined significantly. Many of the routes to becoming an attorney—“reading law,” apprenticeship, entering a law school without having first obtained an undergraduate diploma—have all but disappeared.⁷⁶ Others—night school, part-time study, one- or two-year programs, limited specialization programs—are far less prevalent than one might expect, given the nation’s demographics and the critical demand for legal services among large segments of the population.⁷⁷ The legal landscape has moved far from the free-wheeling years of the early nineteenth century, but at the cost of innovation, flexibility, and diversity. These things are not only necessary to a just and flourishing legal profession; they are an integral part of the ABA’s mandate and mission.⁷⁸ The Standards that the ABA promulgates should reflect this.

⁷⁵ See Shawn P. O’Connor, *Get Insight Into How Law Schools View LSAT Scores*, U.S. NEWS (July 27, 2015), <https://www.usnews.com/education/blogs/law-admissions-lowdown/2015/07/27/get-insight-into-how-law-schools-view-lsat-scores>.

⁷⁶ See Sean Patrick Farrell, *The Lawyer’s Apprentice*, N.Y. TIMES (July 30, 2014), <https://www.nytimes.com/2014/08/03/education/edlife/how-to-learn-the-law-without-law-school.html> (noting that of the 83,986 who sat for the bar in the previous year, only sixty were graduates of apprenticeship programs).

⁷⁷ There is an undeniable shortage of affordable civil legal services for low- and middle-income Americans. While this “justice gap” undoubtedly has multiple underlying factors, commentators have noted that regulations governing the legal profession result in limiting access to legal services among the needy. See LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* (2017) (finding that eighty-six percent of legal problems reported by low-income Americans in the year 2017 received inadequate legal help or none at all); see also, e.g., *States Reimagine Lawyer Regulation to Narrow Justice Gap*, AM. BAR ASS’N: NEWS (Feb. 15, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/02/states-reimagine-lawyer-regulation-to-narrow-justice-gap> (describing Utah and other states’ efforts to “reimagin[e] lawyer regulation” in order to expand “access to justice for low- and middle-income individuals”).

⁷⁸ The ABA’s stated mission is to “serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.” *About Us*, AM. BAR ASS’N, https://www.americanbar.org/about_the_aba (last visited Aug. 9, 2020). Under this mission, the ABA lists four goals, one of which is to “eliminate bias & enhance diversity” in the legal profession and the justice system. *Id.*

D. *The LSAT and ABA Standard 503*

Since 1952, the ABA’s Section of Legal Education and Admissions to the Bar has been recognized by the U.S. Department of Education as the official national accrediting agency for J.D. programs.⁷⁹ The Section is responsible for promulgating minimum standards that schools must meet in order to maintain accreditation; it also provides guidance in the form of binding interpretations on how schools can satisfy the standards.⁸⁰ Fifteen states permit only graduates of ABA-accredited law schools to sit for the bar exam, while another six allow graduates of non-ABA-accredited schools to sit only if those schools are in-state.⁸¹ As a result, aspiring lawyers who choose not to attend an ABA-accredited school are likely to end up significantly geographically limited in their ability to practice law.⁸² This in turn puts pressure on law schools to maintain ABA accreditation, since the failure to do so significantly limits both their viability and the value of the degree they confer.

Under ABA Standard 503, law schools must require all entering J.D. students to “take a valid and reliable admission test” to aid them in assessing the student’s “capability to satisfactorily complete the school’s program of legal education.”⁸³ Interpretation 503-1 of the Standard further requires that a school wishing to use a test other than the LSAT demonstrate that the alternate test is “valid and reliable” in assisting the school to assess applicants’ capability to complete their program.⁸⁴ In practice, this means that if a law school wants to use a test other than the LSAT and maintain ABA accreditation, a validity study must be conducted on the alternate test before it can be used for admissions. Beyond being costly, such a study would naturally face a structural hurdle: Students are required to take the LSAT in order to embark on a “program of legal education,” yet, to conduct a validity study, one would need a pool of students who had both completed a “program of legal education” and taken the alternate test. This produces something of a catch-22: As long as the LSAT is the only

⁷⁹ *Frequently Asked Questions*, AM. BAR ASS’N, https://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions (last visited Aug. 9, 2020).

⁸⁰ *Id.*

⁸¹ NAT’L CONFERENCE OF BAR EXAM’RS & AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 8–9 (2016), <https://www.ncbex.org/pubs/bar-admissions-guide/2016/mobile/index.html>.

⁸² See *Non-ABA-Approved Law Schools*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/choosing-law-school/find-law-school/non-aba-approved-law-schools> (last visited Aug. 10, 2020) (noting that “most states” do not “admit to their bars a graduate of a non-ABA-approved law school who has been admitted to the bar of another state”).

⁸³ ABA STANDARDS, *supra* note 9, at 31.

⁸⁴ *Id.*

approved test for law school entry, applicants have no reason to take an alternate test; but if no students are ever admitted to law school through an alternate test, there is no way to assess whether the alternate test is “valid and reliable” in predicting law school success.⁸⁵ Unsurprisingly, up until very recently, no school had conducted a validity study for an alternate admissions test, and the LSAT was the only game in town.

This state of affairs means that the LSAT—a test created to serve a very different purpose at a very different time in history—is, for most, the mandatory entry point to the American legal profession. The LSAT’s position as gatekeeper is guaranteed by the interplay between Standard 503, the mandatory disclosure requirements of Standard 509, and the reality of rankings and a competitive market for legal education. If there are other tests or admissions practices that would be better suited to the current environment, these interlocking elements ensure that the profession is nonetheless bound to a test designed to serve the needs of law schools eighty years ago. The next Part addresses just a few of the challenges that have arisen from this situation and illustrates why innovation in this field is sorely needed but unlikely to come under Standard 503 as it currently stands.

II

LITIGATION CHALLENGES TO THE LSAT UNDER THE ADA

While the LSAT has undergone numerous changes in structure and content since its first administration, there are some aspects of the test that have only been critically analyzed in the past few decades. “Speededness” is one of these elements. This Part discusses the “speeded” element of the LSAT and the challenges (and litigation) that have flowed from it. The likelihood that these challenges cannot be easily resolved is perhaps the most fundamental reason that Standard 503 should be rescinded.

⁸⁵ For example, in a survey of 128 law schools, Kaplan found that many schools were unequipped to test the effectiveness of an LSAT alternative such as the GRE. “Validity studies cost money and with law schools strapped for cash, that’s not easy,” one school noted. Another responded: “We’d have to do some significant research that the GRE is an effective test for measuring law school performance. Given our size, we probably wouldn’t have the number of students who have taken the GRE to do that sort of study here.” See Press Release, Kaplan, Kaplan Test Prep Survey: Law Schools’ Apprehension to Allow Applicants to Use GRE® for Admissions Drops (Sept. 18, 2017), <https://www.kaptest.com/blog/press/2017/09/18/kaplan-test-prep-survey-law-schools-apprehension-to-allow-applicants-to-use-gre-for-admissions-drops> (listing motivations for schools who had not accepted the GRE).

A. *The LSAT, “Speededness,” and the Practice of Flagging*

The LSAT, in its current form, consists of two parts—a scored multiple-choice exam and an unscored written essay.⁸⁶ The multiple-choice part of the exam consists of five thirty-five-minute sections, four of which are scored and one of which—the “experimental” section—is used to test future exam questions.⁸⁷ Of the four scored sections, one tests reading comprehension, two test logical reasoning (or “arguments”), and one tests analytical reasoning (or diagrammable “logic games”).⁸⁸

While many would agree that there is a strong intuitive connection between speed and mastery, in the realm of academic performance, there is scant evidence correlating speed with competence and robust evidence to the contrary.⁸⁹ To reflect this, test creators generally distinguish between tests designed to measure “speed” and those that measure “power.”⁹⁰ A pure “power” exam assesses the test-taker’s knowledge of a subject without time constraints; a pure “speed” test assesses their ability to quickly work through simple questions.⁹¹ Most standardized assessments that test reasoning ability, including the LSAT, are designed to measure power; many, however, nonetheless contain a speeded element.⁹²

⁸⁶ *Types of LSAT Questions*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/lsat/lsat-prep/types-lsat-questions> (last visited July 31, 2020).

⁸⁷ *Id.* (describing the scored multiple-choice sections in comparison with the unscored or “variable” section). The placement of these sections varies between administrations, so test takers are generally unaware of which section is the unscored “experimental” section while sitting for the exam. *Id.*

⁸⁸ *Id.*

⁸⁹ Jennifer Jolly-Ryan, *The Fable of the Timed and Flagged LSAT: Do Law School Admissions Committees Want the Tortoise or the Hare?*, 38 CUMB. L. REV. 33, 60–61 (2007) (describing and rebutting some of the intuitive arguments for the connection between speed and legal practice, for example, claims such as “no ‘extra time’ accommodation is reasonable when one’s death-row client is relying upon the filing of a last-minute brief”); see, e.g., Ruth Colker, *Test Validity: Faster Is Not Necessarily Better*, 49 SETON HALL L. REV. 679, 732–35 (2019) (canvassing and rebutting various arguments justifying the speeded element of exams); see also William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 979 n.18 (2004) (canvassing the empirical evidence that test-taking speed and reasoning ability are “distinct, separate abilities with little or no correlation”).

⁹⁰ See Colker, *supra* note 89, at 682 n.10; *id.* at 689 (citing Nicole Ofiesh, Nancy Mather & Andrea Russell, *Using Speeded Cognitive, Reading, and Academic Measures to Determine the Need for Extended Test Time Among University Students with Learning Disabilities*, 23 J. PSYCHOEDUCATIONAL ASSESSMENT 35, 37 (2005)) (“As a general matter, there are ‘speed’ exams and ‘power’ exams.”).

⁹¹ See *id.*

⁹² See *id.* at 682 (“Most standardized exams . . . measure both speed and power.”); Henderson, *supra* note 89, at 979–80 (“Like most tests that measure reasoning ability, the LSAT is essentially designed to be a power test.”).

