

# The Legal Cost of the “Split Double Header” of *Gratz* and *Grutter*

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## Introduction

In a short opinion in the law school affirmative action case, *Grutter v. Bollinger*,<sup>1</sup> Justice Scalia predicts that the majority’s approval of race-conscious decisionmaking in *Grutter*,<sup>2</sup> coupled with the Court’s disapproval of a similar program in *Gratz v. Bollinger*,<sup>3</sup> will dramatically increase litigation.<sup>4</sup> He predicts that the “split

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

2. See *id.* at 342.

3. 539 U.S. 244 (2003).

4. *Grutter*, 539 U.S. at 345 (Scalia, J., concurring in part, dissenting in part). See also Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1628 (2003) (concluding that the Michigan opinions “will likely encourage affirmative action opponents to mount more litigation challenges”); Marcia Coyle, *The Fallout Begins: In Its Final Week of the Term, the Supreme Court Gives Legal Backing to Two Kinds of Diversity*, NAT’L LAW J., July 7, 2003, at 1 (quoting Curt Levey, director of legal affairs for the Center for Individual Rights: “*Grutter* and *Gratz* together make it virtually inevitable there will be a lot of litigation on the narrow tailoring grounds.”); Curt A. Levey, *Colleges Should Take No Comfort in the Supreme Court’s Reprieve*, CHRON. OF HIGHER ED., July 18, 2003, at 11 (predicting that “the decisions will instead be a road map for bitter and costly litigation. Justice Antonin Scalia’s opinion in *Grutter* identifies enough prospective issues to keep a small army of attorneys busy until retirement.”); Steve Miller & Stephen Dinan, *More Lawsuits Likely on Affirmative Action*, WASH. TIMES, June 24, 2003, at A-12 (“The most tangible outcome of yesterday’s split Supreme Court decisions on affirmative action will be another round of lawsuits over what’s acceptable and what’s illegal for colleges and universities.”); Terence J. Pell, *Camouflage for Quotas*, WASH. POST, June 30, 2003, at A-15 (writing that *Gratz* and *Grutter* “laid the groundwork for more litigation”); Diana Jean

double header” of *Gratz* and *Grutter* will be a never-ending aggravation for both students and educators because of a high level of uncertainty in distinguishing between constitutional racial activity and the unconstitutional kind.<sup>5</sup> In fact, Justice Scalia predicts that post-*Gratz/Grutter* litigation will draw all racial groups – the majority group, underrepresented minority groups, and overrepresented minority groups – as plaintiffs.<sup>6</sup> By contrast, Justice Scalia proposes that an all-or-nothing approach – one outlawing all racial preferences in the public education setting or one upholding such activity as a general matter – would be preferable for its certainty, from the standpoint of legal costs, than the ambiguous course charted by the Michigan opinions, *Gratz* and *Grutter*.<sup>7</sup>

One could respond to Justice Scalia by claiming that legal certainty is of little value or that increased litigation costs to answer that uncertainty is of minor concern, but that is not my approach. Instead, I take as a given the value of legal certainty<sup>8</sup> and challenge the positivist aspect of Justice Scalia’s claim that *Gratz* and *Grutter* will produce legal uncertainty that the courts will resolve.<sup>9</sup> In a nutshell, I argue that Justice Scalia wrongly characterizes *Gratz* and *Grutter* as producing mountains of litigation to mark the line between permissible and impermissible racial conscious activity.

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Schemo, *Group Vows to Monitor Academia’s Responses*, N.Y. TIMES, June 25, 2003, at A-22 (quoting Terence J. Pell, president of Center for Individual Rights, as saying that the Supreme Court’s approach “increases considerably the odds that there’s going to be additional litigation here”); Peter H. Schuck, *Reflections on Grutter* (September 5, 2003), at <http://jurist.law.pitt.edu/forum/symposium-aa/schuck-printer.php> (writing that “we can expect much future litigation over whether the use of race as a ‘plus factor’ in a given affirmative action plan is excessive”).

5. *Grutter v. Bollinger*, 539 U.S. 306, 345 (2003) (Scalia, J., concurring in part, dissenting in part).

6. See *infra* Part I.C. and accompanying notes.

7. See *Grutter*, 539 U.S. at 345 (Scalia, J., concurring in part, dissenting in part) (“Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today’s *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation.”). For a partial response to this argument, see *infra* notes 73-74, 108-110 and accompanying text.

8. See generally Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 812-16 (2002).

9. The level of uncertainty could affect one’s support of the Michigan opinions. See *infra* note 113 and accompanying text. Yet, both questions put aside, as do I, the issue of the correctness of *Gratz* and *Grutter* from the standpoint of Equal Protection Clause jurisprudence. Certainly one could argue the substantive correctness of the decision justifies the costs associated with the resulting legal change, but my focus – the extent of the legal uncertainty generated by *Gratz* and *Grutter* – is different.

This argument proceeds in two parts. Part I identifies the many questions raised but unanswered by *Gratz* and *Grutter*. New legal rules – whether promulgated by the legislature or announced in court opinions – always produce legal uncertainty resolved often by the judiciary. The primary costs associated with *Gratz* and *Grutter* are akin to what Professor Michael Van Alstine has defined as “positive uncertainty costs” – the uncertainty that remains even after we have deciphered the content of the new rule.<sup>10</sup> Other types of costs often associated with new legal principles are less pronounced after *Gratz* and *Grutter* because of the confusion existing prior to the Michigan opinions.<sup>11</sup>

Part II identifies three reasons why the areas of continuing uncertainty identified in Part I will not lead to much litigation. The first reason concerns the difficulty of the open questions from *Gratz* and *Grutter*.<sup>12</sup> To the extent we can resolve the uncertainty with relative ease, the costs associated with the open questions are lessened. In fact, the most important question after *Gratz* and *Grutter* – what distinguishes constitutional racial decisionmaking from the unconstitutional kind – is actually not as difficult as it appears because *Grutter* provides ample room for other educators to consider race and stay within constitutional boundaries.<sup>12</sup>

The second reason is that we can expect little judicial involvement in solving the more difficult questions.<sup>13</sup> Contrary to Justice Scalia’s predictions, affirmative action opponents are not likely to file much litigation after *Grutter*. Now that the Supreme Court has ruled that race-based affirmative action predicated on diversity can be constitutional, those opposing affirmative action are more likely to achieve their objective of eliminating affirmative action outside of federal court, at the state and local government level.<sup>14</sup> The federal judiciary’s province is now one primarily of detail, which is not the central concern to affirmative action opponents.

Even in evaluating the details of affirmative action programs – which can prove critical – courts are not likely to assert much oversight. The uncertainty will likely be resolved by the court deferring to educators. Courts are likely to behave as they have in other instances where the courts have supervised the constitutional

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10. See Van Alstine, *supra* note 8, at 828.

11. See *infra* notes 36-41 and accompanying text.

13. See *infra* notes 73-79 and accompanying text.

14. See *infra* notes 82-91 and accompanying text.

15. See *infra* notes 103-106 and accompanying text.

behavior of schools and have afforded education defendants special status.<sup>15</sup> That is, now that diversity can be a compelling governmental interest, courts will be incredibly deferential to educators in separating permissible affirmative action from the impermissible. Courts will largely leave the details of affirmative action programs to educators.

Third, the *idea* of diversity (as opposed to its *implementation*) entails a relatively narrow idea of why race should matter.<sup>16</sup> The idea tinkers only at the edges of race-based decisionmaking, in ways supported generally by power elites. This limited view of why race matters further restricts the judiciary's authority in the affirmative action debate.

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.<sup>17</sup> 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.<sup>18</sup>

## I. Potential Legal Transition Costs

### A. The Michigan Decisions, in Brief

In *Grutter*, the Court upheld the University of Michigan Law School's ("law school") program of taking into account race and ethnicity in making offers of admission.<sup>19</sup> Diversity was deemed to be a compelling governmental interest, and the law school's approach was narrowly tailored to that interest.<sup>20</sup> The law school's program included individual reading of each applicant's file, with no cutoff scores under which no student would be admitted and no automatic

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16. *See infra* notes 83, 89-91 and accompanying text.

17. *See infra* notes 99-102 and accompanying text.

18. *See infra* note 113 and accompanying text.

