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

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

Ian Ayres* & Sydney Foster**

Abstract:

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 *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.

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Table of Contents

INTRODUCTION **3**

I. NARROW TAILORING BEFORE *GRUTTER* AND *GRATZ* **7**

II. *GRUTTER* AND *GRATZ*: HOW MUCH WEIGHT THE LAW SCHOOL AND COLLEGE PLACED ON RACE **15**

A. OUTCOME DIMENSION 16
B. MEANS DIMENSION 24

III. NARROW TAILORING AFTER *GRUTTER* AND *GRATZ* **29**

A. ADMISSIONS PROGRAMS AND THE INDIVIDUALIZED CONSIDERATION REQUIREMENT 29
B. THREE MEANINGS OF THE INDIVIDUALIZED CONSIDERATION REQUIREMENT 32
1. Quantified Racial Preferences *35*
2. Undifferentiated Racial Preferences *41*
3. Excessive Racial Preferences *45*
a. The *Gratz* Measures of Excessiveness 46
b. The *Grutter* Measure of Excessiveness 51
C. HOW THE THREE MEANINGS FIT TOGETHER 53

IV. A NORMATIVE CRITIQUE OF *GRUTTER* AND *GRATZ* **61**

A. TWO MISTAKEN SHIFTS 61
1. Quantification Inquiry Mistake *61*
2. Excessiveness Inquiry Mistake *68*
a. *Gratz*'s First Means Measure 69
b. *Gratz*'s Second Means Measure 69
c. *Gratz*'s Outcome Measure 70
d. *Grutter*'s Outcome Measure 72
B. WHAT THE NARROW TAILORING INQUIRY SHOULD LOOK LIKE 76
1. Minimum Necessary Preferences *77*
2. Quantified Preferences *83*

CONCLUSION **85**

Introduction

The Supreme Court's decisions in *Grutter v. Bollinger*[1] and *Gratz v. Bollinger*[2] 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,[3] a central meaning has been that the government use the minimum racial preference possible to achieve its compelling interest.[4] Sometimes expressed as a requirement that plans use the "least restrictive" or "least burdensome" alternative, a core idea was that plans should use the minimum necessary racial preference.[5] If the government objectives could be fulfilled without use of a racial preference, then no racial preference would be allowed.[6] 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."[7] This article unpacks the possible meanings of individualization. We show that the Court's individualization inquiry requires

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[1] 539 U.S. 306 (2003).
[2] 539 U.S. 244 (2003).
[3] *See infra* notes 19-24 and accompanying text.
[4] *See infra* Part I.
[5] *See infra* notes 27-29 and accompanying text.
[6] This is another way of stating the requirement that race-neutral alternatives be used when possible. *See infra* note 24 and accompanying text.
[7] *See infra* Section III.A.

consideration of the extent to which racial preferences are (1) quantified, (2) undifferentiated, and (3) excessive.[8]

In *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.[9]

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. The Court is too hard on quantified plans because there is nothing in the act of "telling" or quantifying the degree of racial preference that should in and of itself render a plan unconstitutional.[10] 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.[11] The Court's wrong-headed preference for unquantified preferences thus makes it more difficult to perform any kind of cost-benefit calculus. The Court is too lenient with respect to unquantified plans because is does not subject them to a meaningful constitutional calculus.

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[8] *See infra* Section III.B.
[9] *See infra* Section III.C.
[10] *See infra* Subsection IV.A.1.
[11] *See infra* Subsection IV.B.2.

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

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.[14] But, once again, the insistence on unquantified preference schemes undermines the ability of courts to test whether a particular plan is in fact nuanced.[15] 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[16] applicants—it merely required that the Law School's

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[12] *See infra* Subsection IV.B.1.
[13] *See infra* Subsection IV.B.2.
[14] *See infra* Subsection IV.B.1.
[15] *See infra* Subsection IV.B.2.
[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 46. 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—

preferences were *potentially* differentiated. 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. The Court showed no interest in ascertaining whether or how the racial preferences varied in fact.[17] It is simply not possible to test whether an unquantified algorithm grants differentiated or undifferentiated preferences.

The Court's dicta favoring differentiated racial preferences, however, suggest a useful move toward "marginalism." Not only should affirmative action defendants show that their plans' total benefits exceed their total costs, but also they should show that the benefits from the last bit of affirmative action are greater than the costs of this last bit. That is, defendants should show that the plan used the minimum necessary preference not just on average but on the margin.[18]

This article is divided into four parts. Part I 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 II 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 III describes the changes wrought by *Grutter* and *Gratz*, explaining that the Court essentially replaced the minimum necessary preference requirement with a "Don't Tell,

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use the term "minorities" throughout this article when what we really mean is "preferred minorities."

[17] *See infra* Subsection III.B.2.

[18] *See infra* Subsection IV.B.1.

Don't Ask" individualization requirement. Finally, Part IV lays out our normative critique of *Grutter* and *Gratz* and sketches a more fully articulated vision of what narrow tailoring should require. We call for not just 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.

I. 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 in order 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 in order to satisfy the narrow tailoring prong of strict scrutiny.[19] First, the beneficiary class of the program must not be

[19] 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 '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

overinclusive in relation to the compelling government interest that justifies the program.[20] Second, the affirmative action program must be flexible and treat people as individuals when necessary to achieve the compelling government interest.[21] In the context of higher education at least, this means that rigid quotas cannot be used.[22] Third, the affirmative action program must be temporary.[23] Fourth, the possibility of achieving the ends of the affirmative action program by race-neutral means must be considered and rejected as not possible.[24]

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consideration.'" (footnotes omitted) (quoting Grutter v. Bollinger, 539 U.S. 306, 341, 339, 342, 334 (2003))).

[20] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 506 (1989) (finding a set-aside benefiting individuals from several racial groups from all over the country not narrowly tailored to remedying past discrimination against blacks in Richmond because the beneficiary group was overinclusive); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 284 n.13 (1986) (plurality opinion); *see also* Drew S. Days, III, Fullilove, 96 YALE L.J. 453 (1987). 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).

[21] *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.").

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

[23] *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 recognized this 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).

[24] *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 273 n.6 (plurality opinion) ("The 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.[25] 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."[26] 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"[27] and "work the least harm possible"[28] on non-preferred racial groups so as not to impose an undue burden on

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neutral alternatives that will achieve the diversity the university seeks."). *But see* Ayres, *supra* note 20 (noting the tension between requiring that narrowly tailored means be used and encouraging the solution of race-specific problems with race-neutral means).

[25] 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.

[26] 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. *Cf.* Ayres, *supra* note 20, at 1786 n.13.

[27] *See, e.g.*, *Bakke*, 438 U.S. at 357 (Brennan, White, Marshall, & 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." (footnote omitted)); *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.*, *Paradise*, 480 U.S. at 184 (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 24.

[28] *Bakke*, 438 U.S. at 308 (opinion of 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.").

them.[29] Finally, this minimum necessary preference requirement is consistent with the requirement that race-neutral alternatives 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.[30]

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 in order to be narrowly tailored, the number of spaces set aside by the quota at issue 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

[29] *See, e.g.*, Metro Broad., Inc. v. FCC, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting) (noting that in order to pass constitutional muster, programs must not "unduly burden individuals who are not members of the favored racial and ethnic groups"); *Paradise*, 480 U.S. at 171 (plurality opinion) (noting that the impact on third parties should be considered); *Bakke*, 438 U.S. at 308 (opinion of Powell, J.) (noting that "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"); *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 (1997) (arguing that equal protection analysis should move from an examination of costs and benefits to an examination of impermissible purposes).

[30] For a description of the race-neutral alternatives requirement, see *supra* note 24; *cf. supra* note 25.

> any meaning, therefore, a promotion goal must have a closer relationship to the percentage of blacks eligible for promotions.[31]

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

> 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.[32]

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[31] 480 U.S. at 198-99 (O'Connor, J., dissenting) (citations omitted). Other Justices have seen that a size inquiry is important but have not framed their size inquiry in terms of whether a given size is the smallest necessary. In *Croson*, 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 blacks, noting that the fifty percent figure is not arbitrary relative to the twenty-five percent labor pool and the twenty-five percent representation of blacks in the upper ranks); *Fullilove*, 448 U.S. at 513-14 (Powell, J., concurring) (noting that the ten percent figure is "reasonable" because it falls approximately halfway between the percentage of the population who are minorities (seventeen percent) and the percentage of contractors who are 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 only weakly adhered to the strict scrutiny test in his *Fullilove* concurrence). So, to the extent that they countenance upholding racial preferences without consideration of whether preferences are the minimum necessary, their analysis on this point may not still be controlling.

[32] 480 U.S. at 199 (O'Connor, J., dissenting). Other Justices have examined the weight given to race and its effect on non-beneficiaries but have not articulated a standard for determining whether the weight is too much. For example, Justice Powell's concurrence in *Fullilove* notes the importance of examining "the effect of the set-aside upon innocent third parties." 448 U.S. at 514 (Powell, J., concurring). Justice Powell observes 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 concludes that it is constitutionally permissible because "the effect of the set-aside is 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*

The minimum necessary preference requirement of narrow tailoring also resonates with Justice Powell's *Bakke* opinion. Justice Powell explains 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.[33]

In this passage, Justice Powell suggests 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 non-racial attributes.[34] Justice Powell essentially observes 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 jurisprudence. First, strict scrutiny is a way to "smoke out" illegitimate motives of those who create programs using a racial classification.[35] Second, strict scrutiny is a tool for ensuring that the benefits of programs using racial

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Context, 79 N.Y.U. L. REV. 803, 870 (2004) (describing the *Fullilove* standard as "less exacting" than the *Croson* standard); Schwartz, *supra* note 31, at 547-48.