While LSAC has not officially acknowledged that the LSAT is a speeded exam, there exists near-conclusive evidence indicating that it contains a significant speeded element.⁹³ In addition to empirical research and strong anecdotal evidence, LSAC itself has implicitly acknowledged the LSAT's speeded element by making test prep materials available for free to help students "increase [their] speed."⁹⁴ Still, despite this tacit acknowledgement, and despite the fact that a speeded element is common to many standardized tests, neither LSAC nor any other testing entity has released a valid study indicating that the time limits used in their exams are justified.⁹⁵

Speededness has been a particularly thorny issue in making standardized tests accessible to students with disabilities. Test administrators have generally responded by providing extra time accommodations to test takers who demonstrate a medical need for them. However, because disability is often highly individualized, there is no efficient way to ensure that these provisions of extended time are individually tailored to a given student's circumstances.⁹⁶ In the past, in order to resolve this dilemma, LSAC, like other test providers, offered extra time accommodations to students with disabilities but subsequently "flagged" accommodated scores to indicate to schools that the test had been taken under non-standard conditions. This solution produced its own complications: Disability rights advocates argued that the practice of flagging was stigmatizing and illegally discriminatory under the ADA. In 2000, such advocates successfully brought a suit against the Educational Testing Service (ETS) challenging its flagging practices; the resulting settlement ended the practice of flagging on most major standardized admissions tests.⁹⁷ LSAC, however, maintained its practice of flagging.⁹⁸ The resulting litigation

⁹³ See Henderson, *supra* note 89, at 1044 (assessing the findings of an empirical study on the speededness of the LSAT, concluding that "test-taking speed is a variable that affects the ordinal ranking of students on both the LSAT and actual law school exams," and noting that "the legal academy's heavy reliance on time-pressured law school exams has the effect of increasing the predictive validity of the LSAT").

⁹⁴ Colker, *supra* note 89, at 703 n.102.

⁹⁵ *Id.* at 686.

⁹⁶ See Colker, *supra* note 89, at 695-98 (discussing the difficulties in tailoring exam accommodations to disabilities). This is particularly true given that test administrators do not release information on the role that speed plays in individual exams. *Id.* at 695 ("[T]here is no scientific way to determine precisely how much extended time a test taker will need on an exam, especially when . . . the testing entities publish no reports explaining the role that speed plays in the examination instrument.").

⁹⁷ See *Breimhorst v. Educ. Testing Servs.*, 2000 WL 34510621 (N.D. Cal. 2000); Jolly-Ryan, *supra* note 89, at 56 (noting that following the *Breimhorst* settlement ETS ended flagging on the SAT, ACT, GRE, GMAT, and TOEFL).

⁹⁸ Jolly-Ryan, *supra* note 89, at 56 (noting that post-*Breimhorst*, law and medical school admissions exams are among the last to retain the practice of flagging).

provides perhaps the most compelling example to date of the LSAT’s resistance to innovations that are critically necessary to making the path to law school accessible to all applicants.

B. Department of Fair Employment & Housing v. Law School Admission Council, Inc.

In April 2012, the California Department of Fair Employment and Housing (DFEH) filed a class action complaint against LSAC in the United States District Court for the Northern District of California. The complaint was filed on behalf of several named students as well as “all disabled individuals in the State of California who requested a testing accommodation for the [LSAT] from January 19, 2009 to the present.”⁹⁹ It raised two principal issues: First, that LSAC had discouraged requests for accommodations, required excessive documentation, and requested information about mitigating measures in violation of both California law and the ADA.¹⁰⁰ On behalf of a subclass of complainants who had successfully obtained extended time accommodations, the complaint further alleged that the subclass was subjected to discriminatory and retaliatory treatment stemming from LSAC’s flagging practices.¹⁰¹

To support these allegations, the complaint included the results of an investigation that the DFEH had conducted into LSAC’s accommodation policies. This investigation indicated that applicants often had to submit “an extensive portfolio of current and historical materials including medical and/or psychological documentation” as well as, depending on the disability, sometimes two or more rounds of additional documentation and medical reports.¹⁰² The investigation had found that the process often cost over three thousand dollars—effectively barring access to the LSAT for low-income applicants with a disability—and was at times so burdensome that applicants had to obtain legal counsel to aid them in pursuing an accommodation.¹⁰³ Those who successfully secured an extended time accommodation had their scores flagged by LSAC when they were reported to law schools,¹⁰⁴ and LSAC further cautioned schools to “[c]arefully evaluate LSAT scores earned under accommodated or nonstandard

⁹⁹ Third Amended Complaint at 6, *DFEH v. LSAC*, 941 F. Supp. 2d 1159 (N.D. Cal. 2013) (No. C-12-1830-EMC).

¹⁰⁰ *Id.* at 6 (citing DFEH’s allegations).

¹⁰¹ *Id.*

¹⁰² *Id.* at 10.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

conditions.”¹⁰⁵ Additionally, LSAC did not report accommodated scores with the percentile ranking that came standard for non-accommodated scores.¹⁰⁶ DFEH requested that the court provide declaratory and injunctive relief barring the challenged practices.¹⁰⁷

LSAC responded by challenging DFEH’s jurisdiction to pursue the claim and alleging various other procedural deficiencies.¹⁰⁸ Substantively, LSAC argued that the ADA did not preclude flagging, which merely indicated that a score was “not comparable to scores achieved under standard time conditions.”¹⁰⁹ Regarding its process of assessing accommodation requests, LSAC argued (somewhat inconsistently with positions taken elsewhere) that since all test takers benefit from extended time, accommodations must necessarily be granted carefully.¹¹⁰ LSAC pointed to *Doe v. Nat’l Bd. of Medical Examiners*, a 1999 case challenging flagging on the United States Medical Licensing Examination (USMLE) to support its position.¹¹¹ In *Doe*, the Third Circuit had held that although the plaintiff had shown that flagging inflicted sufficient injury to support Article III standing, he nonetheless failed to demonstrate an ipso facto violation of the ADA.¹¹² LSAC argued that *Doe* stood for the proposition that the ADA “[does not] prohibit the psychometrically sound practice of annotating scores that are achieved with extra testing time.”¹¹³ The issue, per LSAC, had already been settled.

Five months into the suit, the United States Department of Justice (DOJ) sought leave to intervene on behalf of DFEH.¹¹⁴ Thomas E. Perez, Assistant Attorney General of the Civil Rights

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 40–41 (citing prayer for classwide relief).

¹⁰⁸ Motion to Dismiss, *DFEH v. LSAC*, 941 F. Supp. 2d 1159 (N.D. Cal. 2013) (No. C-12-1830-EMC).

¹⁰⁹ *Id.* at 16.

¹¹⁰ *Id.* at 2 (stating LSAC’s argument that it “conscientiously evaluates each accommodation request. It does so to ensure that ‘individuals with *bona fide* disabilities receive accommodations, and that those without disabilities do not receive accommodations that they are not entitled to, and which could provide them with an unfair advantage when taking the . . . examination.’” (citing *Powell v. Nat’l Bd. of Med. Exam’rs*, 364 F.3d 79, 88–89 (2d Cir. 2004))). LSAC also cited to a previous legal challenge where the court credited LSAC’s arguments based on the premise that “the research indicates that if you give someone extra time on a timed test like the GMAT or LSAT, their scores will improve whether they have a learning disability or not.” *Id.* (quoting *Love v. Law Sch. Admission Council, Inc.*, 513 F. Supp. 2d 206, 216 n.7 (E.D. Pa. 2007)).

¹¹¹ 199 F.3d 146 (3d Cir. 1999).

¹¹² *Id.* at 149, 154, 158 (stating the court’s conclusion).

¹¹³ Motion to Dismiss, *supra* note 108, at 15.

¹¹⁴ United States’ Motion to Intervene, *DFEH v. LSAC*, 941 F. Supp. 2d 1159 (N.D. Cal. 2013) (No. C-12-1830-EMC).

Division, noted that “LSAC’s discriminatory policies . . . adversely impact people with disabilities nationwide.”¹¹⁵ The DOJ’s press release informed the public that “[t]he Justice Department’s full participation in this case is an important step toward ending a long cycle of disability discrimination in standardized testing.”¹¹⁶

In April 2013, the court granted DFEH leave to proceed in its enforcement action for group or class relief, a sort of de facto class certification.¹¹⁷ LSAC settled shortly thereafter. Under the terms of the consent decree, LSAC agreed to pay \$7.7 million in penalties and damages to the named plaintiffs in the suit and all individuals who had applied for accommodations during the preceding five years.¹¹⁸ LSAC also agreed to end its practice of flagging and undergo comprehensive reforms of its accommodation granting policies.¹¹⁹ “This landmark agreement,” announced the DOJ statement, “will impact tens of thousands of Americans with disabilities, opening doors to higher education that have been unjustly closed to them for far too long.”¹²⁰

In 2017, LSAC released a report on “Accommodated Test-Taker Trends and Performance” in the period since the *DFEH* settlement.¹²¹ The report found that in the five-year period from 2012 through 2017 both requests for and approvals of accommodations had gone up significantly—increases that LSAC attributed to policy changes flowing from the consent decree.¹²² Specifically, accommodation requests more than doubled in the five years following the settlement, and approved accommodations more than quadrupled.¹²³ Eighty-seven percent of these granted requests were extended time accommoda-

¹¹⁵ Press Release, Dep’t of Justice, Justice Department Intervenes in Lawsuit Against Law School Admission Council on Behalf of Test Takers with Disabilities Nationwide (Oct. 18, 2012), <https://www.justice.gov/opa/pr/justice-department-intervenes-lawsuit-against-law-school-admission-council-behalf-test-takers>.

¹¹⁶ *Id.*

¹¹⁷ See *DFEH v. LSAC*, 941 F. Supp. 2d 1159 (N.D. Cal. 2013) (“The Court finds that . . . DFEH’s suit against LSAC is properly characterized as a government enforcement action seeking relief for a class of aggrieved individuals, and is not a ‘class action’ within the meaning of Rule 23.”).

¹¹⁸ Consent Decree at 19–21, *DFEH v. LSAC*, 941 F. Supp. 2d 1159 (N.D. Cal. 2013) (No. C-12-1830-EMC).

¹¹⁹ *Id.* at 8–15, 19.