19. *See infra* notes 103-106 and accompanying text.

20. *See Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

21. *See id.* at 332, 336.

admittance scores under which students would always be admitted.<sup>21</sup> In fact, no point system guided the process. In making admissions decisions, the school considered “soft” variables like the “enthusiasm of the recommenders, the quality of the undergraduate institution, the quality of the applicant’s essay, residency, leadership, and work experience, unique talents or interests, and the areas and difficulty of undergraduate course selection.”<sup>22</sup> The evaluation included affording some undefined boost for “racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.”<sup>23</sup> As would be expected for giving a “plus” to certain groups, students from under-represented minority groups had on average lower standardized test scores and undergraduate grades than other admitted students.<sup>24</sup> Yet, the Court held that the law school had not established a quota, despite the school’s quest for a “critical mass” of preferred minority students.<sup>25</sup> The Court concluded

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22. See *Grutter v. Bollinger*, 288 F.3d 732, 746,750 (6th Cir. 2002) (en banc), *aff’d*, 539 U.S. 306 (2003).

23. *Id.* at 736.

24. *Id.* at 737.

25. See *id.* at 748-49. For example, “minority applicants with an A average and an LSAT score down to 156 (the 70th percentile nationally) are admitted at roughly the same rate as majority applicants with an A average and an LSAT score over a 167 (the 96th percentile nationally).” *Id.* at 796 (Boggs, J., dissenting). *But see id.* at 748 (“Upon inspection, however, the unsuccessful applicants’ statistical evidence demonstrates just what one would expect a plan like the Harvard plan to demonstrate – that race and ethnicity, as ‘plus’ factors, play an important role in some admissions decisions.”).

26. See *Grutter v. Bollinger*, 539 U.S. 306, 337-338 (2003) (characterizing the law school’s program as too “flexible [and] mechanical” to be a quota). Chief Justice Rehnquist and Justice Kennedy disagreed. See *id.* at 364-370 (Rehnquist, C.J., dissenting); *id.* at 370-375 (Kennedy, J., dissenting). Chief Justice Rehnquist focused on the strong correlation between the percentage of preferred minority applicants and the percentage of preferred minority admittees. See *id.* at 367 (noting that “from 1995 to 2000 the percentage of admitted applicants who were members of these minority groups closely tracked the percentage of individuals in the school’s applicant pool who were from the same groups”). *But see* Sarah C. Zearfoss, *Admissions of a Director*, 30 HAST. CONST. L. Q. 429,443 (2003) (positing that “the same phenomenon would be revealed for other categories that appear in similar numbers in our applicant pool – people whose last names begin with C or M, for example, or people hailing from California and New York . . . . It may simply be that when some group consistently appears as a relatively fixed percentage of our applicant pool, odds are that they will appear in similar numbers in the pool of admitted students.”). Justice Kennedy identified the range in preferred minority students enrolled as evidence of an unlawful quota. See *Grutter*, 539 U.S. at 372 (noting that from 1995 to 1998, “[t]he percentage of enrolled minorities fluctuated only by 0.3%, from

that the law school provided an individual review for all applicants based on a variety of soft factors, only one of which was racial and ethnic status.<sup>26</sup>

Yet, in *Gratz* the Supreme Court held that the racial preferences in admissions at the University of Michigan College of Literature, Science, and the Arts (hereinafter “undergraduate school”) were unconstitutional.<sup>27</sup> Although diversity could be a compelling governmental interest, the undergraduate program could not pass the narrow tailoring prong of strict scrutiny.<sup>28</sup> Unlike the law school program, admissions to the undergraduate program were largely determined by a numerical score, with twenty points (out of a possible 150) awarded to preferred minority groups.<sup>29</sup> Although some students would receive individualized review, not all would.<sup>30</sup> The combination of an automatic numerical boost and limited individualized review proved fatal, as the Supreme Court deemed the undergraduate program a quota and thus unconstitutional.<sup>31</sup>

Justice Scalia wrote a short dissent in *Grutter*.<sup>32</sup> He argued, in part, that the Court’s approach in *Gratz* and *Grutter* would increase litigation costs.<sup>33</sup> Specifically, Justice Scalia predicts additional litigation on: (1) when admission practices treat an applicant as an individual and without “separate admissions tracts”; (2) when a quest for a “critical mass” becomes an unconstitutional quota system; (3) whether schools are truly interested in diversity if they “walk the walk of tribalism and race segregation on their campuses”; (4) whether racial preferences “have gone below or above the mystical *Grutter*-approved ‘critical mass’”; and (5) whether non-preferred minority groups can be excluded from a school’s definition of a

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13.5% to 13.8%). *But see* Zearfoss, *supra*, at 442, note 39 (countering Justice Kennedy’s argument).

27. *See id.* at 338.

28. *See Gratz v. Bollinger*, 539 U.S. 244 (2003).

29. *See id.* at 284.

30. *See Gratz v. Bollinger*, 122 F. Supp. 2d 811, 828 (E.D. Mich. 2000), *rev’d in part*, 539 U.S. 244 (2003).

31. *See id.* at 829-30.

32. *See Gratz*, 529 U.S. at 284 (“[T]his individualized review is provided *after* admissions counselors automatically distribute the University’s version of ‘plus’ that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant.”).

33. *See Grutter v. Bollinger*, 539 U.S. 306, 344-346 (Scalia, J., concurring in part, dissenting in part).

34. *See supra* notes 1-7 and accompanying text. For a description of a more limited claim by Chief Justice Rehnquist and Justice Thomas, see *infra* note 35.

"critical mass."<sup>34</sup>

His argument depends on two steps: defining a high level of uncertainty in the aftermath of *Gratz* and *Grutter* and determining that the uncertainty will be answered in the courts. If both steps are true, then the Michigan opinions would cause high legal transition costs that may affect one's support of the opinions. The first step of Justice Scalia's argument is the subject of the rest of this part; the second, the topic of Part II.

### **B. The Uncertainty Pre-*Gratz* and *Grutter***

To place the questions left unanswered by *Gratz* and *Grutter* in context, we must first recognize the uncertainty attending affirmative action before the Michigan opinions. Lower courts had split on the validity of Justice Powell's solo opinion in *Bakke*, which had reasoned that diversity could be a compelling governmental interest for race-based admissions.<sup>35</sup> They disagreed on whether diversity could ever be a compelling governmental interest and whether current affirmative action programs could be narrowly tailored even if diversity were accepted as a compelling governmental interest.<sup>36</sup>

That prior uncertainty meant that at least one common cost associated with "new" legal rules – learning the content of the new

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35. *See id.* at 345-46. Relatedly, Chief Justice Rehnquist and Justice Thomas also note a potential concern for future litigation on behalf of non-preferred minority students. *See id.* at 361-62 (Thomas, J., concurring in part, dissenting in part) (noting "the issue of unconstitutional racial discrimination among the groups the Law School prefers" is still an opinion question); *id.* at 366 (Rehnquist, C.J., dissenting) (recognizing that the law school offer no reasons "of why that concept [of critical mass] is applied differently among the three underrepresented minority groups").

26. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978) (opinion of Powell, J.).

37. *Compare Grutter v. Bollinger*, 288 F.3d 732, 739 (6th Cir. 2002) (en banc) (holding that diversity can be a compelling governmental interest), *aff'd* 539 U.S. 306 (2003); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1201 (9th Cir. 2000) (dicta supporting holding in *Grutter*); *Brewer v. West Irondequoit Central Sch. Dist.*, 212 F.3d 738, 745-46 (2d Cir. 2000) (holding that voluntary transfer program designed to reduce the racial isolation of Rochester and the surrounding suburban school districts can be a compelling state interest); and *Hunter v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1063 (9th Cir. 1999) (upholding the constitutionality of a race conscious admissions program for a "laboratory" elementary school operated with a stated justification of researching to learn how to improve "the quality of education in urban public schools"), *with Hopwood v. Texas*, 78 F.3d 932, 948 (5th Cir. 1996) (holding that diversity can never be a compelling governmental interest) *and Johnson v. Bd. of Regents*, 263 F.3d 1234, 1251, 1264 (11th Cir. 2001) (assuming that diversity can be a compelling governmental interest, but holding no narrow tailoring); *Eisenberg v. Montgomery County Public Schs.*, 197 F.3d 123, 126-27 (4th Cir. 1999) (same); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 708 (4th Cir. 1999) (per curiam) (same); *Wessmann v. Gittens*, 160 F.3d 790, 797 (1st Cir. 1998) (same).

rule – would occur no matter what the court were to rule in *Grutter* and *Gratz*.<sup>37</sup> A “new” rule of law was inevitable given the uncertainty over *Bakke*.<sup>38</sup> Even adopting Justice Powell’s opinion in *Bakke* today

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38. See generally Van Alstine, *supra* note 8, at 816-22.

