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# Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz

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## Articles

### Don't Tell, Don't Ask: Narrow Tailoring After *Grutter* and *Gratz*

Ian Ayres\* & Sydney Foster\*\*

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*The Supreme Court's affirmative action decisions in Grutter v. Bollinger and Gratz v. Bollinger changed the meaning of "narrow tailoring." While the narrow tailoring requirement has always had multiple dimensions, a central meaning has been that the government must use the smallest racial preference needed to achieve its compelling interest. We might have expected, therefore, that if the Court were to uphold one of the two programs at issue in Grutter and Gratz, it would, all other things being equal, uphold the program with smaller racial preferences. We show, however, that the preferences in the admissions program upheld in Grutter were larger than the preferences in the admissions program struck down in Gratz.*

*This result was not necessarily wrong, but the Court's analysis was wrong. The Grutter and Gratz Courts replaced the "minimum necessary preference" requirement with a requirement that admissions programs provide "individualized consideration," which we show amounts to a "Don't Tell, Don't Ask" regime. The Court will not "ask" probing questions about the size and differentiation of preferences as long as the government decisionmaker does not "tell" the Court how much of a racial preference it is giving. Indeed, as an example of the differential standards the Court applied, we demonstrate that while the Court impugned the admissions program at issue in Gratz for making race decisive for "virtually every minimally qualified minority applicant," in fact the fraction of qualified minority applicants for whom race was decisive was smaller in the admissions program struck down in Gratz than it was in the admissions program upheld in Grutter.*

*We call for a return to the minimum necessary preference requirement. Instead of examining whether preferences are "individualized," courts should determine whether the constitutionally relevant benefits of granting preferences of a given size outweigh the constitutionally relevant costs, both overall and at the margin.*

## 1. Introduction

The Supreme Court's decisions in *Grutter v. Bollinger*<sup>1</sup> and *Gratz v. Bollinger*<sup>2</sup> represent a sea-change in the requirement that affirmative action plans be "narrowly tailored" to further a compelling government interest. While the narrow tailoring requirement has always had multiple dimensions,<sup>3</sup> a central meaning has been that the government must use the smallest racial preference needed to achieve its compelling interest.<sup>4</sup> Sometimes expressed as a requirement that plans use the "least restrictive" or "least burdensome" alternative, a core idea has been that plans should use the minimum necessary racial preference.<sup>5</sup> If the government objectives could be fulfilled without use of a racial preference, then no racial preference would be allowed.<sup>6</sup> If only mild racial preferences were needed to achieve the compelling government interest, then nothing more than mild preferences would be constitutionally countenanced.

*Grutter* and *Gratz* changed all of this. At least in the university admissions context, these opinions jettisoned this "minimum necessary preference" requirement and in its place imposed a requirement that affirmative action programs be "individualized."<sup>7</sup> This Article unpacks the possible meanings of individualization. We show that the Court's individualization inquiry requires consideration of the extent to which racial preferences are (1) quantified, (2) undifferentiated, and (3) excessive.<sup>8</sup>

Under *Grutter* and *Gratz*, quantification of preferences essentially triggers stricter scrutiny of differentiation and excessiveness. The *Grutter* and *Gratz* decisions establish a kind of "Don't Tell, Don't Ask" regime. If the government decisionmaker does not "tell" courts how much of a racial preference it is giving (by not quantifying its preferences), courts will essentially not "ask" probing questions about whether the preferences are differentiated or excessive. In sharp contrast, courts will subject plans that do "tell" to stricter scrutiny—which is likely to be fatal in fact.<sup>9</sup>

Seen through this lens, the new narrow tailoring requirement is both too harsh with respect to quantified plans and too lenient with respect to unquantified plans. It is too hard on quantified plans because there is nothing in the act of "telling" or quantifying the degree of racial preference that

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1. 539 U.S. 306 (2003).

2. 539 U.S. 244 (2003).

3. See *infra* notes 20–25 and accompanying text.

4. See *infra* notes 26–38 and accompanying text.

5. See *infra* notes 28–38 and accompanying text.

6. This is another way of stating the requirement that race-neutral alternatives be used when possible. See *infra* notes 25–26 and accompanying text.

7. See *infra* subpart IV(A).

8. See *infra* subpart IV(B).

9. See *infra* subpart IV(C).

should in and of itself render a plan unconstitutional.<sup>10</sup> Indeed, quantification of some sort is a necessary prerequisite of being able to test whether racial preferences are narrowly tailored to achieve the government's compelling interest.<sup>11</sup> The Court's wrong-headed preference for unquantified plans thus makes it more difficult to perform any kind of cost-benefit calculus. The Court is too lenient with respect to unquantified plans because it does not subject them to a meaningful constitutional calculus.

The Court should return to the minimum necessary preference standard.<sup>12</sup> Because quantification is necessary to determine whether a preference is the minimum necessary, the Court should require universities to quantify the costs and benefits of their affirmative action programs. This quantification could be—but does not have to be—independent of the use of a point system like that used in *Gratz*.<sup>13</sup> Under this view, quantified preferences would be neither per se constitutional nor per se unconstitutional; rather, their constitutionality would turn on whether the means were in fact tailored to their ends.<sup>14</sup>

We support the Court's theoretical embrace of differentiated preferences. Undifferentiated, one-size-fits-all preferences on their face fail to tailor the benefits to the costs. More nuanced preferences that give minorities varying degrees of preference can be better tailored to minimize the size of racial preferences necessary to achieve the government's interest.<sup>15</sup> But, once again, the insistence on unquantified preference schemes undermines the ability of courts to test whether a particular plan is in fact nuanced. Despite the majestic words of the *Grutter* opinion, the Supreme Court did not require that the University of Michigan Law School (Law School) in fact grant varying preferences to different minority applicants<sup>16</sup>—it merely required that the Law School's preferences were *potentially* differentiated.<sup>17</sup> It is possible that the Law School's admissions in fact gave an equal racial boost to all minority applicants—or to all members of the same race. But the Court showed no interest in ascertaining whether or how the racial preferences varied in fact.<sup>18</sup> It is simply not possible to test whether an unquantified algorithm grants differentiated or undifferentiated preferences.

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10. *See infra* section V(A)(1).

11. *See infra* section V(B)(2).

12. *See infra* section V(B)(1).

13. 539 U.S. 244, 255–57 (2003).

14. *See infra* section V(B)(2).

15. *See infra* section V(B)(1).

16. The University of Michigan Law School and College of Literature, Science, and the Arts granted racial preferences to some, but not all, minority groups. *See infra* note 49. It is, therefore, not accurate to say that either school gave *all* minorities preferences. Because using the more accurate term “preferred minorities” is cumbersome, however, we frequently—but not always—use the term “minorities” throughout this Article when what we really mean is “preferred minorities.”

17. *See infra* section IV(B)(2).

18. *See infra* section IV(B)(2).

The Court's dicta favoring differentiated racial preferences, however, suggest a useful move toward "marginalism." Affirmative action defendants should show not only that their plans' total benefits exceed their total costs, but also that the benefits from the last unit of affirmative action are greater than the costs of this last unit. That is, defendants should show that the plan uses the minimum necessary preference not just on average but on the margin.<sup>19</sup>

The remainder of this Article is divided into four parts. Part II describes the requirements of narrow tailoring before *Grutter* and *Gratz* and argues that the minimum necessary preference requirement was central to narrow tailoring analysis. Part III shows that the rulings in *Grutter* and *Gratz* are likely perverse from the minimum necessary preference perspective because the admissions program that the Court upheld in *Grutter* in all likelihood granted minorities greater racial preferences than the program the Court struck down in *Gratz*. Part IV describes the changes wrought by *Grutter* and *Gratz*, explaining that the Court essentially replaced the minimum necessary preference requirement with a "Don't Tell, Don't Ask" individualization requirement. Finally, Part V lays out our normative critique of *Grutter* and *Gratz* and sketches a more fully articulated vision of what narrow tailoring should require. We call not just for a return to the minimum necessary preference requirement but for a jurisprudence that more explicitly quantifies the overall and marginal costs and benefits of affirmative action.

## II. Narrow Tailoring Before *Grutter* and *Gratz*

While narrow tailoring has always had several meanings, a central meaning has been that the size of racial preferences used in affirmative action programs should be the minimum necessary to achieve the compelling government interest. This Part will begin by describing the multiple meanings of the narrow tailoring requirement. It will then argue that both the narrow tailoring doctrine and the principles that underlie the narrow tailoring requirement recognize a minimum necessary preference requirement. This Part will then close by observing that given this requirement, we would have expected the *Grutter* and *Gratz* Courts to have engaged in a minimum necessary preference inquiry.

The pre-*Grutter* and *Gratz* case law developed several requirements that affirmative action programs must fulfill to satisfy the narrow tailoring prong of strict scrutiny.<sup>20</sup> First, the beneficiary class of the program must not be

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19. See *infra* section V(B)(1).

20. Compare this list to the one Robert Post created to summarize what the *Grutter* Court stated should be considered as part of the narrow tailoring inquiry. Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 66–67 (2003) ("The [*Grutter*] Court . . . holds [that the 'narrowly tailored' prong of the strict scrutiny test] has four components. A race-based affirmative action program (1) must 'not unduly harm members of any racial group'; (2) can be implemented only if there has been a

overinclusive in relation to the compelling government interest that justifies the program.<sup>21</sup> Second, the affirmative action program must be flexible and treat people as individuals when necessary to achieve the compelling government interest.<sup>22</sup> In the context of higher education at least, this means that rigid quotas cannot be used.<sup>23</sup> Third, the affirmative action program must be temporary.<sup>24</sup> Fourth, the possibility of achieving the ends of the affirmative action program by race-neutral means must be considered and rejected as not possible.<sup>25</sup>

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'serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks'; (3) 'must be limited in time'; and (4) must afford each applicant 'truly individualized consideration.'" (footnotes omitted) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 341, 339, 342, 334 (2003))). Also compare this list to the one Richard Fallon created that describes the elements of the narrow tailoring inquiry in all contexts, not just the equal protection context. Richard Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. (forthcoming June 2007) (manuscript at 126–37, on file with authors) (listing four inquiries: (1) "[n]ecessity of infringement on a triggering right," (2) "underinclusiveness," (3) "overinclusiveness," and (4) "proportionality").

21. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989) (holding a set-aside benefiting individuals from several racial groups from all over the country not narrowly tailored to remedying past discrimination against African Americans in Richmond because, inter alia, the beneficiary group was overinclusive); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 284 n.13 (1986) (plurality opinion) (criticizing a school board's layoff provision that targeted certain groups of minorities as "undifferentiated" and noting that the board did not justify its selection of the minority groups that the plan favored). One of us has pointed out that "[a]s a theoretical matter, one might also conclude that an underinclusive program is not narrowly tailored [to the remedial interest] if victims of discrimination are arbitrarily excluded from the affirmative action preferences." Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1786 n.13 (1996).

22. See, e.g., *Croson*, 488 U.S. at 508 (distinguishing the quota at issue in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), from the one at issue in *Croson* by noting its flexible waiver and exemption elements and concluding that "programs [such as the one in *Fullilove*] are less problematic from an equal protection standpoint because they treat all candidates individually, rather than making the color of an applicant's skin the sole relevant consideration"); *United States v. Paradise*, 480 U.S. 149, 177 (1987) (plurality opinion) (noting approvingly that waivers built into the affirmative action plan at issue give it flexibility); cf. *Grutter*, 539 U.S. at 334 ("[T]ruly individualized consideration demands that race be used in a flexible, nonmechanical way.>").

23. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 n.52 (1978) (Powell, J.); cf. *Grutter*, 539 U.S. at 334 ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system . . .").

24. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 238 (1995) (noting that affirmative action programs should not last longer than necessary); *Croson*, 488 U.S. at 510 ("[D]eviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter . . ."); cf. *Grutter*, 539 U.S. at 342 ("[R]ace-conscious admissions policies must be limited in time."). Note that conceptually, narrow tailoring does not entail a limited duration requirement when the compelling government interest is diversity rather than remedying past discrimination. The Sixth Circuit so recognized when it reversed the district court on this point in *Grutter*. Compare *Grutter v. Bollinger*, 288 F.3d 732, 751–52 (6th Cir. 2002) (en banc), *aff'd*, 539 U.S. 306 (2003), with *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 851 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002) (en banc), *aff'd*, 539 U.S. 306 (2003).

25. See, e.g., *Adarand*, 515 U.S. at 237–38 (noting that strict scrutiny requires consideration of race-neutral means); *Croson*, 488 U.S. at 507 (noting disapprovingly that "there does not appear to have been any consideration of the use of race-neutral means"); see also *Wygant*, 476 U.S. at 280 n.6 (plurality opinion) ("[T]he term [narrowly tailored] . . . may be used to require consideration of whether lawful alternative and less restrictive means could have been used."); cf. *Grutter*, 539 U.S. at 339 ("Narrow tailoring does . . . require serious, good faith consideration of workable race-

In addition, though, a central meaning of narrow tailoring before *Grutter* and *Gratz* was that preferences granted to minorities in affirmative action programs should be the minimum necessary to achieve the compelling government interest.<sup>26</sup> This meaning is perhaps the most obvious application of the tailoring metaphor itself—it is essentially a requirement that preferences granted to minorities not be too “baggy” or too “tight.”<sup>27</sup> In addition, this minimum necessary preference requirement follows directly from the threads of the Court’s strict scrutiny jurisprudence that require that affirmative action programs be the “least restrictive alternative”<sup>28</sup> and “work the least harm possible”<sup>29</sup> on nonpreferred racial groups so as not to impose an undue burden on them.<sup>30</sup> Finally, this minimum necessary preference requirement is consistent with the requirement that race-neutral alternatives

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neutral alternatives that will achieve the diversity the university seeks.”). *But see* Ayres, *supra* note 21 (noting the tension between requiring that narrowly tailored means be used and encouraging the solution of race-specific problems with race-neutral means).

26. Note that the race-neutral alternatives requirement is an application of this minimum necessary preference principle to the case where racial preferences are not necessary to achieve the objectives of the government. When race-neutral means exist for accomplishing the objectives of the government, then racial preferences are not the minimum necessary and are therefore not allowed.

27. At least as a theoretical matter, narrow tailoring requires not only that preferences not be too large, but also that they not be too small so as to fail to achieve the goals of the relevant compelling government interest. *See* Ayres, *supra* note 21, at 1786 n.13.

28. *See, e.g., Bakke*, 438 U.S. at 357 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (“Unquestionably we have held that a government practice or statute which restricts ‘fundamental rights’ or which contains ‘suspect classifications’ is to be subjected to ‘strict scrutiny’ and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.”); *see also Wygant*, 476 U.S. at 280 n.6 (plurality opinion) (noting that the narrow tailoring inquiry requires “consideration of whether lawful alternative and less restrictive means could have been used”). Some older cases include language suggesting that strict scrutiny does not demand use of the least restrictive means. *See, e.g., United States v. Paradise*, 480 U.S. 149, 184 (1987) (plurality opinion) (“Nor have we in all situations ‘required remedial plans to be limited to the least restrictive means of implementation.’” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 508 (1980) (Powell, J., concurring))); *Fullilove*, 448 U.S. at 508 (Powell, J., concurring) (“[T]his Court has not required remedial plans to be limited to the least restrictive means of implementation.”). In light of more recent cases demanding consideration of race-neutral alternatives and applying a stricter version of strict scrutiny, however, these cases are no longer good law with respect to this point. *See supra* note 25.

29. *Bakke*, 438 U.S. at 308 (Powell, J.) (“[T]he remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.”).

30. *See, e.g., Mctro Broad., Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O’Connor, J., dissenting) (noting that to pass constitutional muster, programs should not “unduly burden individuals who are not members of the favored racial and ethnic groups”); *Paradise*, 480 U.S. at 171 (plurality opinion) (stating that the impact on third parties should be considered); *Bakke*, 438 U.S. at 308 (Powell, J.) (noting that continued oversight typically ensures “the least harm possible” to others); *cf. Grutter*, 539 U.S. at 341 (“To be narrowly tailored, a race-conscious admissions program must not unduly burden individuals who are not members of the favored racial and ethnic groups.” (internal quotation marks omitted)). *But see* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 432–67 (1997) (arguing that equal protection analysis should move from an examination of costs and benefits to an examination of impermissible purposes).



be considered—indeed, it is a generalized version of the race-neutral alternatives requirement. Whereas the race-neutral alternatives requirement demands the use of *zero* preferences when possible, the minimum necessary preference requirement demands use of *minimum* preferences.<sup>31</sup>

Some Justices have explicitly recognized that the minimum necessary preference inquiry should be part of the narrow tailoring inquiry. For example, in her dissent to *United States v. Paradise*, Justice O'Connor noted that for the quota at issue to be narrowly tailored, the number of spaces set aside by the quota should be no more than was necessary to achieve the government interest:

The one-for-one promotion quota used in this case far exceeded the percentage of blacks in the trooper force, and there is no evidence in the record that such an extreme quota was necessary to eradicate the effects of the Department's delay. The plurality attempts to defend this one-for-one promotion quota as merely affecting the speed by which the Department attains the goal of 25% black representation in the upper ranks. Such a justification, however, necessarily eviscerates any notion of "narrowly tailored" because it has no stopping point; even a 100% quota could be defended on the ground that it merely "determined how quickly the Department progressed toward" some ultimate goal. If strict scrutiny is to have any meaning, therefore, a promotion goal must have a closer relationship to the percentage of blacks eligible for promotions.<sup>32</sup>

Justice O'Connor continued, connecting this minimum necessary preference notion to the idea that preferences should work the "least harm possible" to members of nonpreferred racial groups:

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31. For a description of the race-neutral alternatives requirement, see *supra* note 25.

32. *Paradise*, 480 U.S. at 198–99 (O'Connor, J., dissenting) (citations omitted). Other Justices have recognized that a size inquiry is important but have not framed the inquiry in terms of whether a given size is the smallest necessary. In *City of Richmond v. J.A. Croson, Co.*, the Court criticized the thirty-percent set-aside at issue because the thirty-percent figure rested on "the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." 488 U.S. 469, 507 (1989) (quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)); see also *Paradise*, 480 U.S. at 179–82 (plurality opinion) (upholding a fifty-percent promotion rate for African Americans, noting that the fifty-percent figure was not arbitrary relative to the twenty-five percent labor pool and the twenty-five percent representation of African Americans in the upper ranks); *Fullilove*, 448 U.S. at 513–14 (Powell, J., concurring) (noting that the ten-percent figure was "reasonable" because it fell approximately halfway between the percentage of the population who were minorities (seventeen percent) and the percentage of contractors who were minorities (four percent)). Note, however, that these discussions of weight in *Paradise* and *Fullilove* are from a plurality decision and a concurrence, respectively. Moreover, the scrutiny applied in these opinions was not full strict scrutiny. See, e.g., Herman Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over but the Shouting*, 86 MICH. L. REV. 524, 547–48 (1987) (noting how Justice Powell adhered weakly to the strict scrutiny test in his *Fullilove* concurrence). So, to the extent that these opinions countenance upholding racial preferences without consideration of whether preferences are the minimum necessary, their analysis on this point may not still be controlling.

This is not to say that the percentage of minority individuals benefited by a racial goal may never exceed the percentage of minority group members in the relevant work force. But protection of the rights of nonminority workers demands that a racial goal not substantially exceed the percentage of minority group members in the relevant population or work force absent compelling justification.<sup>33</sup>

The minimum necessary preference requirement of narrow tailoring also resonates with Justice Powell's *Bakke* opinion. Justice Powell explained that in a narrowly tailored admissions program,

[t]he file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism.<sup>34</sup>

In this passage, Justice Powell suggested that an admissions program would place too much weight on race if it admitted racial minorities over nonminorities who could have better contributed to the diversity of the student body because of their nonracial attributes.<sup>35</sup> Justice Powell essentially observed that the weight placed on race should be no larger than that which is necessary to achieve the compelling government interest.

The minimum necessary preference meaning of narrow tailoring finds support not only in the doctrine, as described above, but also in the principles motivating the strict scrutiny requirement. There are two generally accepted accounts of the function of strict scrutiny analysis in equal protection

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33. *Paradise*, 480 U.S. at 199 (O'Connor, J., dissenting). Other Justices have examined the weight given to race and its effect on nonbeneficiaries but have not articulated a standard for determining whether the weight is too much. For example, Justice Powell's concurrence in *Fullilove* noted the importance of examining "the effect of the set-aside upon innocent third parties." 448 U.S. at 514 (Powell, J., concurring). Justice Powell observed that the set-aside at issue would "reserve about 0.25% of all the funds expended yearly on construction work in the United States for approximately 4% of the Nation's contractors who are members of a minority group" and concluded that it was constitutionally permissible because "the effect of the set-aside [was] limited and so widely dispersed." *Id.* at 514–15; see also *id.* at 484 (plurality opinion) ("When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible."). To the extent that these opinions countenance upholding racial preferences without consideration of whether racial preferences are the minimum necessary, it should be remembered that *Fullilove* was decided in an era when strict scrutiny was far less strict than it is today, and therefore its analysis on this point may not still be good law. See, e.g., R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 870 (2004) (describing the *Fullilove* standard as less "exacting" than the *Crosby* standard); Schwartz, *supra* note 32, at 547–48 ("Justice Powell's *Fullilove* opinion was an especially revealing indicator of how weakly he adhered to the strict scrutiny test.").

34. *Bakke*, 438 U.S. at 317 (Powell, J.).

35. Note that to the extent that the diversity interest in *Grutter* and *Gratz* is different from the one articulated in Justice Powell's *Bakke* opinion, see *infra* notes 215–21 and accompanying text, the analysis on this point must be adjusted to take account of the differences, see *infra* note 221.

jurisprudence.<sup>36</sup> First, strict scrutiny is a way to “smoke out” illegitimate motives of those who create programs using a racial classification.<sup>37</sup> Second, strict scrutiny is a tool for ensuring that the benefits of programs using racial classifications outweigh the costs.<sup>38</sup> A minimum necessary preference requirement furthers both of these purposes. After all, if the size of a preference for a particular program is larger than that which is needed to achieve the compelling government interest, then it raises questions about whether there are illegitimate motives for the program. In addition, the best way for an affirmative action program to minimize costs while maximizing benefits is to grant the smallest preference necessary to achieve the compelling government interest.

This Part has argued that prior to *Grutter* and *Gratz*, narrow tailoring doctrine recognized—as it should have—a minimum necessary preference requirement. Given this requirement, we might have expected the *Grutter* and *Gratz* Courts to consider whether the racial preferences at the Law School and the University of Michigan College of Literature, Science, and the Arts (College) were the minimum necessary. Doing so would have required the Court to engage in an inquiry into how much weight each school placed on race and whether the amount of weight was necessary to achieve the benefits of the diversity interest. Such an inquiry would have necessitated not only an overall cost–benefit analysis, but also a marginal cost–benefit analysis.<sup>39</sup>

The *Grutter* and *Gratz* Courts did not engage in such an inquiry. Unfortunately, even at this late date, the Court is far from being able to conduct such an inquiry. Not only has the Court not established a methodology for *comparing* both overall and marginal costs and benefits, but the Court has not even established a methodology for *measuring* the constitutionally relevant costs and benefits of racial preferences.<sup>40</sup>

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36. Richard Fallon argues that embedded in the doctrine is a third account of the function of strict scrutiny: “[s]trict [s]crutiny as a [n]early [c]ategorical [p]rohibition.” Fallon, *supra* note 20 (manuscript at 80–85).