¹²⁰ Press Release, Dep’t of Justice, Law School Admission Council Agrees to Systemic Reforms and \$7.73 Million Payment to Settle Justice Dept’s Nationwide Disability Discrimination Lawsuit (May 20, 2014), <https://www.justice.gov/opa/pr/law-school-admission-council-agrees-systemic-reforms-and-773-million-payment-settle-justice>.

¹²¹ Laura A. Lauth, Andrea Thornton Sweeney & Lynda M. Reese. LAW SCH. ADMISSION COUNCIL, LSAT TECH. REPORT 17-03, ACCOMMODATED TEST-TAKER TRENDS AND PERFORMANCE FOR THE JUNE 2012 THROUGH FEBRUARY 2017 LSAT ADMINISTRATIONS (2017).

¹²² *Id.* at 21.

¹²³ *Id.* at 1–2.

tions.¹²⁴ The report went on to note that in nearly every administration of the test, test takers receiving extra time had (as a group) higher average scores than non-accommodated test takers, and test takers who switched from non-accommodated to extra time saw score increases averaging 7.5 scaled points—a significantly higher leap than any other group taking the test on multiple administrations (for example, those who took the exam twice under non-accommodated conditions or twice under accommodated conditions).¹²⁵ Finally, Black and Asian test takers were underrepresented in the accommodated group, while white, male, and older test takers were each overrepresented.¹²⁶

LSAC's findings lend validity to popular criticisms of extra-time accommodations voiced in the popular media—namely, that accommodations disproportionately favor the already privileged.¹²⁷ Problematically, these frustrations with the testing regime are not infrequently directed at students receiving extra time, rather than at the test designers and administrators.¹²⁸ The underlying problem is that, while test takers with disabilities clearly benefit from being granted extra time, because of the LSAT's speeded element, so does everyone else.¹²⁹ Students with disabilities under the current system are placed in a bind: If they do well on the exam, they're vulnerable to the criticism that their accommodation was too lenient. Yet to resist this criticism, such students must close themselves off to a high score under anything other than standard conditions, thus negating the ADA's legal protections for disability.

¹²⁴ *Id.* at 6.

¹²⁵ *See id.* at 18–20 (analyzing performance statistics of accommodated test takers and accommodated repeat test takers).

¹²⁶ *See id.* at 2, 5, 15 (citing demographic trends as displayed in Table 1 and Figure 7).

¹²⁷ *See, e.g.,* Douglas Belkin, Jennifer Levitz & Melissa Korn, *Many More Students, Especially the Affluent, Get Extra Time to Take the SAT*, WALL ST. J. (May 21, 2019, 10:52 AM), <https://www.wsj.com/articles/many-more-students-especially-the-affluent-get-extra-time-to-take-the-sat-11558450347> (noting that at many elite high schools up to a third of students receive testing accommodations while at poorer schools the number is below two percent); Dana Goldstein & Jugal K. Patel, *Need Extra Time on Tests? It Helps to Have Cash*, N.Y. TIMES (July 30, 2019), <https://www.nytimes.com/2019/07/30/us/extra-time-504-sat-act.html> (detailing reports of a study finding a “wealth gap” where students in the top-earning percentiles claim disabilities at more than double the national average).

¹²⁸ *See, e.g.,* Joe Patrice, *Law School Student Mocks The Disabled Because Why Not?*, ABOVE THE LAW (Dec. 26, 2018, 11:28 AM), <https://abovethelaw.com/2018/12/law-school-student-mocks-the-disabled-because-why-not> (describing an incident at Michigan Law where a 1L student posted a comment about people “messing up the curve” by claiming extra time accommodations and the response from the administration).

¹²⁹ LSAC itself made this argument explicitly in its Motion to Dismiss and the same argument has frequently been raised during litigation involving accommodations. *See supra* note 110 and accompanying text.

A number of scholars have suggested a simple solution to the problem of speed on the LSAT: extended time for all.¹³⁰ Or, as Ruth Colker calls it, a “universal design solution.”¹³¹ Such a solution would have numerous benefits: It would ally the interests of students with disabilities and those without since everyone benefits from extended time. A universal accommodation policy would additionally benefit people with disabilities by eliminating the often significant costs associated with obtaining an accommodation, while also eliminating “line-drawing” problems associated with distinguishing low performance from disability.¹³² And such a solution could mitigate some of the socioeconomic bias associated with standardized tests, as well as their disparate race and gender impacts.¹³³ Further, a universal accommodation policy would eliminate any perceived unfairness in according people with disabilities extra time, since all test takers would benefit.¹³⁴ A universal design solution would be elegant, efficient to administer, and aligned with congressional intent.¹³⁵ However, as discussed in Part III *infra*, there is reason to fear that, even if implemented, such a change would not address the key structural problems that give rise to the test’s problematic social effects. The *Binno* litigation, discussed in the following section, constitutes the most recent

¹³⁰ See, e.g., Jolly-Ryan, *supra* note 89, at 70 (“[E]xtending the time for all students will ensure that all test takers are on equal footing.”); Nancy Leong, Comment, *Beyond Breimhorst: Appropriate Accommodation of Students with Learning Disabilities on the SAT*, 57 STAN. L. REV. 2135, 2152 (2005) (“[T]he best solution to this problem is to remove the speed element for everyone”); Natalie Escobar, *The Time Crunch on Standardized Tests Is Unnecessary*, ATLANTIC (Mar. 25, 2019), <https://www.theatlantic.com/education/archive/2019/03/standardized-test-extended-time/585580> (discussing elimination of the speeded element of exams in the context of the “Varsity Blues” college bribery scandal).

¹³¹ Colker, *supra* note 89, at 689.

¹³² See, e.g., Dylan Gallagher, *Wong v. Regents of the University of California: The ADA, Learning Disabled Students, and the Spirit of Icarus*, 16 GEO. MASON U. CIV. RTS. L.J. 153, 154 (2005) (“Wong’s disability claim was fatally contradicted by his ability to achieve academic success, without special accommodations. Wong’s plight illustrates the dilemma facing learning disabled students in medical and law schools: they must excel academically to earn admission, but academic success may preclude them from receiving the ADA’s protections.”).

¹³³ See Colker, *supra* note 89, at 679 (asserting that a shift to “non-speeded exams . . . would make standardized testing more equitable for a range of people, including racial minorities, women, people with low socio-economic status, older applicants, and individuals with disabilities”).

¹³⁴ See *id.* at 725 (explaining that a universal accommodations policy would offer all test takers the “opportunity to take as much time as they need to demonstrate their knowledge and abilities”).

¹³⁵ See *id.* at 725 n.206 (noting Congress’s reference to “universal design principles” in various pieces of legislation). Additionally, the ADA’s “integration mandate” provides that public entities “shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d) (2020).

entry in the line of ADA-based challenges to the LSAT; the case presents yet another compelling example of how the current Standard 503 discourages important changes to admissions testing practices and illustrates why competition and innovation in this area is both necessary and overdue.

C. *Binno and the LSAT*

In May 2017, LSAC was again sued for running afoul of the ADA.¹³⁶ In the suit, Angelo Binno—a nearly totally blind aspiring law student, fluent in Arabic and Chaldean, who worked under a high-level security clearance for the Department of Homeland Security—alleged that LSAC discriminated against him by refusing to exempt him from the analytical reasoning section of the test.¹³⁷ Binno’s complaint stated that because the analytical reasoning section requires test takers to draw diagrams in order to solve the questions, it places blind test takers at “a substantial competitive disadvantage.”¹³⁸ Notably, LSAC granted such exceptions until 1997—legally blind Michigan Supreme Court Justice Richard Bernstein was the last person in the country to receive one.¹³⁹

The suit came as the culmination of nearly a decade of litigation: Binno had originally sued the ABA over the same issue in Michigan District Court in 2011.¹⁴⁰ The suit wound its way through the courts before finally being heard by the Sixth Circuit in 2016.¹⁴¹ The Sixth Circuit dismissed Binno’s case on standing grounds, but noted that it was “left puzzled by Binno’s failure to litigate against LSAC, rather than the ABA.”¹⁴² Writing in concurrence, Judge Griffin argued that Binno *did* have standing since “Standard 503 effectively compels law

¹³⁶ See Complaint, *Binno v. Law Sch. Admission Council, Inc.*, No. 2:17-cv-11553 (E.D. Mich. May 16, 2017).

¹³⁷ See *id.* ¶¶ 14–18.

¹³⁸ *Id.* ¶ 46. Binno’s Complaint cites to the LSAC website, which at the time stated of the analytical reasoning section that “it may prove very helpful to draw a diagram to assist you in finding the solution.” *Id.* ¶ 41. Binno’s complaint also cites to a popular test-prep book which states: “For most people, trying to work these problems in their heads would be an extremely bad idea. Virtually everyone is well advised to use pencil and paper in solving analytical reasoning questions.” *Id.* ¶ 42.

¹³⁹ See *Schuette Files Amicus Brief in Support of Blind Michigan Man who Sued the American Bar Association for Refusing to Allow a Waiver on the LSAT Exam*, MICH. DEP’T OF ATT’Y GEN., <https://www.michigan.gov/ag/0,4534,7-359-402669-,00.html> (last visited Apr. 28, 2020) (discussing the Michigan Attorney General’s intervention on Binno’s behalf in the original suit against the ABA).

¹⁴⁰ See *Binno v. Am. Bar Ass’n*, 2012 U.S. Dist. LEXIS 141371, No. 11-12247 (E.D. Mich. Sept. 30, 2012).

¹⁴¹ See *Binno v. Am. Bar Ass’n*, 826 F.3d 338 (6th Cir. 2016).