[33] *Bakke*, 438 U.S. at 317 (opinion of Powell, J.).

[34] 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 190-194 and accompanying text, the analysis on this point must be adjusted to take account of the differences. *See* discussion *infra* note 196.

[35] *Croson*, 488 U.S. at 493.

classifications outweigh the costs, such as reinforcing racial stereotypes, creating racial hostility, and instilling feelings of racial inferiority in minorities.[36] 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. This 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 require that courts conduct not only an overall cost-benefit analysis, but also a marginal cost-benefit analysis.[37]

The *Grutter* and *Gratz* Courts did not engage in such an inquiry. Unfortunately, even at this late date, the Court is far away from being able to conduct such an inquiry. Not only has the Court not established a methodology

[36] *See, e.g.*, Rubenfeld, *supra* note 29; *see also Croson*, 488 U.S. at 493.
[37] *See infra* Subsection IV.B.1.

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.[38]

Part II 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 struck down, actually gave more weight to race than the College's admissions program, which the Court upheld. That is, the costs of the Law School's admissions program were higher than the costs of the College's admissions program. This 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 that flow from diversity at a given cost may be 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 results in Part II—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.

[38] Indeed, as Part III will argue, not only did the *Grutter* and *Gratz* Courts not develop methodologies for conducting the cost-benefit calculus, but they effectively replaced the cost-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* Subsection IV.A.2.

II. *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.[39] The first dimension, which we call the *outcome* dimension, examines the outcomes of the affirmative action program—the extent to which the affirmative action program displaces non-preferred 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.[40]

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[39] We are not the first to suggest that the Law School may have placed more weight on race, 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, but he ignores the outcome dimension, and there are several problems with his analysis of the means dimension. *See infra* notes 73-74.

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 stated that the Law School's preferences were greater than the College's, but the source they cited for support of this proposition, Judge Bogg'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)). 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, 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's only citation for support of this proposition, however, is to three pages of Chief Justice Rehnquist's dissent in *Grutter*, but Chief Justice Rehnquist's dissent never addresses the relative weight given to race at the Law School and the College. *Id.* at 718 & n.120 (citing Grutter v. Bollinger, 539 U.S. 306, 365-67 (2003) (Rehnquist, C.J., dissenting)). Therefore, Diver's statement, too, is without empirical support.

In addition, while the empirical studies conducted by the University of Michigan's expert witness did not directly compare the weight given to race at the Law School and College, they can be used to compare the weight along the outcome dimension. *See infra* notes 56-61 & accompanying text.

[40] *Cf.* Ayres, *supra* note 20, at 1803-04 (describing two dimensions to racial preferences in the contracting context); *cf. also* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS

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 places great weight on race on the means dimension, but not on the outcome dimension, and vice versa.[41] The two Sections that follow describe how to measure each dimension and discuss how the Law School and College admissions programs fare under each measure.

A. Outcome Dimension

In order 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." In order 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.[42] Note that comparing the number of but for admits to the number of

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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 non-preferred applicants who would have been admitted in the absence of affirmative action).

[41] 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 effective credit of fifteen LSAT points and is decisive for ten percent of the admitted applicants places the same amount of weight on race as a program that gives minority applicants an effective credit of ten LSAT points and is decisive for fifteen percent of the admitted applicants. *Cf.* Ayres, *supra* note 20, at 1804.

[42] 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 40, at 33-34 (describing evidence that the yield for black 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). If this is the case, 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.

qualified minority applicants does not help measure the outcome dimension because it does not measure the burden on non-preferred applicants.[43]

Available to the Supreme Court in *Grutter* and *Gratz* were admissions data from the Law School and the College[44] broken down by GPA range,[45] test score range (LSAT scores for the Law School and SAT scores for the College), race,[46] Michigan residency status, and year.[47] So, for example, the data could

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It may be the case that data on the yields were available to the experts in *Grutter* and *Gratz*. It appears that the University's expert computed how many enrollees the Law School would have had in the absence of affirmative action, suggesting that he had access to the data on yields. *See* Grutter v. Bollinger, 137 F. Supp. 2d 82, 839 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002) (en banc), *aff'd*, 539 U.S. 306 (2003). These data were not, however, available to us and we were therefore not able to calculate the percentage of enrollees who are but for admits.

To the extent that the yield differs for applicants receiving a racial preference and those not receiving a racial preference, it is possible that the differences are similar at the Law School and the College. Because, as we will demonstrate, the percentage of admits who are but for admits is larger at the Law School than at the College, it is likely that the percentage of enrollees who are but for admits is also larger at the Law School than at the College. *Cf. infra* note 61 (describing that the University of Michigan's expert's calculations can be used to compute the percentage of enrollees who are but for admits at the Law School in 2000).

[43] 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) (ellipsis in original) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978) (opinion of Powell, J.)); *see also infra* note 126 and accompanying text. For a critique of this measure of weight, see *infra* Subsection IV.A.2.c.

[44] 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 v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (No. 97-CV-75231-DT); Revised Second Supplemental Expert Report of Kinley Larntz, *Gratz*, 122 F. Supp. 2d 811; Supplemental Expert Report of Kinley Larntz, Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-CV-75928-DT); Second Supplemental Expert Report, *Grutter*, 137 F. Supp. 2d 821; Fourth Supplemental Expert Report, *Grutter*, 137 F. Supp. 2d 821. Larntz took the data from the University of Michigan and created tables that broke down the data as described above.

[45] College data for 1995-1997 included both a "GPA 1" and "GPA 2," and College data for 1998 and 1999 included only one GPA. Supplemental Expert Report of Kinley Larntz, *Gratz*, 122 F. Supp. 2d 811; Revised Second Supplemental Expert Report of Kinley Larntz, *Gratz*, 122 F. Supp. 2d 811. The "GPA 1" is the actual GPA of applicants, while the "GPA 2" is a number calculated by admissions officers that starts with the actual GPA and then adds or subtracts points for other factors such as quality of high school and strength of the curriculum. *See Gratz*, 122 F. Supp. 2d at 827, *rev'd in part*, 539 U.S. 244 (2003); Brief for the Petitioners at 5-6, *Gratz* (No. 02-516). In 1997, the "GPA 2" also included .5 points for minority status. *Gratz*, 122 F. Supp. 2d at 827, *rev'd in part*, 539 U.S. 244 (2003); Brief for the Petitioners at 6, *Gratz* (No. 02-516). Our calculations used only the GPA 1 figure—that is, the actual GPA of applicants.

[46] 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

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.

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above), and these data were what we used. 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. Inspection of the data also revealed that five subgroups made up the larger group of "Majority Applicants": Caucasians, "Other Hispanics," Asian-Americans, Foreign Applicants, and "Unknown Applicants." Note that the analysis of Larntz suggests that this grouping is consistent with which subgroups actually received a preference on account of their race; that is, applicants in those subgroups in the "Selected Minorities" group appear to have received a preference on account of their race, while applicants in those subgroups in the "Majority Applicants" group (including "Other Hispanics") appear not to have received a preference. Supplemental Expert Report of Kinley Larntz, *Grutter*, 137 F. Supp. 2d 821; Second Supplemental Expert Report of Kinley Larntz, *Grutter*, 137 F. Supp. 2d 821; Fourth Supplemental Expert Report of Kinley Larntz, *Grutter*, 137 F. Supp. 2d 821. So, when we refer to "preferred minority" Law School applicants, we mean "selected minorities"—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." Supplemental Expert Report of Kinley Larntz, *Gratz*, 122 F. Supp. 2d 811; Revised Second Supplemental Expert Report of Kinley Larntz, *Gratz*, 122 F. Supp. 2d 811. While the data in the reports do not indicate which subgroups are included in the larger group of "underrepresented minorities," the College's brief states that it "considers African-Americans, Hispanics, and Native Americans to be underrepresented minorities for purposes of considering race or ethnicity in admissions." Brief for Respondents at 10 n.13, *Gratz* (No. 02-516). So, when we refer to "preferred minority" College applicants, we mean African Americans, Hispanics and Native Americans.

[47] Data for the Law School were available for the years 1995 through 2000. Supplemental Expert Report of Kinley Larntz, *Grutter*, 137 F. Supp. 2d 821; Second Supplemental Expert Report of Kinley Larntz, *Grutter*, 137 F. Supp. 2d 821; Fourth Supplemental Expert Report of Kinley Larntz, *Grutter*, 137 F. Supp. 2d 821. Data for the College were available for the years 1995 through 1999. Supplemental Expert Report of Kinley Larntz, *Gratz*, 122 F. Supp. 2d 811; Revised Second Supplemental Expert Report of Kinley Larntz, *Gratz*, 122 F. Supp. 2d 811.