37. *Croson*, 488 U.S. at 493 (plurality opinion); *see also* Fallon, *supra* note 20 (manuscript at 89–97) (discussing “[s]trict [s]crutiny as an [i]llicit [m]otive [t]est”); Rubinfeld, *supra* note 30, at 428 (“One powerful function of strict scrutiny has always been that of ‘smoking out’ invidious purposes masquerading behind putatively legitimate public policy.”).

38. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229–30 (1995) (noting that “whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection” and stating that “[t]he application of strict scrutiny . . . determines whether a compelling governmental interest justifies the infliction of that injury”); Rubinfeld, *supra* note 30, at 428 (stating that strict scrutiny has “become a cost-benefit test measuring whether a law that falls (according to the Court itself) squarely within the prohibition of the equal protection guarantee is justified by the specially important social gains that it will achieve”); *see also* Fallon, *supra* note 20 (manuscript at 85–89) (discussing “[s]trict [s]crutiny as a [w]eighted [b]alancing [t]est”).

39. *See infra* section V(B)(1).

40. Indeed, as Part IV will argue, not only did the *Grutter* and *Gratz* Courts not develop methodologies for conducting the cost–benefit calculus, but also they effectively replaced the cost–

Part III of this Article outlines one way that courts can measure the costs of racial preferences and demonstrates the surprising result that the Law School's admissions program, which the Court upheld, actually gave more weight to race than did the College's admissions program, which the Court struck down. That is, the costs of the Law School's admissions program were higher than the costs of the College's admissions program. This result is surprising because if all other things are equal, a court applying a minimum necessary preference approach would not strike down an admissions program giving race less weight than an admissions program that it upholds. The fact that the Court did just this in the two Michigan cases therefore presents a bit of a puzzle.

Of course, all other things were probably not equal at the College and the Law School—the benefits flowing from diversity at a given cost may have been different at the two schools. So, that the Law School probably gave more weight to race than the College does not necessarily indicate that the outcomes of the decisions are wrong. But the result in Part III—that the Law School placed more weight on race than the College—should raise an eyebrow and prompt further inquiry into whether this greater amount of weight placed on race was justified by the benefits.

### III. *Grutter* and *Gratz*: How Much Weight the Law School and College Placed on Race

There are two key dimensions that courts should pay attention to when measuring the costs of preferential admissions programs, and arguably the Law School had greater racial preferences on both dimensions.<sup>41</sup> The first

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benefit calculus with an “individualization” requirement. And, while the *Grutter* and *Gratz* Courts developed some methodologies for measuring the costs of affirmative action, those methodologies do not capture costs that are constitutionally relevant. See *infra* section V(A)(2).

41. We are not the first to suggest that the Law School may have placed more weight on race than the College, but we are the first to defend the proposition with rigorous empirical analysis. Richard Sander is the only scholar who has attempted to prove empirically that the Law School placed more weight on race than the College, see *infra* notes 84–87 and accompanying text, but he ignores the outcome dimension, and there are several problems with his analysis of the means dimension, see *infra* note 87. Other scholars have suggested that the Law School may have placed more weight on race but have provided no empirical support for this assertion. Abigail Thernstrom and Stephan Thernstrom state that the Law School's preferences were greater than the College's, but the source they cite for support of this proposition, Judge Boggs's dissenting opinion in the Sixth Circuit in *Grutter*, made no claims about whether the College or the Law School provided greater preferences. See Abigail Thernstrom & Stephan Thernstrom, *Secrecy and Dishonesty: The Supreme Court, Racial Preferences, and Higher Education*, 21 CONST. COMMENT. 251, 259–60 & n.38 (2004) (citing *Grutter v. Bollinger*, 288 F.3d 732, 796 (6th Cir. 2002) (Boggs, J., dissenting), *aff'd*, 539 U.S. 306 (2003)). Thernstrom and Thernstrom's statement is therefore without empirical support. Similarly, Colin Diver states that “[b]ased on the statistics unearthed by the plaintiffs, and summarized in the dissenting opinion of Chief Justice Rehnquist [in *Grutter*], it appears that the advantage conferred on minority applicants by the law school was, in relative terms, as weighty as that conferred by the undergraduate point system.” Colin S. Diver, *From Equality to Diversity: The Detour from Brown to Grutter*, 2004 U. ILL. L. REV. 691, 718 (footnote omitted). Diver offers no direct support for this proposition, however, and Chief Justice Rehnquist's *Grutter* dissent never

dimension, which we call the *outcome* dimension, examines the outcomes of the affirmative action program—the extent to which the affirmative action program displaces nonpreferred applicants. The second dimension, which we call the *means* dimension, examines the explicit or implicit means used to achieve the outcomes—the boost that preferred minorities receive on account of their race.<sup>42</sup> These two dimensions do not need to move in any particular lock-step fashion—after all, it is possible to have an admissions program that gives a large boost to minority applicants but admits only a small number of minority applicants on account of that boost and therefore weights race heavily on the means dimension, but not on the outcome dimension, and vice versa.<sup>43</sup> The two subparts that follow describe how to measure each

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addressed the relative weight given to race at the Law School and the College. See *Grutter v. Bollinger*, 539 U.S. 306, 378–87 (2003) (Rehnquist, C.J., dissenting). Diver’s statement is therefore also without empirical support.

As far as we know, the University of Michigan’s expert statistician did not directly compare the weight given to race at the Law School and the College. His analysis can, however, be used to compare the weight at the two schools along the outcome dimension. See *infra* notes 61–72 and accompanying text.

The plaintiffs’ expert statistician, Kinley Larntz, attempted to compare the weight given to race at the Law School and the College by comparing the overall “odds ratios” at the two schools. See Third Supplemental Expert Report of Kinley Larntz at 2–3, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-CV-75928-DT). Larntz calculated odds ratios for each school for each year from 1995–1999, controlling for GPA and test score. *Id.* at 2. For the College, Larntz also controlled for residency status. *Id.* For the Law School, Larntz compared white applicants with each of four subgroups of minority applicants: Native Americans, African Americans, Mexican Americans, and Puerto Ricans. *Id.* For the College, Larntz compared non-underrepresented minorities with underrepresented minorities. *Id.* Larntz found that for all five years, the odds ratios at the College were substantially higher than the odds ratios at the Law School for Native Americans, Mexican Americans, and Puerto Ricans, suggesting that the College placed more weight on race than the Law School with respect to these subgroups. *Id.* at 7–11. When Larntz compared the odds ratios at the College with the odds ratios at the Law School for African Americans, however, the results were different: for two years, including 1999, the odds ratios were substantially larger at the Law School, *id.* at 8, 11 (1996 and 1999); for one year, the odds ratio was substantially larger at the College, *id.* at 7 (1995); and for two years, the odds ratios were comparable, *id.* at 9–10 (1997 and 1998). Larntz’s odds ratios did not compare the same groups at both schools, nor did he control for the same factors at each school. Moreover, Larntz’s odds ratio measure does not satisfactorily measure weight assigned to race on either the outcome or the means dimension: it does not capture the number of students displaced on account of affirmative action, nor does it give a sense for the amount of boost but-for admits actually received. We therefore do not discuss Larntz’s measure further. We note, however, that Larntz’s results are not inconsistent with our ultimate finding that the program at issue in *Gratz*—the College’s program implemented in 1999, see *infra* notes 58–59 and accompanying text—placed less weight on race than the program at issue in *Grutter*.

42. See Ayres, *supra* note 21, at 1803–04 (describing two dimensions to racial preferences in the contracting context); see also WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 31–39 (1998) (observing that the degree of racial preferences can be measured by examining both the number of but-for admits and also the qualification differentials between but-for admits and nonpreferred applicants who would have been admitted in the absence of affirmative action).

43. There are several ways to aggregate these two dimensions, but one is to multiply the two dimensions together. If race is decisive for  $x\%$  of all admitted applicants, and the effective credit for race is  $y$  units, we can say that the overall weight placed on race is  $xy$  units. Using this logic, we might find, for example, that an affirmative action program that gives minority applicants an

dimension and discuss how the Law School and College admissions programs fare under each measure.

#### A. Outcome Dimension

To measure the outcome dimension, we must look at the number of admitted applicants who, but for their race, would not have been admitted. We call these admitted applicants “but-for admits.” For the number of but-for admits itself to be meaningful, we need to compare it to the total number of admits—that is, we must look at the percentage of all admits who are but-for admits.<sup>44</sup> Note that comparing the number of but-for admits to the

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effective credit of 15 LSAT points and is decisive for 10% of the admitted applicants places the same amount of weight on race as a program that gives minority applicants an effective credit of 10 LSAT points and is decisive for 15% of the admitted applicants. See Ayres, *supra* note 21, at 1804.

44. It may be the case that the percentage of admits who accept offers of admission—a statistic known as the “yield”—is different for applicants who are given a racial preference and applicants who receive no racial preference. See BOWEN & BOK, *supra* note 42, at 33–34 (describing evidence that the yield for African American students is much lower than for white students, at least at highly selective colleges); Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1076 (2002) (citing BOWEN & BOK, *supra* note 42). If the yield is in fact different for preferred applicants and nonpreferred applicants, then the outcome dimension should probably be measured not by the percentage of *admits* who are but-for admits, but rather by the percentage of *enrollees* who are but-for admits. But, this becomes a more difficult normative calculus, in part because there might be a constitutional cost to racial preferences even if none of the but-for admits accept their offers of admission.

Yield data were not available to us, and we therefore did not calculate the percentage of enrollees who were but-for admits. We note, however, that data were available to us from which we could compute yields for the College in 1995 and the Law School in 2000. One of the reports of the defendants' expert statistician included yield data for several subgroups of applicants to the College in 1995. See Supplemental Expert Report of Stephen W. Raudenbush at 11 tbl.3, *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (No. 97-CV-75231-DT) [hereinafter Raudenbush, Supplemental Expert Report (July 13, 2000)], available at <http://www.vpcomm.umich.edu/admissions/research/swrjul13.pdf>. Using these data, we calculated that for the College in 1995, the yield for minorities was 41.3% and the yield for nonminorities was 33.9%. See *infra* note 68. The *Grutter* district court opinion included data that permitted us to compute yields for the Law School in 2000. See *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 839 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002) (en banc), *aff'd*, 539 U.S. 306 (2003). The opinion stated that in 2000, there were 170 minority admits and 58 minority enrollees. *Id.* The minority yield was therefore 34.1%. As described in note 65, we calculated that the number of nonminority admits in 2000 was 1,240. Because the 58 minority enrollees constituted 14.5% of the entering class, see *id.*, it follows that the number of nonminority enrollees was 342. Thus, the yield for nonminorities was 27.6%. So, the yield was approximately 7 percentage points larger for minorities than it was for nonminorities at both the College in 1995 and the Law School in 2000.

To the extent that the yield differs for applicants receiving a racial preference and those not receiving a racial preference, it is likely that the differences in the yields are sufficiently similar at the Law School and the College that if the percentage of admits who were but-for admits is larger at the Law School than at the College, the percentage of enrollees who were but-for admits is also larger at the Law School than at the College. This principle certainly holds true when applied to the data from the Law School in 2000 and the College in 1995. Compare *infra* text accompanying note 66 (establishing that using Raudenbush's calculations, 8.8% of 2000 Law School admits were but-for admits), and *infra* text accompanying note 68 (establishing that using Raudenbush's calculations, 7.8% of 1995 College admits were but-for admits), with *infra* note 66 (establishing that using Raudenbush's calculations, 10.5% of 2000 Law School enrollees were but-for admits), and *infra* note 67 (establishing that using Raudenbush's calculations, 9.3% of 1995 College enrollees

number of qualified minority applicants does not help measure the outcome dimension because it does not measure the burden on nonpreferred applicants.<sup>45</sup>

Available to the Supreme Court in *Grutter* and *Gratz* were admissions data from the Law School and the College<sup>46</sup> broken down by GPA range,<sup>47</sup> test score range,<sup>48</sup> race,<sup>49</sup> Michigan residency status, and year.<sup>50</sup> So, for

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were but-for admits). We therefore assumed that comparing the percentages of admits who were but-for admits at the Law School and the College was a good proxy for comparing the percentages of enrollees who were but-for admits at the two schools.

45. In *Gratz*, the Court found it relevant that the affirmative action program had “the effect of making ‘the factor of race . . . decisive’ for virtually every minimally qualified underrepresented minority applicant.” 539 U.S. 244, 272 (2003) (omission in original) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (Powell, J.)); see also *infra* note 142 and accompanying text. For a critique of this measure of weight, see *infra* subsection V(A)(2)(c).

46. Data were available in many different forms, but we took our data from the expert reports of Kinley Larntz, the plaintiffs’ expert. Supplemental Expert Report of Kinley Larntz, *Gratz*, 122 F. Supp. 2d 811 (No. 97-CV-75231-DT) [hereinafter Larntz, Supplemental Expert Report, *Gratz*]; Revised Second Supplemental Expert Report of Kinley Larntz, *Gratz*, 122 F. Supp. 2d 811 (No. 97-CV-75231-DT) [hereinafter Larntz, Revised Second Supplemental Expert Report, *Gratz*]; Supplemental Expert Report of Kinley Larntz, *Grutter*, 137 F. Supp. 2d 821 (No. 97-CV-75928-DT) [hereinafter Larntz, Supplemental Expert Report, *Grutter*]; Second Supplemental Expert Report of Kinley Larntz, *Grutter*, 137 F. Supp. 2d 821 (No. 97-CV-75928-DT) [hereinafter Larntz, Second Supplemental Expert Report, *Grutter*]; Fourth Supplemental Expert Report of Kinley Larntz, *Grutter*, 137 F. Supp. 2d 821 (No. 97-CV-75928-DT) [hereinafter Larntz, Fourth Supplemental Expert Report, *Grutter*]. Larntz took the data from the University of Michigan and created tables that broke down the data as described above. See, e.g., Larntz, Supplemental Expert Report, *Gratz*, *supra*, at 1–2.

47. College data for 1995–1997 included both a “GPA 1” and “GPA 2,” and College data for 1998 and 1999 included only one GPA. Larntz, Supplemental Expert Report, *Gratz*, *supra* note 46, at 1–2; Larntz, Revised Second Supplemental Expert Report, *Gratz*, *supra* note 46, at 1–2. The GPA 1 is the actual GPA of applicants, while the GPA 2 is a number calculated by starting with the actual GPA and then adding or subtracting points for other factors such as quality of high school and strength of the curriculum. See *Gratz*, 122 F. Supp. 2d at 827 n.15; Brief for the Petitioners at 5–6, *Gratz*, 539 U.S. 244 (No. 02-516), 2003 WL 164186. In 1997, the GPA 2 also included points for minority status. See Joint Appendix at 111–12, *Gratz*, 539 U.S. 244 (No. 02-516); see also *Gratz*, 539 U.S. at 255. Our calculations used the actual GPA of the applicants: GPA 1 for 1995–1997 and the only GPA provided for 1998–1999.

48. The test for which College test score ranges were available was the SAT. See Larntz, Supplemental Expert Report, *Gratz*, *supra* note 46, at 1; Larntz, Revised Second Supplemental Expert Report, *Gratz*, *supra* note 46, at 1–2. The test for which Law School test score ranges were available was the LSAT. See Larntz, Supplemental Expert Report, *Grutter*, *supra* note 46, at 1; Larntz, Second Supplemental Expert Report, *Grutter*, *supra* note 46, at 1; Larntz, Fourth Supplemental Expert Report, *Grutter*, *supra* note 46, at 1.

49. For the Law School, data were available on admissions statistics for particular races such as African Americans and Native Americans, but such data were not further broken down by residency status. Data were available, however, for “Selected Minorities” and “Majority Applicants” that were further broken down by residency status (and the other factors described above), and these were the data we used. See Larntz, Supplemental Expert Report, *Grutter*, *supra* note 46; Larntz, Second Supplemental Expert Report, *Grutter*, *supra* note 46; Larntz, Fourth Supplemental Expert Report, *Grutter*, *supra* note 46. Inspection of the data revealed that four subgroups made up the larger group of “Selected Minorities”: African Americans, Mexican Americans, Puerto Ricans, and Native Americans. Cf. Larntz, Supplemental Expert Report, *Grutter*, *supra* note 46, at 1 (stating that the report analyzes the relationship between Law School acceptance and membership in the group of “selected minorities (Native American, African American, Mexican American, or Puerto

example, the data could answer questions such as how many nonresident minorities applied to and were accepted by the Law School in 1997 with GPAs between 3.50 and 3.74 and LSAT scores between 159 and 160.

To calculate the number of but-for admits,<sup>51</sup> we first computed what we called the “probability enhancement”—the probability of admission for preferred minority applicants minus the probability of admission for nonpreferred applicants—for each combination of GPA range, test score

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Rican”); Larntz, Second Supplemental Expert Report, *Grutter*, *supra* note 46, at 1 (same); Larntz, Fourth Supplemental Expert Report, *Grutter*, *supra* note 46, at 1 (same). Inspection of the data also revealed that five subgroups made up the larger group of “Majority Applicants”: Caucasians, “Other Hispanic Americans,” Asian Americans, Foreign Applicants, and “Unknown Ethnicity” applicants. So, when we refer to “preferred minority” Law School applicants, we mean African Americans, Mexican Americans, Puerto Ricans, and Native Americans.

For the College, data were not available for particular minority subgroups but were available only for “Underrepresented Minorities” and “Not Underrepresented Minorities.” Larntz, Supplemental Expert Report, *Gratz*, *supra* note 46, at 1–2; Larntz, Revised Second Supplemental Expert Report, *Gratz*, *supra* note 46, at 1–2. While the data in the reports do not indicate which subgroups were included in the larger group of “Underrepresented Minorities,” the College’s brief stated that the College “consider[ed] African-Americans, Hispanics, and Native Americans to be underrepresented minorities for purposes of considering race or ethnicity in admissions.” Brief for Respondents at 9 n.13, *Gratz*, 539 U.S. 244 (No. 02-516), 2003 WL 402237 [hereinafter Brief for Respondents, *Gratz*]. So, when we refer to “preferred minority” College applicants, we mean African Americans, Hispanics, and Native Americans.

50. Data for the Law School were available for the years 1995 through 2000. Larntz, Supplemental Expert Report, *Grutter*, *supra* note 46; Larntz, Second Supplemental Expert Report, *Grutter*, *supra* note 46; Larntz, Fourth Supplemental Expert Report, *Grutter*, *supra* note 46. Data for the College were available for the years 1995 through 1999. Larntz, Supplemental Expert Report, *Gratz*, *supra* note 46; Larntz, Revised Second Supplemental Expert Report, *Gratz*, *supra* note 46. Throughout this Article, when we refer to data for year *x*, we are referring to data for the class entering in the fall of year *x*.

51. Our method for computing the number of but-for admits is identical to one of the methods used by Linda Wightman in her 1997 study of admissions to the 173 ABA-approved law schools in the 1990–1991 application year. In Wightman’s method that differs from ours, Wightman performs a logistic regression on the data for white applicants. She then uses this regression to estimate the probabilities of admission for all nonwhite applicants, had they been evaluated by the standards used to evaluate white applicants. She sums these probabilities to estimate the number of nonwhite applicants who would have been admitted without affirmative action and compares that number to the actual number of nonwhite applicants accepted in order to compute the number of but-for admits. Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 6–8 (1997).

The defendants’ expert statistician, Stephen Raudenbush, performed calculations that could be used to compute the number of but-for admits at the College and the Law School. When analyzing the 1998 College data, for example, Raudenbush first performed a regression to predict the probability of admission for nonpreferred applicants and then used this regression to predict the probability of admission for applicants under a race-blind system. Supplemental Expert Report of Stephen W. Raudenbush at 4, *Gratz*, 122 F. Supp. 2d 811 (No. 97-CV-75231-DT) [hereinafter Raudenbush, Supplemental Expert Report (Feb. 24, 2000)], available at <http://www.vpcomm.umich.edu/admissions/research/swrfeb24.pdf>. Raudenbush then departed from Wightman’s method and rank-ordered the applicants by their probability of admission and assumed that the applicants who would have been accepted would have been those at the top of the list; he used this assumption to estimate the number of preferred minorities who would have been admitted in the absence of racial preferences. *Id.* For the results of this analysis, see *infra* notes 62–72 and accompanying text.



range, residency status, and year for each school.<sup>52</sup> For example, in 1995, nonpreferred, nonresident Law School applicants with GPAs between 3.50 and 3.74 and LSAT scores between 164 and 166 had a 34% probability of admission, and preferred minority applicants with otherwise identical characteristics had a 67% probability of admission. We therefore found that the probability enhancement for applicants with these characteristics was 33%. We then multiplied the probability enhancement for each combination of GPA range, test score range, residency status, and year by the number of preferred minority applicants for that combination to get the number of but-for admits for that combination. For example, because there were 3 preferred minority nonresident applicants in 1995 with GPAs between 3.50 and 3.74 and LSAT scores between 164 and 166 and the probability enhancement for these applicants was 33%, we found that the number of but-for admits with this combination of GPA range, test score range, residency status, and year was 1. We summed the number of but-for admits for all combinations in a given subset of the data to get the total number of but-for admits for that subset. Finally, we divided the number of but-for admits for a given subset by the total number of admits for that subset to find the percentage of admits who were but-for admits for that subset.<sup>53</sup>

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52. If there were no preferred minority applicants or no nonpreferred applicants, we defined the probability enhancement to be zero.

53. Note that our method will approximate the number of but-for admits only if other admissions factors—in the aggregate—are distributed evenly across preferred and nonpreferred applicants for each combination of GPA range, test score range, residency status, and year. Other individual factors may not be distributed evenly. For example, legacy status may be distributed unevenly so as to favor white applicants. See, e.g., John D. Lamb, *The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale*, 26 COLUM. J.L. & SOC. PROBS. 491, 508 (1993) (noting that an investigation by the U.S. Department of Education's Office for Civil Rights found that legacy preferences at Harvard and Yale disproportionately advantaged white applicants over Asian American applicants). Athletic ability and experience may be distributed unevenly so as to favor preferred minority applicants. See JAMES L. SHULMAN & WILLIAM G. BOWEN, *THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES* 55 (2001) (concluding that athletic preferences increase racial diversity modestly for males—in the study's 1989 cohort, the percentage of African American males would have "declined . . . from 6 percent to 5 percent, if the athletic contribution to racial diversity had been eliminated"); see also Liu, *supra* note 44, at 1069 & n.101 (describing Shulman and Bowen's findings that "although athletics helps promote racial diversity, the impact is modest" (internal quotation marks omitted) (quoting SHULMAN & BOWEN, *supra*, at 55)). Low socioeconomic status may also be distributed unevenly so as to favor preferred minority applicants. See Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, in *THE BLACK-WHITE TEST SCORE GAP* 431, 449–50 (Christopher Jencks & Meredith Phillips eds., 1998) (noting that socioeconomic status is distributed unevenly by race among students with SAT scores in the top ten percent); see also Wightman, *supra* note 51, at 24–25 & n.51 (finding that socioeconomic status was distributed unevenly by race among applicants to law school for a sample of applicants in 1991). If these other factors have a net effect of advantaging either preferred or nonpreferred applicants, then the differences in admissions rates we observe cannot be attributed solely to racial preferences. Most admissions factors (such as extracurricular activities and special talents) are, however, likely distributed evenly among preferred and nonpreferred applicants with the same GPAs and test scores. And, of the factors that are unevenly distributed, some factors favor preferred applicants while others favor nonpreferred applicants. Thus, as a first cut, it seems reasonable to assume that the other factors in combination do not substantially favor either preferred

Law School data were available to the Court for the years 1995–2000.<sup>54</sup> During those years, we calculated that the percentage of admits who were but-for admits was 10.4%.<sup>55</sup> College data were available to the Court for the years 1995–1999.<sup>56</sup> During those years, we calculated that the percentage of admits who were but-for admits was 6.7%.<sup>57</sup> The admissions policies at the College changed between 1995 and 1999,<sup>58</sup> and it was only the policy that the College began using in 1999 that was at issue before the Supreme Court in *Gratz*.<sup>59</sup> We calculated that the percentage of admits in 1999 who were but-for admits was only 4.0%.<sup>60</sup> These data are summarized in Table 1.