¹⁴² *Id.* at 348 (Griffin, J., concurring).

schools to require the LSAT.”¹⁴³ The majority’s argument that law schools are not required to place any particular weight on LSAT scores “misperceives” the underlying issue, Griffin wrote, since “law schools are required to report each admitted applicant’s score, regardless of the weight attributed to it, for purposes of admissions statistics and rankings.”¹⁴⁴ Nevertheless, like his colleagues, Judge Griffin agreed that Binno did not state a claim upon which relief could be granted since it is LSAC, rather than the ABA, who decides what accommodations are available and to whom they are allowed.¹⁴⁵

Binno duly sued LSAC, and in October 2019—nearly eight years after his original complaint—the two parties reached an amicable agreement. Under the terms of the settlement, LSAC would work with Binno and his co-plaintiff to “identify additional accommodations that they can use if they take the LSAT in the future.”¹⁴⁶ Even more importantly, LSAC committed to research and develop “alternative ways to assess analytical reasoning skills” as part of a broader review to improve “accessibility for all test takers.”¹⁴⁷ LSAC would complete this work within the next four years, the joint statement announced, “which will enable all prospective law school students to take an exam administered by LSAC that does not have the current [Analytical Reasoning] section.”¹⁴⁸

The *DFEH* and *Binno* litigation present two important takeaways. The first is that the LSAT can be changed to become more inclusive when the will to do so is present. Of course, the extent of these potential changes is still unproven—as discussed *infra* in Section III.A.1, it is possible that the LSAT’s internal structure may make it resistant to some of the most necessary and meaningful changes. The second takeaway is that some of the most important past changes to the LSAT have come only when LSAC’s hand was forced by litigation. This second point bolsters the argument for rescission of Standard 503: Innovation should not come only as the result of litigation—however, this is the natural outcome in a market where competition is artificially restricted. The elimination of Standard 503 would eliminate the LSAT’s near-monopoly on law school admissions testing; it would allow law schools to use other tests, which would in

¹⁴³ *Id.* at 349.

¹⁴⁴ *Id.*

¹⁴⁵ *See id.* at 354.

¹⁴⁶ Press Release, Nyman Turkish PC, Statement on the Amicable Resolution of Binno v. LSAC Lawsuit (Oct. 7, 2019), <https://www.prnewswire.com/news-releases/statement-on-the-amicable-resolution-of-binno-v-lsac-lawsuit-300931402.html>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

turn put pressure on the LSAT to become more accommodating to the changing needs of schools, students, and the profession. More generally, rescission of Standard 503 would break down the current barrier to innovation and experimentation in the field of law school admissions testing—and potentially spare students like Binno from having to wait a decade for a non-discriminatory path to law school.

III

THE CASE FOR RESCINDING STANDARD 503

A. *The Barriers to a Universal Accommodation*

Developments such as LSAC's commitment under the *Binno* settlement, along with proposals like a universal accommodations policy, hold out the promise that the LSAT is already on the path to change. This may indeed be true. Nonetheless, there are still powerful considerations that point toward the rescission of Standard 503. This Part presents those arguments.

1. *The LSAT and the Normal Curve*

One of the biggest challenges to making the LSAT truly inclusive is its scoring method. Altogether, there are four scored sections of the LSAT. These four sections total approximately one hundred questions; the number of questions that a test taker answers correctly is known as their "raw score."¹⁴⁹ This raw score is then filtered through a "Score Conversion Chart" to convert it into a scaled score that falls along a range from 120 to 180 (the "scaling" process).¹⁵⁰ These scaled scores are then again adjusted so that the distribution matches that of past administrations, a process called "equating."¹⁵¹ Thus, for example, while a test-taker needed to answer at least 90 questions correctly to receive a score of 170 on the December 2016 LSAT, at the next administration the same student would have needed to answer two additional questions correctly to receive the same score, even though both administrations contained the same number of questions.¹⁵² LSAC states that this procedure is necessary to ensure consistency between administrations: In order for law schools to be able to

¹⁴⁹ *The LSAT Scoring Scale Explained*, POWERSCORE, <https://www.powerscore.com/lSAT/help/scale.cfm> (last visited Aug. 27, 2020).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See *Correct and Incorrect Answers Counts*, POWERSCORE, https://www.powerscore.com/lSAT/help/correct_targeted.cfm (last visited Mar. 3, 2020).

effectively compare students, scores must be adjusted to reflect differences in test “difficulty” between administrations.¹⁵³

The result is that for at least the past two decades and likely for far longer, like other norm-referenced tests, the LSAT’s score distribution has remained consistent across administrations.¹⁵⁴ The score distribution falls along a bell curve, with a median score of 151 and first standard deviation scores at 140 and 160.¹⁵⁵ This distribution has stayed constant despite significant rises and falls in the number of yearly test takers,¹⁵⁶ an expansion of international administrations, a rise in the number of times students sit for the exam, and a rise in the number of college graduates.¹⁵⁷ Regardless of changes in the outside world, the LSAT’s normal distribution curve remains the same.

The normal curve has a long and contested history. Its discovery is generally attributed to Carl Friedrich Gauss, who in 1809 published a manuscript in which he introduced the “normal curve of errors.”¹⁵⁸ His work was subsequently developed into the theory of the “normal” or “bell” curve, now a widely-used concept in statistics. The normal curve is generally defined as the probability distribution of a real-valued random variable; it visually resembles a bell and is symmetrical around the mean.¹⁵⁹ It is widely used in fields ranging from biology to education to investing; however, it is also frequently misused.¹⁶⁰ The bell curve reflects the probable distribution of a *random* variable, but

¹⁵³ Dave Killoran, *Five Things About the LSAT Nobody Is Telling You*, BARBRI (Oct. 17, 2019), <https://lawpreview.barbri.com/five-things-about-the-lsat> (explaining that each LSAT has a scoring scale or “curve” that is tailored to that particular test and according to which the test is adjusted to ensure consistency across administrations and counteract “subtle variations in test difficulty”).

¹⁵⁴ See *Norm-Referenced Test*, GLOSSARY EDUC. REFORM (July 22, 2015), <https://www.edglossary.org/norm-referenced-test> (describing how norm-referenced tests are designed to rank test takers along a bell curve by comparing them to a statistically selected subset of scorers, or “norming group”).

¹⁵⁵ See *LSAT Score: What Does It Mean?*, BLUEPRINT (Dec. 2, 2011), <https://blog.blueprintprep.com/lSAT/lSAT-score-what-does-it-mean> (noting that “the LSAT is scored on a standard bell curve” such that “[m]ost students will score between 140 and 160, each a standard deviation from the mean of 151”).

¹⁵⁶ *Test Registrants and Test Takers*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/data-research/data/lSAT-trends-total-lSATs-administered-admin-year> (last visited Aug. 27, 2020).

¹⁵⁷ See CAMILLE L. RYAN & KURT BAUMAN, U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2015, at 4 fig.2 (2016).

¹⁵⁸ See, e.g., KEN BLACK, BUSINESS STATISTICS: CONTEMPORARY DECISION MAKING 185 (6th ed. 2010) (providing a history of the normal distribution).

¹⁵⁹ See *id.* (providing a definition of the normal distribution).

¹⁶⁰ See Curt Dudley-Marling & Alex Gurn, *Troubling the Foundations of Special Education: Examining the Myth of the Normal Curve*, in THE MYTH OF THE NORMAL CURVE 9, 10–11 (Curt Dudley-Marling & Alex Gurn eds., 2010) (discussing how the bell curve is “a poor model of social reality” yet is often deployed in socially-mediated contexts where variables cannot be expected to distribute randomly).

it is often applied to variables whose randomness is subject to serious debate—such as, for example, scholastic aptitude.¹⁶¹

There is a robust literature challenging the deployment of the normal curve in the educational context.¹⁶² In particular, scholars have noted that application of the normal curve to a purposeful activity such as learning is particularly inapposite since the goal is mastery of a fixed skill or body of knowledge.¹⁶³ Such scholars note that even if a given cohort began with normally-distributed ability in a given arena, one would expect that the learning process would alter this distribution.¹⁶⁴ This is particularly true where learning is broken up into tiers based on proficiency, such as grade levels: Where students are sorted based on pre-assessed proficiency, there is little

¹⁶¹ The link between educational assessment and the normal distribution has a long and fraught history. Many standardized tests, including the LSAT, have their roots in the IQ-testing movement that gained momentum in the early twentieth century. These tests were created against the background premise that human intelligence is both inherent and normally distributed—with certain groups being predisposed to a higher intellectual aptitude. See ANDREA GUERRERO, *SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION* 12 (2002); ALEXANDRA MINNA STERN, *EUGENIC NATION* 94–95 (2d ed. 2015). This view gained perhaps its most prominent contemporary voice in a 1993 book in which Richard J. Herrnstein and Charles Murray argue that intelligence is both more or less fixed and normally distributed, and thus investments in education are misguided in that they ignore the impossibility of shifting intelligence by more than a modest amount. See generally RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994). The book was popular with adherents of trickle-down economic theory but also received a massive backlash from the scholarly community, which attacked both the validity of its starting premises and the conclusions the authors drew from them. See, e.g., Stephen Jay Gould, *Curveball*, *NEW YORKER*, Nov. 28, 1994, at 139 (“The blatant errors and inadequacies of *The Bell Curve* could be picked up by lay reviewers if only they would not let themselves be frightened by numbers It is a manifesto of conservative ideology; the book’s inadequate and biased treatment of data display its primary purpose—advocacy.”). See generally CLAUDE S. FISCHER, MICHAEL HOUT, MARTÍN SÁNCHEZ JANKOWSKI, SAMEUL R. LUCAS, ANN SWIDLER & KIM VOSS, *INEQUALITY BY DESIGN: CRACKING THE BELL CURVE MYTH* (1996).

¹⁶² See, e.g., Lynn Fendler, *Bell Curve*, in *ENCYCLOPEDIA OF EDUCATIONAL THEORY AND PHILOSOPHY* 83, 85 (D.C. Phillips ed., 2014) (“In educational theory and philosophy, the key epistemological question is whether the bell curve should be regarded only as a display of probability functions for random continuous variables, or if it should also be used as a model of distribution for measurable things in the world.”); see also *supra* note 161 and accompanying text. See generally *THE MYTH OF THE NORMAL CURVE* (Curt Dudley-Marling, Alex Gurn, Susan L. Gabel & Scot Danforth eds., 2010).

¹⁶³ Eileen W. Ball & Beth Harry, *Assessment and the Policing of the Norm*, in *THE MYTH OF THE NORMAL CURVE* 105, 116 (“The normal curve . . . describes the outcome of a random process. Since education is a purposeful activity in which we seek to have [] students learn what we teach, the achievement distribution should be very different from the normal curve if our instruction is effective.” (quoting Benjamin S. Bloom, *Mastery Learning*, in *MASTERY LEARNING: THEORY AND PRACTICE* 47, 49 (James H. Block ed., 1971))).