39. The Court, in fact, adopted an approach different from that in Justice Powell’s *Bakke* opinion. Granted, the *Grutter* Court followed Justice Powell’s reliance on the First Amendment’s notion of academic freedom in higher education and a presumption of good faith on the part of colleges of universities. See *Grutter*, 539 U.S. 306, 332. Justice O’Connor also quoted from Justice Powell’s opinion when crafting her notion of deference, which was a critical step both in deeming diversity a compelling governmental interest and in holding the law school’s program as narrowly tailored. See *id.* at 333 (“[G]ood faith’ on the part of a university is ‘presumed’ absent ‘a showing to the contrary.’”) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978) (opinion of Powell, J.)). See generally Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691 (2004) (analyzing *Grutter*’s use of deference). Yet, Justice Powell’s approach to the idea of good faith, when considered in context, is remarkably different from *Grutter*’s idea of deference. His idea of good faith concerned the intent to discriminate, an element that Justice O’Connor assumes. Justice O’Connor instead uses the idea of deference to judge the legality of an intent to discriminate. The Court, in fact, adopted an approach different from that in Justice Powell’s *Bakke* opinion.

Justice Powell’s language of good faith treatment of education administration defendants arose in the context of his response to the argument that diversity programs are in reality racial preference programs like an unlawful quota system. Justice Powell distinguished the diversity program from the set-aside program by the intent to discriminate. See *Bakke*, 438 U.S. at 318 (opinion of Powell, J.) (“A facial intent to discriminate, however, is evident in petitioner’s preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element – to be weighed fairly against other elements – in the selection process.”). In determining intent to discriminate, Justice Powell articulated an idea of good faith: “[A] court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases.” *Id.* at 318-19. He then cited cases regarding proof of discriminatory intent. See *id.* at 319 (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986).

Justice Powell thereby asserted that employing race as a “plus” factor is not a racial classification as is true of a system of reserving slots for minority applicants. Thus, a school “professing to employ a facially nondiscriminatory admissions policy” is presumed not to be using the policy as a “cover” for a discriminatory policy. This could only be overcome by proof of discriminatory intent according to traditional liability opinions. Yet, today’s jurisprudence would undoubtedly deem a diversity program one with an intent to discriminate, leaving open the question of whether the discrimination was legally acceptable. That is, proof of discriminatory intent by the standards developed in the cases cited by Justice Powell and subsequent ones are likely easily met in racial preferences cases – after all the program by design is treating individuals differently because of their race – despite Justice Powell’s contrary characterization that a “plus” program is “a facially nondiscriminatory admissions policy.” See *Bakke*, 438 U.S. at 318 (opinion of Powell, J.). Thus, Justice Powell’s good faith presumption has little relevance today for it is

would still leave questions unanswered and thus create costs associated with learning a new rule. For example, Justice Powell's opinion would not resolve the meaning of diversity, individual review, and narrow tailoring. Justice Powell declared that the setting aside of a certain number of admissions slots for particular minority students was contrary to the notion of diversity, but that some notion of individualized review (i.e., the Harvard Plan) would be acceptable.<sup>39</sup> But the qualities of a constitutional plan were notably absent from his opinion, which also understandably failed to consider the many attributes of today's diversity plans. Thus, even if the Court had adopted wholesale Justice Powell's *Bakke* opinion, a new rule of law would have to be deciphered and articulated.

Further, the uncertainty surrounding the validity of Justice Powell's opinion in *Bakke* also meant that other legal transition costs would not attend *Grutter* and *Gratz*. The idea of "negative uncertainty costs" – the loss of the certainty found under old rules – cannot be present when courts split on defining the old "rules."<sup>40</sup> In short, the legal costs of change in *Gratz* and *Grutter* are lessened to a certain extent because so much uncertainty pre-dated *Gratz* and *Grutter*.

### C. The Uncertainty Post-*Gratz* and *Grutter*

The Court in *Grutter* resolved some of the existing uncertainty when it resolved the critical question of whether diversity could be narrowly tailored to a compelling interest, but questions still remain.

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likely to be overcome whenever a school admits to using racial preferences in the name of diversity.

In many respects, Justice O'Connor's approach in *Grutter* is more akin to Justice Blackmun's solo opinion in *Bakke* than that of Justice Powell. Justice Blackmun, who would have upheld the medical school's affirmative action program, developed a strong idea of deference in the context of his general comments about the contested plan. He emphasized the importance of allowing public school officials to decide the matter for which "the judiciary is ill-equipped and poorly trained . . ." *Bakke*, 438 U.S. at 404 (Blackmun, J., concurring in part and dissenting in part). Further, he noted that "[t]he administration and management of educational institutions are beyond the competence of judges and are within the special competence of educators, provided always that the educators perform within legal and constitutional bounds. For me, therefore, interference by the judiciary must be the rare exception and not the rule." *Id.* This approach is more like Justice O'Connor's because it crafts a special role for educators, based on their superior position, at the expense of the judiciary. This is also more akin to Justice O'Connor's allowance of deference in a broad context, as opposed to Justice Powell's more limited view of presuming a good faith not to discriminate.

40. See *Bakke*, 438 U.S. at 318 (opinion of Powell, J.).

41. See generally Van Alstine, *supra* note 8, at 824-28.

The most obvious open question is distinguishing between what makes the undergraduate system unconstitutional and the law school program constitutional.<sup>41</sup> Similarly, the Court provided little content to the meaning of diversity,<sup>42</sup> which will be relevant in judging the constitutionality of challenged affirmative action programs.<sup>43</sup>

The Court also left open many issues not directly raised by either *Gratz* or *Grutter* but critical on determining the reach of the opinions.<sup>44</sup> These questions include: whether diversity can be a compelling governmental interest in the primary and secondary education setting, or whether that justification is unique to higher education;<sup>45</sup> whether the deference underlying the decision that

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42. Professor Derrick Bell has written that the difference between *Gratz* and *Grutter* “requir[e] a legal micrometer to measure . . . .” Derrick Bell, *Learning from Living: The University of Michigan Affirmative Action Cases* (Sept. 5, 2003) at <http://jurist.law.pitt.edu/forum/symposium-aa/bell.php>. Professor Mark V. Tushnet also writes “that the line between the law school program, as administered, and the undergraduate program is thinner than the Court’s decisions suggest.” Mark V. Tushnet, *The Supreme Court on Affirmative Action*, AALS NEWSLETTER (Amer. Assoc. of Law Schs.) Aug. 2003 (copy on file with HASTINGS CONSTITUTIONAL LAW QUARTERLY); see also *Grutter v. Bollinger*, 539 U.S. 306, 345 (2003) (Scalia, J., dissenting) (“Some future lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant ‘as an individual,’ and sufficiently avoids ‘separate admissions tracts’ to fall under *Grutter* rather than *Gratz*.”).

43. The Court adopted the law school’s definition of “obtaining ‘the educational benefits that flow from a diverse student body.’” *Grutter*, 539 U.S. at 332 (quoting Brief for Respondents *Bollinger, et al.*).

44. I agree with others that a more detailed definition of diversity may not necessarily be needed. For example, Professor Peter Schuck has argued as follows:

What the majority does not do is to provide a coherent account of diversity that goes beyond generalities and platitudes, or to explain why the Constitution allows the law school to define diversity in purely and narrowly ethno-racial terms, disfavoring minorities other than the three favored ones (blacks, Native Americans, and the Spanish-surnamed) and treating other kinds of diversity either as much less weighty or irrelevant.