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minority applicants or nonpreferred applicants. Moreover, the Law School represented that “soft” variables at least do not systematically favor minority applicants. *See Grutter v. Bollinger*, 288 F.3d 732, 800 (6th Cir. 2002) (Boggs, J., dissenting) (noting that during oral argument in the Sixth Circuit, counsel for the Law School “responded with a firm ‘no’” when asked, “Do you assert that under-represented minorities systematically have stronger [soft variables] than non-minority students?”), *aff’d*, 539 U.S. 306 (2003); *see also* BOWEN & BOK, *supra* note 42, at 31 (noting that comparing admissions rates of African American and white applicants with the same SAT range could provide a measure of the amount of affirmative action); Liu, *supra* note 44, at 1070 (concluding that “differences in admission rates based on SAT scores provide a reasonably valid measure of the admissions advantage black applicants receive through affirmative action”); Wightman, *supra* note 51, at 6–9 (using a model that compared admissions rates for white and nonwhite applicants with similar LSAT scores and GPAs and noting that it “was built under the assumption that if race were not a factor in the decisions, patterns of admission decisions observed for white applicants would also hold for applicants of color”).

54. *See supra* note 50.

55. We found that there were 755 but-for admits and 7,284 total admits. The total number of minority admits was 921, so the percentage of minority admits who were but-for admits was 82.0%.

56. *See supra* note 50.

57. We found that there were 3,373 but-for admits and 50,055 total admits. The total number of minority admits was 6,341, so the percentage of minority admits who were but-for admits was 53.2%.

58. For a summary of the changes, see *Gratz v. Bollinger*, 539 U.S. 244, 253–57 (2003) and *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 827–33 (E.D. Mich. 2000), *rev’d in part*, 539 U.S. 244 (2003).

59. The district court struck down the policies in place between 1995 and 1998, and upheld the policy that was implemented in 1999. *Gratz*, 122 F. Supp. 2d at 814. The College’s brief explained why only the policy that was implemented beginning in 1999 was at issue before the Supreme Court:

The admissions programs governed by the 1995–98 guidelines included three race-conscious practices that the University undisputedly has discontinued and disavowed: (1) the use of grids that take race into account by setting forth admissions options for applicants with various combinations of qualifications; (2) the exemption of minority students from the practice of rejecting candidates with very low grades and test scores without counselor review; and (3) a procedure known as “protected seats” that used projections of expected applications from groups known to apply late in the process (including minorities) to pace the rolling admissions process to permit consideration of such applications. The district court concluded that, while the use of grids, standing alone, was not necessarily unlawful, the combination of the three practices was impermissible. Petitioners devote much of their brief to attacking these abandoned admissions practices. However, because the University did not cross-petition to seek review of the district court’s determination that these practices, taken together, were impermissible, those practices are not properly before this Court.

Brief for Respondents, *Gratz*, *supra* note 49, at 5 n.7 (citations omitted). Indeed, the Supreme Court seemed to limit its holding to the policy implemented beginning in 1999. *See Gratz*, 539 U.S. at

Table 1

Percentage of admits who were but-for admits	
Law School: all years	10.4%
College: all years	6.7%
College: 1999	4.0%

These data demonstrate that on the outcome dimension, the Law School placed more weight on race than the College. The difference is especially stark when we compare the two programs actually at issue in the Supreme Court—the Law School’s program for 1995 and subsequent years, and the College’s program for 1999 and subsequent years. For these two programs, the percentage of admits who were but-for admits is 2.6 times higher at the Law School than at the College.

Our conclusion that the Law School gave more weight to race than the College on the outcome dimension is consistent with the analysis of the University of Michigan’s own expert witness, Stephen Raudenbush. While we did not have access to all of Raudenbush’s results, we did have some of his calculations for the Law School in 1995, 1996, and 2000 and for the College in 1995, 1996, and 1998.

Raudenbush used two methods to analyze the 1995 and 1996 Law School data.<sup>61</sup> Using those two methods, he calculated that without affirmative action, the percentage of 1995 Law School admits who were minorities would have been 3.1% or 6% rather than the actual percentage of 18.3%.<sup>62</sup> We would therefore say that the percentage of 1995 Law School admits who were but-for admits was 15.2% or 12.3%. Raudenbush also calculated that without affirmative action, the percentage of 1996 Law School admits who were minorities would have been 4.7% or 5% rather than the actual percentage of 17.6%.<sup>63</sup> We would therefore say that the

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271 (noting that the “*current . . . policy does not provide such individualized consideration*” (emphasis added)).

60. We found that there were 445 but-for admits and 11,228 total admits. The total number of minority admits was 1,228, so the percentage of minority admits who were but-for admits was 36.2%.

61. In his first method, Raudenbush used a mixed model for logistic regression that allowed for random effects and calculated the percentage of admittees who would have been admitted if the only factors the Law School considered were GPA, LSAT scores, residency status, and sex. Richard O. Lempert et al., *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 492 (2000). In his second method, Raudenbush “placed [applicants] in cells on a grid based on the conjunction of LSAT scores and [GPAs], and assum[ed] that the proportion of admitted minorities in a cell would be the proportion of all applicants in the cell who [were] admitted.” *Id.* at 493.

62. *Id.* at 492–93.

63. *Id.*

percentage of 1996 Law School admits who were but-for admits was 12.9% or 12.6%.

For the 2000 Law School data, Raudenbush calculated that in the absence of affirmative action, the number of admits who were minorities would have been 46 rather than the actual number of 170.<sup>64</sup> We would therefore say that the number of but-for admits was 124. Using other data reported in the *Grutter* district court opinion, we determined that Raudenbush found that the total number of admits in 2000 was 1,410.<sup>65</sup> We would therefore say that the percentage of 2000 Law School admits who were but-for admits was 8.8%.<sup>66</sup>

Turning to the College, Raudenbush calculated that without affirmative action, the percentage of 1995 College enrollees who were minorities would have been 5% rather than the actual percentage of 14.3%.<sup>67</sup> Using yield data available in Raudenbush's expert report, we determined that based on Raudenbush's calculations, the percentage of admits who were but-for admits was 7.8%.<sup>68</sup>

Raudenbush calculated that for the College in 1996, 1,066 minority applicants were but-for admits.<sup>69</sup> Because the total number of admits was 10,363,<sup>70</sup> we would say that the percentage of 1996 College admits who were

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64. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 839 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002) (en banc), *aff'd*, 539 U.S. 306 (2003).

65. The opinion stated that Raudenbush found that without affirmative action, the percentage of nonminority applicants who were admitted would have been 44% rather than the actual percentage of 40%. *Id.* It follows that 4% of the nonminority applicants is equal to 124, the number of but-for admits. Because 40% of all nonminority applicants were actually admitted, the actual number of nonminority admits was 1,240. The total number of admits was therefore 1,410, the sum of 1,240 and 170.

66. The district court opinion and the Supreme Court's *Grutter* opinion reported that when examining the Law School data for 2000, Raudenbush found that without affirmative action, minorities would have constituted 4% of the entering class rather than the actual figure of 14.5%. *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003); *Grutter*, 137 F. Supp. 2d at 839. Using these figures, we would say that the percentage of enrollees who were but-for admits was 10.5%. *Cf. supra* note 44 (distinguishing between the percentage of enrollees who are but-for admits and the percentage of admits who are but-for admits).

67. Raudenbush, Supplemental Expert Report (July 13, 2000), *supra* note 44, at 3. Using these figures, we would say that the percentage of enrollees who were but-for admits was 9.3%. *Cf. supra* note 44 (distinguishing between the percentage of enrollees who are but-for admits and the percentage of admits who are but-for admits).

68. The expert report provided yield data for several subgroups. *See* Raudenbush, Supplemental Expert Report (July 13, 2000), *supra* note 44, at 11 tbl.3. Using these yield data, we calculated that the yield for minority applicants was 41.3% and the yield for nonminority applicants was 33.9%. Raudenbush's calculations suggested that the ratios of the number of but-for minority enrollees to the number of non-but-for minority enrollees to the number of nonminority enrollees were 9.3:5:85.7. We used these ratios along with the yield statistics to calculate that the ratios of the number of but-for minority admits to the number of non-but-for minority admits to the number of nonminority admits were 22.5:12.1:252.9. Thus, the percentage of admits who were but-for admits was 7.8%.

69. Brief for Respondents, *Gratz*, *supra* note 49, at 4 n.5.

70. *Id.*

but-for admits was 10.3%. In addition, Raudenbush calculated that without affirmative action, the percentage of 1998 College admits who were minorities would have been 6% rather than the actual percentage of 14%.<sup>71</sup> We would therefore say that the percentage of 1998 College admits who were but-for admits was 8%.

These results using Raudenbush's calculations are summarized in Table 2. Comparing the results using Raudenbush's calculations to our results, we see that the relevant percentages under the former approach are generally slightly larger than the relevant percentages under the latter approach. Importantly, however, the results under the two approaches are consistent with respect to the central inquiry: both show that the percentage of admits who were but-for admits was generally several percentage points higher at the Law School than at the College.<sup>72</sup>

Table 2

Estimate of percentage of admits who were but-for admits using Raudenbush's calculations	
Law School: 1995	12.3% or 15.2%
Law School: 1996	12.6% or 12.9%
Law School: 2000	8.8%
College: 1995	7.8%
College: 1996	10.3%
College: 1998	8%

### B. Means Dimension

The means and outcome dimensions capture different burdens of affirmative action. The outcome dimension measures the percentage of applicants who are admitted because of their race, while the means dimension measures the size of the racial preference needed to admit the average but-for admit. The simple idea is that holding the number of but-for admits constant, an admissions program is more burdensome to disfavored

71. Raudenbush, Supplemental Expert Report (Feb. 24, 2000), *supra* note 51, at 3–5.

72. All percentages for the Law School are greater than all percentages for the College with one exception: the percentage of 2000 Law School admits who were but-for admits is 8.8% while the percentage of 1996 College admits who were but-for admits is 10.3%. It is significant, however, that the Law School percentages are larger than the College percentages for all other pairs of data. Moreover, the 1996 College program was not before the Court in *Gratz*; only the program implemented beginning in 1999 was before the Court. *See supra* note 59 and accompanying text.

applicants if they are passed over because of large racial preferences than because of small racial preferences.<sup>73</sup>

To capture the means dimension, we attempted to measure the effective GPA boost that preferred minorities received on account of their race.<sup>74</sup> For each school, we modeled admissions decisions with a group probit and produced an equation that predicted the probability of admission given GPA, test score, race, residency status, and year.<sup>75</sup> We used the coefficients of the resulting equation to calculate the number of GPA points that being a racial minority was equivalent to—we called this number the “GPA enhancement.”<sup>76</sup> We calculated that the GPA enhancement at the Law School was 1.39 points,<sup>77</sup> while the GPA enhancement at the College was

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73. See Ayres, *supra* note 21, at 1803–04 (arguing that qualified nonminorities are more burdened when they lose out to substantially less qualified minorities than to only slightly less qualified minorities).

74. Some literature has suggested other measures for capturing the weight given to race on what we have called the means dimension. A common approach is to compare the average test scores of preferred minority and nonpreferred matriculants. See, e.g., Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 18–19 (2002) (comparing the differences in test scores and GPAs between African American and white applicants); see also Liu, *supra* note 44, at 1063 & n.79 (criticizing studies that take this approach). As Goodwin Liu points out, however, differences in average test scores cannot be attributed solely to affirmative action and are therefore not a good measure of the means dimension. See Liu, *supra* note 44, at 1064. William Bowen and Derek Bok propose to capture part of what we call the means dimension by examining the differential in qualifications between but-for African American admits and white applicants who would have been admitted in the absence of affirmative action. BOWEN & BOK, *supra* note 42, at 37. Because of problems identifying the white applicants who would have been admitted in the absence of affirmative action, they propose approximating their credentials with the lowest decile of white admits. *Id.* at 37–38. Linda Wightman follows this approach in a study of selective law schools. See Linda F. Wightman, *Are Other Things Essentially Equal? An Empirical Investigation of the Consequences of Including Race as a Factor in Law School Admission*, 28 SW. U. L. REV. 1, 16–25 (1998) (comparing LSAT scores and undergraduate GPAs of minorities who would have been denied admission based on a numbers-only admission model with LSAT scores and undergraduate GPAs of the lowest ten percent of white students that had been admitted to their respective schools).

75. For each set of data falling in a particular GPA range and test score range, we assigned the data a GPA corresponding to the mean of the GPA range and a test score corresponding to the mean of the test score range. In addition, we dropped data corresponding to combinations that included at least one of the following: no test score or GPA, or the lowest possible test score range or GPA range.

76. To compute the GPA enhancement, we divided the minority coefficient by the GPA coefficient from the group probit.

77. Judge Boggs attempted to estimate the GPA enhancement for the Law School's admissions program in his dissent from the Sixth Circuit opinion in *Grutter*. *Grutter v. Bollinger*, 288 F.3d 732, 796 (6th Cir. 2002) (Boggs, J., dissenting), *aff'd*, 539 U.S. 306 (2003). Examining the 1997 data for applicants with LSAT scores between 167 and 169, he noted that “under-represented minorities with a high C to low B undergraduate average are admitted at the same rate as majority applicants with an A average” and concluded that the Law School's GPA enhancement was over 1 full GPA point. *Id.* Using a similar technique, Judge Boggs concluded that the LSAT enhancement was approximately 11 LSAT points. *Id.*

1.02 points for the years 1995–1999<sup>78</sup> and 0.67 points for 1999.<sup>79</sup> These results are summarized in Table 3.<sup>80</sup>

Table 3

Bprobit	GPA enhancement (in GPA points)
Law School: all years	1.39
College: all years	1.02
College: 1999	0.67

On the GPA enhancement measure, then, the Law School placed greater weight on race than the College.<sup>81</sup> The difference is especially stark when

78. These results are consistent with the results of the plaintiffs' expert, Kinley Lartz, who used a different method to compute GPA enhancement for the College in 1995 and 1996. For combinations of test score ranges, race, and residency status, Lartz computed the lowest GPA with a probability of admission of greater than fifty percent. Expert Report of Kinley Lartz at 2, *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (No. 97-CV-75231-DT). Then, Lartz compared these GPAs for preferred and nonpreferred applicants and computed a GPA enhancement for each test score range. *Id.* at 3–4. Lartz concluded that the GPA enhancements in 1995 were approximately 1 GPA point, while the GPA enhancements in 1996 were approximately 1.2 GPA points. *Id.* Lartz did not compute GPA enhancements for other years for the College, nor did he compute GPA enhancements for the Law School.

79. These results are consistent with the results we get when we calculate the GPA enhancement using a different method in which we examine the point values in the College's point system. Beginning in 1998, the College assigned each applicant a "selection index." *See infra* notes 90–94 and accompanying text. Applicants could earn up to 80 points for their GPA and 20 points for membership in an underrepresented minority group. *See infra* note 92. While minorities could theoretically earn 20 points for their race, not all minorities earned these points for their race. *See infra* note 92. This is because the 20 points available for race could be earned on the basis of many factors such as socioeconomic status and athletic ability, but these points could be earned on the basis of one—and only one—of these factors. *See infra* note 92. So, if a racial minority would have earned 20 points for one of these other factors, then in some sense she did not earn any points on account of her race. In addition, some minority applicants effectively received fewer than 20 points for their race because applicants could earn no more than 40 points for nonacademic factors, so if an applicant earned more than 20 points in the other nonacademic factor categories, then she effectively did not earn the full 20 points for her race. *See infra* note 92. Minority applicants therefore received, on average, fewer than 20 points for their race. Because a 4.0 GPA was worth 80 points, we would expect the GPA enhancement to be less than 1 GPA point. Our method described in the text accompanying this footnote produces a GPA enhancement of 0.67 GPA points, so the two results are consistent.

80. For a robustness check, we performed the same computations using a logit model rather than a probit model, and our results were similar:

Logit	GPA enhancement (in GPA points)
Law School: all years	1.41
College: all years	1.08
College: 1999	0.70

we compare the two programs actually at issue in the Supreme Court: the Law School's program for 1995 and subsequent years, and the College's program for 1999 and subsequent years. For these two programs, the Law School's GPA enhancement was more than twice as high as the College's GPA enhancement.

These results were not robust, however. We found that the College had a higher normalized test score enhancement than the Law School.<sup>82</sup> It may be that the GPA enhancement results are not robust because the Law School and the College weighted GPA and test scores differently. The College stated that for at least some of the years between 1995 and 1999 it weighted GPA much more heavily than test scores,<sup>83</sup> and if the Law School weighted

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81. The GPA enhancement measure probably underestimates the amount of weight placed on race at the Law School relative to the College because the Law School likely weighted academic factors more heavily than the College. See BOWEN & BOK, *supra* note 42, at 25 (noting that compared to undergraduate institutions, “[p]rofessional schools place little emphasis on assembling a diversity of talents for the sake of enriching extracurricular life” and observing that “law schools . . . place the greatest weight on the traditional measures of academic achievement”).

82. We normalized test score data on a 1,000-point scale and found the following results:

	Test score enhancement on normalized scale (out of 1,000 points)	Test score enhancement in SAT or LSAT point units
Law School: all years	209	12.5 LSAT points
College: all years	604	725 SAT points
College: 1999	665	798 SAT points

These data suggest the College gave minority applicants a bigger boost than the Law School, and the 1999 College policy provided an even bigger boost to minorities than earlier College policies. Note that a large SAT point boost is consistent with the point system that was in effect starting in 1998 at the College, which awarded applicants up to 20 points for being a racial minority and up to 12 points for SAT scores. See *infra* notes 90–92 and accompanying text. The 20 points minorities could earn for race correspond to 2,000 SAT points. Given that not all minorities could earn all 20 points for race, we would expect the SAT enhancement to be less than 2,000 SAT points. See *supra* note 79.

We also note that the Law School minority coefficient was higher than the College minority coefficient for 1999, but lower than the College minority coefficient for 1995–1999. The raw minority coefficients were as follows:

	Minority coefficient
Law School: all years	2.75
College: all years	2.99
College: 1999	2.06

These data suggest that during 1995–1999, the College gave minority applicants a bigger boost than the Law School, but that the 1999 College policy gave minority applicants a smaller boost than the Law School.

83. In the point system the College began using in 1998, applicants could earn up to 80 points for their GPA but only 12 points for their test scores. See *infra* notes 90, 92.



test scores more heavily than GPAs (or at least weighted test scores and GPAs differently), then the differential weighting could explain the non-robustness of the results.

In order to account for the possibly differential weighting of GPA and test scores, we could construct a single measure of these two academic criteria that takes account of this differential weighting. Richard Sander has taken steps towards creating such a measure. Sander created an “index formula” for each school, which assigns an index score from 0 to 1,000 points for every combination of GPA and test score.<sup>84</sup> Sander then used these index formulas to estimate what we would call the “index enhancement” for each school.<sup>85</sup> Sander found that in 1999 there was a 140-point index enhancement at the Law School and a 120-point index enhancement at the College.<sup>86</sup> While Sander’s method has several flaws,<sup>87</sup> his results are at the very least consistent with the proposition that the Law School granted greater racial preferences than the College on the means dimension.

On net, then, there is strong evidence supported by both our empiricism and the University of Michigan’s own expert that a higher proportion of admits were admitted because of their race at the Law School than at the College. Thus, on the outcome dimension, the Law School’s affirmative action program was more extensive. And on the means dimension, there is some (but weaker) evidence that the racial preferences were larger at the Law School. A reasonable trier of fact might have concluded that both the means and outcome dimensions suggested greater racial preferences at the Law School than at the College.

So, the admissions program the Court upheld in *Grutter* may have placed more weight on race than the admissions program it struck down in *Gratz*. This result is surprising because, all other things being equal, we would not expect the Court to uphold an admissions program with racial

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84. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 402 tbl.2.1, 405 tbl.2.2 (2004).

85. *Id.* at 402–05.

86. *Id.*

87. Sander’s method suffered from three principal flaws. First, Sander was not comparing the same groups at the Law School and the College. Instead, he compared nonpreferred and preferred minority nonresidents at the College, *id.* at 401–02, and white and African American applicants (residents and nonresidents) at the Law School, *id.* at 404–05. Second, while Sander ran a logistic regression on the College data to create an index formula for the College, *id.* at 402 tbl.2.1, he did not run his own regression on the Law School data to come up with an index formula for the Law School. Instead, he used an index formula that he says is typical of law schools, and thus it is unclear how well the index formula he used for the Law School is a good match for the data. *Id.* at 405 tbl.2.2. Third, Sander estimated the index point enhancement figure by eyeballing the data—he created tables that showed that, at several different ranges of index scores, there was a 140-point difference at the Law School and a 120-point difference at the College. *Id.* at 402–05. He does not use more sophisticated analysis such as a group probit to determine if these observed differences are characteristic of the data as a whole. When we ran a group probit on the data Sander examined in his tables, we found that the Law School had a 141-point enhancement and the College had a 160-point enhancement.

preferences that are greater than those of an admissions program it has struck down. Under the minimum necessary preference requirement of the old strict scrutiny, the Law School would have needed to show why these larger preferences were necessary. Relatedly, the College would have needed to make a lesser showing for why its smaller preferences were necessary. While the differences in the sizes of the preferences do not demonstrate that the outcomes of the cases were wrong, they at least raise the question of whether the greater preferences at the Law School were justified by the benefits. The Court should have engaged in a cost-benefit calculus in order to answer this question. As we will show in the next Part, however, the Court conducted no such inquiry.

#### IV. Narrow Tailoring After *Grutter* and *Gratz*

In *Grutter* and *Gratz*, the Court jettisoned the minimum necessary preference requirement and replaced it with a watered-down “individualization” requirement, and in so doing, the Court ignored a central—and important—feature of pre-*Grutter* and *Gratz* narrow tailoring jurisprudence. Subpart A of this Part describes the admissions programs at issue in *Grutter* and *Gratz* and then argues that the narrow tailoring inquiry in *Grutter* and *Gratz* boiled down to an inquiry into whether the programs were individualized. Subpart B describes three possible meanings of this “individualized consideration” requirement, and subpart C examines how these meanings fit together.