In order to calculate the number of but for admits,[48] we first computed what we called the "probability enhancement"—the probability of admission for preferred minority applicants minus the probability of admission for non-preferred applicants.[49] So, for example, we found that for non-resident Law School applicants from 1995 with an LSAT of 164 to 166 and a GPA of 3.50 to 3.74, non-preferred applicants had a thirty-four percent probability of admission and that preferred minority applicants had a sixty-seven percent probability of admission, thus suggesting a probability enhancement of thirty-three percent. We then multiplied the probability enhancement for the various grade, test score, year and residency status combinations by the number of preferred minority applicants to get the number of but for admits. So, for example, we found that the number of nonresident but for admits in 1995 with an LSAT of 164 to 166 and a GPA of

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[48] Linda Wightman's 1997 study of law school admissions attempts to measure the number of but for admits to the 173 ABA-approved law schools in the 1990-1991 application year, and she uses two methods, the first of which is different from our method, and the second of which is identical to our method. For the first method, 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).

Defendant's expert, 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 non-preferred applicants and then used this regression to predict the probability of admission for applicants under a race-blind system. 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. Supplemental Expert Report of Stephen W. Raudenbush, at 3-5, Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (No. 97-CV-75231-DT). For the results of this analysis, see *infra* notes 56-61and accompanying text.

[49] If there were no preferred minority applicants or no non-preferred applicants, we defined the probability enhancement to be zero.

3.50 to 3.74 was one because there were three preferred minority applicants, and the probability enhancement was thirty-three percent.[50]

Law School data were available to the Court for the years 1995-2000. During those years, we calculated that the percentage of admits who were but for

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[50] We summed the number of but for admits for all combinations to get the total number of but for admits. We then divided the number of but for admits by the total number of admits in order to find the percentage of admits who were but for admits.

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 non-preferred 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 42, at 1069 & n.101. And, 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 449 (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 48, 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 non-preferred applicants, then the differences in admissions rates we observe cannot be attributed solely to racial preferences. Most admissions factors, however (such as extracurricular activities and special talents), are likely distributed evenly among preferred and non-preferred applicants with the same GPAs and test scores. And, of the factors that are unevenly distributed, some factors favor preferred applicants while others favor non-preferred applicants, and so as a first cut, it seems reasonable to assume that the other factors in combination do not substantially favor either preferred minority applicants or non-preferred applicants.

Moreover, the Law School has 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?"); *cf.* Liu, *supra* note 42, at 1070 (concluding that "differences in admission rates based on SAT scores provide a reasonably valid measure of the advantage black applicants receive through affirmative action"); *cf. also* BOWEN & BOK, *supra* note 40, at 31 (noting that comparing admissions rates of black and white applicants with the same SAT range could provide a measure of the amount of affirmative action); Wightman, *supra* note 48, at 9, 6-8 (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").

admits was 10.4%.[51] College data were available to the Court for the years 1995-1999. During those years, we calculated that the percentage of admits who were but for admits was 6.7%.[52] The admissions policies at the College changed between 1995 and 1999,[53] and it was only the policy that the College began using in 1999 that was at issue before the Supreme Court in *Gratz*.[54] We calculated that the percentage of admits in 1999 who were but for admits was only 4.0%.[55] These data are summarized in Table 1.

Table 1

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[51] We found that there were 755 but for admits and 7284 total admits. The total number of minority admits was 921, so the percentage of minority admits who were but for admits was 82.0%

[52] We found that there were 3373 but for admits and 50,055 total admits. The total number of minority admits was 6341, so the percentage of minority admits who were but for admits was 53.2%.

[53] For a summary of the changes, see *Gratz*, 539 U.S. at 253-57; and Gratz v. Bollinger, 122 F. Supp. 2d 811, 827-33 (E.D. Mich. 2000), *rev'd in part*, 539 U.S. 244 (2003).

[54] The district court struck down the policies in place between 1995 and 1998, *Gratz*, 122 F. Supp. 2d at 833, and upheld the policy that was implemented in 1999, *id.* at 831. The College's brief explains 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 at 5 n.7, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516) (citations omitted). Indeed, the Supreme Court seemed to limit its holding to the policy implemented beginning in 1999. *See Gratz*, 539 U.S. at 271 (noting that the "*current* . . . policy does not provide such individualized consideration" (emphasis added)).

[55] We found that there were 445 but for admits and 11,228 total admits. The total number of minority admits was 1228, so the percentage of minority admits who were but for admits was 36.3%.

	Percentage of Admits Who Were but for Admits
Law School	10.4%
College: All Years	6.7%
College: 1999	4.0%

These data demonstrate that on the outcome dimension, the Law School gave more weight to 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 and 1996 and for the College in 1996 and 1998.

Raudenbush used two methods to analyze the 1995 and 1996 Law School data. He calculated that in 1995, the percentage of admits who are minorities would be 3.1% or 6% in the absence of affirmative action, rather than 18.3%.[56] So, for the Law School in 1995, the percentage of admits who are but for admits would be 15.2% or 12.3%. Raudenbush calculated that in 1996, the percentage of admits who are minorities would be 4.7% or 5% in the absence of affirmative

[56] Richard O. Lempert, David L. Chambers, & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 492-93 (2000).

action, rather than 17.6%.[57] So, for the Law School in 1996, the percentage of admits who are but for admits would be 12.9% or 12.6%.

Raudenbush calculated that for the College in 1996, 1066 minority applicants were but for admits.[58] Since the total number of admits was 10,363,[59] these numbers indicate that the percentage of admits who were but for admits was approximately 10.3%. In addition, Raudenbush calculated that for the College in 1998, the percentage of admits who are minorities would be 6% in the absence of affirmative action, rather than 14%.[60] So, according to Raudenbush's numbers, the percentage of admits who are but for admits was 8% for the College in 1998.

Raudenbush's results are summarized in Table 2. Comparing Raudenbush's results to ours, then, we see that Raudenbush's results are slightly higher than our results but show that the percentage of admits who are but for admits is several percentage points higher at Law School than at the College.[61]

Table 2

	Raudenbush's Estimate of Percentage of Admits Who Were but for Admits
Law School: 1995	12.3% or 15.2%
Law School: 1996	12.6% or 12.9%
College: 1996	10.3%
College: 1998	8%

[57] *Id.*
[58] Brief for Respondents at 4 n.5, *Gratz* (No. 02-516).
[59] *Id.*
[60] Supplemental Expert Report of Stephen W. Raudenbush, at 3-4, Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (No. 97-CV-75231-DT).
[61] Also, the Supreme Court's *Grutter* opinion reports that when examining the Law School data for 2000, Raudenbush found that in the absence of affirmative action, "underrepresented minority students would have comprised 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent." Grutter v. Bollinger, 539 U.S. 306, 320 (2003) (citation omitted). Using these figures, we would say that the percentage of enrollees who were but for admits was 10.5%. Neither the opinion nor the source cited by the opinion for this proposition notes the relevant percentages that are needed to compute the percentage of admits who are but for admits. *Cf. supra* note 42 (distinguishing between percentage of enrollees who are but for admits and percentage of admits who are but for admits).

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 applicants if they are passed over because of large racial preferences than because of small racial preferences.[62]

To capture the means dimension, we attempted to measure the effective GPA point boost that preferred minorities received on account of their race.[63] 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.[64] We used the coefficients of the resulting equation to calculate the number of GPA points that being a racial minority was

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[62] *See* Ayres, *supra* note 20, at 1803-04.

[63] Note that 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 non-preferred matriculants. *See, e.g.*, Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 18-22 (2002); *see also* Liu, *supra* note 42, at 1063 & n.79 (citing—and criticizing—studies that take this approach). As 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 id.* at 1064.

Bowen and Bok propose to capture part of what we call the means dimension by examining the differential in qualifications between but for black admits and white applicants who would have been admitted in the absence of affirmative action. 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. *See* BOWEN & BOK, *supra* note 40, at 37-38. Linda Wightman followed 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).

[64] In order to perform these calculations, 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.

equivalent to—we called this number the "GPA enhancement."[65] We calculated that the GPA enhancement at the Law School was 1.39 points,[66] while the GPA enhancement at the College was 1.02 points for the years 1995-1999[67] and 0.67 points for 1999.[68] These results are summarized in Table 3.[69]

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[65] In order to compute the GPA enhancement, we divided the minority coefficient by the GPA coefficient from the group probit.

[66] Judge Boggs attempted to estimate the GPA enhancement for the Law School's admissions program in his dissent to the Sixth Circuit opinion in *Grutter*. Examining the 1997 data of 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 one full GPA point. Grutter v. Bollinger, 288 F.3d 732, 796 (6th Cir. 2002) (Boggs, J., dissenting). Using a similar technique, Judge Boggs concluded that the LSAT enhancement was approximately eleven LSAT points. *Id.*

[67] These results are consistent with the results of the plaintiffs' expert, Kinley Larntz, 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, Larntz computed the lowest GPA with a probability of admission of greater than fifty percent. Expert Report of Kinley Larntz, at 2, Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (No. 97-CV-75231-DT). Then, Larntz compared these GPAs for preferred and non-preferred applicants and computed a GPA enhancement for each test score range. Larntz 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.* at 3-4. Larntz did not compute GPA enhancements for other years for the College, nor did he compute GPA enhancements for the Law School.