See Schuck, *supra* note 4, at 3. Many have argued that the implementation of diversity – with its preferences for particular racial and ethnic groups – is inconsistent with the ideal of diversity, which would capture more than certain racial and ethnic groups. See, e.g., Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573 (2000). Yet, the law school’s definition of diversity included more than racial and ethnic terms. See *Grutter*, 539 U.S. at 324. Granted the weight not have been significant – only a handful of overrepresented students were admitted with scores lower than the preferred group, but the definition was clearly an expansive one. See *Grutter*, 539 U.S. at 338; *id.* at 366 (Rehnquist, C.J., dissenting). Nor is it clear that greater preferential treatment is needed to achieve diversity outside of the preferred racial and ethnic groups.

45. See Bell, *supra* note 4, at 1622 (noting: “Diversity invites further litigation by offering a distinction without a real difference between those uses of race approved in college admissions programs, and those in other far more important affirmative action policies that the Court has rejected.”).

46. See *Grutter*, 539 U.S. at 345 (Scalia, J., concurring in part, dissenting in part)

diversity can be a compelling governmental interest<sup>46</sup> will apply only to elite colleges and universities; and whether diversity can be a compelling government interest in schools outside of the admissions setting, including whether diversity can justify racial decisionmaking in a school's employment, recruitment, financial aid, scholarships, and outreach and retention programs.<sup>47</sup>

The answers to these questions will, in turn, raise other issues. Two critical questions arise if diversity can be a compelling governmental interest at the primary and secondary level.<sup>48</sup> First, if diversity can be a compelling government interest in the primary and secondary education level, can it justify race-conscious busing and other student assignment methods that do not rely on student merit? Also left open at the primary and secondary level is the applicability of diversity to student activities and athletics, assignments to individual classes based on merit (i.e., ability grouping or tracking), and curriculum and teacher training.

Justice Scalia also predicts litigation concerning whether a university is truly committed to diversity given its other "segregative"

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("Other lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity."); Roger Clegg, *You're Not at the University of Michigan Anymore*, NAT'L REV. ONLINE (Sept. 4, 2003), at <http://www.nationalreview.com/clegg/clegg090403.asp> (arguing that *Grutter* will not be applied at the K-12 level because of the lack of individualized consideration at this level and that the freedom of speech ideas promoted at higher education and part of *Grutter* are inapplicable at the K-12 level).

47. See *Grutter*, 539 U.S. at 332 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.").

48. For a claim that such programs could be constitutional under *Grutter*, see Joint Statement of Constitutional Law Scholars, *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases* (The Civil Rights Project, Harvard University) (2003) at [http://www.civilrightsproject.harvard.edu/policy/legal\\_docs/Diversity\\_%20Reaffirmed.pdf](http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf). See also Jack Greenberg, *Diversity, the University and the World Outside*, 103 COLUM. L. REV. 1610, 1619 (2003) ("[T]he force of [Justice O'Connor's] perception – that affirmative action justifiably and constitutionally contributes to making the country better through preparing students to take up certain positions following graduation – applies to affirmative action employed following graduation as well."); Gerald Torres, *Grutter v. Bollinger/Gratz v. Bollinger: View From a Limestone Ledge*, 103 COLUM. L. REV. 1596, 1599 (2003) ("Given the compelling nature of [diversity], the Court's reasoning can logically be extended to the constellation of activities universities undertake in the construction of their entering classes. Activities like outreach, recruitment, and financial aid are critical to a university in making a diverse student body possible.").

49. To the extent schools are confined to race neutral plans, Professor David I. Levine chronicles the interesting example of San Francisco's race neutral admissions plan. See David I. Levine, *Public School Assignment Methods After Grutter and Gratz: The View from San Francisco*, 30 HAST. CONST. L. Q. 511 (2003).

practices;<sup>49</sup> whether a university can “go below or above the mystical *Grutter*-approved ‘critical mass’”;<sup>50</sup> and whether a minority group has a claim that they have been “short changed” by the university’s definition of a “critical mass”<sup>51</sup> that is too low for a minority group.<sup>52</sup>

## II. The Exit of The Judiciary

What can we expect from the judiciary in answering the unresolved questions of *Gratz* and *Grutter*? I think the answer is “not much.” The debate over affirmative action will shift to meetings of school boards and boards of regents, among voters over state and local referendums, and before state legislatures – not at the federal court house.<sup>53</sup> Even when called to resolve affirmative action disputes, we can expect minimal judicial intervention. This expectation results from three factors. First, the idea of diversity adopted by *Grutter* is easily manipulated. To the extent schools wish to consider race, *Grutter* gives them broad latitude and an accessible “safe haven.”<sup>54</sup> Second, the federal judiciary has demonstrated a great willingness to defer to educators, and the hesitancy to second-guess educators will further limit judicial involvement in the way educators consider race.<sup>55</sup> Third, a restructuring of society based on the multifaceted nature of race and its effects will likely *not* follow *Grutter* because a very narrow view of why race matters underlies the idea of diversity.<sup>56</sup> The Court has validated a concept generally

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50. See *Grutter*, 539 U.S. at 345 (Scalia, J., concurring in part, dissenting in part) (“Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses – through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.”).

51. *Id.* at 345-46.

52. The law school argued successfully that it needed to admit more than a token number of preferred minority students. Instead, it needed a “meaningful representation” of such students, which was reflected in the enrollment of a “critical mass.” *Id.* at 326 (quoting the law school’s director of admissions).

53. *Id.* See also *supra* note 35 (describing the very similar claims by Chief Justice Rehnquist and Justice Thomas). One could also count as unsettled the applicability of diversity outside the education setting. See Roger Clegg, *Preferences Don’t Work; There’s no reason for corporate America to favor minorities and women on the job*, LEGAL TIMES, Aug. 25, 2003, at 54 (arguing that employers should not be able to consider race to promote diversity).

54. See *infra* Part I.D.

55. See *infra* notes 73-79 and accompanying text.

56. See *infra* notes 83-91 and accompanying text.

57. See *infra* Part II.C.

consistent with the status quo. In doing so, the Court only works at the margins of current education practices. This further limits the involvement of the judiciary. In short, although the Michigan opinions leave many questions unanswered, the federal judiciary will have little input in resolving the unknown. Justice Scalia wrongly predicts that an "all or nothing approach"<sup>57</sup> would be preferable, from the standpoint of litigation costs, than the ambiguity created by the Michigan opinions.<sup>58</sup>

### A. The Difficulty of the Unanswered Questions

First, let's consider the difficulty of the questions unanswered by *Gratz* and *Grutter* identified herein.<sup>59</sup> For to the extent the questions are easily addressed, the degree of legal uncertainty is lessened. Difficult questions, on the other hand, create a great deal more legal uncertainty.

What appears to be the most difficult question may be in fact be the easiest: discerning what makes a program unconstitutional under *Gratz* but constitutional under *Grutter*.<sup>60</sup> There is much to be said for why *Grutter* is *not* distinguishable from *Gratz*.<sup>61</sup> Chief Justice Rehnquist and Justice Kennedy present compelling arguments in *Grutter* about why the law school's program, even with reviewing files individually and without assigning points to the applications of students from underrepresented minority groups, may have nonetheless admitted students largely because of their race.<sup>62</sup> The law school's quest for a critical mass meant, as Chief Justice Rehnquist demonstrated, admittance figures for minorities strikingly proportional to their application rates<sup>63</sup> and apparently a different

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58. See *supra* note 7 and accompanying text.

59. See *infra* Part II.E.

60. See *supra* Part I.C.

61. See *infra* notes 20-32 and accompanying text.

62. Justices on the losing side in *Gratz*, in fact, made this argument. See *Gratz v. Bollinger*, 539 U.S. 244, 296 (2003) (Souter, J., dissenting) ("Although the freshman admissions system here is subject to argument on the merits, I think it is closer to what *Grutter* approves than to what *Bakke* condemns . . ."). See also Robert P. George, *Gratz and Grutter: Some Hard Questions*, 103 COLUM. L. REV. 1634, 1634 (2003) (answering the "question [of] whether there is a reasonable basis for the distinction" between the two Michigan opinions with "I doubt it, and so do at least six of the nine Justices").

63. But see Zearfoss, *supra* note 30 HAST. CONST. L. Q., at 442; *id* at 442, note 39 (summarizing her response as the Assistant Dean and Director of Admissions of the University of Michigan Law School to Chief Justice Rehnquist and Justice Kennedy).

