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In this article, Professor Katyal, who filed the "educational autonomy" amicus brief in Grutter on behalf of Deans at the nation's leading private law schools, defends the view that universities have a zone of freedom to pursue Bakke-style affirmative action but outlines some strong limits on such autonomy. The Court's principle of educational autonomy is anchored in judicial precedent and common sense, but, like all forms of judicial deference, such autonomy must be carefully circumscribed. In particular, Professor Katyal argues that if a law school seeks to use educational autonomy as part of its defense of its admissions process, its admissions office cannot keep its admissions data and policies completely secret. One attractive solution, building on another tradition derived from academic freedom, is to use peer review over admissions policies. Without some process to disseminate to outsiders who the university is admitting and rejecting and why, educational autonomy cannot and should not be used to defend a program.

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In this article, Professor Parker examines Justice Scalia’s prediction that the “split double header” of Gratz and Grutter – which seemingly contradict one another – will result in a dramatically increased amount of litigation and become a never-ending aggravation for both students and educators because of uncertainty in distinguishing between constitutional racial activity and unconstitutional kind racial activity. Justice Scalia further predicts that post-Gratz/Grutter litigation will draw all racial groups – the majority group, underrepresented minority groups, and overrepresented minority groups – as plaintiffs, and he proposes an all-or-nothing approach: Outlaw all racial preferences in the public education setting or uphold one such activity as a general matter. Professor Parker takes as a given the value of legal certainty and challenges the positivist aspect of Justice Scalia’s claim that Gratz and Grutter will produce legal uncertainty, and posits that, in fact, Justice Scalia wrongly characterizes Gratz and Grutter as producing mountains of litigation to mark the line between permissible and impermissible racial conscious activity. Thus, what we’ll likely see in the aftermath of Gratz and Grutter is limited litigation to define more precisely how and when schools can consider race, and an answer from the courts that defers to educators. But after this, litigation will have only limited impact on education today. Litigators will quickly learn – just as many of their school desegregation counterparts have – that litigation is not the way to effectuate social change in America, and the filing of litigation will end. In the end, Gratz and Grutter will shift the site of the affirmative action debate to the local and state government level, contrary to Justice Scalia’s prediction.

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