[68] 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 78-80 and accompanying text. Applicants could earn up to eighty points for their GPA and twenty points for membership in an underrepresented minority group. While minorities could theoretically earn twenty points for their race, not all minorities earned these points for their race. This is because the twenty 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. So, if a racial minority would have earned twenty 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 twenty points for their race because applicants could earn no more than forty points for nonacademic factors, so if an applicant earned more than twenty points in the other nonacademic factor categories, then she effectively did not earn the full twenty points for her race. *See infra* note 78.

Minority applicants therefore received, on average, fewer than twenty points for their race. Since a 4.0 GPA was worth eighty points, we would expect the GPA enhancement to be less than 1 GPA point. Indeed, our method described in the text accompanying this footnote produces a GPA enhancement of .67 GPA points, so the two results are consistent.

[69] For a robustness check, we performed the same computations using a logit rather than a probit, and our results were similar:

Logit	GPA Enhancement (in GPA points)
Law School	1.41
College: All Years	1.08
College: 1999	0.70

Table 3

Bprobit	GPA Enhancement (in GPA points)
Law School	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.[70] 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 Law School's GPA enhancement is 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.[71] It may be that

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[70] 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 weighs academic factors more heavily than the College. *Cf.* BOWEN & BOK, *supra* note 40, 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").

[71] We normalized test score data on a 1000-point scale and found the following results:

	Test score Enhancement on Normalized Scale (out of 1000 Points)	Test score Enhancement in SAT or LSAT Point Units
Law School	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 twenty points for being a racial minority and up to twelve points for SAT scores. *See infra* notes 77-80. The twenty points minorities could earn for race corresponds to 2000 SAT points. Given that not all minorities could earn all twenty points for race, *see supra* note 68, we would expect the SAT enhancement to be less than 2000 SAT points. *Cf. supra* note 68.

Furthermore, 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	2.75
College: All years	2.99

the GPA enhancement results are not robust because the Law School and the College weight 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,[72] and if the Law School weights test scores more heavily than GPAs (or at least weights 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 1000 points for every combination of GPA and test score. Sander then used this index formula to estimate what we would call the "index enhancement" for each school. 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.[73] While Sander's method had several flaws,[74]

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.

[72] In the point system the College began using in 1998, applicants could earn up to eighty points for their GPA but only twelve points for their test scores. *See infra* notes 77-78.

[73] Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 402-05 (2004).

[74] 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 non-preferred and preferred minority nonresidents at the College, *id.* at 401-02, and white and black 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

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's own expert, that a higher proportion of applicants 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 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 to show why these larger 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

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sophisticated analysis such as a group probit in order 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.

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.

III. 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. Section 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." Section B describes three possible meanings of this "individualized consideration" requirement, and Section 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 both academically strong and also diverse along many dimensions.[75] 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

[75] Grutter v. Bollinger, 539 U.S. 306, 313-16 (2003); Gratz v. Bollinger, 539 U.S. 244, 253 (2003); Brief for Respondents at 3-4, *Grutter* (No. 02-241); Brief for Respondents at 5-10, *Gratz* (No. 02-516).

learning of those around them.'"[76] In contrast, the College utilized a point system to aid admissions counselors in deciding who to admit.[77] An admissions counselor read each application and assigned to it a score, called the "selection index," based on predetermined point values for various characteristics. 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.[78] With some exceptions, the admissions office used these selection index scores to determine whether to admit, reject, or postpone decision on applicants.[79] 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.[80]

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[76] *Grutter*, 539 U.S. at 315 (quoting App. at 111).

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

[78] Brief for Respondents at 7, 9, *Gratz* (No. 02-516). The 110 points for academic factors are 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 are 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 the following: socioeconomic disadvantage, membership in an underrepresented minority group, predominantly minority or socioeconomically disadvantaged high school, athletic recruitment, and provost's discretion. Note that in calculating the selection index, a maximum of 40 points can come from these nonacademic factors, even if a student earned more than 40 points in the preceding categories. *Id.* at 8-9. The College considers "African-Americans, Hispanics, and Native Americans" to be underrepresented minorities for purposes of their admissions policy. *Gratz*, 539 U.S. at 253-54.

[79] The majority opinion in *Gratz* states 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 states 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 at 10, *Gratz* (No. 02-516).

[80] The admissions counselor may "flag" an application as long as the applicant meets three criteria. The applicant must be (1) academically prepared; (2) have a selection index that is at least 75 for

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."[81] 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* affirmative action admissions cases, at least for the near future. Robert Post 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."[82]

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,[83] 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[84] and would likely find likewise at other institutions of higher education, therefore taking the bite out of the second of these four requirements.

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nonresidents of Michigan and 80 for residents of Michigan; and (3) "possess[] at least one of a variety of qualities or characteristics important to the university's composition of its freshman class." Brief for Respondents at 10, *Gratz* (No. 02-516).

[81] *Gratz*, 539 U.S. at 271; *see also* Post, *supra* note 19, at 70 (stating that the Court used the individualized consideration requirement to strike down the admissions program in *Gratz*).

[82] Post, *supra* note 19, at 67 (footnotes omitted) (quoting Grutter v. Bollinger, 539 U.S. 306, 341, 339, 342, 334 (2003)).

[83] *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.").

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

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 in order to achieve diversity in universities,[85] and so for at least the next twenty-five years or so,[86] 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 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,[87] but also at least one Supreme Court Justice is uncertain about what the Court requires with respect to individualized consideration.[88] The next two Sections examine what the Court meant by the individualized consideration requirement; Section B describes three possible meanings of the requirement, and Section C analyzes how these meanings fit together.

B. Three Meanings of the Individualized Consideration Requirement

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[85] *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").

[86] *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.").

[87] *See, e.g.*, Post, *supra* note 19, 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.'"); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 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.").

[88] Justice Souter notes that the majority objects either to "the use of points to quantify and compare characteristics, or to the number of points awarded due to race." Gratz v. Bollinger, 539 U.S. 244, 295 (2003) (Souter, J., dissenting).

Representative of the confusion over what satisfies the individualized consideration requirement is Chief Justice Rehnquist's statement in the Court's *Gratz* opinion declaring that the College's admissions program is not narrowly tailored: "We 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."[89] In this statement, Chief Justice Rehnquist alludes to three possible grounds for objecting to the College's admissions program. Is the admissions program problematic because it quantifies the admissions process? Or, is the complaint that the program is not nuanced and does not differentiate between minorities, "*automatically*" distributing 20 points "*to every single* 'underrepresented minority' applicant *solely because of race*"? Alternatively, is the objection that the weight given to race is excessive—"one-fifth of the points needed to guarantee admission"?

The ambiguities in Chief Justice Rehnquist's statement—and in the pair of opinions when read as wholes—point to three possible meanings of the individualized consideration requirement.[90] First, the Court could be requiring

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[89] *Id.* at 270.

[90] 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 ensures 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

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 minorities 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,"[91] 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 who 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 decision making 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

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> of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant."

Post, *supra* note 19, at 701 (ellipsis in original) (citations omitted) (quoting *Gratz*, 539 U.S. at 271 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978) (opinion of Powell, J.))).

[91] *Gratz*, 539 U.S. at 295 (Souter, J., dissenting).

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 from 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 Subsections examine each of these three meanings and the extent to which the opinions suggest that the meanings are part of the individualized consideration inquiry. Section C discusses how these three meanings fit together.

1. Quantified Racial Preferences

Many scholars have read the *Grutter/Gratz* Court to have held that the individualized consideration requirement precludes—or places severe limits on—the use of a point system in which universities assign race[92] a numerical value.[93]

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[92] Even after *Grutter* and *Gratz*, it appears that a university could still employ a *nonracial* point system—that is, a system that does not directly assign points on the basis of race—as part of its process for selecting students. Indeed, 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, 1547 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.

[93] 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 (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." (citations

This Subsection 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 refers disparagingly to the point system used by the College, but most of Chief Justice Rehnquist's complaints have 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 states the following:

> The current LSA[94] 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.[95]

This critique can be read as an attack on the point system itself in that it criticizes the lack of consideration that accompanies the distribution of points for a particular characteristic. It can also be read, however, as an attack on the lack of differentiation in the point system—perhaps if consideration of other factors

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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 19, 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 (quoting *Bakke*, 438 U.S. at 317 (opinion of Powell, J.)))).

[94] LSA is the acronym for the College, which is called the College of Literature, Science, and the Arts. *Gratz*, 539 U.S. at 251.

[95] *Id.* at 271-72.

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 attack the point system qua point system, he asserts 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."[96] Insofar as point systems, by their nature, assign "specific and identifiable" points for race, *any* point system may not pass muster for Chief Justice Rehnquist.[97] Chief Justice Rehnquist may, however, allow a more nuanced point system that assigned points not on the basis of race alone, but rather on the basis of how race interacts 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 is unclear about whether the Court prohibits quantification or merely requires differentiation.