64. See *Grutter v. Bollinger*, 539 U.S. 306, 369 (2003) (Rehnquist, C.J., dissenting) (concluding "that the Law School has managed its admissions program, not to achieve a

definition of critical mass for each preferred minority group.<sup>64</sup> The quest for a critical mass also produced a relatively tight range of enrolled minority students.<sup>65</sup> Lastly, the law school kept daily tabs on the racial composition of admitted students, and consulted these records closely toward the end of the admissions process.<sup>66</sup> This also suggests the emphasis of achieving particular outcomes at the expense of individual review. In short, strong evidence indicated that the law school was pursuing a critical mass of students at the cost of individual treatment of applications. And yet the majority defined the law school's policies as constitutional.<sup>67</sup>

Further, some evidence indicated that race-neutral means could be as successful in enrolling preferred minority students as the race-conscious programs used by the law school.<sup>68</sup> Justice Thomas noted the success of Boalt Hall at the University of California, Berkeley in enrolling minority students after passage of Proposition 209, which prohibited race-conscious state action.<sup>69</sup> Justice Thomas also argued

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'critical mass,' but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool." Chief Justice Rehnquist provided many examples, including that "in 1995, when 9.7% of the applicant pool was African-American, 9.4% of the admitted class was African-American. By 2000, only 7.5% of the applicant pool was African-American, and 7.3% of the admitted class was African-American." *Id.* Less convincingly, Justice Kennedy also argued that the "little deviation" of the percentage of enrolled preferred minorities in the entering class proved the lack of individual review. *See id.* at 372 (Kennedy, J., dissenting).

65. *See id.* at 366-67 (Rehnquist, C. J. dissenting) ("Respondents have *never* offered any race-specific arguments explaining why significantly more individuals from one underrepresented minority group are needed in order to achieve 'critical mass' or further student body diversity.").

66. *See id.* at 372 (Kennedy, J., dissenting) (noting that from 1995 to 1998 "[t]he percentage of enrolled minorities fluctuated only by 0.3%, from 13.5% to 13.8%"). The majority opinion noted a greater range of enrolled students by examining a longer period of time. *See id.* at 337 (observing that "between 1993 and 2000, the number of African-American, Latino, and Native-American students in each class at the Law School varied from 13.5 to 20.1 percent, a range inconsistent with a quota").

67. *Id.* at 373 (Kennedy, J., dissenting) ("The consultation of daily reports during the last stages in the admissions process suggests there was no further attempt at individual review save for race itself."). *See also id.* at 345 (Scalia, J., concurring in part, dissenting in part) ("Some will focus on whether a university has gone beyond the bounds of a 'good faith effort' and has so zealously pursued its 'critical mass' as to make it an unconstitutional *de facto* quota system, rather than merely 'a permissible goal.'").

68. *See id.* at 341.

69. A more dramatic race neutral alternative would be for the law school to decrease its selectivity and end its quest to be an "elite" institution. *See id.* at 344 (Scalia, J., concurring in part, dissenting in part); *id.* at 351 (Thomas, J., concurring in part, dissenting in part).

70. *See id.* at 357 (Thomas, J., concurring in part, dissenting in part) (noting that "[t]otal underrepresented minority student enrollment at Boalt Hall now exceeds [pre-

that the law school's reliance on the Law School Admissions Test ("LSAT") made no sense because the test "produce[s] racially skewed results" recognized by the law school.<sup>70</sup> Yet, the Court still held that the law school's program was narrowly tailored.<sup>71</sup> This again shows further reason to doubt close judicial monitoring of admissions programs.

Schools that want to pursue diversity (and not all do, particularly at the primary and secondary level where the idea of integration is unpopular), will likely be able to do so long as they follow the law school's approach and individually review each applicant. *Grutter* provides ample wiggle room for race-conscious decisions. If the law school's program – even with all of its implementation problems identified by the dissenters – passes constitutional muster, then other affirmative action programs will as well.<sup>72</sup>

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Proposition 209] levels").

71. *Id.* at 358 (Thomas, J., concurring in part and dissenting in part).

72. On the issue of narrow tailoring, the Court considered whether the program was a quota, whether race-neutral alternatives existed, whether nonfavored groups suffered an undue burden, and whether the program would one day end. On all four factors, the Court held sufficient narrow tailoring. The admissions program was not a quota because of individualized review of all applicants, which never included any automatic, numerical boost. *See Grutter*, 539 U.S. at 338. Further, race-neutral alternatives such as devaluing the LSAT or GPA defeated the quest for diversity and thus were not necessary. *See id.* at 339-40. Open admissions or other systems that would defeat the law school's elite status were also not necessary. *See id.* In considering the availability of race-neutral alternatives, a school must afford "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Id.* at 339. No group was unduly burdened because all the law school's broad definition of diversity included all racial and ethnic groups. *See id.* at 340-41. Last, the Court agreed with the defendants that the program would end one day, possibly within twenty-five years. *See id.* at 341-42.

73. Granted, this may lead to less "candor" and more "camouflage," as predicted by Justice Ginsburg in her dissenting opinion in *Gratz*. *See Gratz v. Bollinger*, 539 U.S. 244, 303 (2003) (Ginsburg, J., dissenting). *See also* Bell, *supra* note 42, at 1628 (arguing that "many schools will opt to abandon any overt mention of race and move toward maintaining their minority student enrollments through the 'winks, nods, and disguises' that Justice Ginsburg deplors"); Pell, *supra* note 4 (noting that "[w]ithin hours of the [*Grutter*] decision, Michigan officials and others made clear they viewed last week's decisions as little more than a fig leaf with which to hide new racial double standards); Shelby Steele, *Justice O'Connor and Her Colleagues Embrace Anti-Americanism*, WALL ST. J., June 28, 2003, available at <http://www.opinionjournal.com/extra/?id=110003686> (last visited March 26, 2004) (writing that "[u]niversities can, with confidence, take the matter of race and admissions into the proverbial smoke-filled room where, with Cheshire grins, they can titter at the phrase 'narrow tailoring.'"); Schuck, *supra* note 4, at 5 (noting that the law school's "program is sufficiently opaque by design and allows enough scope for subjectivity and discretion in the arbitrary and undisclosed weighting of the 'soft variables' in individual cases that a skeptic cannot *prove* unmistakably that race-ethnicity is not the predominant factor in the admission of preferred minorities").

Thus, the problem of legal uncertainty is partially abated by the broadness of the *Grutter* opinion. More uncertainly would have been generated if the Court had held that diversity *could* be a compelling governmental interest, but that both the law school's and the undergraduate school's approach were not narrowly tailored. Then we would still be searching for a constitutional system. Instead, we know the following: Diversity is a compelling governmental interest and admissions officials have a fairly wide range of options to implement a race-conscious program that will fit within the narrow tailoring framework. Schools now will most certainly require individual reviews of all files – the law school approach – and not rely on the practice of assigning particular weights to preferred groups in the admission process – the undergraduate school's program.<sup>73</sup>

This ease of meeting the example of *Grutter* is applicable for all schools with selective admissions, including admission to primary and secondary examination and magnet schools.<sup>74</sup> These schools typically admit students based on achievement and ability, and the idea of individualized review can apply to these settings relatively easily, although costs may be high. *Grutter* provides no safe haven, however,

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For a contrary view, see Cliff Hocker, *Affirmative Action Upheld*, BLACK ENTERPRISE (Sept. 2003), available at <http://www.blackenterprise.com/ArchiveOpen.asp?Source=ArchiveTab/2003/09/0903-01.htm> (Last visited March 26, 2004)

(quoting Professor Spencer Overton as saying: "Opponents of affirmative action will try to use the fear of future lawsuits to intimidate college administrators into backing off from admissions programs that increase diversity."); Levey, *supra* note 4, at 11 (the author, the director of legal and public affairs at the Center for Individual Rights, the plaintiffs' attorneys in *Gratz* and *Grutter*, contending that "[w]hile it may be safe to maneuver close to a bright line [of *Grutter*], it's wise to stay far away from a fuzzy one, especially when crossing it invites years of costly litigation or the corrupting influence of deceit"); Peter Kirasanow, NAT'L REV. ONLINE (July 7, 2003), available at <http://www.cir-usa.org/articles/41.html> (last visited March 26, 2004) (article by member of U.S. Comm'n on Civil Rights predicting that "most colleges will not be able to meet" the standards of *Grutter*, which "provide[es] powerful ammunition to preference opponents who challenge such programs.").