##### A. *Admissions Programs and the Individualized Consideration Requirement*

The two admissions programs at issue in *Grutter* and *Gratz* both considered a range of academic and nonacademic factors, including race and ethnicity, and sought to admit student bodies that were not only academically strong, but also diverse along many dimensions.<sup>88</sup> The two admissions programs, however, used different mechanisms for making admissions decisions. The Court described the Law School’s admissions program as conducting a “flexible assessment of applicants’ talents, experiences, and potential to contribute to the learning of those around them.”<sup>89</sup> In contrast, the College utilized a point system to aid admissions counselors in deciding

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88. See *Grutter v. Bollinger*, 539 U.S. 306, 313–16 (2003) (noting the Law School policy’s focus on grades, test scores, and “other criteria that are important to the Law School’s educational objectives”); *Gratz v. Bollinger*, 539 U.S. 244, 253 (2003) (summarizing the admissions factors considered by the College); Brief for Respondents at 3–4, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 402236 [hereinafter Brief for Respondents, *Grutter*] (noting that while the Law School’s admissions program considered race as a factor, the program’s “hallmark [was] a focus on academic capabilities coupled with a flexible assessment of every individual applicant’s talents, experiences and potential to contribute to the learning of those around them” (internal quotation marks omitted)); Brief for Respondents, *Gratz*, *supra* note 49, at 5–10 (describing the admissions factors considered by the College).

89. *Grutter*, 539 U.S. at 315 (internal quotation marks omitted).

whom to admit.<sup>90</sup> An admissions counselor read each application and assigned it a score, called the “selection index,” based on predetermined point values for various characteristics.<sup>91</sup> Applicants could earn up to 110 points for academic factors and up to 40 points for nonacademic factors, including 20 points for being a member of an underrepresented racial group.<sup>92</sup> With some exceptions, the admissions office used these selection index scores to determine whether to admit, reject, or postpone decision on applicants.<sup>93</sup> Admissions counselors who believed that the selection index score may not have accurately reflected the potential contributions of an applicant could “flag” the application for in-depth review by a separate committee, which made decisions without regard to the selection index score.<sup>94</sup>

In *Gratz*, the Court held that the College’s program, unlike the Law School’s program, was not narrowly tailored to the diversity interest because it did not provide “individualized consideration.”<sup>95</sup> Not only was the individualized consideration factor the dispositive one in these two cases, but also it is essentially the only dispositive factor in *all* higher education affirmative action admissions cases, at least for the near future. Robert Post

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90. The College used the point system in 1998 and subsequent years. *See Gratz*, 539 U.S. at 255.

91. *Grutter*, 539 U.S. at 315.

92. Brief for Respondents, *Gratz*, *supra* note 49, at 7, 9. The 110 points for academic factors were available as follows: 80 points for tenth and eleventh grade GPA, 12 points for standardized test scores, 10 points for “academic strength of . . . high school,” and 8 points for a rigorous course of study. *Id.* at 7–8. The 40 points for nonacademic factors were available as follows: 10 points for Michigan residents, 6 points for being from an underrepresented Michigan county, 2 points for being from an underrepresented state, 4 points for children of an alumnus or 1 point for close relative of an alumnus, 3 points for outstanding essay, 5 points for leadership or public service, 5 points for personal achievement, and 20 points for one and only one of five characteristics or factors—(1) socioeconomic disadvantage, (2) membership in an underrepresented minority group, (3) predominantly minority or socioeconomically disadvantaged high school, (4) athletic recruitment, and (5) provost’s discretion. In calculating the selection index, a maximum of 40 points could come from these nonacademic factors, even if a student earned more than 40 points in the preceding categories. *Id.* at 8–9. The College considered “African-Americans, Hispanics, and Native Americans” to be underrepresented minorities for purposes of their admissions policy. *Gratz*, 539 U.S. at 253–54.

93. The majority opinion in *Gratz* stated that “[t]his index was divided linearly into ranges generally calling for admissions dispositions as follows: 100–150 (admit); 95–99 (admit or postpone); 90–94 (postpone or admit); 75–89 (delay or postpone); 74 and below (delay or reject).” *Gratz*, 539 U.S. at 255. The brief for the University of Michigan stated that “[t]o avoid overenrollment, [the College] sets and adjusts, when necessary, the selection index levels that trigger the three possible admissions outcomes—admittance, deferral, and denial.” Brief for Respondents, *Gratz*, *supra* note 49, at 10.

94. The admissions counselor could “flag” an application as long as the applicant met three criteria. The applicant must: (1) have been academically prepared; (2) have had a selection index of at least 75 for nonresidents of Michigan and 80 for residents of Michigan; and (3) have “possess[ed] at least one of a variety of qualities or characteristics important to the University’s composition of its freshman class.” Brief for Respondents, *Gratz*, *supra* note 49, at 10.

95. *Gratz*, 539 U.S. at 271; *see also* Post, *supra* note 20, at 70 (stating that the Court used the individualized consideration requirement to strike down the admissions program in *Gratz*).

has noted that the *Grutter* Court held that in order for an admissions program to be narrowly tailored, the program:

- (1) must “not unduly harm members of any racial group”;
- (2) can be implemented only if there has been a “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks”;
- (3) “must be limited in time”;
- and
- (4) must afford each applicant “truly individualized consideration.”<sup>96</sup>

At least for the near future, however, it is necessary for universities to show they fulfill only the last of these four requirements. The *Grutter* Court noted that a program that provides individualized consideration automatically does not unduly harm members of racial groups not receiving a preference,<sup>97</sup> thus making the first of these four requirements redundant with the fourth. *Grutter* further held that there were no workable race-neutral alternatives at the University of Michigan Law School<sup>98</sup> and would probably find likewise at other institutions of higher education, therefore taking the bite out of the second of these four requirements. And finally, while the Court took the third requirement of a time limitation seriously, it acknowledged that affirmative action will be necessary for the near future to achieve diversity in universities,<sup>99</sup> and so for at least the next twenty-five years or so,<sup>100</sup> the third requirement will be deemed to be filled with little or no showing on the part of universities. Therefore, all that remains of narrow tailoring analysis is the individualized consideration requirement.

While the Court was clear that the narrow tailoring inquiry in the higher education admissions context boils down to an individualized consideration inquiry, it was not clear about what it meant by “individualized consideration.” Indeed, not only are scholars puzzled about what the Court meant by individualized consideration,<sup>101</sup> but also at least one Supreme Court

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96. Post, *supra* note 20, at 67 (footnotes omitted) (quoting *Grutter*, 539 U.S. at 341, 339, 342, 334); see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 426 F.3d 1162, 1180 (9th Cir. 2005) (en banc) (listing five “hallmarks” of a narrowly tailored affirmative action program: the four listed by Post and a “no-quotas” hallmark, which Post presumably folded into the individualized consideration hallmark), *cert. granted*, 126 S. Ct. 2351 (2006).

97. *Grutter*, 539 U.S. at 341 (“[I]n the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School’s race-conscious admissions program does not unduly harm nonminority applicants.”).

98. *Id.* at 340 (“[T]he Law School sufficiently considered workable race-neutral alternatives.”).

99. *Id.* at 342 (noting that “race-conscious admissions policies must be limited in time” and that “the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity”).

100. *Id.* at 343 (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

101. See, e.g., Post, *supra* note 20, at 70–71 (“[T]he Court never makes clear whether the Michigan undergraduate program fails the individualized consideration requirement because it quantifies the contribution of race to diversity by ‘a specific and identifiable’ measure, or instead because the program employs a measure that is ‘decisive.’” (quoting *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003)); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117

Justice is uncertain about what the Court requires with respect to individualized consideration.<sup>102</sup> The next two subparts examine what the Court meant by the individualized consideration requirement: subpart B describes three possible meanings of the requirement, and subpart C analyzes how these meanings fit together.

*B. Three Meanings of the Individualized Consideration Requirement*

Representative of the confusion over what satisfies the individualized consideration requirement is Chief Justice Rehnquist's statement in *Gratz* declaring that the College's admissions program was not narrowly tailored: "[w]e find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program."<sup>103</sup> In this statement, Chief Justice Rehnquist alluded to three possible grounds for objecting to the College's admissions program. Was the admissions program problematic because it quantified the admissions process? Or, was the complaint that the program was not nuanced and did not differentiate among individual minority applicants, "automatically" distributing 20 points "to every single 'underrepresented minority' applicant solely because of race"?<sup>104</sup> Alternatively, was the objection that the weight given to race was excessive—"one-fifth of the points needed to guarantee admission"?<sup>105</sup>

The ambiguities in Chief Justice Rehnquist's statement—and in the pair of opinions when read in their entireties—point to three possible meanings of the individualized consideration requirement.<sup>106</sup> First, the Court could be

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HARV. L. REV. 493, 561 (2003) ("Exactly what it means to treat applicants as individuals is, and will surely continue to be, a contested question. After *Grutter*, individual treatment can include some consideration of race, though it is difficult to say how much and what kind.").

102. Justice Souter noted that the majority objected either to "the use of points to quantify and compare characteristics, or to the number of points awarded due to race." *Gratz*, 539 U.S. at 295 (Souter, J., dissenting).

103. *Id.* at 270 (majority opinion).

104. *Id.* (emphasis added).

105. *Id.*

106. Robert Post reads the opinions as susceptible to two, rather than three, interpretations of what satisfies the individualized consideration requirement. His first interpretation seems to be a combination of our first and second interpretations; his second interpretation maps onto our third interpretation:

*Gratz* offers two distinct accounts of the individualized consideration requirement. It states, on the one hand, that the requirement is inconsistent with any program in which "any single characteristic automatically ensure[s] a specific and identifiable contribution to a university's diversity." But it also notes, on the other hand, that the Michigan undergraduate affirmative action program is unconstitutional because the "automatic distribution of 20 points has the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant."

requiring racial preferences that are not *quantified*. Second, the Court could be requiring racial preferences that are not *undifferentiated*. That is, the Court may be requiring that universities not give all individual minority applicants the same amount of preference on account of their race. Third, the Court might be requiring racial preferences that are not *excessive*.

We might make progress in distinguishing among these three meanings by thinking about an admissions office at least implicitly using a formula or algorithm in deciding whether to admit particular applicants. Given that admissions decisions are, as Justice Souter put it, “not left entirely to inarticulate intuition,”<sup>107</sup> admissions decisions can be conceived of as being modeled as a formula whose inputs are all of the variables the admissions officers consider when deciding whom to admit and whose output is the zero–one decision to reject or admit. Of course, given the complexity of admissions decisions, such a formula would likely be extremely complicated, and it might contain subjective evaluations as part of its components. But conceiving of an admissions process as a decisionmaking formula with different weights given to different factors helps clarify what the Court might have meant by individualized consideration.

The “no quantified preferences” meaning focuses on whether a program employs an explicit formula with quantified weights showing the relative importance of different qualifications. The “differentiated preferences” meaning examines whether the formula used is sufficiently sophisticated—that is, whether the implicit formula is linear or nonlinear with respect to the race variable and whether it involves the right variables. A formula with differentiated preferences would have minority interaction terms that had the effect of granting larger or smaller preferences to distinct subclasses of minorities. The “no excessive preferences” meaning looks at whether the coefficients in the formula are such that race does not receive too much weight. So, viewed through the lens of a formula, the offense of the undergraduate program might be either that it had known weights, invariant weights, or excessive weights.

The following sections examine each of these three meanings and the extent to which the opinions suggest that the meanings are part of the individualized consideration inquiry. Subpart C then discusses how these three meanings fit together.

*1. Quantified Racial Preferences.*—Many scholars have read the *Grutter* and *Gratz* Courts to have held that the individualized consideration requirement precludes—or places severe limits on—the use of a point system

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Post, *supra* note 20, at 70 (alteration in original) (omission in original) (footnote omitted) (quoting *Gratz*, 539 U.S. at 271, 272).

107. *Gratz*, 539 U.S. at 295 (Souter, J., dissenting).

in which universities assign race<sup>108</sup> a numerical value.<sup>109</sup> This section will examine the extent to which the Court meant to proscribe quantified admissions programs.

Chief Justice Rehnquist's opinion for the Court in *Gratz* frequently and disparagingly referred to the point system used by the College, but most of Chief Justice Rehnquist's complaints had to do not with attributes that all point systems have, but rather with particular attributes specific to the point system employed by the College. Indeed, there are only two places in which Chief Justice Rehnquist might be said to attack the point system qua point system directly. First, he stated the following:

The current LSA policy does not provide such individualized consideration. The LSA's policy automatically distributes 20 points to every single applicant from an "underrepresented minority" group, as defined by the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups.<sup>110</sup>

This critique can be read as an attack on the point system itself in that it found fault with the lack of consideration that accompanied the distribution

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108. Even after *Grutter* and *Gratz*, it appears that a university could still employ a *nonracial* point system—that is, a point system that does not directly assign points on the basis of race—as part of its process for selecting students. See *Smith v. Univ. of Wash.*, 392 F.3d 367, 376 (9th Cir. 2004) (upholding a law school admissions program that assigned applicants an index score on the basis of their grades and test scores). As Reva Siegel has pointed out, "[a]pplicants who are evaluated as individuals can be categorized and valued on the basis of any trait (for example, grades, standardized test scores, parental income, residence, high school, alumni affiliations, or musical or athletic ability) *except* race." Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1540 n.240 (2004). Indeed, if the Court meant to make even nonracial point systems unconstitutional, then use of GPAs and standardized test scores would presumably not be allowed, as they assign points to reflect particular attributes.

109. For example, Robert George explains the difference between the outcomes of *Grutter* and *Gratz* as turning on the point system qua point system. Robert P. George, *Grutter and Gratz: Some Hard Questions*, 103 COLUM. L. REV. 1634, 1634 (2003) ("The admissions policy of the undergraduate college, which formally awarded valuable 'points' to certain candidates based on race and ethnicity, was judged to fail the test of narrow tailoring; the Law School's policy of taking race and ethnicity into account without the formal awarding of points was judged to pass." (footnote omitted)); see also Marvin Krislov, *Affirmative Action in Higher Education: The Value, the Method, and the Future*, 72 U. CIN. L. REV. 899, 903 (2004) ("Although [the College's] system, like the law school, did not employ quotas or set-asides, the Court found the weighting of race 'mechanistic' and 'automatic,' and thus concluded that the program was not narrowly tailored."); Post, *supra* note 20, at 70–71 ("The upshot is that the Court never makes clear whether the Michigan undergraduate program fails the individualized consideration requirement because it quantifies the contribution of race to diversity by 'a specific and identifiable' measure, or instead because the program employs a measure that is 'decisive.'" (quoting *Gratz*, 539 U.S. at 271)); Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1901 (2006) (noting that in *Gratz*, "[t]he Court did not rule that the twenty points [awarded for race] were too high; it ruled instead that a point system, in the context of racial preference, is invalid as such").

110. *Gratz*, 539 U.S. at 271–72. "LSA" refers to the College, which is called the College of Literature, Science, and the Arts. *Id.* at 251.

of points for race. It can also be read, however, as an attack on the lack of differentiation in the point system; perhaps if consideration of other factors accompanied the distribution of points for race the point system would not be as problematic.

In the other place in which Chief Justice Rehnquist might be said to have attacked the point system qua point system, he asserted that “[t]he admissions program Justice Powell described . . . did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university’s diversity.”<sup>111</sup> Insofar as point systems, by their nature, assign “specific and identifiable” points for race, *any* point system may not have passed muster for Chief Justice Rehnquist.<sup>112</sup> Chief Justice Rehnquist may, however, have allowed a more nuanced point system that assigned points not on the basis of race alone, but rather on the basis of how race interacted with other characteristics. Such a system would not assign a specific and identifiable number of points to a single characteristic and therefore may pass constitutional muster. Thus, Chief Justice Rehnquist was unclear about whether the Court prohibits quantification or merely requires differentiation.

In her concurrence in *Gratz*, Justice O’Connor argued more forcefully against the point system qua point system. She stated that “the selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed.”<sup>113</sup> Furthermore, she noted that “this mechanized selection index score, by and large, automatically determines the admissions decision for each applicant. The selection index thus precludes admissions counselors from conducting the type of individualized consideration the Court’s opinion in *Grutter* requires.”<sup>114</sup>

Justice O’Connor’s majority opinion in *Grutter* also condemned the mechanical nature of the point system. She noted that “[u]nlike the program at issue in *Gratz v. Bollinger*, the Law School awards no mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity.”<sup>115</sup> She continued, stating, “[a]s Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way.”<sup>116</sup> Like Chief Justice Rehnquist’s critique, Justice O’Connor’s critiques in *Grutter* and *Gratz* can be read either as critiques of the *Gratz* admissions

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111. *Id.* at 271.

112. Of course, one might respond to Chief Justice Rehnquist by noting that just because a point system assigns the same number of points to each preferred minority applicant, it does not embody the notion that race “automatically ensure[s] a specific and identifiable contribution to a university’s diversity.” *Id.* Rather, such a system stands for the notion that, *on average*, minority students will contribute to the diversity of the student body on account of their race.

113. *Id.* at 279 (O’Connor, J., concurring).

114. *Id.* at 277 (citation omitted).

115. *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003) (citation omitted).

116. *Id.* at 334.



system's quantification or as critiques of the *Gratz* admissions system's lack of differentiation.<sup>117</sup>

Thus, when read together, the opinions make clear that at the very least, the Court was suspicious of simple point systems like the one used by the College. Whether the Court objected to these point systems because of their quantification or because of their lack of differentiation (or whether the Court thought no quantified system could provide sufficient differentiation) is less clear. Either way, it is clear that the Court was bothered by quantification, and we will argue in subpart C that the Court adopted an approach of subjecting quantified systems to scrutiny that is more rigorous than the scrutiny to which it will subject unquantified systems.

The discussion so far in this section has addressed possible concerns the Court may have had with *quantified* admissions programs, but do the Court's concerns extend also to *quantifiable* admissions programs? Imagine, for example, that a statistician collected information about the applicants to the Law School and came up with a formula for predicting whether applicants would be admitted that is a function of test scores, GPAs, residency status, race, strength of recommendations, extracurricular activities, and so on. If the statistician could perform a regression that fit the data well, the regression would demonstrate that the program quantified the admissions process, albeit implicitly.

To satisfy a "not quantifiable" meaning of the individualized consideration requirement would mean that preferences could not be ex post recoverable by a regression or other statistical method. Perversely, narrow tailoring under this reading would require a statistical "badness of fit."<sup>118</sup> If a statistician after the fact could extract the true size and form of the racial preferences relative to other factors, this might be enough to subject an affirmative action program to higher scrutiny.

The regression we conducted on the Law School data was a better fit to the data than the regression we conducted on the College data. The pseudo-R-squared statistics are summarized in Table 4.

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117. Justice Souter's *Gratz* dissent provides clues as to whether the majority meant to prohibit quantification. He noted that the Court's "objection goes to the use of points to quantify and compare characteristics, or to the number of points awarded due to race, but on either reading the objection is mistaken." *Gratz*, 539 U.S. at 295 (Souter, J., dissenting). In other words, he interpreted the Court to be taking a position against either quantification or excessive weight.

118. To be sure, narrow tailoring was originally meant to focus on the closeness of fit between the means and ends of affirmative action, while a possible statistical badness of fit requirement refers to a disjunct between the qualifications of an applicant and her probability of being admitted. Badness of fit in this statistical sense suggests the degree to which randomness or unknown variables are driving admissions behavior. But it would still be perverse if a generalized disjunct between qualifications and admission might add to the constitutionality of a program.

Table 4

	Pseudo-R-squared: bprobit	Pseudo-R-squared: blogit
Law School: all years	0.4904	0.4994
College: all years	0.4623	0.4667
College: 1999	0.4361	0.4382

The data demonstrate that, despite using no explicit formula, it appears that the Law School may have been more formulaic than the College. The pseudo-R-squared statistics suggest that 49% or 50% of the variance in the Law School admission decisions could be explained by race, GPA, test scores, residency status, and year, while only 44% to 47% of the undergraduate decisions could be explained by the same factors.<sup>119</sup>

The Supreme Court has not, at least for now, imposed a “not quantifiable” requirement. In *Grutter*, the Court did not inquire into whether the Law School’s implicit admissions algorithm could be recovered after the fact by statistical analysis. And the constitutionality of the Law School’s admission process was not jeopardized by the facts that it (1) was possibly more formulaic than the College’s, and (2) gave more weight to race than the College in that it produced a larger proportion of admits who were but-for admits and probably gave racial minorities a greater effective boost as measured in GPA points or similar units. Quantifiable but unquantified programs may sail under the radar screen of constitutional review. Indeed, this difference between quantified and quantifiable programs is consonant with our larger thesis about the “Don’t Tell, Don’t Ask” ramifications of *Grutter* and *Gratz*. So long as a decisionmaker does not tell in the sense of quantifying the relative weights placed on race and nonrace factors, the Supreme Court will be loath to ask whether the weights were reasonable.

2. *Undifferentiated Racial Preferences*.—Chief Justice Rehnquist’s complaints about the point system in *Gratz*, discussed in the previous section, alternatively can be read as complaints that the point system was not nuanced enough in that it did not sufficiently differentiate among minority applicants. So, rather than—or in addition to—the no quantification meaning of individualized consideration, the Court may have been adopting a “no undifferentiated preferences” meaning.<sup>120</sup> This section will discuss the extent

119. Cf. Sander, *supra* note 84, at 406 (finding that 88% of admissions outcomes can be correctly predicted for the Law School in 1999 on the basis of academic factors and race, while only 82% of admissions outcomes can be correctly predicted for the College in 1999 on the basis of academic factors, race, and residency status).

120. Some scholars have suggested that the Court’s main concern was that admissions systems be sufficiently nuanced. See, e.g., Michael Rosman, *Uncertain Direction: The Legacy of Gratz and Grutter*, JURIST LEGAL INTELLIGENCE F., Sept. 5, 2003, <http://jurist.law.pitt.edu/forum/symposium->

to which the *Grutter* and *Gratz* opinions suggest that the Court meant to adopt this meaning.

Chief Justice Rehnquist's opinion for the Court in *Gratz* noted that "[t]he admissions program Justice Powell described . . . did not contemplate that any *single* characteristic automatically ensured a specific and identifiable contribution to a university's diversity"<sup>121</sup> and then concluded that the College's admissions system did not provide individualized consideration because it "automatically distribute[d] 20 points to every single applicant from an 'underrepresented minority' group."<sup>122</sup> Chief Justice Rehnquist illustrated his concern with an example from Justice Powell's *Bakke* opinion concerning what would happen in the admissions process to two hypothetical applicants, A and B, where A was "the child of a successful black physician in an academic community with promise of superior academic performance" and B was "a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently-abiding interest in black power."<sup>123</sup> Chief Justice Rehnquist noted that the College's admissions system was not an "individualized selection process" because admissions officers would not consider the "differing backgrounds, experiences, and characteristics" of A and B but "would simply award both A and B 20 points because their applications indicate that they are African-American."<sup>124</sup> So, for Chief Justice Rehnquist, it appears that any one particular characteristic—at least, when that characteristic is race—cannot have a predetermined,

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aa/rosman.php (implying that the lack of nuance might have been a fatal flaw of the College program). Robert Post's discussion of the individualized consideration requirement notes two possible meanings of individualized consideration, and it is unclear whether Post sees his first interpretation as consistent with what we have called the quantification meaning or the differentiation meaning. See Post, *supra* note 20, at 70–71 ("The upshot is that the Court never makes clear whether the Michigan undergraduate program fails the individualized consideration requirement because it quantifies the contribution of race to diversity by 'a specific and identifiable' measure, or instead because the program employs a measure that is 'decisive.'" (quoting *Gratz*, 539 U.S. at 271)).