In her concurrence to *Gratz*, Justice O'Connor argues more forcefully against the point system qua point system. She states 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."[98] Furthermore, she notes that "this mechanized selection index score,

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[96] *Id.* at 271 (citations omitted).
[97] 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.
[98] *Id.* at 279 (O'Connor, J., concurring).

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."[99]

Justice O'Connor's majority opinion in *Grutter* also condemns the mechanical nature of the point system. She notes 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."[100] Furthermore, "[a]s Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way."[101] Like Chief Justice Rehnquist's critique, Justice O'Connor's critiques in *Grutter* and *Gratz* can be read either as critiques of the admissions system's quantification or as critiques of the admissions system's lack of differentiation.[102]

Thus, when read together, the opinions make clear that at the very least, the Court is suspicious of simple point systems like the one used by the College. Whether the Court objects to these point systems because of their quantification or because of their lack of differentiation (or whether they think any quantified system cannot provide sufficient differentiation) is less clear. Either way, it is clear that the Court is bothered by quantification, and we will argue in Section C that it essentially subjects such systems to scrutiny that is more rigorous than the scrutiny to which it subjects unquantified systems.

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[99] *Id.* at 277 (O'Connor, J., concurring) (citations omitted).
[100] Grutter v. Bollinger, 539 U.S. 306, 337 (2003) (citation omitted).
[101] *Id.* at 334.
[102] Justice Souter's *Gratz* dissent provides clues as to whether the majority meant to prohibit quantification. He notes 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 interprets the Court to be taking a position against either quantification or excessive weight.

The discussion so far in this Subsection 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 University of Michigan 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 quantifies 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." 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.[103]

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.

Table 4

[103] To be sure "narrow tailoring" was originally meant to imply a 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.

	Pseudo-R-Squared: Bprobit	Pseudo-R-Squared: Blogit
Law School	.4904	.4994
College: All Years	.4623	.4667
College: 1999	.4361	.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 forty-nine or fifty percent of the variance in the law school admission decisions can be explained by race, GPA, test scores, residency, and year, while only forty-four to forty-seven percent of the undergraduate decisions could be explained by the analogous factors.[104]

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 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"

[104] *Cf.* Sander, *supra* note 73, at 406 (finding that eighty-eight percent of admissions outcomes can be correctly predicted for the Law School in 1999 on the basis of academic factors and race, while only eight-two percent of admissions outcomes can be correctly predicted for the College in 1999 on the basis of academic factors, race, and residency status).

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 non-race 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 Subsection, 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.[105] This Subsection will discuss the extent 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* notes 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"[106] and then concludes that the College's admissions system does not provide individualized consideration because it "automatically

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[105] 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* Grutter *and* Gratz, Jurist Legal Intelligence Forum, *at* http://jurist.law.pitt.edu/forum/symposium-aa/rosman.php (Sept. 5, 2003) (implying that the lack of nuance might have been a fatal flaw of the College program, by asking whether more nuanced point systems would have passed constitutional muster). 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 19, 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 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978) (opinion of Powell, J.)))).

[106] *Gratz*, 539 U.S. at 271 (emphasis added) (citations omitted).

distributes 20 points to every single applicant from an 'underrepresented minority' group."[107] Chief Justice Rehnquist illustrates 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 is "the child of a successful black physician in an academic community with promise of superior academic performance" and B is "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."[108] Chief Justice Rehnquist noted that the College's admissions system is 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."[109] So, for Chief Justice Rehnquist, it appears that any one particular characteristic—at least, when that characteristic is race—cannot have a predetermined, constant weight; rather, it must be evaluated in the context of other characteristics.[110]

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[107] *Id.*

[108] *Id.* at 272 (internal quotation marks omitted) (quoting *Bakke*, 438 U.S. at 324 (opinion of Powell, J.)).

[109] *Id.* at 273. This example demonstrates that Chief Justice Rehnquist seems to be bothered by the fact that the University of Michigan makes no distinctions on class grounds among minority applicants. Indeed, he is correct that the point system itself operates in this way. As described *supra* in note 78, applicants could earn twenty 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.

[110] 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?

Justice O'Connor's *Gratz* concurrence shows she, too, is concerned about differentiation. She states 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*."[111] She also complains that the College's admissions office assigns "every underrepresented minority applicant the same, *automatic* 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant."[112] She contrasts the "automatic, predetermined point allocation" in the admissions program of the College with the admissions program at the Law School, which "enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class."[113] 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

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Chief Justice Rehnquist's example implies 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 Subsection IV.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) representing that education, the pathway to leadership, is open to people of all races. See *infra* notes 190-194 and accompanying text for a discussion of the goals of the diversity interest.

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

[112] *Id.* at 276-77 (O'Connor, J., concurring).

[113] *Id.* at 279 (O'Connor, J., concurring).

underrepresented minority applicants."[114] Justice Thomas then makes explicit a point that is not addressed in the Court's opinion and is 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.[115]

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). It should be noted, however, that *Grutter* and *Gratz* differ in their treatment of differentiation in one key respect. The *Gratz* Court demonstrates that the College's admissions program is not sufficiently differentiated by pointing to the mechanical nature of the point system and the fact that all minorities receive the same number of points regardless of their other characteristics.

In contrast, the *Grutter* opinion contains much lofty language about the importance of nuance and differentiation, but it comes up short on pointing to evidence that the Law School's admissions program actually operates in a

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[114] *Id.* at 281 (Thomas, J., concurring).

[115] *Id.* (Thomas, J., concurring) ("An admissions policy, however, must allow for consideration of these nonracial distinctions among applicants on both sides of the single permitted racial classification." (citations omitted)). Note that 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 states emphatically that "[u]nder today's decisions, a university may not racially discriminate between the groups constituting the critical mass." *Id.* (Thomas, J., concurring). Some of the *Grutter* opinions also address this issue, at least tangentially. *See* Grutter v. Bollinger, 539 U.S. 306, 374 & n.12 (2003) (Thomas, J., dissenting) ("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, 382 (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 applies and arguing that the data demonstrate that there is "substantially different treatment among the three underrepresented minority groups").

nuanced way.[116] Instead, the *Grutter* Court simply takes the Law School at its word that its admissions program is nuanced, citing only the Law School's admissions policies to support the proposition that the admissions system operates in a nuanced fashion.[117] While the *Grutter* Court cites statistics that it states demonstrate that the Law School "frequently" admits non-preferred applicants with lower credentials than preferred minorities it rejects,[118] such statistics say nothing about whether preferences granted to minorities are differentiated; they merely demonstrate that the university affords weight to factors other than race. Thus, the most that can be said about the Law School's admissions program is that its racial preferences are *potentially* differentiated; no evidence is offered that the preferences are *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

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[116] The Court uses much lofty language in its opinions and makes unsupported assertions about how the Law School's program operates. For example, the Court states 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 states 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) (opinion of Powell, J.)). The Court continues, 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.*

[117] *Id.* at 337-39; *cf. infra* note 158 and accompanying text.

[118] *See Grutter*, 539 U.S. at 338. Not only does this statistic fail to support the proposition that the Law School's admissions program is sufficiently nuanced, but also it fails to measure the extent to which the Law School places weight on race. *See infra* Subsection IV.A.2.d.

give excessive weight to race.[119] This Subsection 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 had placed too much weight on race. While this Subsection is descriptive only, we offer a normative critique of these methods for measuring weight in Subsection IV.A.2. This Subsection analyzes each case separately because the Court engages in a different weight inquiry in each case.

a. The *Gratz* Measures of Excessiveness

The opinion for the Court in *Gratz* suggests 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

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[119] 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 19, 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 (quoting *Bakke*, 438 U.S. at 317 (opinion of Powell, J.)))).

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 say 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 87, at 548 (citations omitted). Primus emphasizes this point in another part of his article:

> 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. (citations 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).

which attempts to measure weight on what we have called the "outcome dimension."

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 suggests this measure in a discussion of the example from Justice Powell's *Bakke* decision that compares three hypothetical applicants, A, B, and C, where A and B are black and C is "a white student with extraordinary artistic talent."[120] 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."[121]

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[120] *Gratz*, 539 U.S. at 272 (quoting *Bakke*, 438 U.S. at 324 (opinion of Powell, J.)). We discussed this hypothetical earlier. *See* discussion *supra* notes 108-109 and accompanying text.

[121] *Gratz*, 539 U.S. at 273 (citations omitted). Note that Chief Justice Rehnquist gives short shrift to how the flagging system mitigates 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 ARC, he would most certainly be admitted by the review committee. In order to be flagged, the student would need to be academically qualified and earn a selection index score of at least seventy-five if he was not a resident of Michigan and eighty if he was a resident of Michigan. *See supra* note 80. The applicant would be awarded five points for his "extraordinary talent," and surely an applicant with this much talent would earn the twenty points available at the provost's discretion. *See supra* note 78. So, this future Monet or Picasso would need to cobble together only fifty or fifty-five more points in order to be flagged. Given the multitude of other ways he can earn points and the fact

This passage suggests that the relative weights of the points bother Chief Justice Rehnquist and it implies that he views the weight inquiry to be relevant to the individualized consideration inquiry. This passage does not, however, offer a theory for evaluating when race is given too much weight on this measure.[122]

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 announces that the admissions system at issue in *Gratz* is not narrowly tailored, he implies that courts may want to make such a comparison: "We 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."[123] Chief Justice Rehnquist does 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 narrowly tailored inquiry. To the extent that such an inquiry is relevant, however, Chief Justice Rehnquist once again does not offer a theory for determining when race receives too much weight relative to the total number of points needed for admission.[124]

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many points are available for even a low GPA, it seems that such a student would be flagged as long as his credentials are not unduly low, in which case it might be appropriate to reject him.

