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EDUCATIONAL BENEFITS REALIZED:  
UNIVERSITIES' POST-ADMISSIONS POLICIES  
AND THE DIVERSITY RATIONALE

Diversity in education, and the means of attaining it, has been one of the most controversial legal issues in modern American history.<sup>1</sup> The Supreme Court has upheld the use of affirmative action in the college admissions process as a means of attaining a critical mass of racial minorities, which is necessary to create a diverse educational setting to facilitate interactions among students of diverse backgrounds and the accompanying robust exchange of ideas.<sup>2</sup> The positive effects of interactional diversity are well documented<sup>3</sup> and have formed the basis of a compelling interest justifying racial preferences in the admissions processes of public universities.<sup>4</sup>

Receiving less scholarly attention is the crucial link connecting the critical mass of minority students to these positive results.<sup>5</sup> While it is true that race-based admissions may be a necessary precondition to robust interactional diversity, admissions alone is not enough.<sup>6</sup> Racial clustering abounds on college campuses and can detract from the full potential of universities to reap the benefits of their numerically diverse classes.<sup>7</sup> If interactional diversity is indeed a compelling interest under the strict scrutiny standard the Court has applied, then colleges should be actively seeking to promote these interactions through

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<sup>1</sup> See, e.g., Stylianos-Ioannis G. Koutnatzis, *Affirmative Action in Education: The Trust and Honesty Perspective*, 7 TEX. F. ON C.L. & C.R. 187, 189 (2002) ("Affirmative action is one of the most controversial topics for constitutional scholars, perhaps for American society at large . . .").

<sup>2</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 329–30 (2003); see also *infra* Part II, pp. 581–89.

<sup>3</sup> See Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229, 1243 n.43 (2008) ("Academic opinion is solidly behind the tremendous benefits of diversity for the education of all students."); Joshua M. Levine, Comment, *Stigma's Opening: Grutter's Diversity Interest(s) and the New Calculus for Affirmative Action in Higher Education*, 94 CALIF. L. REV. 457, 461–75 (2006) (analyzing the benefits of classroom diversity).

<sup>4</sup> For the purposes of brevity, this Note will refer generally to colleges and universities, even though the constitutional analysis will likely only apply to public institutions, where the state action requirement is met.

<sup>5</sup> See Mitchell J. Chang et al., *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 J. HIGHER EDUC. 430, 433 (2006) ("Although the benefits of cross-racial interaction have been examined broadly . . . , the equally important conditions that support higher levels of interaction and presumably more positive contact have [not].").

<sup>6</sup> See Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 333 (2002) ("Although structural diversity increases the probability that students will encounter others of diverse backgrounds . . . , simply attending an ethnically diverse college does not guarantee that students will have the meaningful intergroup interactions . . .").

<sup>7</sup> See Richard Buttny, *Discursive Constructions of Racial Boundaries and Self-Segregation on Campus*, 18 J. LANGUAGE & SOC. PSYCHOL. 247 (1999).

means other than admissions policies. The failure to implement simple and relatively costless policies, such as removing barriers to roommates of different races and assigning seats at random in classes, calls into question the seriousness of the diversity rationale. Further, failure to implement such policies could violate the narrow tailoring prong, if the failure to do so means that universities could achieve the same amount of diversity through methods that do not depend on affirmative action-type racial classifications at the point of admissions.

This Note thus argues that, under the Court's equal protection doctrine, institutions using affirmative action in admissions should be required to implement post-admissions policies to promote interactional diversity. Part I sets the legal framework, tracing the Supreme Court's jurisprudence from *Regents of the University of California v. Bakke*<sup>8</sup> through *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>9</sup> and argues that universities' compelling interest in diversity extends only to the educational benefits of a diverse class, not the racial proportions of the class itself. Part II discusses the empirical literature on promoting interactional diversity, including reforms that may prove useful for college campuses. Part III argues that adoption of the policies in Part II is not merely advisable but constitutionally required; failure to adopt institutional reforms to promote interactional diversity post-admissions renders pre-admissions use of racial preferences unconstitutional. Part IV concludes.

## I. THE LEGAL FRAMEWORK

*Bakke*, the *University of Michigan Cases*,<sup>10</sup> and *Parents Involved* stress educational diversity as a compelling interest that can satisfy the strict scrutiny applied to racial classifications, including affirmative action. "Diversity," however, can mean different things, and not every definition may constitute a compelling interest. Sociology identifies three dimensions of diversity: structural diversity, interactional diversity, and diversity-related initiatives.<sup>11</sup> Structural diversity is "the numerical and proportional representation of students from different racial/ethnic groups in the student body."<sup>12</sup> Interactional diversity "is characterized by students' exchanges with racially and ethnically di-

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<sup>8</sup> 438 U.S. 265 (1978).

<sup>9</sup> 127 S. Ct. 2738 (2007).

<sup>10</sup> The *University of Michigan Cases* include *Grutter v. Bollinger*, 539 U.S. 306 (2003), and its companion case *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>11</sup> Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, in COMPELLING INTEREST 126, 132 (Mitchell J. Chang et al. eds., 2003).