121. *Gratz*, 539 U.S. at 271 (emphasis added).

122. *Id.*

123. *Id.* at 272 (internal quotation marks omitted) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978) (Powell, J.)).

124. *Id.* at 273. This example demonstrates that Chief Justice Rehnquist seemed to be bothered by the fact that the College made no distinctions on class grounds among minority applicants. Indeed, he was correct that the point system itself operated in this way. As described *supra* in note 92, applicants could earn 20 points for race or low socioeconomic status, but not both. Had the point system allowed applicants to earn points for both race and low socioeconomic status, then Chief Justice Rehnquist's concerns would seemingly be alleviated. Note that this illustrates that a point system can differentiate among racial minorities *and* award a constant number of points to race as long as it also awards points for the other relevant dimensions. Thus, an award of a constant amount of points for race does not necessarily indicate that a system is undifferentiated.

constant weight; rather, it must be evaluated in the context of other characteristics.<sup>125</sup>

Justice O'Connor's *Gratz* concurrence shows she, too, is concerned about differentiation. She stated that "the type of individualized consideration" the Court "requires [is] consideration of each applicant's individualized qualifications, including the contribution each individual's race or ethnic identity will make to the diversity of the student body, *taking into account diversity within and among all racial and ethnic groups*."<sup>126</sup> She also complained that the College's admissions office assigned "every underrepresented minority applicant the same, *automatic* 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant."<sup>127</sup> She contrasted the "automatic, predetermined point allocations" in the admissions program of the College with the admissions program at the Law School, which "enable[d] admissions officers to make nuanced judgments with respect to the contributions each applicant [was] likely to make to the diversity of the incoming class."<sup>128</sup> So, like Chief Justice Rehnquist, Justice O'Connor wants to assign preference to race only in conjunction with consideration of other factors.

Finally, Justice Thomas's concurrence in *Gratz* also echoes the differentiation principle, stating that "[t]he LSA policy falls . . . because it does not sufficiently allow for the consideration of nonracial distinctions among underrepresented minority applicants."<sup>129</sup> Justice Thomas then made explicit a point that was not addressed in the Court's opinion and was implicit in Justice O'Connor's opinion—that universities should seek diversity not only within the group of underrepresented minorities but also within the group of applicants who are not underrepresented minorities.<sup>130</sup>

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125. To the extent that these opinions suggest that one's race can be considered only in context with other characteristics, they raise several questions. First, what other characteristics must universities consider when deciding the amount of preference to give in conjunction with race? Chief Justice Rehnquist's example implied that class and parental education are factors that should be considered, but what other factors are relevant? Second, and related, how is it decided which combinations of race and other characteristics receive more preference than others? We will argue in section V(B)(1) that admissions programs should favor combinations that promote the goals of the diversity interest of (1) creating a lively campus atmosphere with robust discussions by people of diverse backgrounds; (2) breaking down racial stereotypes; and (3) ensuring that education, the pathway to leadership, is open to people of all races. See *infra* notes 215–19 and accompanying text for a discussion of the goals of the diversity interest.

126. *Gratz*, 539 U.S. at 277 (O'Connor, J., concurring) (emphasis added).

127. *Id.* at 276–77.

128. *Id.* at 279.

129. *Id.* at 281 (Thomas, J., concurring).

130. *Id.* ("An admissions policy, however, must allow for consideration of these nonracial distinctions among applicants on both sides of the single permitted racial classification."). Justice Thomas is the only Justice in *Gratz* to address expressly the issue of whether it is permissible to consider *racial* distinctions among applicants who are members of underrepresented racial minority groups. Justice Thomas stated emphatically that "[u]nder today's decisions, a university may not racially discriminate between the groups constituting the critical mass." *Id.* Some of the *Grutter* opinions also addressed this issue, at least tangentially. See *Grutter v. Bollinger*, 539 U.S. 306,

Read together, these opinions suggest that the Court is particularly concerned with undifferentiated racial preferences—admissions programs must seek diversity within the class of underrepresented minorities (and perhaps within the group of applicants who are not underrepresented minorities).<sup>131</sup> It should be noted, however, that *Grutter* and *Gratz* differ in their treatment of differentiation in one key respect. The *Gratz* Court demonstrated that the College's admissions program was not sufficiently differentiated by pointing to the mechanical nature of the point system and the fact that all minorities received the same number of points regardless of their other characteristics.

In contrast, the *Grutter* opinion contained much lofty language about the importance of nuance and differentiation, but it came up short on pointing to evidence that the Law School's admissions program actually operated in a nuanced way.<sup>132</sup> Instead, the *Grutter* Court simply took the Law School at its word that its admissions program was nuanced, citing only the Law School's admissions policies to support the proposition that the admissions system operated in a nuanced fashion.<sup>133</sup> While the *Grutter* Court cited statistics that it claimed illustrated that the Law School "frequently" admitted nonpreferred applicants with lower credentials than preferred minorities it rejected,<sup>134</sup> such statistics say nothing about whether preferences granted to minorities were differentiated; they merely demonstrate that the Law School afforded weight to factors other than race. Thus, the most that can be said about the Law

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374–75 & n.12 (2003) (Thomas, J., concurring in part and dissenting in part) ("I join the Court's opinion insofar as it confirms that . . . racial discrimination [among the group of minorities receiving a preference] remains unlawful."); *id.* at 381–86 (Rehnquist, C.J., dissenting) (arguing that the percentage of each racial group admitted to the Law School is close to the percentage of each racial group that applied and arguing that the data demonstrated that there was "substantially different treatment among the three underrepresented minority groups").

131. One circuit court case decided since *Grutter* and *Gratz* also suggested that differentiation is a consideration when determining whether admissions programs are narrowly tailored. *See Smith v. Univ. of Wash.*, 392 F.3d 367, 375–77 (9th Cir. 2004) (holding that a law school's consideration of "ethnicity substantiation letter[s]," in which applicants explain the role race or ethnicity has played in their lives, "supports rather than undermines the constitutionality of the Law School's program" because the letters allow the law school to "give more weight to those minority candidates who ha[ve] more to contribute to the diversity of the classroom").

132. For example, the Court stated that "the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Grutter*, 539 U.S. at 337. Later, the Court stated that "the Law School's admissions policy 'is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'" *Id.* (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (Powell, J.)). The Court continued, saying that the "Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions." *Id.*

133. *Id.* at 337–39; *cf. infra* note 179 and accompanying text.

134. *See Grutter*, 539 U.S. at 338. Not only does this statistic fail to support the proposition that the Law School's admissions program was sufficiently nuanced, but also it fails to measure the extent to which the Law School placed weight on race. *See infra* subsection V(A)(2)(d).

School's admissions program is that its racial preferences were *potentially* differentiated; no evidence was offered that the preferences were *actually* differentiated. On the ground then, *Grutter* and *Gratz* at most require potential differentiation of racial preferences across the class of preferred applicants.

3. *Excessive Racial Preferences*.—Many scholars have interpreted the *Grutter* and *Gratz* Courts to be saying that to satisfy the individualized consideration requirement, universities cannot give excessive weight to race.<sup>135</sup> This section reviews the parts of the *Grutter* and *Gratz* opinions that suggest that the Court meant for a weight inquiry to be part of the individualized consideration inquiry and describes the ways the Court thought it should measure whether a university has placed too much weight on race. While this section is descriptive only, we offer a normative critique of these methods for measuring weight in section V(A)(2). This section analyzes each case separately because the Court engaged in a different weight inquiry in each case.

a. *The Gratz Measures of Excessiveness*.—The opinion for the Court in *Gratz* suggested three different methods for measuring whether universities give race too much weight, two of which attempt to measure weight on what we have called the “means dimension” and one of which attempts to measure weight on what we have called the “outcome dimension.”

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135. Robert Post states that the Court is “ambiguous” about the meaning of individualized consideration. He reads the Court to be offering two “accounts of the individualized consideration requirement,” one of which is the excessive preferences meaning. Post, *supra* note 20, at 70–71 (“The upshot is that the Court never makes clear whether the Michigan undergraduate program fails the individualized consideration requirement because it quantifies the contribution of race to diversity by ‘a specific and identifiable’ measure, or instead because the program employs a measure that is ‘decisive.’” (quoting *Gratz*, 539 U.S. at 271)). Lani Guinier and Richard Primus agree that the weight inquiry was important to the Court, but they are silent as to whether they read the Court’s weight inquiry to be part of the individualized consideration inquiry. Guinier states that the cases mean that “as long as institutions do not weight race so heavily that it overdetermines admissions outcomes, their good faith is essentially presumed.” Lani Guinier, *The Supreme Court, 2002 Term—Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 198 (2003). According to Primus, the cases stand for the proposition that “universities can prefer members of racially disadvantaged groups as long as the value of the racial preference is, *inter alia*, not too large as compared to the value of other admissions criteria.” Primus, *supra* note 101, at 548. Primus emphasizes this point:

In *Grutter* and *Gratz* . . . the validity of the University of Michigan’s affirmative action plans turned substantially on the relative importance of the racial criterion for admission as compared to other admissions factors. Where the Court found race to be predominant, it disallowed affirmative action. Where it found the racial motive to be merely one factor among several, the Court permitted affirmative action.

*Id.* at 547 (footnote omitted); *see also* Mark W. Cordes, *Affirmative Action After Grutter and Gratz*, 24 N. ILL. U. L. REV. 691, 715–16 (2004) (observing that a weight inquiry was part of the individualized consideration inquiry).

Chief Justice Rehnquist's first measure along the means dimension compares the number of points the university assigns to race with the number of points it assigns to other characteristics. Chief Justice Rehnquist suggested this measure in a discussion of the example from Justice Powell's *Bakke* decision comparing three hypothetical applicants, A, B, and C, where A and B are black and C is "a white student with extraordinary artistic talent."<sup>136</sup> Chief Justice Rehnquist discussed what would happen to students A, B, and C under the College's point system:

Even if student C's "extraordinary artistic talent" rivaled that of Monet or Picasso, the applicant would receive, at most, five points under the LSA's system. At the same time, every single underrepresented minority applicant, including students A and B, would automatically receive 20 points for submitting an application. Clearly, the LSA's system does not offer applicants the individualized selection process described in Harvard's example. Instead of considering how the differing backgrounds, experiences, and characteristics of students A, B, and C might benefit the University, admissions counselors reviewing LSA applications would simply award both A and B 20 points because their applications indicate that they are African-American, and student C would receive up to 5 points for his "extraordinary talent."<sup>137</sup>

This passage suggests that the relative weights of the points bothered Chief Justice Rehnquist, and it implies that he viewed the weight inquiry to be relevant to the individualized consideration inquiry. Chief Justice Rehnquist did not, however, offer a theory for evaluating when race is given too much weight on this measure.<sup>138</sup>

Chief Justice Rehnquist's second measure along the means dimension compares the number of points assigned to race with the total number of points needed to gain admission. In the part of the opinion where Chief Justice Rehnquist announced that the admissions system at issue in *Gratz*

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136. *Gratz*, 539 U.S. at 272 (quoting *Bakke*, 438 U.S. at 324 (Powell, J.)). We discussed this hypothetical earlier. See *supra* notes 123–24 and accompanying text.

137. *Gratz*, 539 U.S. at 273 (citation omitted). Note that Chief Justice Rehnquist gave short shrift to how the flagging system mitigated what seems like a disproportionate point distribution. After all, if applicant C truly had artistic talent that rivaled Monet or Picasso, then as long as that applicant met the requirements for being flagged for further review by the admissions review committee, he would most certainly have been admitted by the review committee. To be flagged, the student would need to have been academically qualified and earned a selection index score of at least 75 if he was not a resident of Michigan and 80 if he was a resident of Michigan. See *supra* note 94. The applicant would have been awarded 5 points for his personal achievement due to his "extraordinary talent," and surely an applicant with this much talent would have earned the 20 points available at the provost's discretion. See *supra* note 92. So, this future Monet or Picasso would have needed to cobble together only 50 or 55 more points to be flagged. Given the multitude of other ways he could have earned points and the fact that many points were available for even a low GPA, it seems that such a student would have been flagged as long as his credentials were not unduly low, in which case it might be appropriate to reject him.

138. See *infra* subsection V(A)(2)(a) (discussing this measure).

was not narrowly tailored, he implied that courts may want to make such a comparison: “[w]e find that the University’s policy, which automatically distributes 20 points, or *one-fifth of the points needed to guarantee admission*, to every single ‘underrepresented minority’ applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.”<sup>139</sup> Chief Justice Rehnquist did not pursue this inquiry further and so it is unclear to what extent such an inquiry is relevant not only to the individualized consideration inquiry, but also, more broadly, to the narrow tailoring inquiry. To the extent that such an inquiry is relevant, however, Chief Justice Rehnquist once again did not offer a theory for determining when race receives too much weight relative to the total number of points needed for admission.<sup>140</sup>

In addition to suggesting that courts should look at the means of the admissions system to determine if universities place too much weight on race, Chief Justice Rehnquist indicated that courts might look at admissions outcomes. He noted that “unlike Justice Powell’s example, where the race of a ‘particular black applicant’ could be considered without being decisive, the LSA’s automatic distribution of 20 points has the effect of making ‘the factor of race . . . decisive’ for virtually every minimally qualified underrepresented minority applicant.”<sup>141</sup> This statement’s placement in a paragraph about individualized consideration indicates that Chief Justice Rehnquist saw the weight inquiry as part of the individualized consideration inquiry. Furthermore, it suggests that Chief Justice Rehnquist thought one way to measure whether a university gives too much weight to race is to examine the percentage of “minimally qualified . . . minority applicant[s]” for whom race is “decisive.”<sup>142</sup> Chief Justice Rehnquist did not, however, offer a theory for determining when an admissions system assigns too much weight to race under his proposed measure.<sup>143</sup>

Justice Souter’s dissenting opinion in *Gratz* sheds further light on what the *Gratz* Court said about whether a weight inquiry is part of the

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139. *Gratz*, 539 U.S. at 270 (emphasis added). Chief Justice Rehnquist’s figure of one-fifth comes from the fact that preferred minorities could earn 20 points for their race, *see supra* note 92, and the majority opinion stated that an index of 100 points or more guaranteed admission, *see supra* note 93.

140. *See infra* subsection V(A)(2)(b) (criticizing this measure).

141. *Gratz*, 539 U.S. at 272 (omission in original) (citation omitted) (quoting *Bakke*, 438 U.S. at 317 (Powell, J.)).

142. *Id.* Two circuit court opinions have applied the *Gratz* outcome test as part of their narrow tailoring analysis. *See Smith v. Univ. of Wash.*, 392 F.3d 367, 376 (9th Cir. 2004) (stating, without providing empirical support, that “unlike the program found unconstitutional in *Gratz*, the racial and ethnic pluses here did not ‘ha[ve] the effect of making the factor of race decisive for virtually every minimally qualified underrepresented minority applicant’” (alteration in original) (quoting *Gratz*, 539 U.S. at 272)); *Petit v. City of Chicago*, 352 F.3d 1111, 1117 (7th Cir. 2003) (applying a more lenient version of the *Gratz* outcome test, stating that “[i]t cannot be said that the process affected every ‘minimally qualified’ candidate as did the blanket award of 20 points per candidate, the procedure found to be unconstitutional in *Gratz*”).

143. *See infra* subsection V(A)(2)(c) (criticizing this measure).



individualized consideration inquiry.<sup>144</sup> Justice Souter stated that the weight component might have been the basis for the Court's decision to strike down the College's program: "[t]he [Court's] objection goes to the use of points to quantify and compare characteristics or . . . the number of points awarded due to race."<sup>145</sup> The placement of this sentence after a sentence referring to individualized consideration suggests that Justice Souter read the Court to be saying that the weight inquiry is part of the individualized consideration inquiry.<sup>146</sup>

So, the *Gratz* majority opinion suggests that a weight inquiry is part of the individualized consideration inquiry, and it proposed three methods for measuring weight: (1) comparing the number of points assigned to race to the number of points assigned to other characteristics; (2) comparing the number of points assigned to race to the number of points needed for admission; and (3) comparing the number of qualified minority applicants for whom race was decisive to the total number of qualified minority applicants. For none of these measures, however, did Chief Justice Rehnquist explain why the measure captures the constitutionally relevant weight assigned to race. In addition, for none of the measures did he offer a theory for where the line should be drawn between programs that place too much weight on race and programs that do not.<sup>147</sup>

*b. The Grutter Measure of Excessiveness.*—The majority opinion in *Grutter* also suggested that the weight given to race is relevant to the individualized consideration inquiry, but its discussion of weight was different from *Gratz*'s discussion of weight:

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144. Justice Souter's dissent also addressed how he thinks weight should be measured: [I]t [is not] possible to say that the 20 points convert race into a decisive factor comparable to reserving minority places as in *Bakke*. Of course we can conceive of a point system in which the "plus" factor given to minority applicants would be so extreme as to guarantee every minority applicant a higher rank than every nonminority applicant in the university's admissions system. But petitioners do not have a convincing argument that the freshman admissions system operates this way. . . . It suffices for me, as it did for the District Court, that there are no *Bakke*-like set-asides and that consideration of an applicant's whole spectrum of ability is no more ruled out by giving 20 points for race than by giving the same points for athletic ability or socioeconomic disadvantage.

*Gratz*, 539 U.S. at 295–96 (Souter, J., dissenting). So, for Justice Souter, an admissions system should not weigh race so heavily that either it effectively operates as a quota or all minority applicants are ranked higher than all nonminority applicants. Note, however, that this latter test is absurd—only the most extreme admissions programs would rank all preferred minority applicants above all other applicants. This test does not offer a helpful benchmark for separating constitutional systems from unconstitutional ones.

145. *Id.* at 295.

146. The previous sentence is as follows: "The Court nonetheless finds fault with a scheme that 'automatically' distributes 20 points to minority applicants because 'the only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups.'" *Id.*

147. We discuss both of these shortcomings *infra* in section V(A)(2).

When using race as a “plus” factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and *not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application*. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.<sup>148</sup>

Justice O’Connor framed the weight requirement as prohibiting race or ethnicity from becoming the “defining feature” of an application.<sup>149</sup> Given that Justice O’Connor sandwiched this statement about race not being the “defining feature” between two statements about individualized consideration, it seems reasonable to infer that she viewed the inquiry into whether race is a “defining feature” as part of the individualized consideration inquiry.<sup>150</sup>

But, what does it mean for race to be the “defining feature” of an application? Justice O’Connor did not explain what she meant by “defining feature,” but later in the opinion, during the same discussion, she noted what she saw as evidence that the Law School gave sufficient weight to factors other than race:

The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected. This shows that the Law School seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well.<sup>151</sup>

The *Grutter* Court seemed to be suggesting a measure along the outcome dimension. This outcome measure differs from the *Gratz* Court’s outcome measure, however. Rather than use the *Gratz* measure of examining the percentage of qualified minority applicants for whom race is decisive, *Grutter* advocated looking at admissions outcomes to determine how

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148. *Grutter v. Bollinger*, 539 U.S. 306, 336–37 (2003) (emphasis added).

149. *Id.*

150. Justice O’Connor’s views on this matter are consistent with her views in the voting redistricting cases—just as consideration of race is permissible (in that it passes strict scrutiny) in the admissions context as long as race is not the “defining feature” of an application, consideration of race is permissible (in that it does not trigger strict scrutiny) in the redistricting context as long as race is not the “predominant factor” motivating a redistricting decision. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 959 (1996) (O’Connor, J.) (“For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were ‘subordinated’ to race. By that, we mean that race must be ‘the predominant factor motivating the legislature’s [redistricting] decision.’” (alteration in original) (citation omitted) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995))); *cf.* *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (“Race must not simply have been ‘a motivation for the drawing of a majority-minority district,’ but ‘the “predominant factor” motivating the legislature’s districting decision.’” (citation omitted) (quoting *Vera*, 517 U.S. at 959 (O’Connor, J.) and *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999))).

151. *Grutter*, 539 U.S. at 338 (citations omitted).

“frequently”<sup>152</sup> cases arose in which race clearly did not trump nonracial characteristics.<sup>153</sup>

Further evidence that the *Grutter* Court viewed the weight inquiry to be part of the individualized consideration inquiry comes in its discussion of the requirement that the affirmative action plan not unduly burden third parties. The *Grutter* Court noted that “in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School’s race-conscious admissions program does not unduly harm nonminority applicants.”<sup>154</sup> The fact that the no-undue-burden requirement—a requirement that is related to the weight given to race in admissions<sup>155</sup>—is necessarily satisfied by an admissions plan that provides individualized consideration implies that the weight inquiry must be part of the individualized consideration inquiry.

So, the *Grutter* Court also viewed the weight inquiry as part of the individualized consideration inquiry, but it suggested a different—and weaker—measure for determining whether race had been given too much weight. It asked whether race was the defining feature of an application, and it answered this question in the negative if nonminority applicants were “frequently” admitted with lower credentials than minority applicants who were rejected. As was the case in *Gratz*, the Court did not attempt to justify why its measure captures the constitutionally relevant weight assigned to race. And, also like the *Gratz* Court, the *Grutter* Court failed to offer a theory for where the line should be drawn between programs that weight race too heavily and those that do not.<sup>156</sup>

Two important points have emerged in this section. First, the Court viewed the inquiry into the weight assigned to race as part of the individualized consideration inquiry, but it analyzed the weight the programs assigned to race differently in *Grutter* and *Gratz*. Second, the Court did not adopt a minimum necessary preference approach to determining whether race was given too much weight. Instead, the Court made assertions about whether the weight given to race was too much without explaining how it determined what “too much” was.

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152. For a description and discussion of what the Court means by the word “frequently,” see *infra* notes 201–04 and accompanying text.

153. One circuit court has applied a more lenient version of the *Grutter* outcome test. See *Smith v. Univ. of Wash.*, 392 F.3d 367, 376 (9th Cir. 2004) (stating, without empirical support, that “[t]he Law School also accepted nonminority applicants with grades and test scores lower than underrepresented minority applicants who were rejected, thus showing that the Law School ‘seriously weigh[ed] many other diversity factors besides race that [could] make a real and dispositive difference’” (quoting *Grutter*, 539 U.S. at 338)). See *infra* note 204 for a discussion of *Smith*’s use of this measure.

154. *Grutter*, 539 U.S. at 341.