74. For example, after the Court issued the Michigan opinions, the University of Michigan announced that it would adopt the law school's approach at its undergraduate school. See Press Release, University of Michigan, New U-M undergraduate admissions process to involve more information, individual review (Aug. 28, 2003), available at <http://http://www.umich.edu/news/index.html?Releases/2003/Aug03/admissions> (last visited March 26, 2004). Other schools made similar announcements. See, e.g., Press Release, The University of Texas, The University of Texas at Austin proposes inclusion of race as a factor in admissions process, (Nov. 24, 2003), available at [http://http://www.utexas.edu/opa/news/03newsreleases/nr\\_200311/nr\\_admission031124.html](http://http://www.utexas.edu/opa/news/03newsreleases/nr_200311/nr_admission031124.html) (last visited, March 26, 2004).

75. For case law on the constitutionality of race-based admissions at Boston's Examination Schools, see *Wessmann v. Gittens*, 160 F.3d 790, 797 (1st Cir. 1998).

for schools where admission is not selective, but still includes a racial or ethnic dynamic. For example, K-12 magnet schools with racially weighted lottery admissions programs will not be protected by *Grutter*. By design, lotteries involve no individual review and depend entirely on chance, which can be manipulated for certain groups but not individuals. *Grutter*, with its strong emphasis on individual review, will unlikely allow racially weighted lottery methods.<sup>75</sup> Primary and secondary schools also often allow voluntary transfers for desegregative purposes,<sup>76</sup> and whether individualized review would work here is possible, although transfer requests are usually treated similarly according to the reason for the transfer request, rather than warranting individual review. The irony, of course, is such choice-based approaches to desegregation – even outside of litigation – have long been the preferred method of desegregation of conservatives, who now often oppose affirmative action.<sup>77</sup> Affirmative action principles might result in an end to voluntary desegregative approaches long favored by those opposed to mandatory desegregation plans, leaving schools with few desegregation tools.<sup>78</sup> Even if diversity is deemed a compelling governmental interest in primary and secondary schools, choice-based programs will have greater difficulty falling within the example of the law school because of the absence of merit based admissions.

### **B. Will the Idea of Deference Have Legs?**

While distinguishing the constitutional affirmative action program from the unconstitutional will prove less difficult than others have suggested,<sup>79</sup> uncertainty still remains. After all, this is only one of the many questions unanswered by the Michigan opinions.<sup>80</sup> In approaching these questions, which can prove difficult, courts are

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76. The same is also likely true for “controlled choice” plans. Under such programs, parents can choose among a select number of schools, but their choices and their likelihood of getting their choice are controlled to help ensure a particular racial balance. See DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* 15, 163 (1995).

77. See *id.* at 163. The most common allows students in the racial majority at their home school to transfer to a school where they would be in the racial minority. See *id.*

78. See, e.g., STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 333-36, 421-22 (1997).

79. Professor Levine has identified race-neutral desegregation tools used in San Francisco as a possible solution. See Levine, *supra* note 53, at 521.

80. See *supra* note 42.

81. See *supra* Part I.C.

very likely to curtail their authority. As a beginning point, courts will have the example of the *Grutter* Court's deferential approach. In upholding the law school's admissions system, the Court started from a position of deference to colleges and universities.<sup>81</sup> Deference to educational priorities proved to be a critical concept; without it the Court could have readily deemed that diversity could not be a compelling government interest or that the law school's program was an unconstitutional quota not narrowly tailored to a compelling governmental interest. The Court approached the law school from a stated position of deference on both the question of compelling governmental interest and narrow tailoring. Further, it left the question of the importance of diversity to the law school's mission to the values and opinions of others.<sup>82</sup> The elevation of diversity to a compelling governmental interest occurred not because of judicially imposed values or identified jurisprudence. Instead, diversity becomes a constitutionally protected ideal because of the deference allowed to an elite law school. If courts are likely not to afford other defendants the same degree of deference, affirmative action opponents are more likely to see litigation as winnable. Faced with the idea of deference, affirmative action opponents are much more likely to lose litigation filed in the wake of *Gratz* and *Grutter*. Further, the idea of deference greatly lessens the judiciary's decision-making authority; it encourages courts to agree with educators rather than impose their own substantive admissions criteria.

The deference found in *Grutter* will very likely have legs and be applied in future education affirmative action opinions. Opinions upholding race-conscious activity by educators before *Grutter* had willingly adopted the "good faith" presumption on behalf of

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82. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer . . . . Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."); *id.* at 341 (agreeing "to take the Law School at its word" that it will try its best for the program to end one day); Parker, *supra* note 39 (detailing the role of deference afforded by the majority in *Grutter*). The Court also relied upon the First Amendment protections for colleges and universities. See *Grutter*, 539 U.S. at 332 ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."). *Grutter's* use of deference to school authorities is analyzed in depth in another article. See Parker, *supra* note 39, at 1699-1705.

83. The Court relied on findings by the District Court, social scientists, Fortune 500 Companies, and former members of the United States military in declaring the diversity can be a compelling governmental interest. See *id.* at 334.

institutions defending affirmative action that Justice Powell articulated in his *Bakke* opinion.<sup>83</sup> The earlier reliance on *Bakke*'s presumption of good faith on behalf of educators is entirely consistent with *Grutter*'s notion of deference, although differences between the two exist,<sup>84</sup> and suggests a judicial acceptance of curtailed court intervention.<sup>85</sup>

Further, deference is consistent with the way educators are treated outside the affirmative action arena. Courts have crafted and implemented special constitutional rules for educators in areas outside of the Fourteenth Amendment.<sup>86</sup> These principles have limited the constitutional rights of students, on the theory that educators need special authority for their academic mission to

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84. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978) (opinion of Powell, J.); *Grutter v. Bollinger*, 288 F.3d 732, 748 (6th Cir. 2002) (en banc) (noting that "[i]n light of . . . Justice Powell's instruction that lower courts presume that academic institutions act in good faith in operating their 'plus' programs, we simply cannot conclude that the Law School is using the 'functional equivalent' of the Davis Medical School quota struck down in *Bakke*."); *id.* at 751 ("As with the formulation and consideration of race-neutral alternatives, some degree of deference must be accorded to the educational judgment of the Law School in its determination of which groups to target."); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1201 (9th Cir. 2000) (quoting Justice Powell's language of good faith from *Bakke*); *Hunter v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1066 (9th Cir. 1999) (concluding "that courts should defer to researchers' decisions about what they need for their research"). *But see* *Brewer v. West Irondequoit Central Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000) (upholding race conscious voluntary transfer program with no concern with deference or good faith).

Not surprisingly, other courts, when holding unlawful racial preferences in admissions, had no concern whatsoever with Justice Powell's language or idea of good faith. See generally *Johnson v. Bd. of Regents*, 263 F.3d 1234 (11th Cir. 2001); *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 126-27 (4th Cir. 1999); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). The First Circuit explicitly rejected a defendant's request for deference. *Wessmann v. Gittens*, 160 F.3d 790, 797 (1st Cir. 1998) (concluding that "the School Committee must do more than ask us blindly to accept its judgment"). *Bakke*'s presumption of good faith is discussed further, *supra* note 39.

85. See *supra* note 39.

86. *But see* *Levey*, *supra* note 4, at 11 (arguing that "[o]ther judges will probably take the court at its word that it was applying an 'exacting standard' and will be less deferential to the 'good faith' of a defendant college, with regard to both the consideration of race and the instituting of race-neutral alternatives") (author is the director of legal and public affairs at the Center for Individual Rights, the plaintiffs' attorneys in *Gratz* and *Grutter*).