<sup>12</sup> *Id.*; see also Sylvia Hurtado et al., *College Environments, Diversity, and Student Learning*, in 18 HIGHER EDUCATION: HANDBOOK OF THEORY AND RESEARCH 145, 155 (John C. Smart ed., 2003).

verse people as well as diverse ideas, information, and experiences.”<sup>13</sup> Diversity-related initiatives, such as workshops and ethnic studies courses, are not directly implicated by admissions processes but will be discussed later for their ability to magnify the effects of structural diversity and interactions. A close look at the cases shows that interactional diversity is the predominant definition of diversity, and likely the only one, that constitutes a compelling government interest.

#### A. Regents of the University of California v. Bakke

In *Bakke*, a white applicant rejected from medical school sued the school claiming its special admissions program for racial minorities violated the Equal Protection Clause of the Fourteenth Amendment.<sup>14</sup> The special admissions program set aside sixteen percent of the seats in the class for disadvantaged minority applicants.<sup>15</sup> Justice Powell’s controlling opinion began by determining that all racial classifications are inherently suspect and thus receive strict scrutiny review, even if they are “benign,” because they are intended to benefit minorities.<sup>16</sup> The university thus had to show that its use of race preferences served a compelling state interest and was necessary in aid of that interest.<sup>17</sup>

The University of California argued that four justifications for its admissions policies were compelling: “(i) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the . . . profession; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.”<sup>18</sup> The Court recognized only the fourth as a potentially compelling interest,<sup>19</sup> although the university’s admissions were not narrowly tailored to this goal.<sup>20</sup>

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<sup>13</sup> Miley, *supra* note 11, at 132 (defining “diverse interactions”); see also Thomas F. Nelson Laird, *College Students’ Experiences with Diversity and Their Effects on Academic Self-Confidence, Social Agency, and Disposition Toward Critical Thinking*, 46 RES. HIGHER EDUC. 365, 369–70 (2005) (“[I]nteractional diversity is a concept intended to capture both the quantity and quality of students’ . . . interactions with diverse peers . . .”). Patricia Gurin, a lead psychologist in the *University of Michigan Cases*, insists that interactional diversity is the most important form to consider, because structural diversity does not guarantee any benefits of interaction. See Gurin et al., *supra* note 6, at 360.

<sup>14</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 276–78 (1978) (opinion of Powell, J.).

<sup>15</sup> See *id.* at 275.

<sup>16</sup> *Id.* at 287–305 (“Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.” *Id.* at 291.); see also *id.* at 298 (discussing the difficulty of determining whether a particular instance of discrimination is benign).

<sup>17</sup> See *id.* at 305.

<sup>18</sup> *Id.* at 306 (citation omitted) (quoting Brief for Petitioner, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 189474, at \*32) (internal quotation marks omitted).

<sup>19</sup> *Id.* at 311–12 (“The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education.”).

<sup>20</sup> *Id.* at 320.

In rejecting the other justifications, Justice Powell implicitly rejected a legal definition of diversity that hinged on structural diversity, noting that desiring a certain percentage of students for racial balancing was “discrimination for its own sake” and thus constitutionally forbidden.<sup>21</sup> Interactional diversity, in contrast, was necessary to train leaders “through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.”<sup>22</sup> Students from diverse backgrounds “may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training”<sup>23</sup> provided and increase the “interplay of ideas and the exchange of views.”<sup>24</sup> Thus, Justice Powell distinguished between desiring a raw number of racial minorities, which is not itself a constitutional end, and desiring to use those numbers to create a diverse learning environment, which is not only constitutional, but compelling.

### B. *The University of Michigan Cases*

In 2003, the Supreme Court again confronted the constitutionality of affirmative action in college admissions. In *Grutter v. Bollinger*<sup>25</sup> and its companion case, *Gratz v. Bollinger*,<sup>26</sup> the Court considered white applicants’ challenges to the admissions policies of the University of Michigan’s law school and undergraduate program, respectively. In *Grutter*, upholding the law school’s use of race in admissions, Justice O’Connor stated that in *Bakke*, “Justice Powell approved the university’s use of race to further only one interest: ‘the attainment of a diverse student body.’”<sup>27</sup> Justice O’Connor reaffirmed that the interest in a diverse student body meant something other than structural diversity, reiterating that such racial balancing is “patently unconstitutional.”<sup>28</sup> Instead, she discussed an interest in diversity in terms closely aligned with interactional diversity. She lauded diversity as “help[ing] to break down racial stereotypes, and enabl[ing students] to better understand persons of different races.”<sup>29</sup> She noted specific benefits, in-

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<sup>21</sup> *Id.* at 307 (“If petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid.”).

<sup>22</sup> *Id.* at 313 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)) (internal quotation mark omitted).

<sup>23</sup> *Id.* at 314.

<sup>24</sup> *Id.* (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)); see also *id.* at 312 (discussing how racial diversity creates “wide exposure to that robust exchange of ideas” (quoting *Keyishian*, 385 U.S. at 603)).

<sup>25</sup> 539 U.S. 306 (2003).

<sup>26</sup> 539 U.S. 244 (2003).

<sup>27</sup> *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 311).

<sup>28</sup> *Id.* at 330.