155. See *supra* note 30 and accompanying text.

156. See *infra* subsection V(A)(2)(d) (criticizing this measure).

### C. *How the Three Meanings Fit Together*

Read together, *Grutter* and *Gratz* suggest that the Court has adopted a “Don’t Tell, Don’t Ask” approach to individualized consideration: if universities don’t *tell* how much weight they give to race by quantifying racial preferences, then courts won’t *ask* probing questions about whether the preferences are differentiated and not excessive. If, however, universities do tell, then courts will conduct a searching review of the admissions program, examining whether preferences are in fact differentiated and not excessive.<sup>157</sup>

When it came to looking at differentiation, the Court simply accepted the Law School’s assertions that its racial preferences varied within particular minority groups depending on various non-race attributes. The Court did not seek to determine whether the preferences were differentiated *in fact* but instead was satisfied with a showing of *potential* differentiation. In contrast, the Court attacked the College’s program for not being sufficiently differentiated because the College assigned all minority applicants the same number of points for their race.<sup>158</sup> But, at the end of the day, the Court had no basis for concluding that the Law School’s system was in fact more differentiated than the College’s system.

And, when it came to examining excessiveness, the Court applied different tests to measure the weight given to race at the Law School and at the College. When examining the weight assigned to race at the Law School, the Court applied one test that attempted to capture weight along the outcome dimension. In contrast, when examining the weight assigned to race at the College, the Court applied two tests that attempted to capture weight along the means dimension and one test that attempted to capture weight along the outcome dimension. The two outcome tests the Court applied were certainly different in form—the *Grutter* test examined how frequently nonpreferred applicants were admitted with lower GPAs and test scores than preferred

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157. Cf. Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT. 221, 247 (2004) (“The real difference between the law school program upheld in *Grutter* and the undergraduate program invalidated in *Gratz* seems to be that the Supreme Court believes that the *Gratz* program gave too much weight to the factor of race, and it did so in a manner that was too transparent.”); cf. also PETER H. SCHUCK, *MEDITATIONS OF A MILITANT MODERATE* 12–18 (2006) (arguing that the strict scrutiny applied by the *Grutter* Court was anything but strict); Nelson Lund, *The Rehnquist Court’s Pragmatic Approach to Civil Rights*, 99 NW. U. L. REV. 249, 281 (2004) (“‘Strict scrutiny’ now means virtually no scrutiny, at least as to university admissions policies that discriminate against certain races, such as whites and Asians. To put the point another way, *Grutter* creates a safe harbor for such discrimination that extends over the whole ocean, except for one little cove that contains strictly unbending quotas and absolutely mechanical preferences like those at issue in *Bakke* and *Gratz*.”). Another way of conceptualizing the “Don’t Tell, Don’t Ask” position of the Court is that not only should universities not “tell” by quantifying their admissions programs, but also universities should not “tell” by placing so much weight on race that the university effectively “tells” the Court something about the weight it places on race.

158. See *supra* notes 131–34 and accompanying text (criticizing the Court in *Grutter* for “tak[ing] the Law School at its word that its admissions program is nuanced” without a showing of *actual* differentiation while striking down the College’s program in *Gratz* because of its “mechanical nature”).

minority applicants who were rejected, while the *Gratz* test examined the percentage of qualified minority applicants for whom race was decisive. But, could it be the case that although these two tests were formally different, they were functionally equivalent? If that were so, we would expect that the Law School would fare better than the College on both tests. Instead, however, we will demonstrate in the remainder of this subpart that the Law School actually fares *worse* than the College on the *Gratz* test, demonstrating that the differences in the Court's outcome tests are differences of substance and that the Court was applying different standards to the two admissions programs.<sup>159</sup>

The *Gratz* outcome measure asks whether an admissions program "has the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant."<sup>160</sup> The *Gratz* Court did not make clear what it meant by "qualified," and the source it cited for support of the proposition that virtually all qualified minority applicants were accepted did not provide a definition either,<sup>161</sup> so we must approximate a definition. We first aggregated all of the relevant data across residency status, race, and year<sup>162</sup> so that we could work with grids that had test score ranges on one dimension and GPA ranges on the other dimension. We then defined an applicant to be "qualified" if either (1) the applicant was in a cell in which greater than or equal to five percent of the applicants in that cell were admitted and greater than or equal to three applicants were admitted, or (2) the applicant was in a cell whose test score range and GPA range were greater than or equal to a cell meeting the description in (1).<sup>163</sup>

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159. We do not conduct similar analysis on the *Grutter* test because the test itself is not well defined. See *infra* notes 201–05 and accompanying text. While we do not fully analyze how the College data fare under the *Grutter* test, we do report on some calculations that have some bearing on this question. See *infra* note 205.

160. *Gratz v. Bollinger*, 539 U.S. 244, 272 (2003) (omission in original) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978) (Powell, J.)).

161. The Court cited the Appendix to the Petition for Certiorari. *Id.* at 254 (citing Petition for Writ of Certiorari app. at 111a, *Gratz*, 539 U.S. 244 (No. 02-516)).

162. When computing statistics for the College for 1999, we did not aggregate across years; we examined only the 1999 data. Also, when performing these computations for the College data, we were not able to aggregate all five years of data because the test score ranges used in the 1995 data were different from the ranges used in the 1996–1999 data. Because we were already separately performing computations for the 1999 data, we created separate grids for the 1995 data, the 1996–1998 data, and the 1999 data. After coming up with a different definition for "qualified" for each grid, we computed the relevant numbers for each grid and then aggregated those numbers to come up with the figures for the "College: all years" row of Table 5.

163. The Court stated that all applicants who were accepted were "qualified." See *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003) (noting that "all underrepresented minority students admitted by the Law School have been deemed qualified"); *Gratz*, 539 U.S. at 303 (Ginsburg, J., dissenting) ("Every applicant admitted under the current plan, petitioners do not here dispute, is qualified to attend the College." (citing Petition for Writ of Certiorari app. at 111a, *Gratz*, 539 U.S. 244 (No. 02-516))); Petition for Writ of Certiorari app. at 111a, *Gratz*, 539 U.S. 244 (No. 02-516) ("According to the University, all of the students admitted to the [College] are qualified to attend the University, and for purpose of these motions, Plaintiffs assume this proposition to be true."). While all admits

We then computed the number at issue in the *Gratz* test, the percentage of qualified preferred minority applicants for whom race was decisive, by dividing the number of qualified but-for admits by the number of qualified preferred minority applicants.<sup>164</sup> Our results are summarized in Table 5.<sup>165</sup>

were qualified, it does not follow that all applicants with the same academic credentials as all admits were qualified. Indeed, it is likely that some of the admits with low qualifications were deemed qualified because of factors beyond their GPAs and test scores, such as strong letters of recommendation. We therefore did not want to count as qualified every applicant sharing a cell with an admit. We tried to strike a balance by deeming an applicant qualified if and only if greater than or equal to three applicants in her cell were admitted, and they made up greater than or equal to five percent of all applicants in that cell. This measure is, of course, to some degree arbitrary in that we could have chosen other figures besides the three admit and five-percent figures. Nonetheless, this measure seems to be a good attempt at approximating a definition of “qualified.”

164. See *supra* notes 51–53 and accompanying text for a description of how we computed the number of but-for admits. Note that when computing the number of but-for admits, our data were broken down by year, residency status, test score range, and GPA range. We also computed the percentage of qualified preferred minority applicants who were accepted and, for comparative purposes, the percentage of nonpreferred qualified applicants who were accepted:

	Percentage of qualified preferred minority applicants accepted	Percentage of qualified nonpreferred applicants accepted
Law School: all years	63%	38%
College: all years	90%	69%
College: 1999	87%	71%

Thus, while the proportion of minimally qualified preferred minority applicants who were admitted was larger at the College, the proportion of minimally qualified preferred minority applicants who were admitted because of their race was larger at the Law School.

165. Our results were robust. To check the robustness, we used two closely related methods for approximating a definition for qualified.

For the first alternative method, we defined an applicant to be “qualified” if the school admitted at least one person with the same characteristics as the applicant (ignoring race)—that is, the same GPA range, test score range, residency status, and year of application. This method differs from the method used in the text in several ways. First, we do not aggregate data (except race) before determining whether particular cells contain applicants who are qualified. Second, as long as *any* applicant with a given combination of characteristics (ignoring race) is admitted, all applicants with that same combination of characteristics are deemed “qualified,” even if only a small number or percentage of such applicants are accepted. Third, this method does not deem qualified those applicants in cells where there are no admits, even if those cells have test score ranges and GPA ranges that are greater than or equal to other cells whose applicants have been deemed “qualified.” Significantly, the results from this method are almost identical to the results we obtain when using the method described in the text:

Table 5

Percentage of qualified preferred minority applicants for whom race was decisive	
Law School: all years	52%
College: all years	48%
College: 1999	32%

Alternative method 1: Defining qualified by determining if another applicant with the same combination of characteristics (of any race) was admitted

	Percentage of qualified preferred minority applicants for whom race was decisive	Percentage of qualified preferred minority applicants accepted	Percentage of qualified nonpreferred applicants accepted
Law School: all years	53%	64%	39%
College: all years	48%	90%	70%
College: 1999	32%	88%	72%

For the second alternative method, we performed the same computations described in the text, except the grids we used to determine which cells contained “qualified” applicants contained admissions data for nonpreferred applicants only. That is, we said that an applicant was “qualified” if (1) the applicant was in a cell such that greater than or equal to five percent of nonpreferred applicants in that cell were admitted and greater than or equal to three nonpreferred applicants were admitted, or (2) the applicant was in a cell whose test score range and GPA range are greater than or equal to a cell meeting the description in (1). Once we identified the cells that contained “qualified” applicants, our analysis was the same as the analysis described in the text. When we used this method, we obtained the following results:

Alternative method 2: Defining qualified with reference to nonpreferred applicants

	Percentage of qualified preferred minority applicants for whom race was decisive	Percentage of qualified preferred minority applicants accepted	Percentage of qualified nonpreferred applicants accepted
Law School: all years	60%	89%	50%
College: all years	46%	95%	70%
College: 1999	32%	88%	71%

This method yields results that are similar to those obtained with our other two methods. In all three methods, the percentage of qualified minority applicants for whom race was decisive was larger at the Law School. In addition, in all three methods, it is not true that race was decisive for “virtually every” qualified minority applicant at the College—rather, race was decisive for under half of the qualified minority applicants.

Our computations demonstrate two important points. First, under the *Gratz* measure of weight, the Law School actually assigned *more* weight to race than the College. Race was decisive for 52% of the qualified minority applicants at the Law School, whereas it was decisive for only 48% of the qualified minority applicants at the College for all years, and 32% of the qualified minority applicants for 1999, the year the program at issue in *Gratz* was in place.

Second, stunningly, the Court misapplied its own test in *Gratz*—the Court was incorrect in concluding that race was decisive for “virtually every minimally qualified underrepresented minority applicant” at the College. In fact, race was decisive for only 48% of all qualified minority applicants at the College for all years and for only 32% of qualified minority applicants for 1999, the year that the College used the program at issue in *Gratz*.

But how could the Court have made this error? The fact that the College admitted virtually every qualified minority applicant was a fact that was not contested in *Gratz*, a point that Chief Justice Rehnquist noted in his opinion.<sup>166</sup> Because Chief Justice Rehnquist cited no authority for the proposition that race was *decisive* for virtually every qualified minority applicant, it seems reasonable to assume that he thought that the latter proposition—that race was decisive for virtually all qualified minority applicants—followed from the former proposition—that virtually all qualified minority applicants were admitted.<sup>167</sup> A large proportion of minimally

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166. Early in the opinion, Chief Justice Rehnquist noted that “it is undisputed that the University admits ‘virtually every qualified . . . applicant’ from these groups [underrepresented minorities].” *Gratz*, 539 U.S. at 254 (omission in original) (quoting Petition for Writ of Certiorari, *supra* note 163, app. at 111a). His statement that this fact was “undisputed” seems accurate—the brief for the University of Michigan stated that “LS&A ends up admitting virtually all minority applicants with competitive academic credentials.” Brief for Respondents, *Gratz*, *supra* note 49, at 4–5. And, our calculations indicate that 90% of the qualified minority applicants were admitted for the years 1995–1999, and 87% were admitted in 1999; both figures are close to “virtually every” qualified applicant.

167. Perhaps Chief Justice Rehnquist meant to say that the College’s admissions program was defective not because race was decisive for virtually every qualified minority applicant, but rather because virtually every qualified minority applicant was admitted. If this was the test that he meant to apply, then the College would have done worse under this measure than the Law School because the College admitted 90% of all qualified minority applicants in all years and 87% in 1999, while the Law School admitted only 63% of all qualified minority applicants. But, this cannot be a sensible metric because it penalizes less selective institutions like the College, which admit a higher percentage of *all* applicants. If an institution admits around 70% of *all* qualified applicants and gives a nontrivial boost for race, then it follows that “virtually every” qualified minority applicant will be admitted. In contrast, if an institution admits fewer applicants, such as, for example, 40% of applicants, and grants a boost of a similar size, the boost will not result in admitting “virtually every” qualified minority applicant. In addition, if the applicant pool of minority applicants who fall into the “qualified” category happens to be especially strong, then “virtually every” minority applicant may be admitted even in the absence of any preference for race. Justice Souter made this point in his dissent in *Gratz*. *Gratz*, 539 U.S. at 296 (Souter, J., dissenting) (“[T]he fact that the university admits virtually every qualified under-represented minority applicant, may reflect nothing more than . . . the possibility that self-selection results in a strong minority applicant pool.”)



qualified minorities was admitted to the undergraduate program, but for a large chunk of these minorities, race was not decisive. Thus, the latter proposition does not follow from the former position, and so if this was Chief Justice Rehnquist's reasoning, he was mistaken.

These data demonstrate that the tests applied to the admissions programs at the Law School and the College were substantively different. That the Law School fares worse than the College on the *Gratz* test shows that the Court analyzed the two systems differently, supporting our "Don't Tell, Don't Ask" interpretation of the cases.<sup>168</sup>

Part IV has argued that the *Grutter* and *Gratz* Courts essentially adopted a "Don't Tell, Don't Ask" approach to narrow tailoring.<sup>169</sup> If a university

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(citations and internal quotation marks omitted) (quoting Petition for Writ of Certiorari, *supra* note 163, app. at 111a)).

168. Peter Schuck has observed that the *Grutter* Court approved of the Law School's affirmative action program only because "[t]he program is sufficiently opaque by design and allows enough scope for subjectivity and discretion in the arbitrary and undisclosed weighting of the 'soft variables' in individual cases that a skeptic cannot *prove* unmistakably that race-ethnicity is the predominant factor in the admission of preferred minorities." SCHUCK, *supra* note 157, at 16. We agree that *Grutter* applied a lower level of scrutiny to the Law School program because of its opacity. We disagree, however, that the Court was not capable of determining the weight assigned to race in the Law School program. Indeed, Part III demonstrated one method the Court could have used to determine the weight the Law School assigned to race.

169. Circuit courts have varied in the degree to which they have adhered to what we argue is *Grutter* and *Gratz*'s "Don't Tell, Don't Ask" approach. Only one circuit court has reached the question whether an admissions program in the higher education context was narrowly tailored to the diversity interest. *Smith v. Univ. of Wash.*, 392 F.3d 367 (9th Cir. 2004). That court faithfully adhered to *Grutter* and *Gratz*'s "Don't Tell, Don't Ask" approach, subjecting a law school admissions program that did not "tell" to little scrutiny. *See id.* at 375–82 (holding that the admissions program was narrowly tailored to the diversity interest).

Several circuit courts have reached the question whether affirmative action programs in contexts other than higher education admissions are narrowly tailored to particular interests. Two circuit courts have avoided the "Don't Tell, Don't Ask" individualized consideration regime by expressly limiting the circumstances in which *Grutter* and *Gratz* require individualized consideration, holding that the individualized consideration requirement does not apply to K–12 non-merit-based school-choice plans. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 426 F.3d 1162, 1180–84 (9th Cir. 2005) (en banc), *cert. granted*, 126 S. Ct. 2351 (2006); *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 17–19 (1st Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 798 (2005); *cf. McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513 (6th Cir. 2005) (per curiam) (affirming district court opinion upholding a race-based school-choice plan but not conducting any independent analysis of the constitutionality of the plan), *cert. granted sub nom. Meredith v. Jefferson County Bd. of Educ.*, 126 S. Ct. 2351 (2006); Goodwin Liu, *Seattle and Louisville*, 95 CAL. L. REV. (forthcoming Feb. 2007) (manuscript at 24–26, on file with authors) (arguing that the individualized consideration requirement of *Grutter* and *Gratz* should not apply to K–12 school-choice plans not based on merit); James E. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 OHIO ST. L.J. 327, 341–42 (2006) (same). The Supreme Court will soon decide the extent to which *Grutter* and *Gratz* apply to race-based K–12 school-choice plans when it decides *Parents Involved* and *Meredith*.

Three circuit courts have implicitly limited the circumstances in which *Grutter* and *Gratz* require individualized consideration by upholding affirmative action programs without considering whether the programs provided individualized consideration. *See W. States Paving Co. v. Wash. State Dep't of Transp.*, 407 F.3d 983, 995 (9th Cir. 2005) (upholding the Transportation Equity Act for the 21st Century, which authorizes the use of race- and sex-based preferences in federally funded transportation contracts), *cert. denied*, 126 S. Ct. 1332 (2006); *Petit v. City of Chicago*, 352

does not tell how much of a preference it grants racial minorities, then the Court is not searching in its review of whether the preferences are differentiated or excessive. Indeed, if the university does not tell, as was the case in *Grutter*, the Court is satisfied with potential differentiation, and it hardly inquires into whether the weight assigned to race is excessive. In contrast, if a university does tell how much of a preference it grants racial minorities by quantifying racial preferences, then the Court subjects the program to intense scrutiny as to whether the preferences are differentiated and excessive. Part V will argue that this narrow tailoring analysis has two significant flaws and will articulate a vision of what narrow tailoring analysis should look like in the admissions context.

## V. A Normative Critique of *Grutter* and *Gratz*

The *Grutter* and *Gratz* narrow tailoring analysis described in Part IV departs from the pre-*Grutter* and *Gratz* narrow tailoring analysis in two significant ways. First, post-*Grutter* and *Gratz*, the scrutiny of admissions programs that quantify racial preferences is stricter than the scrutiny of admissions programs that do not quantify racial preferences. Second, post-*Grutter* and *Gratz*, the weight inquiry is not a minimum necessary preference inquiry, but rather is divorced from any kind of theory about what amount of weight is permissible. This Part will begin in subpart A by arguing that both shifts are mistakes and then will outline in subpart B how the Court should conduct its narrow tailoring inquiry when evaluating admissions programs.

### A. Two Mistaken Shifts

Section I will argue that *Grutter* and *Gratz* were mistaken to the extent that they transformed narrow tailoring analysis so that quantified admissions programs receive more intense scrutiny than unquantified ones. Section 2 will then argue that the Court was also mistaken in its treatment of the weight inquiry; instead of determining whether programs granted the minimum necessary preference, the Court assessed whether race was assigned too much weight without any coherent theory about how to measure weight and how to determine whether a given preference is excessive.

1. *Quantification Inquiry Mistake.*—Part IV established that admissions programs that do not “tell” through quantification are practically exempt from narrow tailoring scrutiny, whereas programs that do tell are subject to stricter scrutiny. This section argues that the narrow tailoring inquiry should not be stricter when applied to programs that quantify. The idea that

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F.3d 1111, 1114–18 (7th Cir. 2003) (upholding an affirmative action program used to promote police officers); *Sherbrooke Turf, Inc. v. Minn. Dep’t of Transp.*, 345 F.3d 964, 969–74 (8th Cir. 2003) (upholding the Transportation Equity Act for the 21st Century). Nonetheless, *Petit* did address one of the weight requirements in *Gratz*. See *supra* note 142.

quantification should trigger heightened scrutiny is not supported by precedent,<sup>170</sup> and it does not bear any relationship to the diversity rationale articulated by Justice O'Connor in *Grutter*.<sup>171</sup> Indeed, in no way does whether universities assign race a number have any effect on being able to enroll a student body that can enjoy the benefits of diversity: stimulating classroom discussions, the breaking down of racial stereotypes, and the opening up of universities to people of all races.<sup>172</sup>

And, while it may be true that the diversity interest requires that an admissions process be sufficiently nuanced so as to take into account the many diversity offerings applicants have,<sup>173</sup> there is no reason that a sophisticated point system would not be up to this challenge. A well-designed point system could incorporate any number of variables, including

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170. The *Gratz* opinion never directly cited precedent to argue against quantification, but there is one place in which the *Gratz* Court cited precedent in what *may* have been an effort to argue against quantification. Chief Justice Rehnquist followed the statement that “[t]he admissions program Justice Powell described . . . did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university’s diversity,” *Gratz*, 539 U.S. at 271, with citations to two cases, *Bakke* and *Metro Broadcasting*. To the extent that the *Gratz* Court meant for this statement to assert an anti-quantification position, the cases cited to support that position fail to do so. The page of *Bakke* that *Gratz* cited made two points. First, it stated that the diversity interest that supports an affirmative action program is not an interest in racial diversity alone, but rather “encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.” *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (Powell, J.). Second, it noted that the state’s diversity interest would not be served “by expanding petitioner’s two-track system into a multitrack program with a prescribed number of seats set aside for each identifiable category of applicants.” *Id.* Thus, Justice Powell did not imply that in a plus-factor plan race cannot be assigned a “specific and identifiable” weight. The part of Justice O’Connor’s dissenting opinion in *Metro Broadcasting* that *Gratz* cited stated that policies that “presume that persons think in a manner associated with their race” are constitutionally impermissible. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 618 (1990) (O’Connor, J., dissenting). Unquantified systems that take account of race in making admissions decisions, however, make assumptions about applicants that are based on race just as much as quantified systems. So, while this critique may provide a basis for arguing against racial preferences, it does not provide a basis for distinguishing between quantified and unquantified systems. Furthermore, a system that uses race to make admissions decisions—whether it is quantified or not—does not necessarily embody the notion that “persons think in a manner associated with their race.” Rather, a race-conscious admissions system can embody the notion that in our society, race often affects people’s experiences, which in turn shape how people think. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (“Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”). Therefore, the only citations to precedent that may have been intended to support a no quantification requirement fail to support the position.

171. See Spann, *supra* note 157, at 243–44 (noting that “for any individual applicant, race is either dispositive or it is not,” that this “is true whether race is used holistically in connection with a flexible admissions process, or mechanically in connection with a mathematical score” and that “[t]herefore, the differences that exist between the ways in which race was used in *Grutter* and in *Gratz* are simply irrelevant to any constitutionally protected individual right”).