87. See, e.g., *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 656 (1995) ("Fourth Amendment rights, no less than First and Fourteenth Amendment [due process] rights, are different in public schools than elsewhere."). See generally James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1338 (2000) (concluding that for First Amendment, Fourth Amendment, and due process rights, "the Court has characterized the government as acting in a special capacity – that of educator – and has accordingly given education officials greater leeway to bend constitutional rights in order to achieve certain education goals.").

succeed.<sup>87</sup>

Likewise, in the school desegregation arena – which like affirmative action concerns the Fourteenth Amendment – courts have proven particularly hesitant to involve themselves in educational policy and rarely second-guess school desegregation defendants. The Supreme Court’s school desegregation jurisprudence has long valued local control over schools,<sup>88</sup> an emphasis that harks back to as early as 1955.<sup>89</sup> The idea of local control counsels federal courts to limit their oversight of public schools, an idea very similar to *Grutter’s* allowance of deference.<sup>90</sup> Both are premised on the ideal of local educators running schools and not federal judges. One study of district court opinions issued from June 1, 1992, to June 1, 2002, and the opinion’s disposition on appeal found that local government defendants won in 71% of opinions, a figure that increased to 95% after omitting opinions concerning minor issues.<sup>91</sup> Abiding by Supreme Court precedent, lower courts have hesitated greatly before involving themselves in educational policy and management; instead, the courts have been deferential to the preferences of defendants, a deference entirely consistent with the ideal of local control actively promoted by

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88. *See id.* at 1340 (concluding that “the more a particular policy has to do with the academic function of schools, the more likely it is that the Court will uphold the policy, even if it means truncating a constitutional right”).

89. *See Missouri v. Jenkins*, 515 U.S. 70, 131 (1995) (*Jenkins III*) (“[O]ur cases recognize that local autonomy of school districts is a vital national tradition.”); *Freeman v. Pitts*, 503 U.S. 467, 489 (1992) (“As we have long observed, ‘local autonomy of school districts is a vital national tradition.’”) (quoting *Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977)); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991) (recognizing a “necessary concern for the important values of local control of public school systems”) (quoting *Spangler v. Bd. of Educ.*, 611 F.2d 1239, 1245 n.5 (9th Cir. 1979) (Kennedy, J., concurring)); *Milliken v. Bradley*, 433 U.S. 267, 281 (1977) (*Milliken II*) (holding that “federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution”) (internal quotation marks deleted); *Milliken v. Bradley*, 418 U.S. 717, 743 (1974) (*Milliken I*) (“No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”). *See also Parker*, *supra* note 39 (analyzing the role of local control in school desegregation).

90. *See Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955) (*Brown II*) (“School authorities have the primary responsibility for elucidating, assessing, and solving [school desegregation] problems.”). *See also Parker*, *supra* note 39 (detailing the role of defendants in school desegregation remedies after *Brown II*).

91. *See Parker*, *supra* note 39 (noting similarities between school desegregation’s local control and *Grutter’s* deference).

92. *See Wendy Parker, The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1630, 1633 (2003).

the Supreme Court.<sup>92</sup> This prior tendency toward deferring to educators, an idea rooted in our tradition of local control of schools, provides another strong indicator that the Supreme Court's idea of deference will continue. Lower courts are likely to apply this familiar concept to future cases, and thereby restrict their authority.

The idea of deference will strongly counsel courts to adopt the position of affirmative action defendants. This in turn makes litigation an unlikely avenue of success for affirmative action opponents. Deference also places responsibility for resolving the uncertainty attending the Michigan opinions outside the judiciary and instead to educators (in the context of litigation) or other state and local governments or voters (in the contest of ballot initiatives, legislation, or executive policy).<sup>93</sup> The idea of deference strongly suggests that courts themselves will not be deciding the questions raised but unanswered by *Gratz* and *Grutter*.

### C. The Limits of Diversity

The judiciary's responsibility over affirmative action is also lessened by the rather limited nature of the idea of diversity. Although the implementation of diversity can support a number of affirmative action programs after *Grutter*,<sup>94</sup> neither the implementation nor the idea of diversity will result in a radical restructuring of education. As before the Michigan cases, a choice remains.<sup>95</sup> Some schools in some states will determine that race should not be a factor in admissions; other schools in other states will reach a different conclusion. After all, *Grutter* "reaffirms the status quo, rather than commanding change."<sup>96</sup> For affirmative action opponents, the wrong is race-based decisionmaking, not the idea of diversity. The notion of litigating the details of diversity before the federal courts will likely not be attractive to affirmative action opponents, particularly when courts will be deferential to educators in

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93. See *supra* notes 89-92 and accompanying text.

94. See *infra* Part II.D. (exploring the possibility of affirmative action disputes outside the court house).

95. See *supra* Part II.A.

96. See Torres, *supra* note 48, at 1598 ("Justice O'Connor was clear that mere constitutional *permission* would not translate into constitutional *obligation*.").

97. Michael Klarman, *Are Landmark Court Decisions All That Important?*, CHRON. OF HIGHER EDUC., Aug. 8, 2003, at 10; see also *Grutter v. Bollinger*, 539 U.S. 306, 328-29 (2003) ("Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies.").

resolving the many detailed questions of diversity's implementation.<sup>97</sup>

Further, the choice of affirmative action is a rather limited one. The ideal of diversity is a far cry from the legally repudiated goal of remedying societal discrimination.<sup>98</sup> As it stands now, the narrow tailoring necessary for diversity requires individual review of students, which limits the rationale to institutions with selective admissions.<sup>99</sup> The idea that test scores indicate merit still continues.<sup>100</sup> Nor is the goal to enroll students in proportion to their general racial and ethnic population or to redress the gap in objective measures used for admission. Most significantly, the majority flatly ignored "past and continuing racial barriers."<sup>101</sup> Instead, the goal of diversity adopted by the law school affects the enrollment choices of a handful of students. It is tinkering with race at the margins, and in ways comfortable to many in power. In short, a limited policy justification for affirmative action (diversity) further restricts the judiciary's authority.

#### D. A Change of Venue

The debate over affirmative action will move from the federal courts to the state and local level.<sup>102</sup> For this reason as well, Justice Scalia's parade of litigation onslaught overemphasizes the role the federal judiciary will play in future. Affirmative action opponents not only lost the quest for an absolute judicial ban, they are likely to

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98. See *supra* Part II.B.

99. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496-98 (1989) (plurality opinion); *id.* at 520-21 (Scalia, J., concurring in judgment).

100. See *supra* notes 75-77 and accompanying text.

101. See *supra* note 65 (noting Justice Thomas's argument that continued reliance on the LSAT may not be warranted); Bell, *supra* note 4, at 1629 (persuasively arguing that "diversity serves to give undeserved legitimacy to the heavy reliance on grades and test scores that privilege well-to-do, mainly white applicants").

102. See Bell, *supra* note 4, at 1625.

103. Coyle, *supra* note 4 (quoting Edward Blum of the Center for Equal Opportunity as reporting a need for "a multifaceted attack in the courts, at the ballot box, through grassroots organizations and in legislative bodies"); Schemo, *supra* note 4 (reporting that Terence J. Pell, president of Center for Individual Rights, "contends that the real future of affirmative action will most likely be decided at the ballot box, not in the courtroom"); Sarah-Jane Wilton, *U. Colorado Regent Votes Deciding Yes in Affirmative Action Policy*, COLO. DAILY, Aug. 8, 2003, at - (reporting that state legislators intend to introduce legislation to disallow the consideration of race in Colorado). Curt A. Levey, Director of legal affairs at the Center for Constitutional Rights, has detailed changes at the state and federal executive and legislative levels that could limit the reach of *Grutter*. Levey, *supra* note 4, at 11.

achieve only limited success in the federal judiciary.<sup>103</sup> Yet, ending affirmative action can still be achieved. Individual schools can make that decision, or voters or legislatures can restrict the choice of schools. California, Florida, and Washington are obvious examples of the potential for success at the state level.<sup>104</sup> Not surprisingly, Ward Connerly is hoping to duplicate his success with California and has proposed a ballot initiative in Michigan to outlaw affirmative action.<sup>105</sup> Given that the potential for meaningful success for affirmative action opponents exists at the state and local government level, challenges there seem much more likely than at the federal courts.

### E. Uncertainty Inevitable

Justice Scalia also argued that either an absolute prohibition or a more open acceptance of affirmative action would have created less legal uncertainty than the Court's Michigan opinions.<sup>106</sup> Justice Scalia overstates the impact of a holding that diversity could not be a compelling governmental interest. Such a holding would not end litigation by affirmative action opponents. In fact, litigation might increase.