<sup>29</sup> *Id.* (quoting Appendix to Petition for Writ of Certiorari at 246a, *Grutter*, 539 U.S. 306 (No. 02-241)) (internal quotation marks omitted).

cluding that “classroom discussion is livelier, more spirited, and simply more enlightening and interesting” when students are from “the greatest possible variety of backgrounds.”<sup>30</sup> Although admitting to the class a “critical mass”<sup>31</sup> of students from particular backgrounds may be necessary to attain the constitutional end of educational benefits, the critical mass is not itself a compelling, or even legitimate, interest.<sup>32</sup>

Although Justice O’Connor mentioned societal benefits of diversity, which may suggest a broader interest than that recognized in *Bakke*,<sup>33</sup> these passing suggestions are better read as aspirational, laudatory language, instead of language creating an independent interest sufficient to justify affirmative action. The societal benefits comments can conceptually be divided into two categories: societal benefits that result from a professional class of individuals who are smarter and better prepared for the workplace because they benefited from the educational benefits of diversity, and the societal benefits that flow from increasing the visibility of equal access to education.

The first category can be dismissed as an independent basis compelling interest in that it depends on the primary educational benefits rationale. Plausibly in this category are comments that “universities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders”<sup>34</sup> and that a diverse learning environment “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”<sup>35</sup> Justice O’Connor may have expanded the compelling interest somewhat in relying on briefs from corporations and the military indicating the societal good of providing graduates, their future employees, with an education enhanced by exposing students to peers with heterogeneous backgrounds, but this interest is inextricably intertwined with, and framed in terms of, the educational benefits of a diverse class.<sup>36</sup>

The second category, the visibility of equal opportunity, is also unlikely to create a new compelling interest separate from the diversity rationale. Justice O’Connor mentioned that “it is necessary that the path to leadership be visibly open” to members of every race, but her

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<sup>30</sup> *Id.* (quoting Appendix to Petition for Writ of Certiorari, *supra* note 29, at 244a) (internal quotation marks omitted).

<sup>31</sup> *Id.* at 316.

<sup>32</sup> See Carl A. Auerbach, *Legislative Facts in Grutter v. Bollinger*, 45 SAN DIEGO L. REV. 33, 59–60 (2008) (situating Milem’s diversity typology in the legal framework and arguing that the *Grutter* Court justified structural diversity only because it is essential for interactional diversity).

<sup>33</sup> See Ellison S. Ward, Note, *Toward Constitutional Minority Recruitment and Retention Programs: A Narrowly Tailored Approach*, 84 N.Y.U. L. REV. 609, 625 n.92 (2009).

<sup>34</sup> *Grutter*, 539 U.S. at 332.

<sup>35</sup> *Id.* at 330 (quoting Brief for American Educational Research Ass’n et al. as Amici Curiae in Support of Respondents, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 398292, at \*3) (internal quotation marks omitted).

<sup>36</sup> *Id.* at 330–31.

opinion is inconsistent with the notion that this “visibility” interest was an independent compelling interest apart from educational benefits.<sup>37</sup> In the narrow tailoring analysis, Justice O’Connor focused exclusively on the “fit” between the holistic use of race in admissions to compose a diverse class and enhancing the school’s educational mission,<sup>38</sup> and not at all on the “fit” between the use of affirmative action and the resulting equal access to gateway educational institutions to promote an ethnically mixed leadership class.<sup>39</sup> Indeed, if maintaining visibly open paths to leadership was compelling, one might wonder why a quota system, where transparency of accessibility is paramount, would not be narrowly tailored to meet this goal.<sup>40</sup> Thus, although colleges may in the future seek to include a second, broader possible compelling interest in the appearance of equal accessibility, the Court has not relied on such an interest to uphold a race preference, and the educational diversity rationale is likely to continue to predominate.<sup>41</sup>

The *University of Michigan Cases* thus underscore the proposition that, when admissions programs are individualized and narrowly tailored, the use of race can be constitutionally permissible to further the compelling interest in diversity and its benefits for education.

### C. Parents Involved in Community Schools v. Seattle School District No. 1

Although *Parents Involved* presented a challenge to affirmative action in the secondary school context, it reaffirms and cabins the appropriate ends of race-conscious means. Both Seattle and Louisville used race as a “tiebreaker” when too many students ranked a given school as their first choice; the school districts would review the proportion of

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<sup>37</sup> *Id.* at 332. Quite to the contrary, she twice noted that the educational benefit was the “only” compelling interest articulated in *Bakke*. *Grutter*, 539 U.S. at 323–24.

<sup>38</sup> *Id.* at 333–42; *see also id.* at 318–20 (discussing, in the fact section, the statements of administrators that the purpose of the policy was to foster educational benefits and the expert reports of academics regarding the educational benefits of diversity, and making no mention of the purpose of the affirmative action policy to increase legitimacy of the institution by being visibly open).

<sup>39</sup> Lending further credence to the view that the Court did not recognize a new interest in making access appear equal is a *Gratz* dissent suggesting that because the Court did not recognize that “[t]he stain of . . . racial oppression [that] is still visible in our society” itself constituted a compelling interest, universities will not use affirmative action policies “in full candor” but will instead “resort to camouflage” by claiming they are interested in educational benefits and not the appearance of racial disparity. *Gratz v. Bollinger*, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting).

<sup>40</sup> *See* Ian Ayres & Sydney Foster, *Don’t Tell, Don’t Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 563–64, 564 n.168 (2007) (arguing that the Court upheld *Grutter*’s admissions policies because they were opaque).