¹⁶⁴ See *id.*

reason to expect a normal distribution from each cohort/tier. In the context of the LSAT, test takers will normally have been sorted dozens of times before they ever sit for the test. Typically, they will be college graduates and aspiring attorneys, and many will have prepared extensively and at great expense—hardly a random population.

It should then perhaps be unsurprising that, as indicated by empirical evidence, raw standardized test scores are seldom randomly distributed.¹⁶⁵ Such evidence is particularly notable given that standardized test questions are generally painstakingly revised on the front end to achieve a continuum of difficulty that will distribute normally.¹⁶⁶ The artificial imposition of a normal distribution on a population is perhaps useful in distinguishing among or ranking a group of test takers, but it comes at the cost of masking large differences in performance and/or emphasizing differences that are insignificant.

A foray into test design is beyond the scope of this Note. However, it seems likely that the LSAT’s design may not be able to accommodate a true universal accommodations policy while remaining faithful to the purpose of accommodations under the ADA. Implementing such a policy would undercut the accommodations received by those with disabilities since they would again be forced to compete for a place in the normal distribution. Speed is one of the primary ways of making sure that a testing instrument is “scalable”¹⁶⁷—that is,

¹⁶⁵ Dudley-Marling & Gurn, *supra* note 160, at 15–17 (discussing the evidence indicating that achievement test scores are unlikely to reflect a true underlying normal distribution); see also Theodore Micceri, *The Unicorn, The Normal Curve, and Other Improbable Creatures*, 105 PSYCHOL. BULL. 156, 161 (analyzing raw data from 440 standardized exams and finding that “[n]o distributions among those investigated passed all tests of normality, and very few seem to be even reasonably close approximations”).

¹⁶⁶ See, e.g., Fendler, *supra* note 162, at 85 (“A random collection of test questions would not yield a bell-curve distribution of results; . . . [n]ew tests must be ‘normed,’ which means the test items are repeatedly revised until new tests reproduce the same bell-curve distribution that was established by the previous versions of the test.”); see also *Criterion-Referenced Test*, GLOSSARY OF EDUC. REFORM, <https://www.edglossary.org/criterion-referenced-test> (last visited Aug. 11, 2020) (“To produce a bell curve each time, test questions are carefully designed to accentuate performance differences among test takers—not to determine if students have achieved specified learning standards, learned required material, or acquired specific skills.”).

¹⁶⁷ See, e.g., KHEN LAMPERT, MERITOCRATIC EDUCATION AND SOCIAL WORTHLESSNESS 15 (2013) (describing how educators, often acting on an unconscious premise that a normal distribution is the only natural outcome, design exams to yield a belled, or bellable, distribution by adding questions that require speed or prior knowledge). Lampert argues that the search for ways to differentiate leads to the privileging and elevation of arbitrary characteristics—namely, speed—often at the cost of other valuable traits such as diligence and work ethic. See *id.* at 70 (“[T]he trivial difference in speed of execution, by being so easy to identify, is used for . . . comparative differentiation . . . [S]peed becomes a supreme definer of intelligence, while intelligence becomes a social hatchet for frustration and worthlessness, as well as a justification for them.”).

that it produces significant enough differences to make it amenable to a normal distribution. Removing the LSAT's speeded element while retaining the normal distribution may thus be functionally impracticable. And to implement a universal accommodation of extended time while the normal distribution remains in place would likely place students with disabilities in the same position they were in pre-*DFEH*—on a “level playing field” that strips them of the protections afforded by the ADA.

Simply put, a truly universal design solution is likely incompatible with an imposed normal distribution. The benefits of a universally-designed admissions test have been well-argued; they are backed by empirical research and compelling ethical reasons.¹⁶⁸ The imposition of a normal distribution on the LSAT, however, does not appear to be grounded in any empirical justification. Indeed, the normal distribution appears to be a background assumption that has gone more or less unquestioned due to its claim to represent a natural “reality.”¹⁶⁹

2. “Standards” (vs. Rankings)

While “raising standards” in the legal profession was the larger conceptual framework under which the LSAT was first developed, the fear of “lowering standards” has been a large part of the justification for its continued use and resistance to change. Serious attempts at rescinding Standard 503 are likely to face arguments about the potential for falling standards.

In the early days of accreditation, “raising standards” was used to justify implementation of requirements that drove non-elite law schools—many of which served primarily women, racial and linguistic minorities, and non-traditional students—out of business.¹⁷⁰ In a more

¹⁶⁸ See *supra* notes 130–35 and accompanying text (discussing the arguments supporting a universally-designed admissions test); *supra* note 89 (canvassing the empirical evidence supporting removal of the LSAT's speeded element for all test-takers).

¹⁶⁹ See Ball & Harry, *supra* note 163, at 108 (“This misconstrued concept is so woven into our sense of the world that even arguments against the value of the bell curve fall victim to the continuing assumption that it is based on reality.”).

¹⁷⁰ STEVENS, *supra* note 14, at 172–80, 191–99 (describing negative effects of the states' and the ABA's agenda during the 1920–40s to “raise standards” on non-elite law schools). The push to raise standards drove many schools that catered to minorities and to the poor out of existence. *Id.* Further, while standards were often uncompromisingly enforced against schools that served the “unworthy poor,” schools that catered to more desirable groups were granted a reprieve or exempted. For example, Freylinghuysen University in Washington, D.C., which catered to “colored working men and women,” noted at its 1932 commencement that, “owing to the advancing of standard requirements from three to four years, there [were] no graduates for 1932 from the Department of Law.” *Id.* at 195. Freylinghuysen University had shuttered by 1938, along with two of the other Black law schools noted in a comprehensive study on law schools conducted a decade earlier. *Id.*

recent example, after the ABA Section of Legal Education and Admissions to the Bar voted in November 2017 to recommend that the ABA rescind Standard 503,¹⁷¹ Kellye Testy, President and CEO of LSAC, expressed LSAC’s disappointment with the outcome. LSAC claimed to take issue with “the message it sends to the academy, law students, practitioners, and the public about weakening law school admission standards.”¹⁷² Testy argued that rescission of Standard 503 would create “a free-for-all that [would] be confusing and unfair for potential applicants,” which in turn could lead to “exploitation.” LSAC further emphasized the need to ensure “quality and fairness in law school admission.”¹⁷³ Such arguments are characteristic of those typically marshalled in the face of calls for serious change to the existing legal testing regime.

Often, however, arguments about lowering standards do not account for the fact that many of the “standards” in dispute are more properly conceptualized as rankings. As discussed above, a norm-referenced test, such as the LSAT, does not measure performance in relation to any fixed, independently-existing quality; rather, it measures how test takers compare to *each other* in reference to the quality being assessed. Such tests have difficulty accurately reflecting non-normal distributions and differences between cohorts over time. This is perhaps one of the reasons why the ABA is perennially accused of anticompetitive behavior¹⁷⁴—where “standards” are in fact

However, Washington College of Law, which at the time primarily catered to white women, was exempted from complying with the new standards. *Id.* at 194–95.

¹⁷¹ See discussion *infra* Section III.B.1 (describing the proposal, the process leading up to the Council’s vote in its favor, and the subsequent unexplained withdrawal of the resulting resolution by the Council before a full vote).

¹⁷² Paul Caron, *ABA Council Clears the Way for All Law Schools to Admit Students Based on the GRE (or to Ignore Admissions Tests Entirely)*, TAXPROF BLOG (Nov. 4, 2017), https://taxprof.typepad.com/taxprof_blog/2017/11/aba-council-clears-the-way-for-all-law-schools-to-admit-students-based-on-the-gre-or-to-ignore-admis.html.

¹⁷³ *Id.*

¹⁷⁴ In 1995, the DOJ filed a complaint against the ABA alleging that several of its accreditation requirements violated the Sherman Antitrust Act. The DOJ charged that ABA’s practices had (1) “fixed, stabilized, and raised” the salaries and working conditions for law school faculty, administrators, and employees; (2) subjected state-accredited law schools to a group boycott by ABA-approved schools; and (3) subjected students and graduates of state-accredited schools to a group boycott. Complaint at 13, *United States v. ABA*, No. 1:95CV01211 (D.D.C. June 27, 1995). The ABA settled in a consent decree with the DOJ in 1996, but in 2006 the DOJ requested the court hold the ABA in contempt for violating the consent decree. Petition by the United States for an Order to Show Cause Why Defendant American Bar Association Should Not Be Found in Civil Contempt, *United States v. ABA*, No. 95-1211-(RCL) (D.D.C. June 23, 2006); see also Harry First, *Competition in the Legal Education Industry (I)*, 53 N.Y.U. L. REV. 311 (1978) (arguing that the ABA and AALS engage in unfair restraint of trade through the process of law school accreditation).

“rankings,” discussions about lowering or raising standards are de facto discussions about the size of the pool that will be allowed to enter the profession, a decision likely to affect the cost of legal services. A real debate about “standards” would require a true standard—that is, an objective metric against which individuals are assessed—rather than a tool for comparing them to each other. Nevertheless, “falling standards” carries a strong emotional resonance and has proved an effective tool in restricting innovations that could result in increasing the size of the pool or diluting the meaningfulness of rankings.

B. ABA Standard 503 and the Future of Legal Education

1. The GRE and ABA Standard 503

For many years, in order to receive accreditation, law schools have been required either to use the LSAT as part of their admissions procedure or to conduct their own validity study before using an alternative test. This requirement created something of a catch-22: In order to adopt an alternative admissions test, schools needed to show that the alternative test could predict students’ success—but this was difficult when all students who wanted to enter law school were required to take only the LSAT.¹⁷⁵ Nonetheless, in 2015, the University of Arizona College of Law requested that ETS conduct a study to investigate whether the GRE could be validly used for law school admissions purposes. The resulting study compiled data from 1587 law students at 21 American law schools who had taken both the LSAT and the GRE;¹⁷⁶ it found that there was no “practical difference” in predictive validity between the two tests.¹⁷⁷ The University of Arizona concluded from the study that the GRE was sufficient to meet the ABA’s “valid and reliable” requirement and in May 2016 became the first law school in the United States to accept the GRE.¹⁷⁸ It was quickly followed by numerous other law schools, including Harvard Law School in May 2017.¹⁷⁹

¹⁷⁵ See discussion *supra* Section I.D.