[122] *See also* discussion *infra* Subsection IV.A.2.a (discussing this measure).

[123] *Gratz*, 539 U.S. at 270 (emphasis added). Chief Justice Rehnquist's figure of one-fifth comes from the fact that preferred minorities can earn twenty points for their race, *see supra* note 78, and the majority opinion states that an index of one hundred points or more guaranteed admission, *see supra* note 79.

[124] *See also* discussion *infra* Subsection IV.A.2.b (criticizing this measure).

In addition to suggesting that courts should look at the means of the admissions system to determine if universities place too much weight in race, Chief Justice Rehnquist indicates that courts might look at admissions outcomes. He notes 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."[125] This statement's placement in a paragraph about individualized consideration indicates that Chief Justice Rehnquist sees the weight inquiry as part of the individualized consideration inquiry. Furthermore, it suggests that Chief Justice Rehnquist thinks 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."[126] Chief Justice Rehnquist does not, however, offer a theory for determining when an admissions system assigns too much weight to race under his proposed measure.[127]

Justice Souter's dissenting opinion in *Gratz* sheds further light on what the *Gratz* Court says about whether a weight inquiry is part of the individualized consideration inquiry.[128] Justice Souter states that the weight component might be

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[125] *Gratz*, 539 U.S. at 272 (citations omitted) (alteration in original) (quoting *Bakke*, 438 U.S. at 317 (opinion of Powell, J.)).
[126] *Id.*
[127] *See also* discussion *infra* Subsection IV.A.2.c (criticizing this measure).
[128] Justice Souter's dissent also addresses 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

the basis for the Court's decision to strike down the College's program: "The [Court's] objection goes to the use of points to quantify and compare characteristics or . . . the number of points awarded due to race."[129] The placement of this sentence after a sentence referring to individualized consideration suggests that Justice Souter reads the Court to be saying that the weight inquiry is part of the individualized consideration inquiry.[130]

So, the *Gratz* opinion suggests that a weight inquiry is part of the individualized consideration inquiry, and it proposes 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, does Chief Justice Rehnquist explain why the measure captures the constitutionally relevant weight assigned to race. In addition, for none of the

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> 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 weight 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.

[129] *Id.* at 295 (Souter, J., dissenting).

[130] 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.*

measures does 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.[131]

b. The *Grutter* Measure of Excessiveness

The majority opinion in *Grutter* also suggests that the weight given to race is relevant to the individualized consideration inquiry, but its discussion of weight is different from *Gratz*'s discussion of weight:

> 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.[132]

Justice O'Connor frames the weight requirement as prohibiting race or ethnicity from becoming "the defining feature" of an application. Given that Justice O'Connor sandwiches this statement about race not being the "defining feature" between two statements about individualized consideration, it seems reasonable to infer that she views the inquiry into whether race is a "defining feature" as part of the individualized consideration inquiry.[133]

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[131] We discuss both of these shortcomings *infra* in Subsection IV.A.2.

[132] Grutter v. Bollinger, 539 U.S. 306, 336-37 (2003) (citations omitted) (emphasis added).

[133] Justice O'Connor's views on this matter are consistent with her views in the voting redistricting cases—just as the 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., principal opinion) ("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) (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 . . . .'" (quoting Bush v. Vera, 517 U.S. 952, 959 (1996) (O'Connor, J., principal opinion) and Hunt v. Cromartie, 526 U.S. 541, 547 (1999))).

But, what does it mean for race to be "the defining feature" of an application? Justice O'Connor does not explain what she means by "defining feature," but later in the opinion, during the same discussion, she notes what she sees as evidence that universities give 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.[134]

The *Grutter* Court seems to be suggesting a measure along the outcome dimension. The *Grutter* Court's 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* advocates looking at admissions outcomes to determine how "frequently"[135] cases arise in which race clearly did not trump nonracial characteristics.

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 notes 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."[136] The fact that the no-undue-burden requirement—a requirement that is related to the weight

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[134] *Grutter*, 539 U.S. at 338 (citations omitted).
[135] For a description and discussion of what the Court means by the word "frequently," see *infra* notes 179-181 and accompanying text.
[136] *Grutter*, 539 U.S. at 341.

given to race in admissions[137]—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 views the weight inquiry as part of the individualized consideration inquiry, but it suggests a different—and weaker—measure for determining whether race has been given too much weight. It asks whether race is the defining feature of an application, and it answers this question in the negative if nonminority applicants are "frequently" admitted with lower credentials than minority applicants who are rejected. As was the case in *Gratz*, the Court does not attempt to justify why its measure captures the constitutionally relevant weight assigned to race. And, also like the *Gratz* Court, the *Grutter* Court fails to offer a theory for where the line should be drawn between programs that weight race too heavily and those that do not.[138]

Two important points emerge in this Subsection. 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.

C. How the Three Meanings Fit Together

[137] *See supra* note 29.
[138] *See also* discussion *infra* Subsection IV.A.2.d (criticizing this measure).

Read together, *Grutter* and *Gratz* suggest that the Court 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.[139]

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 since the College assigned all minority applicants the same number of points for their race.[140] 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.

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[139] *Cf.* Girardeau A. Spann, *From* Brown *to* Bakke *to* Grutter*: Constitutionalizing and Defining Racial Equality*, 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* 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.

[140] *See supra* notes 116-118 and accompanying text.

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 non-preferred applicants are admitted with lower GPAs and test scores than preferred minority applicants who are 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 Subsection 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.[141]

The *Gratz* outcome measure asked whether the program "has the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified

[141] We do not conduct similar analysis on the *Grutter* test because the test itself is not well-defined. *See* discussion *infra* notes 178-180 and accompanying text. While we do not fully analyze how the College data fares under the *Grutter* test, we do report on some calculations that have some bearing on this question. *See infra* note 180.

underrepresented minority applicant."[142] The Court does not make clear what it means by "qualified," and the source it cites for support of the proposition that virtually all qualified minority applicants are accepted does not provide a definition either,[143] so we must approximate a definition. We first aggregated all of the relevant data across residency status, race, and year[144] 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 or equal to five percent of 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 are greater than or equal to a cell meeting the description in (1).[145]

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[142] *Gratz*, 539 U.S. at 272 (ellipsis in the original) (quoting *Bakke*, 438 U.S. at 317 (opinion of Powell, J.)).

[143] The Court cites the Appendix to the Petition for Certiorari. *Id.* at 254 (citing App. to Pet. for Cert. at 111a).

[144] When computing statistics for the College for 1999, we did not aggregate across year; 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.

[145] The Court found 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 App. to Pet. for Cert. at 111a)); App. to Pet. for Cert., *Gratz*, at 111a ("According to the University, all of the students admitted to the University are qualified to attend the University, and for the purpose of these motions, Plaintiffs assume this proposition to be true.").

While all admits 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

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.[146] Our results are summarized in Table 5.[147]

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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."

[146] See *supra* notes 48-49 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 non-preferred qualified applicants who were accepted:

	Percentage of Qualified Preferred Minority Applicants Accepted	Percentage of Qualified Non-Preferred Applicants Accepted
Law School	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.

[147] 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:

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 Non-Preferred Applicants Accepted
Law School	53%	64%	39%
College: All Years	48%	90%	70%
College: 1999	32%	88%	72%

Table 5

	Percentage of Qualified Preferred Minority Applicants for Whom Race Was Decisive
Law School	52%
College: All Years	48%
College: 1999	32%

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 fifty-two percent of the qualified minority applicants at the Law School, whereas it was decisive for only forty-eight percent of the qualified minority applicants at the College for all years, and thirty-two percent of the qualified minority applicants for 1999, the year the program at issue in *Gratz* was in place.

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 non-preferred 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 non-preferred applicants in that cell were admitted and greater than or equal to three non-preferred 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 non-preferred applicants	Percentage of Qualified Preferred Minority Applicants for Whom Race Was Decisive	Percentage of Qualified Preferred Minority Applicants Accepted	Percentage of Qualified Non-Preferred Applicants Accepted
Law School	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.

Second, stunningly, the Court misapplied its own test in *Gratz*—the Court was incorrect in concluding that race is decisive for "virtually every minimally qualified minority applicant" at the College. In fact, race was decisive for only forty-eight percent of all qualified minority applicants at the College for all years and for only thirty-two percent 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 notes in his opinion.[148] Because Chief Justice Rehnquist cites 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.[149] A

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[148] Early in the opinion, Chief Justice Rehnquist notes that "it is undisputed that the University *admits* 'virtually every qualified . . . applicant' from these groups [underrepresented minorities]." *Gratz*, 539 U.S. at 254 (emphasis added) (quoting App. to Pet. for Cert. at 111a). His statement that this fact is "undisputed" seems accurate—the brief for the University of Michigan states that "LS&A ends up admitting virtually all minority applicants with competitive academic credentials." Brief for Respondents at 4-5, *Gratz* (No. 02-516). And, our calculations indicate that ninety percent of the qualified minority applicants were admitted for the years 1995-1999, and eighty-seven percent were admitted in 1999; both figures are close to "virtually every" qualified applicant.