<sup>41</sup> Of course, to the extent that the Court accepts such an argument in the future, the impact of the policies and arguments in this Note will be reduced. Nonetheless, the diversity rationale is the primary, if not sole, justification for the use of affirmative action, and colleges will likely continue to rely on such an interest to support their policies. *See* sources cited *infra* note 51.

students of particular races in the school and then admit students of the race that would bring the school's proportion more in line with the racial proportions of the district's population as a whole.<sup>42</sup>

Citing the *University of Michigan Cases*, Justice Kennedy applied strict scrutiny. Justice Kennedy acknowledged that the Court had only found two situations sufficiently compelling to justify the use of racial affirmative action: when race-based preferences are used to remedy specific past instances of discrimination<sup>43</sup> and when race is "considered as part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints'" in higher education.<sup>44</sup> Ultimately, the Court struck down the use of naked black-white preferences because by ignoring other factors that could contribute to the educational benefits, the school districts "employ[ed] only a limited notion of diversity," that of bare racial proportions, which was not constitutionally permissible.<sup>45</sup> Justice Kennedy confirmed that "it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, that can justify the use of race."<sup>46</sup> The Court thus did not embrace the "simple" definition of diversity defined as the sheer number of students on campus, or what the social science literature terms structural diversity.

*Parents Involved* is also notable for its characterization of the compelling interest in the *University of Michigan Cases*. The Court described the interest as one in the educational benefits of diversity,<sup>47</sup> and criticized lower courts for disregarding the limitations of the compelling interest as defined in *Grutter* by extending the interest in diversity beyond its "specific type."<sup>48</sup> *Parents Involved* stated that "[t]he Court in *Grutter* expressly articulated key limitations on its holding,"<sup>49</sup> thus emphasizing the narrow, specific definition of diversity as one based on the benefits of interacting with diverse people.<sup>50</sup> Thus, to the extent there remains uncertainty regarding whether Justice O'Connor's articulation of the diversity rationale in the *University of Michigan Cases* is broader than Powell's narrow construction in *Bakke*, *Par-*

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<sup>42</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2746–50 (2007).

<sup>43</sup> *Id.* at 2752.

<sup>44</sup> *Id.* at 2753 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)).

<sup>45</sup> *Id.* at 2754.

<sup>46</sup> *Id.* at 2753 (internal quotation marks omitted).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 2754.

<sup>49</sup> *Id.*

<sup>50</sup> Even in discussing the educational benefits of diversity, well accepted in *Grutter*, the Court took a much more skeptical position by questioning the connection between the use of race in school assignments and the "purported benefits" of diversity. *Id.* at 2757.

*ents Involved* indicates the Court will likely read Justice O'Connor's position as reaffirming only the educational benefits rationale.<sup>51</sup>

The most significant element of *Parents Involved*, however, may be its indication that the Court will be willing to apply a robust form of strict scrutiny in the narrow tailoring prong of future affirmative action cases, even in the context of higher education. Although the Court purported to apply strict scrutiny in each of the aforementioned cases,<sup>52</sup> scholars have questioned how strict this strict scrutiny truly is in the context of college admissions policies.<sup>53</sup> Part of the confusion arises from the tension between statements that the Court will "defer" to the judgment of universities that diversity is integral to their educational missions, and the Court's simultaneous insistence that such deference, unusual in traditional strict scrutiny analysis,<sup>54</sup> does not render the Court's "scrutiny of the interest . . . [any] less strict."<sup>55</sup> Any murkiness resulting from these arguably inconsistent articulations of the level of scrutiny applied in the *University of Michigan Cases* is likely settled by the robust strict scrutiny applied in *Parents Involved*.<sup>56</sup> In

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<sup>51</sup> The legal literature further reveals that although the Court should perhaps recognize an interest in structural diversity apart from its educational benefits, the Court has not done so. See Kenneth L. Marcus, *Diversity and Race-Neutrality*, 103 NW. U. L. REV. COLLOQUY 163, 167 (2008) ("[The Court] has repeatedly emphasized that, by itself, increasing racial or ethnic representation is not a sufficiently compelling interest to justify the use of racial preferences. Rather, the legally cognizable diversity interest consists of an institution's efforts to achieve the educational benefits that flow from the interchange of varied [viewpoints] . . ." (footnotes omitted)); see also Derek W. Black, *The Uncertain Future of School Desegregation and the Importance of Goodwill, Good Sense, and a Misguided Decision*, 57 CATH. U. L. REV. 947, 972 (2008) (stating that *Parents Involved* evaluated the plans "solely from the perspective of diversity as a compelling interest . . . [and] where the educational benefits of diversity, rather than desegregation, were the goal" (footnotes omitted)); cf. Lizzie Barmes with Sue Ashtiani, *The Diversity Approach to Achieving Equality: Potential and Pitfalls*, 32 INDUS. L.J. 274, 292 (2003) (discussing the "basic dichotomy between valuing diversity for instrumental, managerial reasons and valuing diversity for intrinsic, justice reasons").

<sup>52</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

<sup>53</sup> See William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TUL. L. REV. 519, 533-34 (2005) (stating that the *Grutter* Court "applied a less strict version of strict scrutiny"). But see *The Supreme Court, 1977 Term — Leading Cases*, 92 HARV. L. REV. 57, 148 (1978) (suggesting that only the dissent in *Bakke* applied a "less demanding "strict" in theory [but not] fatal in fact" standard, while Justice Powell applied true strict scrutiny (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 362 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.))).

<sup>54</sup> See Andrew LeGrand, Note, *Narrowing the Tailoring: How Parents Involved Limits the Use of Race in Higher Education Admissions*, 21 NAT'L BLACK L.J. 53, 71-72 (2008-2009) ("[D]eference and strict scrutiny are two paradoxical and irreconcilable legal concepts.").