¹⁷⁶ DAVID M. KLIEGER, BRENT BRIDGEMAN, RICHARD J. TANNENBAUM, FREDERICK A. CLINE & MARGARITA OLIVERA-AGUILAR, EDUCATIONAL TESTING SERVICE RESEARCH REPORT NO. RR-18-26, THE VALIDITY OF GRE® GENERAL TEST SCORES FOR PREDICTING ACADEMIC PERFORMANCE AT U.S. LAW SCHOOLS 3–4 (2018).

¹⁷⁷ *Id.* at 28.

¹⁷⁸ See Elizabeth Olson, *Law School’s Acceptance of GRE Test Scores Provokes Tussle*, N.Y. TIMES: DEALBOOK (May 5, 2016), <https://www.nytimes.com/2016/05/06/business/dealbook/law-schools-acceptance-of-gre-test-scores-provokes-tussle.html>.

¹⁷⁹ See Elizabeth Olson, *Harvard Law, Moving to Diversify Applicant Pool, Will Accept GRE Scores*, N.Y. TIMES: DEALBOOK (Mar. 8, 2017), <https://www.nytimes.com/2017/03/08/business/dealbook/harvard-law-will-accept-gre-scores.html>; Elizabeth Olson, *Law Schools*

In February 2017, the ABA’s Standards Review Committee submitted a proposal to change Standard 503; the proposal would shift the responsibility for determining whether an admissions test was “valid and reliable” from the law schools to the ABA.¹⁸⁰ Under the proposed change, law schools would be prohibited from using tests besides the LSAT “unless the test ha[d] been determined by the Council to be a valid and reliable test” pursuant to procedures that the Council would subsequently establish.¹⁸¹ The proposal further stipulated that the Council’s procedure “shall be the only method” for determining the validity of admissions tests and that law schools would be required to publish “information regarding which tests are used in assessing an applicant’s capability.”¹⁸²

In March 2017, the Standards Review Committee opened its proposed rule for public notice and comment.¹⁸³ In June, the deans of several law schools signed a letter challenging the ABA’s regulation of which tests could be used in admissions decisions.¹⁸⁴ LSAC pushed back: It argued against “reduc[ing] standards of quality” and for

Debate a Contentious Testing Alternative, N.Y. TIMES (Apr. 5, 2018), <https://www.nytimes.com/2018/04/05/education/learning/lsat-law-school-testing-alternative.html> (“Nearly 20 law schools, including Harvard’s, have embraced the GRE as an alternative.”).

¹⁸⁰ DRAFT REVISION TO STANDARD 503 PROPOSED DURING FEBRUARY 10-11 COMMITTEE MEETING, STANDARDS REVIEW COMM., AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, (2017), <http://www.abajournal.com/files/proposedrevisiontostandard503.pdf>.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Memorandum from Gregory G. Murphy, Council Chairperson, & Barry A. Currier, Managing Dir. of Accreditation & Legal Educ., ABA Section of Legal Educ. & Admissions to the Bar, to Interested Persons and Entities, ABA Standards for Approval of Law Schools Matters for Notice and Comment (Mar. 24, 2017), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20170324_notice_and_comment_memo.authcheckdam.pdf.

¹⁸⁴ See Don Macaulay, *Law Deans Question ABA Taking Role in Entrance Exam Approval*, NAT’L JURIST (July 14, 2017, 4:50 PM), <http://www.nationaljurist.com/national-jurist-magazine/law-deans-question-aba-taking-role-entrance-exam-approval> (describing the various reactions to the proposed revision of Standard 503); Marc L. Miller, Dean & Ralph W. Bilby Professor, Univ. of Ariz. James E. Rogers Coll. of Law, Erwin Chemerinsky, Dean & Distinguished Professor of Law, Univ. of Cal. at Irvine, College of Law, Daniel B. Rodriguez, Dean & Harold Washington Professor of Northwestern Pritzker Sch. of Law, Blake Morant, Dean & Robert Kramer, Research Professor of Law, Andrew T. Guzman, Dean & Carl Mason Franklin Chair in Law, USC Gould Sch. of Law, Ward Farnsworth, Dean & John Jeffers Research Chair in Law, Univ. of Tex. Sch. of Law, Comment on Proposed Revision to ABA Standard 503 (June 28, 2017), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/20170628_comment_s503_deans_miller_chemerinsky_rodriguez_morant_guzman_farnsworth.authcheckdam.pdf (arguing that the standardized test mandate does not fit its claimed purpose, noting that the testing requirement “negatively impacts efforts to diversify the profession,” and that the Council’s

“more commitment to the quality, diversity and fairness the LSAT provides.”¹⁸⁵

Following the period of notice and comment and subsequent hearing, in April 2018, the chair of the Council for the Section of Legal Education and Admissions to the Bar issued a memo with the Council’s recommendations.¹⁸⁶ The Council proposed that Standard 503—which had required a “valid and reliable” admissions test—should be eliminated altogether.¹⁸⁷ Instead, the Interpretation of Standard 501, which governs admissions, would be amended to include language stating that “admission test scores” would be considered as part of a holistic assessment of “sound admissions policies”; additionally, an attrition rate above twenty percent would create a “rebuttable presumption” that the law school was not in compliance with the standard.¹⁸⁸ The Council noted that, despite its elimination of the admissions testing requirement, it expected that it would still “remain the norm” for schools to require admissions tests, although under the proposed rule it would be up to schools to determine which tests to accept.¹⁸⁹

The Council of the ABA Section of Legal Education and Admissions to the Bar passed the proposal in May 2018.¹⁹⁰ However, before the full vote of the House of Delegates at the 2018 ABA Annual Meeting—which would have made the proposal official ABA policy—the Council withdrew the resolution.¹⁹¹ There does not appear to have been an official, on-record reason provided for the withdrawal of the resolution after the completion of notice and comment, a hearing, and adoption by the Council. One source reported that the resolution was withdrawn after a March 2018 letter authored by the Minority Network, a group of law school admissions profes-

proposed Standard “close[s] the door on the modest innovation allowed to law schools under existing Standard 503”).

¹⁸⁵ See Macaulay, *supra* note 184.

¹⁸⁶ Memorandum from Pamela Lysaght, Chair, Standards Review Comm., to Maureen O’Rourke, Chair, Council of the Section of Legal Educ. & Admissions to the Bar, Comments Received on Items Circulated for Notice and Comment; SRC Recommendations—Proposed Standards 205, 206, and 501/503 (Apr. 23, 2018), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/May2018CouncilOpenSession/18_may_c1_memo_205_206_501_503_with_appendix.authcheckdam.pdf.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See Scott Jaschik, *ABA Panel Moves to End LSAT Requirement*, INSIDE HIGHER ED (May 14, 2018), <https://www.insidehighered.com/admissions/article/2018/05/14/aba-panel-votes-end-lsat-requirement-accreditation>.

¹⁹¹ See REPORT TO THE HOUSE OF DELEGATES RESOLUTION, 2018 AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR.

sionals, was circulated among the delegates.¹⁹² However, this letter had previously been submitted during notice and comment and one of its co-authors had already testified at the public hearing in April 2018.¹⁹³ The letter’s argument—that abandoning the LSAT requirement would harm minorities—had already been fully considered and rejected by the committee.¹⁹⁴

¹⁹² See Stephanie Francis Ward, *Plan to Drop Law School Entry Exam Requirement Withdrawn Before ABA House Vote*, ABA JOURNAL (Aug. 6, 2018), https://www.abajournal.com/news/article/plan_to_drop_law_school_entry_exam_requirement_withdrawn_before_house_vote; Letter from Reyes Aguilar et al., Assoc. Dean, Univ. of Utah, S.J. Quinney Coll. of Law, to Council of the ABA Section of Legal Educ. & Admissions to the Bar (Mar. 28, 2018), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/20180328_comment_s503_minority_network_authcheckdam.pdf.

¹⁹³ See Memorandum from Pamela Lysaght to Maureen O’Rourke, *supra* note 186, at 7 (referencing testimony of Jay Austin); ABA, Meeting on Amendments to Standards and Rules of Procedure, at 66–70 (Apr. 12, 2018) (statement of Jay Austin, University of California-Irvine).

¹⁹⁴ This should come as no surprise. Indeed, for decades the LSAT has been criticized for disadvantaging women and minorities, as have standardized admissions tests generally. In the 1970s, Black organizations and journalists were among the leading critics pushing for accountability in standardized testing. See LEMANN, *supra* note 55, at 221. In the wake of the *Bakke* decision, the National Institute of Education commissioned an investigation into “the validity and cultural bias” of the LSAT. See DAVID M. WHITE, TOWARDS A DIVERSIFIED LEGAL PROFESSION (1981). The resulting report, which concluded that UGPA was less biased against minorities than the LSAT, was extensively peer-reviewed and critiqued under the auspices of the National Institute of Education. *Id.* at 2–3. “Without exception,” reviewers agreed with the “concern for a rethinking of current admissions policies which appear to unfairly limit the enrollment of minority applicants,” although many took issue with the author’s methodology and final recommendations. *Id.* at 5–6.