[149] 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 ninety percent of all qualified minority applicants in all years and eight-seven percent in 1999, while the Law School admitted only sixty-three percent 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 seventy percent 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

large proportion of minimally qualified minorities was admitted to 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.

Part III has argued that the *Grutter* and *Gratz* Courts essentially adopted a "Don't Tell, Don't Ask" approach to narrow tailoring. If a university 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 IV will argue that this narrow

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fewer applicants, such as, for example, forty percent 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 makes this point in his dissent to *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." (quoting App. to Pet. for Cert. at 111a)).

tailoring analysis has two significant flaws and will articulate a vision for what narrow tailoring analysis should look like in the admissions context.

IV. A Normative Critique of *Grutter* and *Gratz*

The *Grutter* and *Gratz* narrow tailoring analysis described in Part III 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 Section A by arguing that that both shifts are mistakes and then will outline in Section B how the Court should conduct its narrow tailoring inquiry when evaluating admissions programs.

A. Two Mistaken Shifts

Subsection 1 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. Subsection 2 will then argue that the Court was also mistaken in its treatment of the weight inquiry—instead of determining whether programs grant the minimum necessary preference, the Court assessed whether race is 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 III 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 Subsection argues that the narrow tailoring inquiry should not be stricter when applied to programs that quantify. The idea that quantification should trigger heightened scrutiny is not supported by precedent,[150] and it does not bear any relationship to the diversity rationale articulated by Justice O'Connor in *Grutter*.[151] Indeed, in no way does

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[150] The *Gratz* opinions never directly cite precedent in order to argue against quantification, but there is one place in which the *Gratz* Court cites precedent in what *may* be an effort to argue against quantification. Chief Justice Rehnquist follows 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," *id.* at 271 (citations omitted), 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, these cases cited to support that position fail to do so.

The page of *Bakke* that *Gratz* cites makes two points. First, it states 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) (opinion of Powell, J.). Second, it notes 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 does 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* cites states 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 a 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*, 539 U.S. at 333 ("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.

[151] See also Spann, *supra* note 139, 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").

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 an opening up of universities to people of all races.

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,[152] 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 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 to *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.[153]

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[152] *See Bakke*, 438 U.S. at 315 (opinion of 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").

[153]

> 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.

Gratz, 539 U.S. at 295 (Souter, J., dissenting) (citations omitted). Robert George makes a similar point, when he states that the "question that the remaining Justices, particularly Justice O'Connor,

Not only does the diversity interest not call for a requirement that admissions systems not be quantified, but also such a requirement is bad policy. A "no quantification requirement" will cause universities to adopt admissions plans that are, on average, less transparent.[154] Justices Souter and Ginsburg noted in their dissents to *Gratz* the importance of transparency. 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."[155] 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."[156]

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 reviewed flagged applications was sufficient to satisfy the individualized consideration requirement, Justice O'Connor noted disapprovingly that "there is no evidence of how the decisions are actually

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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 93, at 1634-35 (citations omitted) (quoting *Gratz*, 539 U.S. at 305 (Ginsburg, J., dissenting)).

[154] Several scholars have noted that after *Grutter* and *Gratz*, the courts sanction admissions systems that are lacking in transparency. *See* Guinier, *supra* note 119, 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." (citations omitted)); Post, *supra* note 19, at 74 ("Although transparency is ordinarily prized in the law, the Court in *Grutter* and *Gratz* constructs doctrine that in effect demands obscurity." (citations omitted)).

[155] *Gratz*, 539 U.S. at 298 (Souter, J., dissenting).

[156] *Id.* at 305 (Ginsburg, J., dissenting).

made—what type of individualized consideration is or is not used."[157] 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 not clear.[158]

The lack of transparency is problematic for several reasons.[159] First, it is anti-democratic—it prevents citizens from obtaining the information needed to judge the policy of public institutions.[160] Second, lack of transparency invites

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[157] *Id.* at 280 (O'Connor, J., concurring). Justice O'Connor concluded that the review provided by the ARC 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 is not clear that the committee reviews a "meaningful percentage" of applications, and (2) qualification for review by the committee is still based in part on the selection index score).

[158] In *Grutter*, the Court cites 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 116-118 and accompanying text. But, the *Grutter* Court does not examine any evidence about whether decisions are actually made in accordance with these policies, except to examine some statistics suggesting that race is not always dispositive. *See supra* note 118 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 provides individualized review.

Yet, in *Gratz*, Justice O'Connor was not satisfied that the ARC provided individualized review, despite the fact that according to the brief for the University of Michigan, this review was perhaps just as individualized: "[E]very member of the ARC closely reviews each applicant's entire file; the whole committee discusses the applicant's strengths and weaknesses." Brief for Respondents, at 9, *Gratz* (No. 02-516).

[159] *Cf. also* Peter H. Schuck, *Response to 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))).

[160] *See* 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); Richard Kahlenberg, *The Conservative Victory in* Grutter *and* Gratz, Jurist Legal Intelligence Forum, *at* http://jurist.law.pitt.edu/forum/symposium-aa/kahlenberg.php (Sept. 5, 2003).

more arbitrary admissions decisions.[161] Under an unquantified regime, no concrete framework expresses the ways admissions officers should weigh competing characteristics, so individual admissions officers will make admissions decisions that are relatively more inconsistent.[162] 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.[163] Lani Guinier argues that that obfuscation of admissions criteria can lead to "elite self-replication"[164] 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."[165]

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

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[161] *See* Leonard M. Baynes, *Michigan's Minority Point System "Compensated" Minority Students for Inferior Public Education*, Jurist Legal Intelligence Forum, *at* http://jurist.law.pitt.edu/forum/symposium-aa/baynes.php (Sept. 5, 2003) (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").

[162] 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 at 6, *Gratz* (No. 02-516) (citations omitted) (quoting Joint App. at 223). And, university admissions officers have reported that quantifying characteristics helps produce more consistent results. *See* Guinier, *supra* note 119, at 195 n.318.

[163] *See* Crump, *supra* note 160, at 528.

[164] Guinier, *supra* note 119, at 196.

[165] *Id.* at 196 n.320.

assigning a number to race.[166] Under this view, the act of quantifying may itself be socially divisive.[167] 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 under the theory that the citizenry is less likely to learn about the university's racial preferences under an unquantified system.[168] This theory is not justifiable because it also incapacitates the courts from making a judgment on the merits—without some kind of quantification of costs and benefits, courts cannot assess whether racial preferences are excessive.[169]

This Subsection 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.

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[166] For example, Robert Post has stated 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 19, at 74. *See generally* Primus, *supra* note 87, at 566-67 (describing literature discussing expressive harm).

[167] *Cf.* Ayres, *supra* note 20, at 1793-1800 (describing—and refuting—arguments that race-neutral means are less socially divisive than race-conscious means).

[168] *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).

[169] *Cf. id.* 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.

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 focus on weight through use of the four tests described in Subsection III.B.3, the weight inquiry was not an inquiry into whether racial preferences were the minimum necessary. Indeed, in order 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.[170]

The Court completely failed at the second stage in its treatment of all four measures of weight. For all four measures of weight, 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 much at the Law School, without explaining how that determination was—and should be—made.

And, at the first stage, the Court made only very limited progress towards success. As Subsections (a) through (d) will demonstrate, only one of the Court's four tests for quantifying the costs of affirmative action measured a constitutionally relevant cost.[171] This test was not, however, sufficient because it measured the burden of affirmative action along only the means dimension.

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[170] *See infra* Section IV.B.

[171] The test that measured a constitutionally relevant burden was Chief Justice Rehnquist's *Gratz* test that compared the number of points assigned to race to the number of points assigned to other characteristics. *See infra* Subsection IV.A.2.a.

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.[172] We agree with the Court that this measure captures part of the burden felt by non-preferred 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 it to the amount of boost they receive on account of other characteristics.

While we support the Court's use of this measure, use of it 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 is flawed because it is 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 in order 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

[172] *See supra* Subsection III.B.3.a.

the individualized consideration requirement. 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. For example, imagine if the College changed its admissions system such that instead of being able to earn up to 150 points, applicants could earn up to 1050 points, and instead of needing a score of 100 points to earn admission to the College, applicants needed a score of 1000 points to earn admission.[173] 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 accounts 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 "has the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented

[173] For a description of the point values assigned to characteristics under the current system, see *supra* notes 78-79 and accompanying text.

minority applicant."[174] Section III.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 cites Justice Powell's *Bakke* opinion for support for this measure, he misreads Justice Powell's opinion. The portion of Justice Powell's opinion that Chief Justice Rehnquist quotes 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.[175]

When Justice Powell says race should not necessarily be "decisive" for a "particular black applicant" he means 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.[176] Note that when Justice Powell talks about race not being "decisive" for a given candidate, he talks about it in relative terms, as demonstrated by the fact that he follows the word "decisive" with the words "when compared . . . with."