<sup>55</sup> *Grutter*, 539 U.S. at 328.

<sup>56</sup> Although Justice Powell indicated that "good faith would be presumed," *Bakke*, 438 U.S. at 318-19 (opinion of Powell, J.), and that the Court would not assume diversity was a "cover for the functional equivalent of a quota system," *id.* at 318, such a presumption was called into question by *Parents Involved* and is fundamentally incompatible with the demands of strict scrutiny in virtually every other constitutional context. See Stanley A. Halpin, *Looking over a Crowd and Picking Your Friends: Civil Rights and the Debate over the Influence of Foreign and Internation-*

sharp contrast to *Grutter's* ambivalent statements that no exhaustion requirement existed<sup>57</sup> even though strict scrutiny required “serious, good faith consideration of workable race-neutral alternatives,”<sup>58</sup> *Parents Involved* criticized the school districts for “fail[ing] to present any evidence that [they] considered alternatives,” and the Court made what appears to be its own empirical assessment that the limited impact of affirmative action “casts doubt on the necessity of using racial classifications” in the first place.<sup>59</sup> Additionally, any deference to the districts disappeared, as the districts were given the burden of demonstrating that their policies were tied to a “pedagogic concept of the level of diversity needed” to attain educational benefits.<sup>60</sup> Although the Court distinguished the *University of Michigan Cases* as limited to “the unique context of higher education,”<sup>61</sup> it read those cases as reaffirming that “racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification,” and never acknowledged those cases as applying anything less than the strictest scrutiny.<sup>62</sup> *Parents Involved* thus may indicate a reinvigoration of the narrow tailoring requirement for all educational affirmative action cases.

## II. PROMOTING INTERACTIONAL DIVERSITY ON COLLEGE CAMPUSES

Considering the Court’s renewed willingness to apply robust strict scrutiny review to affirmative action, universities might well have to show that they are using the structural diversity that affirmative ac-

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*al Human Rights Law on the Interpretation of the U.S. Constitution*, 30 HASTINGS INT’L & COMP. L. REV. 1, 31 (2006) (stating that *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), “required strict scrutiny whereas Powell [in *Bakke*] probably applied a less stringent standard”).

<sup>57</sup> *Grutter*, 539 U.S. at 339–40. Even the explicit rejection of an exhaustion requirement, however, was made in response to the “drastic” suggestion that the university get rid of merit-based admissions altogether. *Id.* at 340. The Court held that the university did not have to sacrifice other state interests, including academic selectivity, for the sake of race neutrality. *See id.* Such an exhaustion requirement would be less controversial, and more defensible, if the suggested alternatives, or supplementary actions, were relatively costless and served the primary interest in diversity “about as well,” *id.* at 339 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)), such as many of the suggestions to promote cross-racial interaction in Part III.

<sup>58</sup> *Id.* at 339.

<sup>59</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2760 (2007).

<sup>60</sup> *Id.* at 2755. *Compare id.* at 2789 (Kennedy, J., concurring in part and concurring in the judgment) (placing the burden of proving narrow tailoring definitively on the government, stating that “[t]he government bears the burden of justifying its use of individual racial classifications”), with *Grutter*, 539 U.S. at 329 (questioning who has the burden of proof, stating that “‘good faith’ on the part of a university is ‘presumed’ absent ‘a showing to the contrary’” (quoting *Bakke*, 438 U.S. at 318–19)).

<sup>61</sup> *Parents Involved*, 127 S. Ct. at 2754.

<sup>62</sup> *Id.* at 2752 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)).

tion can create to further the interactional diversity that drives the educational benefits identified in *Grutter*.<sup>63</sup> Evaluating the potential of such challenges requires understanding the benefits of diverse interactions and the options for promoting them. This Part explores these benefits before turning to how such interactional diversity might be maximized. Understanding methods of increasing these positive interactions is important both to encourage institutions to adopt reforms in furtherance of stated goals and to shed light on the constitutional issues concerning the ability of universities that are not implementing post-admissions policies to pass strict scrutiny.

#### A. *The Benefits of Interactional Diversity*

As noted in the *University of Michigan Cases*, the benefits of interactional diversity are immense.<sup>64</sup> The Supreme Court has recognized the educational benefits of integration and diversity since before *Brown v. Board of Education*.<sup>65</sup> University presidents have also hailed the importance of diversity to their educational missions.<sup>66</sup>

The theoretical underpinnings of interactional diversity originate in Gordon Allport's classic book *The Nature of Prejudice*.<sup>67</sup> In his book, Professor Allport explains that interracial interaction is most likely to be positive when the contact is sustained and frequent, when the contact is between people of relatively equal status, and when the envi-

<sup>63</sup> See, e.g., Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 431 (1998) ("As a starting point, it seems reasonable to require a university invoking the diversity rationale to define and substantiate the educational needs that its admissions policies purport to meet. To meet this requirement, a university could not simply offer broad assertions about the need to improve racial understanding; it would have to articulate why a racially diverse student body is vital to the specific school, department, or educational program in which affirmative action is used.")

<sup>64</sup> *But cf. Parents Involved*, 127 S. Ct. at 2755 (explicitly refusing to resolve "whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits"). Of course, to the extent the Court is no longer willing to believe that racial diversity has educational benefits, no affirmative action plan will be upheld as constitutional unless the Court recognizes a new compelling state interest to justify its use.