172. See *infra* notes 215–19 and accompanying text (describing the diversity interest).

173. See *Bakke*, 438 U.S. at 315 (Powell, J.) (stating that the diversity interest “encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element”).

subjective variables, and could use formulas that assign race different weights depending on an applicant's other characteristics, thus ensuring that all characteristics are meaningfully considered in a nuanced fashion. Indeed, any admissions process that is not random will admit applicants according to a pattern that can be modeled by a formula of *some* sort, even if the formula is complicated. As Justice Souter pointed out in his dissent in *Gratz*, it is difficult to see why a university should be prohibited from using a formula that is equivalent to the nonformulaic consideration it would otherwise provide.<sup>174</sup>

The diversity interest does not call for a requirement of unquantified admissions systems, and should not, as such a requirement is bad policy. A "no quantification requirement" will cause universities to adopt admissions plans that are, on average, less transparent.<sup>175</sup> Justices Souter and Ginsburg noted the importance of transparency in their dissents in *Gratz*. When comparing the program at issue in *Gratz* to "race-neutral" percent plans, Justice Souter noted that he preferred plans like the one at issue in *Gratz* because "[e]qual protection cannot become an exercise in which the winners are the ones who hide the ball."<sup>176</sup> Justice Ginsburg agreed, noting that "[i]f honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises."<sup>177</sup>

Ironically, even Justice O'Connor, whose *Grutter* opinion upheld the Law School's decidedly untransparent admissions program, recognized the importance of transparency in her *Gratz* concurrence. In rejecting arguments that the review provided by the committee that considered flagged applications was sufficient to satisfy the individualized consideration

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174. *Gratz*, 539 U.S. at 295 (Souter, J., dissenting) ("Since college admission is not left entirely to inarticulate intuition, it is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race. Justice Powell's plus factors necessarily are assigned some values. The college simply does by a numbered scale what the law school accomplishes in its 'holistic review'; the distinction does not imply that applicants to the undergraduate college are denied individualized consideration or a fair chance to compete on the basis of all the various merits their applications may disclose." (citation omitted)). Robert George makes a similar point when he states that the "question that the remaining Justices, particularly Justice O'Connor, fail to address adequately is: How can it be unconstitutional to do honestly and above board what it is constitutionally permissible to do 'through winks, nods, and disguises'?" George, *supra* note 109, at 1634-35 (quoting *Gratz*, 539 U.S. at 305 (Ginsburg, J., dissenting)).

175. Several scholars have noted that after *Grutter* and *Gratz*, courts sanction admissions systems that are lacking in transparency. See, e.g., Guinier, *supra* note 135, at 194-95 ("[T]he likely immediate consequence of *Grutter* is that trusted admissions officials are now freer to make their decisions without a great deal of transparency."); Post, *supra* note 20, at 74 ("Although transparency is ordinarily prized in the law, the Court in *Grutter* and *Gratz* constructs doctrine that in effect demands obscurity."); Sunstein, *supra* note 109, at 1905-07 (discussing the lack of transparency in systems not using points).

176. *Gratz*, 539 U.S. at 298 (Souter, J., dissenting).

177. *Id.* at 305 (Ginsburg, J., dissenting).

requirement, Justice O'Connor noted disapprovingly that "there is no evidence of how the decisions are actually made—what type of individualized consideration is or is not used."<sup>178</sup> Of course, the same criticism could be leveled against the admissions program of the Law School, and how—or whether—Justice O'Connor can distinguish between the two is unclear.<sup>179</sup>

The lack of transparency is problematic for several reasons.<sup>180</sup> First, it is antidemocratic—it prevents citizens from obtaining the information needed to judge the policy of public institutions.<sup>181</sup> Second, the lack of transparency invites more arbitrary admissions decisions.<sup>182</sup> Under an

178. *Id.* at 280 (O'Connor, J., concurring). Justice O'Connor concluded that the review provided by the committee did not satisfy the requirement of individualized consideration, citing several grounds in addition to the one described in the text. *See id.* (noting two further problems with the committee's review of applications: (1) it was not clear that the committee reviewed a "meaningful percentage" of applications, and (2) qualification for review by the committee was still based in part on the selection index score).

179. In *Grutter*, the Court cited Law School policies that assert that each application is assessed in a manner that provides individualized consideration. *See Grutter v. Bollinger*, 539 U.S. 306, 337–39 (2003); *see also supra* notes 132–33 and accompanying text. But, the *Grutter* Court did not examine any evidence about whether decisions were actually made in accordance with these policies, except to examine some statistics suggesting that race was not always dispositive. *See supra* notes 132–33 and accompanying text. So, citation to policies asserting there was individual review was sufficient for the *Grutter* Court to support the proposition that the system provided individualized review. Yet, in *Gratz*, Justice O'Connor was not satisfied that the admissions review committee provided individualized review, despite the fact that according to the brief for the University of Michigan, this review was perhaps just as individualized: "every member of the [admissions review committee] closely reviews each applicant's entire file; the whole committee discusses the applicant's strengths and weaknesses." Brief for Respondents, *Gratz*, *supra* note 49, at 9.

180. *Cf.* Peter H. Schuck, *Response to the Symposium Participants*, 23 YALE L. & POL'Y REV. 75, 81 (2005) (arguing that affirmative action programs should be transparent because "transparency . . . is designed to discipline the granting of preferences by forcing institutions to be more candid about their value choices and by triggering reputational, market, and other informal mechanisms that make the entity bear more of the costs of adopting preferences instead of shifting them to innocent third parties" and noting that "[c]ustomers, students, alumni, investors, journalists, and other interests to which the entity must be attentive can then hold it accountable, rewarding, punishing, or ignoring the preferences, as they see fit" (internal quotation marks omitted) (quoting PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 196–97 (2003))).

181. *See* Richard Kahlenberg, *The Conservative Victory in Grutter and Gratz*, JURIST LEGAL INTELLIGENCE F., Sept. 5, 2003, <http://jurist.law.pitt.edu/forum/symposium-aa/kahlenberg.php> (characterizing the *Grutter* system as antidemocratic because it permits public universities to make preferential admissions decisions without having to disclose their policies to the public); *see also* David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court's Approval in Gratz and Grutter of Race-Based Decision-Making by Individualized Discretion*, 56 FLA. L. REV. 483, 528 (2004) (noting that "the system struck down in *Gratz* has the advantage of making the level of the preference visible, so that it can be analyzed, critiqued, and reconsidered"); Drew S. Days, III, Fullilove, 96 YALE L.J. 453, 458–459 (1987) (observing that programs not "openly adopted and administered" do not "benefit[] from the scrutiny and testing of means to ends assured by public deliberation").

182. Cass Sunstein has elaborated:

[I]t is unlikely that any particular officer [making admissions decisions under an unquantified program like the one at issue in *Grutter*] will be able to give constant,

unquantified regime, no concrete framework expresses the ways admissions officers should weight competing characteristics, so individual admissions officers will make admissions decisions that are relatively more inconsistent.<sup>183</sup> In addition, schools using a quantified system likely require fewer admissions officers to read applications, and the fewer people involved, the more consistent decisions are likely to be. Third, unquantified systems might invite not just arbitrariness, but also more opportunities to make admissions decisions on invidious grounds.<sup>184</sup> Lani Guinier argues that that obfuscation of admissions criteria can lead to “elite self-replication”<sup>185</sup> because “to the extent that colleges and universities obscure their admissions criteria, the elite are free to choose applicants like themselves and then legitimate those choices with a critical mass of people of color.”<sup>186</sup>

Some have suggested that the Court may view the very act of assigning race a number to be problematic because of the expressive harm that comes with assigning a number to race.<sup>187</sup> Under this view, the act of quantifying

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rather than fluctuating, weight to race. It is even less likely that different officers will use the same system, in the sense that they will allocate the same informal points, or weight, to race. The resulting criteria will likely be highly variable across applicants, and they will not be transparent to anyone. It follows that as compared to [a quantified program], [an unquantified program] sacrifices three important values: predictability, transparency, and equal treatment.

Sunstein, *supra* note 109, at 1905; *see also* Leonard M. Baynes, *Michigan's Minority Point System "Compensated" Minority Students for Inferior Public Education*, JURIST LEGAL INTELLIGENCE F., Sept. 5, 2003, <http://jurist.law.pitt.edu/forum/symposium-aa/baynes.php> (observing that “[r]elying solely on individualized determinations to implement affirmative action programs can cause” results that are “arbitrary” because an “individualized determination is a standardless process”).

183. Indeed, the University of Michigan explained that one of the purposes of the point system was to make decisions consistent and fair:

The volume of applications requires procedures and routines to promote fairness and consistency, while preserving counselors' ability to exercise judgment. A single, unitary set of guidelines, which is reviewed annually and altered periodically, governs the admissions process. The aim of the guidelines is to “blend the consistency of a formula with the flexibility of a review that is ultimately a matter of human judgment.”

Brief for Respondents, *Gratz*, *supra* note 49, at 6 (citation and footnotes omitted). And, university admissions officers have reported that quantifying characteristics helps produce more consistent results. *See* Guinier, *supra* note 135, at 195 n.318.

184. *See* Crump, *supra* note 181, at 528; *see also* Jessica Bulman-Pozen, Note, *Grutter at Work: A Title VII Critique of Constitutional Affirmative Action*, 115 YALE L.J. 1408, 1420 (2006) (“*Grutter's* conception of narrow tailoring depends on the same unchecked subjective decisionmaking that, according to Title VII doctrine, invites bias.”).

185. Guinier, *supra* note 135, at 196.

186. *Id.* at 196 n.320.

187. For example, Robert Post states that the *Gratz* Court may be prohibiting point systems because “the twenty-point bonus sends a message to applicants and to the world that being a member of a racial group is worth a certain, named amount, and it therefore invites members of that group to feel entitled to that amount.” Post, *supra* note 20, at 74; *see also* Sunstein, *supra* note 109, at 1906 (describing the argument that unquantified systems impose a lesser expressive harm than quantified systems). *See generally* Primus, *supra* note 101, at 566–67 (describing literature discussing expressive harm).

may itself be socially divisive.<sup>188</sup> If this is the rationale of the Court, it is not persuasive. After all, the only theory under which an unquantified program produces less social divisiveness than a quantified program is the theory that the citizenry is less likely to learn about the university's racial preferences under an unquantified system.<sup>189</sup> This theory is not justifiable because it also limits courts' ability to make a judgment on the merits—without some kind of ex ante quantification of costs and benefits, it is more difficult for courts to assess whether racial preferences are excessive.<sup>190</sup>

This section has argued that narrow tailoring doctrine should not subject admissions programs that quantify to stricter scrutiny than admissions programs that do not quantify. Imposing stricter scrutiny on quantified admissions programs is neither supported by precedent nor theoretically defensible. Rather, narrow tailoring doctrine should subject both types of programs to the usual narrow tailoring requirements, including the minimum necessary preference and differentiation requirements.

2. *Excessiveness Inquiry Mistake*.—The *Grutter* and *Gratz* Courts also introduced another problematic change into the narrow tailoring inquiry: to the extent that the *Grutter* and *Gratz* Courts focused on weight through the use of the four tests described in section IV(B)(3), the weight inquiry was not an inquiry into whether racial preferences were the minimum necessary. Indeed, to engage in a minimum necessary inquiry, the Court would have needed to engage in a two-stage inquiry, first quantifying the constitutionally relevant costs and benefits and then determining whether the benefits outweighed the costs, both overall and at the margin.<sup>191</sup>

The Court completely failed at the second stage in its treatment of all four measures of weight because for all four measures, the Court lacked an underlying theory for determining whether a given weight was excessive. Instead, the Court merely asserted that the amount of weight given to race as measured by each of the four tests was too much at the College and not too

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188. Cf. Ayres, *supra* note 21, at 1793–800 (describing—and refuting—arguments that race-neutral means are less socially divisive than race-conscious means).

189. Cf. *id.* at 1793–96 (criticizing the argument that race-neutral means are less socially divisive than race-conscious means because the citizenry is less likely to be aware of the racial motivation of the former); cf. also Sunstein, *supra* note 109, at 1906 (persuasively refuting the argument that quantified affirmative programs impose a stigma on minorities while unquantified programs do not).

190. Cf. Ayres, *supra* note 21, at 1795–96 (noting that the doctrine requiring consideration of race-neutral alternatives may force legislatures to be less open about their use of race, shielding not only the citizenry, but also the courts from information about when legislatures are acting on the basis of race). Of course, if the Court prohibits only ex ante quantification (e.g., points systems) but not ex post quantification (e.g., regressions that capture the weight assigned to race), then we need not worry that the Court is being shielded from information about the amount of racial preferences. We do, however, still need to be worried that the citizenry does not have access to this information.

191. See *infra* subpart V(B).

much at the Law School, without explaining how that determination was—and should be—made.

At the first stage, moreover, the Court made only limited progress towards success. As the next four subsections will demonstrate, only one of the Court's four tests for quantifying the costs of affirmative action measured a constitutionally relevant cost.<sup>192</sup> This test was not sufficient, however, because it measured the burden of affirmative action along only the means dimension. Furthermore, the Court made no attempt at quantifying the benefits of affirmative action. The Court, therefore, also failed at the first stage of quantifying the constitutionally relevant costs and benefits.

*a. Gratz's First Means Measure.*—*Gratz* suggested that a point system that assigns too many points to race relative to the number of points assigned to other characteristics may not satisfy the individualized consideration requirement.<sup>193</sup> We agree with the Court that this measure captures part of the burden felt by nonpreferred applicants along the means dimension. Indeed, this measure is similar to our GPA enhancement measure—it attempts to determine the amount of boost applicants receive on account of their race by comparing that amount to the amount of boost they receive on account of other characteristics.

While we support the Court's use of this measure, this measure alone is not enough because it captures cost along only the means dimension and not also along the outcome dimension. In addition, the Court's use of this measure was flawed because it was not rooted in a theory for determining when the weight assigned to race is excessive. Instead, the Court should have used this measure (or another measure of the means dimension) along with a measure of costs along the outcome dimension and a measure of the benefits to determine whether the benefits outweighed the costs in both an overall and a marginal sense.

*b. Gratz's Second Means Measure.*—*Gratz* also suggested that a point system that assigns too many points to race relative to the total number of points needed for admission may not satisfy the individualized consideration requirement.<sup>194</sup> Unlike the first means measure, this measure does not capture the burden of affirmative action programs. Indeed, this measure is meaningless because universities can manipulate point systems so that functionally equivalent admissions systems have different ratios of

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192. The test that measured a constitutionally relevant burden was Chief Justice Rehnquist's *Gratz* test, which compared the number of points assigned to race to the number of points assigned to other characteristics. See *infra* subsection V(A)(2)(a) (arguing that while Rehnquist's test in *Gratz* captures the means dimension, it is inadequate because it does not measure outcomes and fails to suggest a theory that determines how much weight assigned to race is excessive).

193. See *Gratz v. Bollinger*, 539 U.S. 244, 273 (2003); see also *supra* subsection IV(B)(3)(a).

194. *Gratz*, 539 U.S. at 270; see also *supra* subsection IV(B)(3)(a).



points assigned to race to points needed to earn admission. For example, imagine that the College changed its admissions system such that instead of being able to earn up to 150 points, applicants could earn up to 1,050 points, and instead of needing a score of 100 points to earn admission to the College, applicants needed a score of 1,000 points to earn admission.<sup>195</sup> Suppose that applicants earn 900 points simply for completing the application, and they earn the other 150 points in the same way they earn points under the system at issue in *Gratz*. Such a system would be functionally equivalent to the system at issue in *Gratz*. Unlike the system at issue in *Gratz*, however, where race accounted for 20/100, or 20%, of the points needed for admission, under the hypothetical system, race would account for only 20/1000, or 2%, of the points needed for admission. This example demonstrates that the ratio of the points assigned to race to the points needed to earn admission does not provide a measure of the weight universities assign to race and is therefore inadequate.

*c. Gratz's Outcome Measure.*—*Gratz* argued that at least part of the reason the College's admissions program was not narrowly tailored was that it "ha[d] the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant."<sup>196</sup> Subpart IV(C) argued that the Court actually misapplied its own test in *Gratz*. This subsection puts that issue aside and argues that the test itself is not a good measure of whether an admissions program places too much weight on race.

First, an aside is in order on this test's lack of basis in precedent. While Chief Justice Rehnquist cited Justice Powell's *Bakke* opinion for support for this measure, Chief Justice Rehnquist misread Justice Powell's opinion. The portion of Justice Powell's opinion that Chief Justice Rehnquist quoted is as follows:

The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism.<sup>197</sup>

When Justice Powell said race should not necessarily be "decisive" for a "particular black applicant," he meant that a minority applicant should not be admitted ahead of a nonminority applicant who can, notwithstanding his race, contribute more to the diversity of the school.<sup>198</sup> Note that when Justice

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195. For a description of the point values assigned to characteristics under the system at issue in *Gratz*, see *supra* notes 92–93 and accompanying text.

196. *Gratz*, 539 U.S. at 272 (omission in original) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (Powell, J.)).

197. *Bakke*, 438 U.S. at 317 (Powell, J.).

198. See *supra* note 35 and accompanying text.

Powell talked about race not being “decisive” for a given candidate, he talked about it in relative terms, as demonstrated by the fact that he followed the word “decisive” with the words “when compared . . . with.”

In contrast, when Chief Justice Rehnquist cited this passage of Justice Powell’s *Bakke* opinion, he took the words out of context, stripping them of their relativistic meaning. For Justice Powell, the fact that race was decisive for “virtually every minimally qualified underrepresented minority applicant”<sup>199</sup> would be troubling only if by admitting those candidates, other nonminority candidates were rejected who would have been better able to contribute to the diversity of the campus notwithstanding their race. So, as far as the precedent of Justice Powell’s opinion in *Bakke* is concerned, it is irrelevant what fraction of qualified minority applicants at universities are but-for admits; what is relevant is the relative diversity offerings of those minority applicants accepted and those nonminority applicants rejected.

Chief Justice Rehnquist’s standard is therefore not rooted in precedent, as he suggested. Moreover, this standard for measuring the weight given to race does not capture the constitutionally relevant costs of affirmative action. Examining the percentage of qualified minority applicants for whom race is decisive cannot help determine the extent to which an affirmative action program imposes costs on nonpreferred racial groups because it does not examine the impact of such a program on nonpreferred racial groups. Indeed, if there are few qualified minority applicants, but race is decisive for most or all of them, then this measure will indicate that too much weight is being given to race when, in fact, the burden on nonpreferred applicants is slight. Because this measure does not capture the burden of affirmative action on nonpreferred applicants, it is not a good measure to use in the constitutional calculus.

*d. Grutter’s Outcome Measure.*—*Grutter* noted that the Law School did not give race too much weight because it “frequently accept[ed] nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who [were] rejected.”<sup>200</sup> This “test” does not provide a good measure of the constitutionally relevant costs of affirmative action.

The principal reason that this test does not capture the costs of affirmative action that we care about is that its contours are not well defined. First, it is unclear what the Court’s definition of “frequently” is. The Court cited to the brief of the University of Michigan for the proposition that the Law School “frequently” admitted nonminorities with lower academic qualifications than rejected minorities,<sup>201</sup> and the University’s brief backed

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199. *Gratz*, 539 U.S. at 272.

200. *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003).

201. *Id.*

up this assertion with the following data: “[s]ixty-nine minority applicants were rejected between 1995 and 2000 with at least a 3.5 GPA and a 159 or higher on the LSAT, while 85 white and Asian American applicants were accepted from the same or *lower* cells.”<sup>202</sup> This averages to a yearly rate of 11.5 minority applicants who were rejected with at least a 3.5 GPA and a 159 LSAT and 14.2 white or Asian American applicants who were accepted from the same or lower cells.<sup>203</sup> It is completely unclear what standards the Court used to determine that this was a phenomenon that occurred “frequently.”<sup>204</sup> Second, the contours of the test are ill-defined in that it focuses on a “reference cell” (in this case, the cell corresponding to a GPA range starting at 3.5 and an LSAT range starting at 159), but it does not explain how this reference cell was selected. Does an admissions program pass the test as long as any reference cell can be found that demonstrates preferred applicants in that cell and higher were “frequently” rejected in favor of nonpreferred applicants in lower cells?<sup>205</sup>

The contours of this test are difficult to identify, and for that reason it is not a good measure of the costs of affirmative action, but even if the test did not suffer from these problems, it would not provide a good measure of the costs of affirmative action along the outcome dimension because it does not gauge the *burden* felt by nonpreferred racial groups. Instead, it focuses on cases where nonpreferred applicants did *not* experience a burden. But because this test does not provide a measure of the total number of applicants for whom race was not decisive, it does not help in determining the number

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202. Brief for Respondents, *Grutter*, *supra* note 88, at 10.

203. As a reference point, each year the Law School made approximately 1,300 offers of admission and received over 3,500 applications. *Id.* at 2 n.3.

204. Indeed, perhaps for this reason, the one circuit court that has applied this “test” ignored the word “frequently” altogether, noting that the law school whose admissions program was at issue “also accepted nonminority applicants with grades and test scores lower than underrepresented minority applicants who were rejected, thus showing that the Law School ‘seriously weigh[ed] many other diversity factors besides race that [could] make a real and dispositive difference.’” *Smith v. Univ. of Wash.*, 392 F.3d 367, 376 (9th Cir. 2004) (alterations in original) (quoting *Grutter*, 539 U.S. at 338). The *Smith* test is, of course, entirely too lenient, as an admissions program would pass muster under that test as long as at least two nonminority applicants were accepted with grades and test scores that were lower than two minority applicants who were rejected.

205. If this is the case, then we might be able to demonstrate that the College also “frequently” admitted nonpreferred applicants over preferred applicants with higher scores who were rejected. Indeed, our data analysis shows that if we divide College applicants into two groups, the first of which is applicants with a GPA of 2.6 or higher and an SAT of 900 or higher, and the second of which is applicants with either a GPA of less than 2.6 or an SAT of less than 900, we find that between 1995 and 1999, 595 nonpreferred applicants with the lower credentials in the latter group were accepted, while 165 preferred minority applicants with the higher credentials in the former group were rejected. So, on average, each year 119 nonpreferred applicants with the lower credentials were accepted, while 33 preferred minority applicants with the higher credentials were rejected. As reference points, for the years between 1995 and 1999, each year the university admitted an average of 10,011 applicants and received an average of 14,230 applications. Whether this reference cell is an appropriate one to use for the test and whether these numbers rise to the level of “frequently” is, of course, entirely unclear because the Court did not elaborate on this test.

of applicants for whom race was decisive, the relevant inquiry on the outcome dimension. Thus, this test fails to capture the costs of affirmative action on the outcome dimension.

*Grutter* came tantalizingly close to factoring into the constitutional calculus a constitutionally relevant measure of weight—the percentage of enrollees who were but-for admits. In its section describing the facts and the district court opinion, *Grutter* noted that the University of Michigan's expert "predicted that if race were not considered" at the Law School, "underrepresented minority students would have constituted 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent."<sup>206</sup> Of course, this statistic can be used to calculate weight on the outcome dimension—the statistic indicates that the percentage of enrollees who were but-for admits was 10.5%. Unfortunately, despite the fact that the Court had easy access to this statistic, the Court failed to use it in its constitutional calculus.<sup>207</sup>

This section has argued that the *Grutter* and *Gratz* Courts' treatment of the weight inquiry departed from the pre-*Grutter* and *Gratz* narrow tailoring jurisprudence in that it abandoned the minimum necessary preference inquiry. To the extent that *Grutter* and *Gratz* did pay attention to weight, the four ways in which the opinions measured weight all suffer from the flaw that they are not rooted in a theory for determining whether a given weight is excessive. Furthermore, three of the four methods for measuring weight do not measure a constitutionally relevant weight. And, while one of the methods measures a constitutionally relevant weight, it measures that weight along only the means dimension and not also along the outcome dimension. In sum, then, not only has the Court failed to come up with meaningful measures of the weight given to race along both the means and outcome dimensions, but also the Court has made no progress in coming up with a way for determining whether a given weight is excessive.