In contrast, when Chief Justice Rehnquist cites this passage of Justice Powell's *Bakke* opinion, he takes the words out of context, stripping them of their relativistic meaning. For Justice Powell, the fact that race is decisive for

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[174] Gratz v. Bollinger, 539 U.S. 244, 272 (2003) (ellipsis in original) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978) (opinion of Powell, J.)).
[175] *Bakke*, 438 U.S. at 317 (opinion of Powell, J.).
[176] *See also* discussion *supra* note 34 and accompanying text.

"virtually every minimally qualified underrepresented minority applicant" would be troubling only if by admitting those candidates, other nonminority candidates were not admitted 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 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 suggests that it is. 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 non-preferred racial groups because it does not examine the impact of such a program on non-preferred 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 non-preferred applicants is slight. Because this measure does not capture the burden of affirmative action on non-preferred applicants, it is not a good measure to use in the constitutional calculus.

d. *Grutter*'s Outcome Measure

Grutter noted that the Law School does not give race too much weight because it "frequently accepts nonminority applicants with grades and test scores

lower than underrepresented minority applicants (and other nonminority applicants) who are rejected."[177] 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 cites to the brief of the University of Michigan for the proposition that the Law School "frequently" admits nonminorities with lower academic qualifications than rejected minorities,[178] and the brief backs up this assertion with the following data: "Sixty-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."[179] This averages to a yearly rate of 11.5 minority applicants who are rejected with at least a 3.5 GPA and a 159 LSAT and 14.2 white or Asian American applicants who are accepted from the same or lower cells. It is completely unclear what standards the Court used to determine that this is a phenomenon that occurs "frequently."[180] 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

[177] Grutter v. Bollinger, 539 U.S. 306, 338 (2003) (citations omitted).
[178] *Id.*
[179] Brief for Respondents, at 10, *Grutter* (No. 02-241).
[180] As a reference point, each year the Law School makes approximately 1300 offers of admission and receives over 3500 applications. *Id.* at 2 n.3.

can be found that demonstrates preferred applicants in that cell and higher are "frequently" rejected in favor of non-preferred applicants in lower cells?[181]

The contours of this "test" are difficult to identify, and for that reason 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 non-preferred racial groups. Instead, its focus is on cases where non-preferred applicants did *not* experience a burden. But because this test does not provide a measure of the total number of applicants for whom race is not decisive, it does not help in determining the number of applicants for whom race is 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 measure of weight—the percentage of enrollees who are 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

[181] If this is the case, then we might be able to demonstrate that the College also "frequently" admits many non-preferred applicants over preferred applicants with higher scores who are rejected. Indeed, our data analysis shows that if we divide College applicants into two groups, the first of which is applicants with a GPA that is 2.6 or higher and an SAT that is 900 or higher, and the second of which is applicants with either a GPA that is lower than 2.6 or an SAT that is lower than 900, we find that between 1995 and 1999, 595 non-preferred 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 non-preferred 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."

would have comprised 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent."[182] 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 was10.5%. Unfortunately, despite the fact that the Court had easy access to this statistic, the Court failed to use it in its constitutional calculus.[183]

This Subsection has argued that the Court's 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* do pay attention to weight, the four ways that the opinions measure 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.

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[182] *Grutter*, 539 U.S. at 320. The Court recites this statistic in the section of the opinion describing the facts and the district court opinion.

[183] The University of Michigan's expert computed similar statistics for other years at the Law School and the College, and the Court had access to these statistics. *See supra* notes 56-61 and accompanying text. Despite its access to such statistics, however, the Court showed no interest in factoring such statistics into its constitutional calculus.

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. Section IV.B outlines what such an inquiry should look like.

B. What the Narrow Tailoring Inquiry Should Look Like

Section IV.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 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. Subsection 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. Subsection 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 non-preferred 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 in order 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 non-preferred applicants.

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 Section IV.A that those tests did not adequately measure the constitutionally relevant cost—the burden on non-preferred applicants. In Part II, we argued that the best way to measure these costs is to measure the costs along the means and outcome dimensions.[184] 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.[185] This statistic better captures the actual cost experienced by non-preferred 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 II 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

[184] Courts may need to aggregate the outcome and means dimensions. We describe one possible way to aggregate these dimensions *supra*. *See supra* note 41.

[185] If the yield—the percentage of admits who accept offers of admission—is the same for preferred minorities and non-preferred 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 non-preferred applicants, then the two statistics will be different. Evidence suggests that the yield is different, at least at highly-selective colleges. *See supra* note 42.

enrollees who were but for admits, we calculated the percentage of admits who were but for admits.[186]

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.[187] Note that in order to measure the marginal costs of affirmative action, this is equivalent to examining the qualification gap between the least qualified[188] but for enrollees and the best qualified non-preferred rejectees who would have enrolled if accepted.[189]

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 to diversity.[190] First, she noted the

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[186] Of course, it may be that the number of but for admits also is 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 may be more burdensome than the one with the smaller percentage.

[187] For example, the enhancement could be measured in units of test score percentile points or GPA percentile points.

[188] 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).

[189] Of course, there may also be a cognizable burden on an applicant who is rejected even if she would not have enrolled if accepted. *Cf.* discussion *supra* note 63 of BOWEN & BOK, *supra* note 40, and Wightman, *supra* note 63. This 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 one percent to two percent might be lower than the costs of increasing from twenty-one percent to twenty-two percent. 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.

[190] Lani Guinier characterizes Justice O'Connor's opinion as emphasizing three elements of diversity, the first of which is endorsed by Justice Powell's opinion in *Bakke*, and the second two of which are new. These three elements are as follows: "[D]iversity is pedagogical and dialogic; it helps challenge stereotypes; and it helps legitimate the democratic mission of higher education."

impact in the classroom: "'[C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'"[191] 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.'"[192] Third, the Court viewed racial diversity as helping both to ensure that higher education is "accessible to all individuals regardless of race or ethnicity"[193] and also to make the "path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[194] So, courts should determine the extent to which the program at issue achieves these three benefits both overall and at the margin.[195]

Guinier, *supra* note 119, at 176 (citations omitted). For a discussion of the ways Justice O'Connor's diversity interest differs in scope from Justice Powell's, see *id.* at 173-176; Primus, *supra* note 87, at 560; Post, *supra* note 19, at 60-61; Rosman, *supra* note 105; and Siegel, *supra* note 92, at 1538-39.

[191] Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (quoting App. to Pet. for Cert. at 246a, 244a).

[192] *Id.* at 330 (alteration in original) (quoting App. to Pet. for Cert. at 246a).

[193] *Id.* at 331.

[194] *Id.* at 332.

[195] 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 the benefits of a diverse student body, schools must enroll at least a "critical mass" 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 (2002); Expert Report of Kent D. Syverud, Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-CV-75928-DT), *available at* http://www.umich.edu/~urel/admissions/research/expert/syverud.html; *cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316 (1978) (opinion of 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 close to zero when the number of preferred minority students who will be enrolled is less than the "critical mass number," but 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 ED. 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).

Once the court has before it quantifications of the overall and marginal costs and benefits, it can conduct the required cost-benefit calculus.[196] Of course, the costs and the benefits are not measured in the same units. But this does not mean they are necessarily incommensurate. The law frequently trades off radically different values—such as lives and dollars, disparate impacts and business justifications. We recognize that the cost and benefit quantums are difficult to compare, but we see two advantages to attempting to compare these incommensurate 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 incommensurate values, sometimes we will be able to make conclusions about the constitutionality of a program by comparing the values. In particular, if it turns

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[196] Interestingly, it follows from this analysis that 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 of speculation, experiment and creation," and promotes the "robust exchange of ideas." *Bakke*, 438 U.S. at 312 (opinion of 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 discussed race-specific benefits enjoyed both on and off campus. *See* text accompanying notes 190-194. 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." *Grutter*, 539 U.S. at 330-32. 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 19, 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* sources cited note 190.

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, in order 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.

Subsection III.B.2 noted that the *Grutter* and *Gratz* opinions suggested another inquiry that might be relevant to the individualization inquiry—the Court's opinions suggest 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 repeatedly 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.[197]

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 these 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 the burden on them to produce these data. 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 in order to admit applicants (nor would we prohibit them from using 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,

[197] 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.

including marginal costs and benefits of differentiation. Under our quantification requirement, if a university's affirmative action program was 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 does come forward with data about the relevant costs and benefits, courts would 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 are but for admits[198] and the effective credit those but for admits received.[199] To compute the marginal costs, universities would need to estimate the quality differential between the least qualified but for admits and the best qualified rejected applicants who would have been admitted and would have enrolled in the absence of affirmative action.[200] 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-

[198] *Cf. supra* note 185 and accompanying text.
[199] *Cf. supra* note 187 and accompanying text.
[200] *Cf. supra* notes 188-189 and accompanying text.

racial understanding, and an increased sense that universities are open to individuals of all races.[201]

Conclusion

The affirmative action program the Supreme Court upheld in *Grutter* appears to have granted larger racial preferences than the program 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 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 truly are 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

[201] For a description of the *Grutter* diversity rationale, see *supra* notes 190-194 and accompanying text.

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—their 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 hold 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* find 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 non-remedial 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.