<sup>65</sup> 347 U.S. 483 (1954); see, e.g., *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 641 (1950) (finding that segregated educational arrangements "impair[ed] and inhibit[ed] the appellant's] ability to study[ and] to engage in discussions and exchange views with other students"); *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (citing the benefits of "the interplay of ideas and the exchange of views" from desegregated education); see also Liu, *supra* note 63, at 386–90 (tracing the jurisprudential origins of the diversity rationale).

<sup>66</sup> See FRANCES A. MAHER & MARY KAY THOMPSON TETREAU, *PRIVILEGE AND DIVERSITY IN THE ACADEMY* 85–86 (2007); Milem, *supra* note 11, at 127 ("We believe that our students benefit significantly from education that takes place within a diverse setting. . . . If our institutional capacity to bring together a genuinely diverse group of students is removed — or severely reduced — then the quality and texture of the education we provide will be significantly diminished." (quoting Ass'n of Am. Univs., *On the Importance of Diversity in University Admissions*, N.Y. TIMES, Apr. 24, 1997, at A27) (internal quotation marks omitted)).

<sup>67</sup> See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1954).

ronment is conducive to and encouraging of such interactions.<sup>68</sup> As later scholars have noted, many of these factors point to the college setting as being particularly well suited for potential interactions.<sup>69</sup>

Sociological literature and empirical studies confirm the benefits of interactional diversity in higher education.<sup>70</sup> Specifically, research shows that interactional diversity on campuses leads to increased leadership skills and cultural understanding.<sup>71</sup> Students who frequently interact with peers of different races show larger gains in critical thinking, problem-solving skills, and self confidence.<sup>72</sup> These students also show more commitment to cleaning up the environment, higher satisfaction with college, and greater academic development.<sup>73</sup> Researchers have also shown that students who interact more frequently with members of different races are more prepared to contribute to a democratic society in that they are more interested in politics and more interested in political activities.<sup>74</sup>

### B. Numbers Alone Are Not Enough

Structural diversity, the only type of diversity directly created by affirmative action policies, cannot alone attain the educational benefits associated with interactional diversity. Researchers explain, “So far, the research literature suggests that the educational potential of ‘diversity’ is not reducible simply to the mere presence of underrepresented students; rather, its value appears to depend on whether it leads to greater levels of engagement in diversity-related activities.”<sup>75</sup> Racial clustering abounds on college campuses and can detract from the potential of universities to reap the full benefits of their numerically diverse classes.<sup>76</sup> As the Supreme Court recognized in *McLaurin v. Ok-*

<sup>68</sup> *Id.* at 261–81.

<sup>69</sup> Anthony Lising Antonio, *The Role of Interracial Interaction in the Development of Leadership Skills and Cultural Knowledge and Understanding*, 42 RES. HIGHER EDUC. 593, 595 (2001) [hereinafter *The Role of Interracial Interaction*] (“The college campus setting appears to be one in which the satisfaction of each of [Allport’s] conditions is possible.”); cf. Anthony Lising Antonio, *When Does Race Matter in College Friendships? Exploring Men’s Diverse and Homogeneous Friendship Groups*, 27 REV. HIGHER EDUC. 553, 555 (2004) (“Drawing upon Gordon Allport’s contact theory for reducing prejudice, researchers have recently queried the racial makeup of students’ close friends in studies of campus diversity.” (citation omitted)).

<sup>70</sup> See generally Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733 (1998).

<sup>71</sup> Antonio, *The Role of Interracial Interaction*, *supra* note 69, at 611–13.

<sup>72</sup> See Chang et al., *supra* note 5, at 449.

<sup>73</sup> Alexander W. Astin, *Diversity and Multiculturalism on the Campus: How Are Students Affected?*, CHANGE, Mar./Apr. 1993, at 44, 47–48.

<sup>74</sup> Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. SOC. ISSUES 17, 24 (2004).

<sup>75</sup> Chang et al., *supra* note 5, at 432 (citation omitted).

<sup>76</sup> Sean B. Seymore, Note, *I’m Confused: How Can the Federal Government Promote Diversity in Higher Education Yet Continue to Strengthen Historically Black Colleges?*, 12 WASH. & LEE J.

*lahoma State Regents for Higher Education*,<sup>77</sup> simply attending a racially mixed school “will not necessarily abate individual and group predilections, prejudices and choices.”<sup>78</sup> Students separate by race in classrooms,<sup>79</sup> study groups,<sup>80</sup> cafeterias,<sup>81</sup> formal events,<sup>82</sup> extracurriculars,<sup>83</sup> and dormitories.<sup>84</sup> White students prefer to live with other white students,<sup>85</sup> are more likely to date white students,<sup>86</sup> and self-segregate on campuses.<sup>87</sup> Some colleges host race-based “fraternities, sororities, theme houses, cafeteria tables, library floors, and sporting events.”<sup>88</sup> Many colleges offer affiliated housing to allow members of the same race to live together, which often means forgoing the oppor-

C.R. & SOC. JUST. 287, 316 (2006) (“Colleges that claim to be diverse may be able to tout high minority enrollment statistics, but campus self-segregation is reminiscent of the 1950s.”); *see also* Grace Chua, *Despite Efforts, Self-Segregation Persists at College*, THE DARTMOUTH, May 19, 2004, <http://thedartmouth.com/2004/05/19/news/despite>.