The Court should not have replaced the minimum necessary preference inquiry with this new individualized consideration inquiry. Instead, it should have inquired into whether racial preferences were the minimum necessary. Subpart V(B) outlines what such an inquiry should look like.

#### *B. What the Narrow Tailoring Inquiry Should Look Like*

Subpart V(A) argued that the Court took a wrong turn in *Grutter* and *Gratz* by abandoning the minimum necessary preference requirement and instead adopting a "Don't Tell, Don't Ask" individualization requirement. It

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206. *Grutter*, 539 U.S. at 320. The Court recited this statistic in the section of the opinion describing the facts and the district court opinion.

207. The University of Michigan's expert statistician computed similar statistics for other years at the Law School and the College, and the Court had access to these statistics. See *supra* notes 61–72 and accompanying text. Despite its access to such statistics, however, the Court showed no interest in factoring such statistics into its constitutional calculus.

argued that this new individualization requirement is problematic for two reasons. First, admissions programs that quantify should not be subject to stricter scrutiny than those that do not. Second, the Court's weight inquiry should examine whether the racial preferences are the minimum necessary to achieve the interest in diversity instead of examining whether preferences are excessive with no theory for what constitutes excessive weight and how to measure it.

What should the narrow tailoring inquiry have looked like, then? No program should pass strict scrutiny without careful consideration of whether the racial preferences are the minimum necessary, including consideration of whether preferences are sufficiently differentiated. Section 1 describes what the minimum necessary preference inquiry should look like. In order to engage in this inquiry, courts must examine data on the costs and benefits of admissions programs. Section 2 argues that because of the need for data on costs and benefits, narrow tailoring should *require* that universities quantify—at least *ex post*—the costs and benefits of their affirmative action programs.

Thus, like the *Grutter* and *Gratz* Courts, we embrace paying attention to the quantification, differentiation, and weight dimensions of racial preferences. But rather than *proscribing* quantification, we would *require* *ex post* quantification, and we would further require that courts find that racial preferences are the minimum necessary to achieve the diversity interest, including that they are differentiated when necessary to minimize racial preferences.

*1. Minimum Necessary Preferences.*—In order to determine whether a preference is the minimum necessary, courts must conduct two kinds of cost–benefit analysis. First, they must engage in an overall cost–benefit analysis and ask whether the overall benefits justify the overall costs. After all, if the benefits do not outweigh the costs, then the program is imposing an undue burden on nonpreferred applicants. Of course, this inquiry into whether the costs outweigh the benefits is inherently a normative one, turning on judgments about what “price” to put on the benefits of diversity. Nonetheless, this is the sort of inquiry narrow tailoring doctrine calls for to determine if a racial preference is the minimum necessary.

Second, courts should also engage in a marginal cost–benefit analysis and ask whether the marginal benefits justify the marginal costs of assigning race the given weight. After all, if there are no marginal benefits, then the university could achieve the same benefits by assigning a smaller weight to race, and so the weight assigned to race is not the minimum necessary. And, if the marginal benefits do not outweigh the marginal costs, then—just as is

the case in analyzing overall benefits and costs—the program is imposing an undue burden on nonpreferred applicants.<sup>208</sup>

In order to conduct these two cost–benefit analyses, of course, we must be able to quantify the costs and benefits in some way. As for the costs, while the *Grutter* and *Gratz* Courts offered several tests for measuring the weight universities place on race, we argued in subpart V(A) that those tests do not adequately measure the constitutionally relevant cost—the burden on nonpreferred applicants. In Part III, we argued that the best way to measure these costs is to measure the costs along the means and outcome dimensions.<sup>209</sup> One adjustment should be made to the measurement of the outcome dimension, however. Rather than looking at the percentage of *admits* who are but-for admits, courts should probably examine the percentage of *enrollees* who are but-for admits.<sup>210</sup> This statistic better captures the actual cost experienced by nonpreferred applicants because it measures the extent to which seats in the entering class were unavailable due to affirmative action. We did not compute this statistic in Part III because data on “yield”—the percentage of admits who accept offers of admission—were not available to us. Instead, as a proxy for the percentage of enrollees who were but-for admits, we calculated the percentage of admits who were but-for admits.<sup>211</sup>

Thus, courts should consider costs along the outcome and means dimensions. For the outcome dimension, courts should examine the percentage of enrollees who are but-for admits, and for the means dimension, they should examine the effective credit that minorities receive on account of their race, measured in GPA units, test score units, or other similar units.<sup>212</sup>

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208. The First Circuit has made progress in examining marginal costs and benefits. See *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 15, 21 (1st Cir. 2005) (en banc) (finding it significant that the district court concluded that “the benefits of intergroup contact continue to accrue as a school becomes increasingly diverse”), *cert. denied*, 126 S. Ct. 798 (2005).

209. Courts may need to aggregate the outcome and means dimensions. We describe one possible way to aggregate these dimensions. See *supra* note 43.

210. If the yield—the percentage of admits who accept offers of admission—is the same for preferred minorities and nonpreferred applicants, then the percentage of admits who are but-for admits will be the same as the percentage of enrollees who are but-for admits. If, however, the yield is different for preferred minorities and nonpreferred applicants, then the two statistics will be different. See *supra* note 44.

211. Of course, it may be that the number of but-for admits is also independently significant. Indeed, if two admissions programs have the same percentage of enrollees who are but-for admits but different numbers of admits who are but-for admits, the program with the larger percentage of admits who are but-for admits may be more burdensome than the one with the smaller percentage.

212. In some contexts other than higher education, it makes sense to measure costs only along the outcome dimension. For example, when considering a secondary school assignment policy that takes account of race but does not take account of qualifications of the students, there is no need to examine whether there is a differential in qualifications along the means dimension, as qualifications are irrelevant to the admissions decision. Relatedly, the cost of each unit along the outcome dimension will vary depending on the context. See *Comfort*, 418 F.3d at 20 (“Every child . . . is guaranteed a seat in a district where, as the parties have stipulated, every school provides a comparable education. The denial of a transfer under the Plan is therefore markedly

Note that measuring the marginal costs of affirmative action is equivalent to examining the qualification gap between the least qualified<sup>213</sup> but-for enrollees and the best qualified nonpreferred rejectees who would have enrolled if accepted.<sup>214</sup>

The benefits that are constitutionally relevant are those benefits that the Court has stated make up the diversity interest. Justice O'Connor's majority opinion in *Grutter* articulated three benefits of diversity.<sup>215</sup> First, she noted the impact in the classroom: "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the

different from the denial of a spot at a unique or selective educational institution."). Finally, the cost calculation should probably take into account not only the extent to which the affirmative action program at issue burdens individuals, but also the extent to which the program burdens each race. All other things being equal, it may make sense that an affirmative action program imposing an equal burden on the races imposes lower net costs than an affirmative action program imposing an unequal burden on the races. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, No. 1, 426 F.3d 1162, 1192 (9th Cir. 2005) (en banc) (finding it significant that "the [racial] tiebreaker does not uniformly benefit any race or group of individuals to the detriment of another"), *cert. granted*, 126 S. Ct. 2351 (2006).

213. When we use the word "qualified," we mean qualified in a holistic sense, taking into consideration all qualifications, including academic and nonacademic qualifications (but not race).

214. Cf. *supra* note 74 (discussing BOWEN & BOK, *supra* note 42 and Wightman, *supra* note 74). This analysis assumes that the marginal costs along the outcome dimension do not depend on the percentage of admits who are but-for admits, an assumption that may not be accurate. For example, the costs of increasing the percentage of but-for admits from 1% to 2% might be lower than the costs of increasing the percentage of but-for admits from 21% to 22%. To the extent that the marginal costs vary depending on the percentage of admits who are but-for admits, these varying marginal costs on the outcome dimension should be considered as well.

215. Lani Guinier characterizes Justice O'Connor's opinion as emphasizing three elements of the diversity interest, the first of which was endorsed by Justice Powell's opinion in *Bakke*, and the second two of which are new. These three elements are as follows: "diversity is pedagogical and dialogic; it helps challenge stereotypes; and it helps legitimate the democratic mission of higher education." Guinier, *supra* note 135, at 176 (citations omitted). The Ninth Circuit has characterized *Grutter* as articulating two elements of the diversity interest, combining our first and second elements into a single element. See *Smith v. Univ. of Wash.*, 392 F.3d 367, 373 (9th Cir. 2004) (characterizing the two primary benefits of diversity articulated in *Grutter* as the enrichment of the "educational experience itself" and ensuring the effective participation of all racial and ethnic groups in the nation's civic life).

Several commentators have analyzed the ways Justice O'Connor's diversity interest differs in scope from Justice Powell's. See Guinier, *supra* note 135, at 173-76; K.G. Jan Pillai, *The Defacing Reconstruction of Powellian Diversity*, 31 T. MARSHALL L. REV. 1, 40 (2005) (arguing that "Justice O'Connor chose to expand the Powellian concept of diversity specifically to accommodate the integrative and remedial components of all [extant] race-conscious admissions policies"); Post, *supra* note 20, at 59-61 (comparing *Grutter*'s focus on, inter alia, ensuring the participation of all racial and ethnic groups in the nation's civic life and leadership with Justice Powell's focus in *Bakke* on the educational benefits of diversity); Siegel, *supra* note 108, at 1538 (noting that "*Grutter* does not simply incorporate Justice Powell's diversity rationale for race-conscious admissions practices into the fabric of constitutional law" but rather that "*Grutter* transforms the diversity rationale in the course of adopting it, expanding the concept of diversity so that it explicitly embraces antisubordination values"); Rosman, *supra* note 120 (comparing the diversity rationales in *Grutter* and *Bakke*); see also Primus, *supra* note 101, at 560 (characterizing the diversity interest articulated in *Grutter* as being "in part about mitigating the effects that existing racial hierarchies have on the composition of national leadership cadres" and not just about diversity's educational benefits).

greatest possible variety of backgrounds.”<sup>216</sup> Second, the *Grutter* Court stated that racial diversity “promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’”<sup>217</sup> Third, the Court viewed racial diversity as helping both to ensure that higher education is “accessible to all individuals regardless of race or ethnicity”<sup>218</sup> and also to make the “path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”<sup>219</sup> So, courts should determine the extent to which the program at issue achieves these three benefits both overall and at the margin.<sup>220</sup>

Once the court has before it quantifications of the overall and marginal costs and benefits, it can conduct the required cost–benefit calculus.<sup>221</sup> Of

216. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (quoting Petition for Writ of Certiorari app. at 246a, 244a, *Grutter*, 539 U.S. 306 (No. 02-241)).

217. *Id.* (alteration in original) (quoting Petition for Writ of Certiorari app. at 246a, *Grutter*, 539 U.S. 306 (No. 02-241)).

218. *Id.* at 331.

219. *Id.* at 332.

220. Note that the marginal benefits as a function of the number of minority enrollees may not be—and likely is not—a constant function. Many claim that in order to enjoy many of the benefits of a diverse student body, schools must enroll significant numbers of minority students. *See, e.g.*, Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 360–61 (2002) (explaining that enrolling “significant numbers of students of various groups” is necessary to enable students to “perceive differences both within groups and between groups”); *cf.* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978) (Powell, J.) (noting the “necessity of including more than a token number of black students”). If this is so, then the marginal benefits of admitting preferred minority applicants are smaller when the number of preferred minority students who will be enrolled is less than the number needed to form a “critical mass,” and the marginal benefits then jump suddenly when the number of preferred minority students who will be enrolled reaches the “critical mass number.” *Cf.* Kathryn R.L. Rand & Steven Andrew Light, *Teaching Race Without a Critical Mass: Reflections on Affirmative Action and the Diversity Rationale*, 54 J. LEGAL EDUC. 316, 332–34 (2004) (noting that under a cost–benefit analysis it may be more difficult to uphold an affirmative action program when a university is unable to enroll a critical mass of minority applicants). Whether universities have an interest in enrolling more than a critical mass of minority students should turn on the marginal benefits (and costs) of enrolling those students. *Cf.* *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 20–22 (1st Cir. 2005) (en banc) (upholding an affirmative action program that sought to enroll more than a critical mass of minorities because the evidence suggested that marginal benefits accrued when more than a critical mass of minority applicants was enrolled, but not analyzing the marginal costs), *cert. denied*, 126 S. Ct. 798 (2005).

221. Interestingly, it follows from this analysis that universities can assign more weight to race under Justice O’Connor’s diversity rationale than they could under Justice Powell’s diversity rationale. This is because Justice Powell focused only on the benefits of diversity that were intrinsic to the university experience and were not race-specific. In his view, a diverse student body helps create an “atmosphere . . . conducive to speculation, experiment and creation,” and promotes the “robust exchange of ideas.” *Bakke*, 438 U.S. at 312 (Powell, J.) (internal quotation marks omitted). In contrast, in *Grutter*, Justice O’Connor focused not only on benefits of holistic diversity that were intrinsic to the university setting, but also on race-specific benefits enjoyed both on and off campus. *See supra* text accompanying notes 215–19. In particular, the *Grutter* Court stated that racial diversity “promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races”; helps ensure that higher education is “accessible to all individuals regardless of race or ethnicity”; and also makes the “path to leadership . . . visibly open to talented and qualified individuals of every race and ethnicity.”



course, the costs and benefits are not measured in the same units. But this does not mean they are necessarily incommensurable. The law frequently trades off radically different values, such as lives and dollars or disparate impacts and business justifications. We recognize that the cost and benefit quanta are difficult to compare, but we see two advantages to attempting to compare these incommensurable values anyway. First, simply making public the information about the benefits and costs of affirmative action programs is valuable, performing an educative function.

Second, although it will often be difficult to make sense of these incommensurable values, sometimes we will be able to make conclusions about the constitutionality of a program by comparing the values. In particular, if it turns out that there are no marginal benefits to a particular racial preference, then it is clear that the preference is not the minimum necessary and is therefore unconstitutional. For example, if an increase in the number of but-for admits does not result in an increase in the quality of classroom discussions, amount of cross-racial understanding, or sense in which universities are open to students of all races, then that increase in the number of but-for admits is not justified.

Even if the marginal benefits are nonzero, courts can in case-by-case fashion develop a jurisprudence of comparison. For example, if admitting two percent of an entering class on the basis of their race improves cross-racial understanding by a significant amount, then courts could openly debate whether these benefits are worth the costs. So, to pass constitutional muster, we would require that a court find that an admissions program's overall benefits justify its overall costs, and that its marginal benefits justify its marginal costs.<sup>222</sup>

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*Grutter*, 539 U.S. at 330–32 (internal quotation marks omitted). Unlike the benefits of diversity described by Justice Powell, these benefits are particular to racial diversity, and the latter benefits extend beyond the university campus. Thus, when conducting marginal cost–benefit analysis, the marginal benefit to admitting a preferred minority applicant under Justice O'Connor's diversity rationale is greater than or equal to the marginal benefit to admitting a minority applicant under Justice Powell's diversity rationale because there are more marginal benefits to admitting a minority applicant under Justice O'Connor's rationale. Cf. Post, *supra* note 20, at 62 (noting the “far-reaching implications” of the *Grutter* diversity rationale and finding it to be in conflict both with the Court's assertion that “outright racial balancing” would be “patently unconstitutional” and also with the individualized consideration requirement (quoting *Grutter*, 539 U.S. at 330)); see also *supra* note 215.

222. Two post-*Grutter* and *Gratz* circuit court opinions addressing affirmative action programs in contexts other than higher education have made some progress towards engaging in this cost–benefit inquiry. In *Parents Involved in Community Schools v. Seattle School District, No. 1*, the Ninth Circuit considered the constitutionality of a secondary school assignment plan. 426 F.3d 1162 (9th Cir. 2005) (en banc), cert. granted, 126 S. Ct. 2351 (2006). The court computed the percentage of admits who were but-for admits, *id.* at 1170–71, and thus computed all relevant costs, see *supra* note 212. The court did not, however, go on to quantify the benefits and conduct cost–benefit analysis. It did, though, attempt to justify the particular amount of weight placed on race by noting the similar weight assigned to race in desegregation plans. See *Parents Involved*, 426 F.3d at 1186 (noting that, like the plan at issue in the case, most desegregation programs had a goal of matching the surrounding community within fifteen percentage points). In *Petit v. City of Chicago*,

Section IV(B)(2) noted that the *Grutter* and *Gratz* opinions suggested another inquiry that might be relevant to the individualization inquiry—that admissions programs should provide differentiated preferences, assigning race different weights depending on an applicant's mix of characteristics. We agree that courts should pay attention to differentiation, and we think that the differentiation inquiry should grow out of the minimum necessary preference inquiry. Indeed, the minimum necessary preference principle should mean that a school does not give racial preferences to minorities who are not likely to generate benefits. For example, if, as intimated in *Gratz*, it is shown that upper class African Americans contribute less to the benefits of diversity than lower class African Americans, then the preferences for upper class African Americans should be commensurably less.<sup>223</sup>

2. *Quantified Preferences.*—In order for a court to conduct a minimum necessary preference inquiry, it must have available to it data on the overall and marginal costs and benefits of the affirmative action program at issue. We think that universities should be *required* to produce such data in order for their admissions programs to pass strict scrutiny. After all, courts cannot conduct the minimum necessary preference and differentiation inquiries without these data, and universities should be considering these data as they design their programs, so it makes sense to place this burden on them. Of course, parties challenging university policies would also be free to produce their own data, and the adversarial system can sort out which data to credit.

Thus, we would impose a “quantification” requirement of sorts. The quantification we would require, however, is not *ex ante* quantification—that is, we would not require that universities use point systems or other quantified means to admit applicants (nor would we prohibit them from using

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the Seventh Circuit considered the constitutionality of an affirmative action program that gave minorities a boost on a test used to determine which employees to promote. 352 F.3d 1111 (7th Cir. 2003). The opinion discussed data from which the number of but-for promoted employees could be calculated and thus came close to measuring the weight assigned to race along the outcome dimension. *See id.* at 1116–17 (stating the number of minorities who would have been promoted in the absence of the affirmative action program and the number of minorities actually promoted). In addition, the opinion cited data that attempted to measure the test score boost minority applicants received and thus came close to measuring the weight assigned to race along the means dimension. *See id.* at 1117 (comparing the pre-boost and post-boost test scores for the least-qualified white, African American, and Hispanic applicants in the top 500 applicants). The opinion did not, however, attempt to quantify the benefits, and it did not compare the costs and the benefits. It may be that the opinion did not do so because the test score adjustment scheme at issue was justified, in part, on the ground that it was necessary to compensate for a discriminatory test that unfairly favored whites. *See id.* (“[S]tandardizing the scores can be seen not as an arbitrary advantage given to the minority officers, but rather as eliminating an advantage the white officers had on the test.”).

223. Moreover, courts should examine the extent to which preferences are differentiated *in fact* by looking at actual practices, not by examining only university policies that merely assert that preferences are differentiated. The extreme deference that Justice O'Connor showed to state officials is deeply inconsistent with the whole idea of strict scrutiny as an attempt to smoke out unjustified governmental racial preferences. That is, we would look at *actual* differentiation, not *potential* differentiation.

such systems). Rather, the quantification we would require would at least be ex post and ongoing—that is, we would require that universities periodically quantify the overall and marginal costs and benefits of their affirmative action programs, including marginal costs and benefits of differentiation. Under our quantification requirement, if a university's affirmative action program were challenged and the university did not come forward with data about its costs and benefits, we would find that the program is per se not narrowly tailored because it is impossible to conduct the minimum necessary preference and differentiation inquiries. If, on the other hand, a university did come forward with data about the relevant costs and benefits, courts could subject the program to the minimum necessary preference inquiry, including an inquiry into whether the program is sufficiently differentiated.

For the costs, we would require universities to compute the overall and marginal costs on both the outcome and means dimensions. To figure out the overall costs, universities would need to calculate the percentage of enrollees who were but-for admits and the effective credit those but-for admits received.<sup>224</sup> To compute the marginal costs, universities would need to estimate the quality differential between the least qualified but-for enrollees and the best qualified rejected applicants who would have been admitted and would have enrolled in the absence of affirmative action.<sup>225</sup> For the benefits, we would require universities to quantify the extent to which the admissions program achieves the three benefits of the diversity rationale described in the *Grutter* opinion, both overall and at the margin: enriched classroom discussions and campus atmosphere, improved cross-racial understanding, and an increased sense that universities are open to individuals of all races.<sup>226</sup>

## VI. Conclusion

The affirmative action program the Supreme Court upheld in *Grutter* appears to have granted larger racial preferences than the program the Court struck down in *Gratz*. Because a minimum necessary preference requirement was an important part of the narrow tailoring requirement before *Grutter* and *Gratz*, this result is at the very least surprising. The Law School should have been required to show something more than the College to justify these larger preferences. But, instead of demanding more, the Supreme Court demanded less of the Law School.

Was the Court wrong to uphold the *Grutter* system and strike down the *Gratz* system? We simply do not have enough information to determine whether the Court got the outcomes wrong in *Grutter* and *Gratz*. And that is precisely one of the problems this Article has argued that courts ought to

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224. See *supra* text accompanying note 212.

225. See *supra* notes 213–14 and accompanying text.

226. For a description of the *Grutter* diversity rationale, see *supra* notes 215–19 and accompanying text.

correct. Courts should require defendants to provide the information that is necessary to resolve this question—that is, courts should require that defendants quantify the overall and marginal costs and benefits of granting racial preferences. Only then can courts engage in inquiries that determine whether racial preferences are truly narrowly tailored to the diversity interest.

Courts should return to the minimum necessary preference requirement. They should examine the overall and marginal costs and benefits of racial preferences to determine if the university is using the smallest possible preference to achieve the objectives of the diversity interest. In addition, this Article has embraced the Court's articulation of the differentiation principle, but we believe courts should determine whether racial preferences are sufficiently differentiated by examining the actual costs and benefits to differentiation.

Thus, like *Grutter* and *Gratz*, this Article has advocated that the narrow tailoring inquiry should involve examination of three dimensions of racial preferences: quantification, differentiation, and size. Also like *Grutter* and *Gratz*, this Article has argued that quantification should trigger different levels of review of differentiation and size. Unlike *Grutter* and *Gratz*, however, which essentially held that lack of quantification triggers almost no such scrutiny, we think that lack of quantification should render an admissions program unconstitutional. And, while *Grutter* and *Gratz* established that quantification triggers scrutiny that is so intense that is likely to be fatal in fact, we believe that quantification should trigger a strict scrutiny that forces decisionmakers to prove that they used the minimum necessary preference.

It is difficult to quantify the burdens of racial preferences and even more difficult to quantify government interests in nonremedial affirmative action. But the Supreme Court erred in turning its back on the core requirement that the means of racial preferences must be narrowly tailored to government objectives. At the end of the day, the Court evinced shockingly little interest in determining the actual size of the Law School's racial preferences. It is impossible to assess whether the benefits outweigh the costs if the Court does not know what is on either side of the scale. The fuzzy math of unquantified preferences should not excuse government actors from showing that they are in fact using the minimum necessary preference.

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