In the years since, other scholars have criticized the LSAT for using questions with politically charged content that distracts women and minorities and triggers “socialized self-doubt.” See Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121, 129–30 (1993) (analyzing numerous examples of inflammatory questions from recent tests and arguing that such “distractor questions” constitute “a form of subtle, unconscious psychological warfare” that disparately impacts women and minority test takers). More recently, scholars have analyzed how the LSAT’s “sensitivity screening” procedure for selecting questions has the practical effect of introducing systemic bias against women and minorities. See Jay Rosner, *The SAT: Quantifying the Unfairness Behind the Bubbles*, in SAT WARS: THE CASE FOR TEST-OPTIONAL COLLEGE ADMISSIONS (Joseph A. Soares ed., 2015) (describing how this methodology, known as “point bi-serial correlation” and used on many admissions tests including the LSAT, requires that each question reflect the profile of the test’s high-scorers and frequently results in questions that favor women and minorities being discarded); see also William C. Kidder & Jay Rosner, *How the SAT Creates “Built-in-Headwinds”: An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131, 157–62 (2002) (describing how the correlation methods for selecting questions on tests like the LSAT create “built-in headwinds” for wealthy white male test takers such that even when a question is demonstrably *wrong* in a provable field such as geometry, the question is still considered to “function[] as intended” if the norming group answers it correctly). Other scholars have shown that under an admissions regime that relies heavily on LSAT scores,

Under the current ABA rules, Section 503 remains as it ever was: Law schools wishing to use an admissions test other than the LSAT must still demonstrate that it is “valid and reliable.”¹⁹⁵ The ABA’s position on the GRE remains unaddressed, as do the accreditation implications for those law schools that use it. Nevertheless, over thirty law schools now accept the GRE, and two, Cornell¹⁹⁶ and the University of Pennsylvania,¹⁹⁷ have even gone so far as to accept the GMAT in a limited “pilot program.” Still, there is reason to be concerned that the ABA’s failure to provide clarity may have chilled schools’ enthusiasm to adopt the GRE. A survey done by Kaplan in 2017 found that twenty-five percent of law schools who had yet to accept the GRE intended to do so, up eleven percent from the previous year.¹⁹⁸ Of the forty-five percent who planned to stick with the LSAT, two primary reasons were given: concern about the GRE’s predictive validity and uncertainty about the ABA’s position on the issue.¹⁹⁹ Yet Standard 503 did not appear anywhere on the ABA’s 2019 agenda, and neither the Standard nor the issues raised during

women and minorities must perform significantly higher along other metrics thus artificially reducing their numbers. See William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and Its Relationship to Racial Diversity in Legal Education*, 12 *YALE J.L. & FEMINISM* 1, 9, 10 (finding that if UGPA were used as the primary numeric criterion for admission, rather than LSAT score, African American admissions would more than double, Puerto Rican admissions would nearly double, Asian American admissions would rise by thirteen percent, and overall, admission of students of color would rise by forty-one percent).

In any event, the evidence that admissions policies that rely heavily on standardized tests disadvantage women, Blacks, and Latinos is essentially undisputed, and unsurprisingly many minority advocacy groups continue to vigorously oppose the use of standardized tests in higher education. See, e.g., *Standardized Testing*, *AFRICAN AM. POL’Y F.*, <https://aapf.org/standardized-testing> (last visited Aug. 12, 2020) (“Standardized testing has been recognized and criticized for being part of the picture of structural racism for some time.”); Nicholas Lemann, Daily Comment, *A Civil-Rights Challenge to Testing Joins the College-Admissions Battle*, *NEW YORKER* (Oct. 31, 2019), <https://www.newyorker.com/news/daily-comment/a-civil-rights-challenge-to-testing-joins-the-college-admissions-battle> (describing a letter from several groups representing underrepresented minorities announcing their intention to sue the University of California system if it does not halt its use of the SAT/ACT in admissions).

¹⁹⁵ See ABA STANDARDS, *supra* note 9, at 31.

¹⁹⁶ Press Release, Cornell Law Sch., Cornell Law School to Accept GRE and GMAT Under Pilot Program (July 17, 2018), <https://www.lawschool.cornell.edu/spotlights/Cornell-Law-School-to-Accept-GRE-and-GMAT-Under-Pilot-Program.cfm>.

¹⁹⁷ Press Release, Univ. of Pa. Carey Sch. of Law, Penn Law to Accept GRE, GMAT in Pilot Program, in Addition to Accepting LSAT (June 4, 2018), <https://www.law.upenn.edu/live/news/8117-penn-law-to-accept-gre-and-gmat-tests-for-jd>.

¹⁹⁸ Press Release, Kaplan *supra* note 85.

¹⁹⁹ See *id.* (noting that many law schools said their policies would remain unchanged until the ABA ruled on the issue and noting, for example, that “[t]he ABA hasn’t fully weighed in on it yet and we don’t want to have a new enrollment method only to not have it available down the road”).

the 2017 notice and comment period appear to be under discussion in the 2020 cycle.²⁰⁰

2. *Beyond “Valid and Reliable”*

Viewed in its best light, the LSAT was originally a tool to open and increase diversity in the legal profession. Its creators, like the creators of many other standardized tests during the same period, thought that the neutral benchmark provided by an “objective” exam would open the gates of the academy to the intelligent from all walks of life, rather than restricting access to the wealthy and well-connected, as had previously been the case.²⁰¹ It would create a just and inclusive meritocracy of talent to replace the old backroom-deal aristocracy, where money and connections mattered more than academic performance. And indeed, by most accounts, in its early days the LSAT *was* a great opener, allowing bright, working class young men from immigrant backgrounds to prove they merited a legal education.²⁰² But the LSAT long ago ceased to be a force for diversity—its negative disparate impacts for women, people of color, those with disabilities, and the non-affluent are nearly impossible to argue against.²⁰³ Studies have indicated that LSAT scores correlate negatively with social activism and a self-reported “ability to relate to

²⁰⁰ See Memorandum from Diane Bosse, Council Chair, & Barry A. Currier, Managing Dir. of Accreditation & Legal Educ., Am. Bar Ass’n Section of Legal Educ. & Admissions to the Bar, to Interested Persons and Entities, ABA Standards of Rules and Procedure – Matters for Notice and Comment (Mar. 6, 2020), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/3-6-20-notice-and-comment-memo-distance-ed.pdf.

²⁰¹ See *supra* Section I.B.

²⁰² See LaPiana, LSAC Keynote, *supra* note 36, at 7–8 (describing the LSAT’s role in minimizing the role of individual prejudice in admissions decisions and opening law schools to new demographic groups such as Catholics, Jews, and working class men).

²⁰³ See *supra* note 194 and accompanying text (discussing the LSAT’s role in educationally disadvantaging women and members of marginalized communities). See generally LANI GUINIER, *THE TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA* (2015) (arguing that current higher education admissions systems that rely heavily on test scores and ranking systems benefit a small, privileged set of individuals instead of providing educational opportunity to those with the wide range of backgrounds and social commitments necessary to sustain a democratic society).

others,”²⁰⁴ and some see its dominance as being partially responsible for declining perceptions of the legal profession.²⁰⁵

The elimination of Standard 503 is a necessary first step toward creating admissions procedures that align with the best of the ideals the LSAT was originally designed to serve. But as long as the LSAT remains the only officially ABA-sanctioned law school admissions test, experimentation in this area will be stymied. Indeed, under the current status quo, there is little incentive for experimentation within the LSAT itself—innovations such as a universal accommodations policy or a departure from norm-referencing will continue to be resisted in the absence of litigation. The LSAT enjoys a near-monopoly on legal admissions testing, but this monopoly comes at the cost of innovation that benefits aspiring law students, law schools, the legal profession, and the public at large.

To provide one example, in the late nineties, Berkeley Law created a committee to investigate the appropriate definition of merit in law school admissions.²⁰⁶ The committee found that the LSAT was insufficient when it came to predicting professional competence and, as a result, two of the committee members—Marjorie Shultz and Sheldon Zedeck—undertook an empirical study to determine what might be a basis for predicting professional performance.²⁰⁷ The resulting findings revealed “a complex model of lawyering.”²⁰⁸ They demonstrated that “professional competence requires not only the analytic quickness and precision that law school currently seeks . . .

²⁰⁴ William C. Kidder, *The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 167, 202 (2000) (assessing an empirical study that found that LSAT and GRE performance “negatively correlates with self-ratings of the ‘ability to relate to others’” (citation omitted)). Kidder further notes that a study of nearly six thousand students who took the LSAT found that LSAT performance negatively correlates with social activism. *Id.* See also Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593, 608 (2001) (noting that “the LSAT correlates negatively with community activism, social empathy, a desire to help others in trouble, and wanting to make a contribution to knowledge”).

²⁰⁵ Richard Delgado speculates that the “obsession with testing may even be responsible for the decline in public esteem for the legal profession” and notes that many of the attorneys we most respect—judges, senior partners, and legal scholars—attended law school when the LSAT was not required for admission or when scores did not carry the same weight that they do at present. Delgado, *supra* note 204, at 608. Many of the most respected figures in the legal profession, he writes, “could not get into the schools from which they graduated if they were applying today.” *Id.*

²⁰⁶ Kristen Holmquist, Marjorie Shultz, Sheldon Zedeck & David Oppenheimer, *Measuring Merit: The Shultz-Zedeck Research on Law School Admissions*, 63 J. LEGAL EDUC. 565, 565 (2014).

²⁰⁷ *Id.* at 565–66.

²⁰⁸ *Id.* at 566.

[but also] relational skills, negotiation and planning skills, self-control and self-development, creativity and practical judgment, among other proficiencies.”²⁰⁹ Based on their research, Shultz and Zedeck developed a test to predict professional competence; they administered the test to over 1100 lawyers who also allowed them to see their original LSAT scores, as well as their undergraduate and law school grades.²¹⁰ The results showed that the new test could predict lawyer effectiveness (which the LSAT was not helpful in predicting), although it was not superior to the LSAT in predicting first-year grades.²¹¹ However, since the lawyers who sat for the new test might have performed differently if they had actually been applying to law school, Shultz indicated that the next step in evaluating the new test should be to track test takers over time, from before they apply to law school through their professional practice.²¹²

Yet despite enthusiasm from law school deans,²¹³ over a decade has passed without any updates on the progress of the Shultz-Zedeck research. It’s not clear what the reasons behind this are, but given the challenges involved in getting the ABA’s blessing for even a well-established test like the GRE, it should not be surprising that a novel test without a decades-old pedigree would stall on the runway. This illustrates the problem with Standard 503: It sends a powerful signal that investment in experimentation with alternative tests is likely to be wasted. This artificially binds law schools, the legal profession, and the public to a test that measures only a narrow subset of the qualities necessary to legal practice—even when that test has significant negative attendant costs to diversity across the board.