As school desegregation has demonstrated time and time again, educators will do their best to continue policies outlawed by the courts. Schools would turn to ostensibly race-neutral plans to accomplish the ends of race-based diversity plans, and litigation over the "new" plans would almost be guaranteed. In this scenario, affirmative action opponents would see the judiciary as a place for success and continue litigation-based strategies.

For example, race-neutral plans, such as the percent plans, would still be subject to claims of illegal race-based decisions, as affirmative action opponents claimed before the Michigan opinions.<sup>107</sup> Further, if

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104. See Coyle, *supra* note 4 (quoting Michael Greve of the American Enterprise Institute as saying: "You can continue to litigate these kinds of things [i.e., in what settings can diversity be a compelling governmental interest], but the broader question is settled and everything else is sort of skirmishes.").

105. See CAL. CONST. ART. I, § 31 (2003) (California Proposition 209); TEX. EDUC. CODE ANN. § 51.803(a) (1998) (Top Ten Percent Plan); Washington State Civil Rights Initiative, WASH. REV. CODE § 49.60.400 (2001); Fl. Exec. Order No. 99-281 (1999) (One Florida Plan), available at [http://sun6.dms.state.fl.us/eog\\_new/eog/orders/1999/november/eo99-281.html](http://sun6.dms.state.fl.us/eog_new/eog/orders/1999/november/eo99-281.html) (last visited March 9, 2004).

106. Coyle, *supra* note 4.

107. See *supra* note 7 and accompanying text.

108. See, e.g., Roger Clegg, *Letter to the Editor*, WASH. POST, Nov. 7, 2002, at A24 (writing that the Texas Top Ten Percent Plan "is unconstitutional because it was adopted to circumvent a federal court decision striking down the use of racial preferences and

schools could not consider race (unless remedying past discrimination), admissions officers would still use “soft,” easily manipulated factors such as family background and overcoming of hardship as a way to ensure minority enrollment.<sup>108</sup> If racial enrollment figures remained the same after race-conscious admissions stopped, litigation could challenge whether race was now a hidden factor. Courts would then have to inquire closely into actual admissions practices to determine whether race is an admissions factor, which will likely include detailed evidence of individual admissions files.

That endeavor would be more difficult than the litigation pre-*Gratz* and *Grutter* and what is expected post-*Gratz* and *Grutter*. Before the Michigan opinions, defendants admitted their use of race; but if diversity were not a compelling government interest, in future cases that use of race would be hidden and thus would be subject to intense proof and counterproof involving detailed examination of practices into whether race-neutral measures are really a proxy for race.<sup>109</sup> Such litigation would be incredibly time-consuming, and place judges where they least like to be – in the midst of detailed educational decisions.

### Conclusion

Without a doubt, Justice Scalia is right on one point. The Court has created uncertainty about the reach of diversity as a compelling governmental interest; the Michigan opinions do raise many

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rewrites admissions criteria to achieve a particular racial mix”); Ron Nissimov, *UT Tailors Scholarship to Minority High Schools*, HOUS. CHRON., Feb. 12, 2002, at A21 (reporting that the Center for Individual Rights is determining which scholarship program based on high school enrollment to sue).

109. See generally, Klarman, *supra* note 93, at 10 (arguing that “a contrary decision in *Grutter* would have been very consequential seems unlikely. As Southern whites convincingly demonstrated after *Brown*, court rulings can be evaded in myriad ways.”).

110. See generally Schuck, *supra* note 4, at 6. For example, the University of California, Los Angeles (UCLA) provides extra points in the admissions process for students who have participated in outreach programs for low-performing high schools, or have personal challenges, low-income, or attended a low-performing high school, or are first-generation college students. Daniel Golden, *Extra Credit To Get into UCLA, It Helps to Face ‘Life Challenges,’* WALL ST. J., July 12, 2002, at A1. The law school at UCLA has started a Critical Race Studies program, and its minority enrollment has increased. Daniel Golden, *Case Study: School Find Ways to Achieve Diversity Without Key Tool*, WALL ST. J., June 20, 2003, at A1. The University of California counts scores on SAT II’s in Spanish, including the scores of Spanish-speaking students. Daniel Golden, *Admission: Possible: Language Test Gives Hispanic Students a Leg Up in California*, WALL ST. J., June 26, 2001, at A1.

unanswered questions.<sup>110</sup> But Justice Scalia overstates that uncertainty. The Court has resolved the most fundamental constitutional question: Can affirmative action in admissions ever be constitutional? Not only did the Court answer that question in the affirmative, but it also validated the law school's example. This approach has actually created a great deal of certainty for schools.<sup>111</sup> They can follow the law school's program with relative confidence in legal success.

Likewise, litigation will not resolve much of the remaining uncertainty.<sup>112</sup> Affirmative action opponents are likely to meet quick and extreme resistance by the courts, who have evidenced a strong desire to absolve themselves of the responsibility for second-guessing educators on the details of any policy.<sup>113</sup> Diversity's limited capacity to change the status quo also restricts the authority of the judiciary.<sup>114</sup> Further, the debate over affirmative action is likely to become one not of constitutionality, but of utility and morality and will thus shift to state and local governments.<sup>115</sup> At this level, affirmative action opponents can still achieve what they desire: an end to affirmative action. Tinkering at the details of affirmative action before federal

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111. *See supra* Part I.C.

112. *See supra* Part II.A.

113. In fact, litigation has not yet been filed. Instead, affirmative action opponents have been filing administrative complaints with the Department of Education, Office for Civil Rights (OCR), presumably in the hopes that the Bush Administration will be more sympathetic than the federal judiciary has been. The Center for Equal Opportunity (CEO) has filed a complaint with OCR about sixty programs at Virginia Polytechnic Institute and State University, including ones regarding financial aid, scholarships, internship, and mentors. *See* Memo from Center for Equal Opportunity to Department of Education, Office for Civil Rights, Re: OCR Complaint No. 11-03-2045 (Virginia Tech.) (June 10, 2003) (noting OCR's agreement to investigate eight programs and supplying additional information about other programs) (copy on file with HASTINGS CONSTITUTIONAL LAW QUARTERLY). CEO has also filed a complaint against Rice University with the OCR. *See* Letter from Roger Clegg, General Counsel, Center for Equal Opportunity to Gerald Reynolds, Assistant Secretary for Civil Rights, U.S. Dep't of Educ. (Aug. 18, 2003) (copy on file with HASTINGS CONSTITUTIONAL LAW QUARTERLY). Rice quit considering race in admissions after *Hopwood*, but announced after *Grutter* its intention to consider race again. CEO is contending that Rice's post-*Hopwood* program was a sufficient race neutral alternative. Relatedly, CEO has written The University of Texas that it believes the same to be true for that school as well. *See* Letter from Roger Clegg, General Counsel, Center for Equal Opportunity to Larry R. Faulkner, President, The University of Texas (Aug. 20, 2003) (copy on file with HASTINGS CONSTITUTIONAL LAW QUARTERLY).

114. *See supra* Part II.A.-B.

115. *See supra* Part II.C.

116. *See supra* Part II.D.

courts that are deferential to educators is likely to be a less appealing avenue.

My analysis over the legal costs of the uncertainty generated by *Gratz* and *Grutter* has put aside all together the question of the substantive correctness of the decisions. Yet, the relatively low legal costs generated by the opinions demonstrates one reason to support them. Courts have not proven particularly adept at effectuating change within the school setting.<sup>116</sup> Neither school desegregation<sup>117</sup> nor school finance<sup>118</sup> has demonstrated much potential for restructuring education, and the same is now likely true in affirmative action. By adopting what is essentially the status quo – granting educators some choice in how they consider race in admissions – in the Michigan opinions, the Court has curtailed its role in the affirmative action debate.

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117. See generally STEPHEN C. HALERN, *ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT* (1995); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

118. The resegregation of public school is a well known trend. See, e.g., ARMOR, *supra* note 76, at 172; Erica Frankenberg, Chungmei Lee, & Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream* (The Civil Rights Project, Harvard University) (July 2003), available at [http://www.civilrightsproject.harvard.edu/research/deseg/Charter\\_Schools03.pdf](http://www.civilrightsproject.harvard.edu/research/deseg/Charter_Schools03.pdf) (last visited March 9, 2004).

119. See James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 536-41 (1999).