<sup>77</sup> 339 U.S. 637 (1950).

<sup>78</sup> *Id.* at 641; *see also* Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIAMI L. REV. 577, 595–96 (2009) (describing *McLaurin* as the Court’s “recognition of the societal benefits of diversity” stemming from “potentially beneficial interracial contact,” *id.* at 596).

<sup>79</sup> *See* Dinesh D’Souza, *The New Segregation on Campus*, 60 AM. SCHOLAR 17, 19 (1991).

<sup>80</sup> *See, e.g.*, Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CALIF. L. REV. 2241, 2304–05 (2000).

<sup>81</sup> *See* BEVERLY DANIEL TATUM, “WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?” AND OTHER CONVERSATIONS ABOUT RACE 75–80 (1997); Sharon E. Rush, *Beyond Admissions: Racial Equality in Law Schools*, 48 FLA. L. REV. 373, 379 (1996) (“I often see racial segregation. Black students congregate in one area of the cafeteria, Whites [sic] students in another, and Hispanic students in yet a third.”).

<sup>82</sup> *See* Rea J. Harrison, *Black and White Prom Nights: The Unconstitutionality of Racially Segregated High School Proms in the 21st Century*, 10 J. GENDER RACE & JUST. 505, 525 (2007) (describing self-segregation as “a prominent social practice in America, especially on the nation’s college campuses”).

<sup>83</sup> *See* Rush, *supra* note 81, at 381–83 (discussing self-segregation on law reviews); Wendy Hernandez, Note, *The Constitutionality of Racially Restrictive Organizations Within the University Setting*, 21 J.C. & U.L. 429, 431–32 (1994) (discussing the emergence of student organizations that restrict membership to students of certain ethnic backgrounds). One article, in fact, observed that athletics and theater were the only two activities in which students did not self-segregate. J. Douglas Toma & Thomas Kecskemethy, *College Sports, the Collegiate Ideal, and the Values of the American University: A Review of: The Game of Life*, 28 J.C. & U.L. 697, 708 (2002).

<sup>84</sup> *See* J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993, 1002 (1995).

<sup>85</sup> *Cf.* James A. Kushner, *New Urbanism: Urban Development and Ethnic Integration in Europe and the United States*, 5 U. MD. L.J. RACE RELIGION GENDER & CLASS 27, 28 (2005) (stating that de facto segregation in schools is “largely enabled by ‘white flight’”); Florence Wagman Roisman, *Living Together: Ending Racial Discrimination and Segregation in Housing*, 41 IND. L. REV. 507, 517–18 (2008) (“[V]irtually all studies agree that Black choice is a relatively small part of the explanation for residential racial segregation.”).

<sup>86</sup> *See* Shana Levin, Pamela L. Taylor & Elena Caudle, *Interethnic and Interracial Dating in College: A Longitudinal Study*, 24 J. SOC. & PERS. RELATIONSHIPS 323, 326 (2007).

<sup>87</sup> *Cf.* J. Clay Smith, Jr. & Lisa C. Wilson, *Brown on White College Campuses: Forty Years of Brown v. Board of Education*, 36 WM. & MARY L. REV. 733, 741 (1995) (discussing the creation of a “White Student Union” at the University of Minnesota).

<sup>88</sup> Seymore, *supra* note 76, at 290.

tunity to interact with diverse peers in a residential setting.<sup>89</sup> These examples show that despite numerical diversity, universities are far from maximizing interactional diversity.<sup>90</sup> One commentator has gone so far as to advocate calling college campuses pluralistic rather than integrated or diverse.<sup>91</sup>

As a result, attaining the full educational benefits of diversity requires institutional action. Research has demonstrated that “[a]lthough minority student representation (i.e., structural diversity) is necessary for interracial contact on campus, it is not sufficient for meaningful interracial interactions; direct institutional intervention is essential.”<sup>92</sup> Accordingly, “One cannot expect to throw together a racially mixed group of undergraduates and expect good things to happen automatically.”<sup>93</sup> Research suggests not only that institutional intervention is necessary to reap the benefits of structural diversity, but also that increasing *only* the structural diversity of an institution, without further intervention, may actually produce *negative* effects for students.<sup>94</sup> Unfortunately, “[w]hile most campuses have focused on increasing the [numerical] diversity of their faculties and student bodies, campuses have neglected the important dimension of improving intergroup relations.”<sup>95</sup> A group of researchers commissioned by the Association of American Colleges and Universities thus recommends that “diversity

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<sup>89</sup> See *Taking Steps to Curtail Black Student Self-Segregation at Harvard College*, J. BLACKS HIGHER EDUC., Spring 1997, at 14, 14 (discussing African American theme housing at Cornell, Wesleyan, Brown, and Amherst “where most, if not all, residents are black”). At one university, housing administrators backed down from a decision to fill nine empty spaces in the African American-themed residential unit with houseless Caucasian students after African American students “objected to living with anyone of another race.” Stephan Thernstrom & Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. REV. 1583, 1607 (1999).

<sup>90</sup> Harry T. Edwards, *The Journey from Brown v. Board of Education to Grutter v. Bollinger: From Racial Assimilation to Diversity*, 102 MICH. L. REV. 944, 959–60 (2004) (“[S]ome African-American undergraduates, when given a choice, elect to live with other Black students. I worry about the implications of this when students cut themselves off from opportunities that would better ensure a full and rich educational experience.”).

<sup>91</sup> See D’Souza, *supra* note 79, at 20.