Part of the problem is that the extent to which law schools are bound to the LSAT is not widely understood—in particular, the way that the ABA’s Standards 503 and 509 interact with the reality of market competition and rankings is widely misperceived. The combination of these factors places a substantial hurdle on the path of any law school that wishes to innovate its admissions procedures. But this hurdle is nearly invisible—even at the highest levels of the legal community.

One prominent example of this is *Grutter v. Bollinger*, the case in which the Supreme Court narrowly upheld the University of Michigan

²⁰⁹ *Id.*

²¹⁰ See Jonathan D. Glater, *Study Offers a New Test of Potential Lawyers*, N.Y. TIMES (Mar. 10, 2009), <https://www.nytimes.com/2009/03/11/education/11lsat.html>.

²¹¹ *Id.*

²¹² *Id.*

²¹³ See *id.* (describing the warm response from the deans of Northwestern Pritzker School of Law and Boston College School of Law).

Law School's use of affirmative action in its admissions procedures.²¹⁴ The case was brought by Barbara Grutter, a white applicant to Michigan Law with an LSAT score of 161 and an undergraduate GPA of 3.8.²¹⁵ After being waitlisted and finally rejected, Grutter challenged the law school's admissions policy as unconstitutionally favoring minority candidates.²¹⁶ The *Grutter* majority agreed that the school's policies advantaged some minority candidates, but held that its race-conscious strategy was justified because of the compelling interest in achieving a diverse student body.²¹⁷ Writing in dissent, Justice Thomas characterized the school's use of race-conscious admissions as a violation of the Fourteenth Amendment, arguing that Michigan Law "of its own choosing, and for its own purposes, maintains an exclusionary admissions system that it knows produces racially disproportionate results."²¹⁸ Thomas argued that "an infinite variety of admissions methods are available" to law schools, and concluded that "[c]onsidering all of the radical thinking that has historically occurred at this country's universities, the Law School's intractable approach toward admissions is striking."²¹⁹

Thomas's dissent illustrates a common misconception about the amount of freedom law schools have in determining how they admit their first-year classes. Unlike undergraduate institutions, accredited law schools *must* use the LSAT (or another test approved as "valid and reliable" pursuant to Standard 503) and, per ABA Standard 509, they *must* disclose the median scores of their incoming classes.²²⁰

Certainly, law schools are not required by the ABA to use LSAT scores in any particular way, and to an extent Justice Thomas is correct to disparage law schools for attempting to remain "elite and exclusive."²²¹ But his dissent overlooks the realities of a competitive market and overstates the amount of choice schools have to innovate their admissions policies. For example, law schools do not yet unequivocally have the option that undergraduate schools adopted long ago: accepting a diversity of tests.²²² Neither do law schools have

²¹⁴ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

²¹⁵ *Id.* at 316.

²¹⁶ *Id.* at 316–17.

²¹⁷ *Id.* at 343. The Court noted that a large proportion of the nation's leaders are trained in law schools and that, "[i]n 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." *Id.* at 332.

²¹⁸ *Id.* at 350 (Thomas, J., dissenting).

²¹⁹ *Id.* at 370 (Thomas, J., dissenting).

²²⁰ See ABA STANDARDS, *supra* note 9, at 31, 33–34.

²²¹ *Grutter*, 539 U.S. at 361 (Thomas, J., dissenting).

²²² For example, the ACT, developed in the early 1950s by E.F. Lindquist and now one of the most widely administered college admissions tests, was consciously designed as an

the option to discard the testing requirement altogether and rely exclusively on other methods to evaluate prospective students, as many undergraduate institutions have done.²²³ Law schools’ failure to innovate their admissions policies is not, as Justice Thomas styles it,

alternative to the SAT, which was the dominant undergraduate admissions test at the time. Lindquist, who served on the board of the organization that administered the SAT, later stated that it was this role that gave him “special occasion and opportunity to think about alternatives to and improvements” to the SAT. See *General College Admissions Is a One Horse Town*, ACT, <https://www.transformingact.org/detail/general-college-admissions-is-a-one-horse-town> (last visited Aug. 11, 2020). Even today, the ACT celebrates its role in changing the market. *About ACT*, ACT, <https://global.act.org/content/global/en/about-act.html> (last visited Aug. 11, 2020) (“We’ve disrupted the industry once—and we’re ready to do it again.”). Lindquist, who had a lifelong commitment to inclusivity in education, believed that standardized tests should not be used to exclude or sort along hierarchical lines, but rather should be designed to measure academic preparation—that is, they should assess achievement rather than aptitude, innate intelligence, or IQ. See *Lindquist Makes His Case to ETS*, ACT, <https://www.transformingact.org/detail/lindquist-makes-his-case-to-ets> (last visited Aug. 11, 2020). As a result, the ACT was designed to measure “as directly as possible the skills and abilities required for college success,” and it required test takers to “perform tasks comparable to those performed in college work.” See *More than First ACT Test Date*, ACT, <https://www.transformingact.org/detail/more-than-first-act-test-date> (last visited Aug. 11, 2020).

Beyond the SAT and ACT, many undergraduate institutions employ “test-flexible” admissions policies. For example, New York University, whose website announces that it has one of the “most flexible testing policies of any college or university,” accepts SAT, ACT, SAT-II, AP, IB scores, and also considers various international tests and degree-based admissions qualifications. *Standardized Tests*, N.Y.U., <https://www.nyu.edu/admissions/undergraduate-admissions/how-to-apply/standardized-tests.html> (last visited Aug. 11, 2020). The National Center for Fair & Open Testing (FairTest), an organization dedicated to ensuring quality education and equal opportunity by promoting “fair, open, valid and educationally beneficial evaluations of students,” reports that over eight hundred “top tier” schools are “deemphasizing” the ACT and SAT in their admissions procedures for Fall 2021. See *800+ “Top Tier” Schools Deemphasizing the ACT/SAT in Admissions Decisions for Fall 2021 per U.S. News & World Report Best Colleges Guide (2020 Edition)*, FAIRTEST, <https://www.fairtest.org/sites/default/files/Optional-Schools-in-U.S.News-Top-Tiers.pdf> (last updated Sept. 9, 2020) (listing those schools that deemphasize the ACT and SAT in their admissions process); *About FairTest*, FAIRTEST, <https://www.fairtest.org/about> (last visited Aug. 13, 2020) (describing the organization’s mission and current projects).

²²³ For example, in 2018, the University of Chicago announced that it would no longer require applicants to submit standardized test scores, in conjunction with several changes to its financial aid program. The following year, the number of low-income and first-generation students rose twenty percent, even as the school’s incoming average SAT score increased. See Scott Jaschik, *Chicago Sees Success by Dropping SAT Requirement*, INSIDE HIGHER ED (July 15, 2019), <https://www.insidehighered.com/admissions/article/2019/07/15/chicago-sees-success-dropping-testing-requirement-admissions>. Numerous other undergraduate schools have test-optional policies in place, and, in the wake of the COVID-19 pandemic, many more have temporarily suspended testing requirements. See Elissa Nadworny, *Colleges Go Test-Optional After SAT, ACT Are Called Off*, NPR (Apr. 1, 2020, 2:26 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/01/825304555/colleges-go-test-optional-after-sat-act-are-called-off> (noting that even before the pandemic, close to one thousand U.S. colleges and universities had dropped the standardized testing requirement).

sheer “intractab[ility]”—rather, it is the direct result of ABA Standards 503 and 509 combined with the realities of a competitive market.²²⁴ The statement that an “infinite variety of admissions methods are available” to law schools is simply not true.²²⁵ Law schools *can* experiment, but their ability to do so is both highly constrained and accompanied by significant risk.

Still, on a philosophical level, Thomas’s dissent can be viewed as making the same larger argument as this Note: Namely, that law schools should be incentivized to be innovative in their admissions policies (and, conversely, that legal bodies such as the ABA should not uphold practices that curtail experimentation aimed at making the legal profession more diverse and inclusive). While undergraduate institutions can and do constantly innovate their admissions policies—for example, by taking up newly-created tests, adopting “test-flexible” policies, or using non-test-based admissions procedures—law schools’ admissions practices have been held artificially static. And as long as the ABA Standards make innovations like these risky for law schools to implement, this is likely to remain the case. Beyond this, meaningful experimentation—such as the development of non-curved tests, tests created using universal design principles, or tests based on the criteria researched by Shultz and Zedeck—will remain a pipe dream under the current Standard 503. While this status quo is undoubtedly beneficial for LSAC, it is deeply problematic for the legal profession and the goals of inclusivity that the ABA and many law schools uphold.

CONCLUSION

Standardized testing is a multibillion-dollar industry that affects all levels of American education.²²⁶ Getting it right is important. The stakes are high—testing policies have effects that span the public interest, from access to education to professional pipelines to the shape of our core legal and political institutions and beyond. Testing policies implicate our commonly held beliefs about equity, access, and

²²⁴ *Grutter*, 539 U.S. at 370 (Thomas, J., dissenting).

²²⁵ *Id.*

²²⁶ According to its tax filings, LSAC’s annual revenue was just over \$74 million in 2017, the last year for which records were available, and the organization held over \$275 million in assets. LAW SCH. ADMISSION COUNCIL, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (FORM 990) 1 (2017). Other nonprofit providers of standardized testing services run far higher margins: for example, ETS, which administers the SAT and GRE, reported over two billion dollars in yearly revenue as well as assets. EDUC. TESTING SERV., RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (FORM 990) 1 (2017). *See also supra* note 65 and accompanying text (discussing estimates of the test prep industry ranging in the low billions).

opportunity, and they inform our debates on merit, competition, public service, and justice.

The LSAT is one test in the American panoply of standardized examinations. It is an important test—one whose historical role as an opener and equalizer on the path to legal practice should not be forgotten. But the LSAT long ago ceased to serve this egalitarian role, and it has since become the opposite—a mechanism for exclusion and the reproduction of an elite. But the momentum for change is already underway: Work has begun to create tests that capture talents the LSAT leaves unaccounted for, to adopt alternatives, and to propose alterations to the existing test design. The elimination of Standard 503 will open up these possibilities. It will allow schools to experiment with alternatives and tailor their policies to their individual needs. Such innovation is necessary and long overdue—for students, law schools, the legal profession, and the public it serves.