<sup>92</sup> Darnell Cole, *Do Interracial Interactions Matter? An Examination of Student-Faculty Contact and Intellectual Self-Concept*, 78 J. HIGHER EDUC. 249, 274 (2007). *But see* Gary R. Pike & George D. Kuh, *Relationships Among Structural Diversity, Informal Peer Interactions and Perceptions of the Campus Environment*, 29 REV. HIGHER EDUC. 425, 445–46 (2006) (finding that diversity of a student body is positively related to interactions among students from different racial backgrounds).

<sup>93</sup> THOMAS J. ESPENSHADE & ALEXANDRA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL 394 (2009) (citation omitted). Instead, “[e]fforts [to increase interaction] must be *intentional*.” *Id.*

<sup>94</sup> See Milem, *supra* note 11, at 133; *see also* ALLPORT, *supra* note 67, at 263–64 (finding that infrequent, casual interactions actually increase prejudice).

<sup>95</sup> Sylvia Hurtado & Christine Navia, *Reconciling College Access and the Affirmative Action Debate*, in AFFIRMATIVE ACTION’S TESTAMENT OF HOPE 105, 126 (Mildred García ed., 1997).

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and inclusion efforts move beyond numbers of students or numbers of programs as end goals. Instead, they [should be] multilayered processes through which we achieve excellence in learning; research and teaching; student development; local and global community engagement; workforce development; and more.”<sup>96</sup>

If a university is serious about the educational benefits of diversity — serious enough to assert them as a compelling government interest — it should be expected to investigate critically the situation on its campus and to determine in good faith if it is truly maximizing the potential for diverse interactions. The following section illustrates the steps universities might take to make a legal showing that they are sincere about promoting interactional diversity and that their use of affirmative action is narrowly tailored to this goal. While these suggestions do not guarantee success in increasing diverse interactions, they offer a menu of options that have generated empirical support in some circumstances and might prove useful once implemented and evaluated in individual contexts.

### C. *Fostering Interactional Diversity*

One of the most basic and most studied means of facilitating interactional diversity is providing for randomized roommates.<sup>97</sup> Unlike peer institutions that offer racially affiliated housing, many schools randomize freshman dormitory assignments and thus end up with fairly diverse pairings.<sup>98</sup> Other colleges, including both Yale and Harvard, have moved to a system that randomizes where students live even beyond freshman year to avoid racial clustering.<sup>99</sup> Aside from

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<sup>96</sup> JEFFREY F. MILEM ET AL., MAKING DIVERSITY WORK ON CAMPUS: A RESEARCH-BASED PERSPECTIVE, at iii (2005), available at [http://www.cs.uwec.edu/~wick/ASDAC/Milem\\_et\\_al.pdf](http://www.cs.uwec.edu/~wick/ASDAC/Milem_et_al.pdf); see also Nelson *supra* note 78, at 600 (“[T]he benefits of employing affirmative action to achieve racial representation begin and end at the university door. Without moving beyond mere representation, there is no guarantee that the benefits of diversity will actually be realized . . .”).

<sup>97</sup> Universities could also pair roommates strategically, and although this race-conscious method may be less controversial than race-conscious admissions policies, it would not be considered a race-neutral alternative. It may represent a policy that is more narrowly tailored to the educational benefits, however, since it is more closely tied to that end. More information would be needed to determine empirically whether race-conscious pairings produce more benefits than does randomization, but it is another logical step that universities could consider.

<sup>98</sup> Many Ivy League schools, for example, do not allow freshmen to choose their roommates, but instead ask them to fill out a survey to “ensure that roommates have diverse interests, but compatible lifestyles.” See Becca Iverson, *Penn’s Randomized Roommate Assignments Force Freshmen into the Great Unknown*, DAILY PENNSYLVANIAN (Apr. 25, 1997), <http://www.dailypennsylvanian.com/node/10638> (discussing the policies of Princeton University, Dartmouth College, and the University of Pennsylvania).

<sup>99</sup> See Thernstrom & Thernstrom, *supra* note 89, at 1608. Harvard University implemented its randomized housing assignments after it discovered that African American students were choosing the least desirable housing, housing that would not fill up, to ensure that they could all

the obvious socialization that occurs between roommates, sociological research shows that freshmen who live with a roommate of a different race have, on average, a greater number of close friends of a different race even two years later, and are less prejudiced than their counterparts with same-race roommates.<sup>100</sup> Another study showed that “randomly assigned interracial college roommates report more positive views of other racial groups years later.”<sup>101</sup> These studies show that the impact of having a roommate of a different race may encourage further cross-racial friendships as well as directly foster some of the benefits of diverse interactions. Thus, forced randomization of student housing ameliorates some of the concerns presented by residential self-segregation and provides one simple step universities can take to maximize the benefits of the structural diversity present on their campuses.

Further, universities may use diversity-related initiatives to bolster the positive effects of interactional diversity.<sup>102</sup> Studies show that such initiatives, including requiring ethnic studies courses or offering cultural awareness workshops,<sup>103</sup> work to enhance the quality and quantity of interactional diversity.<sup>104</sup> One study compared students who were about to complete their diversity course requirement with those who were just starting and found that those who had completed it were both less prejudiced and more likely to become acquainted with students of a different race.<sup>105</sup> Because of the complementary nature of diversity-related initiatives and interactional diversity, “a comprehensive set of diversity-related initiatives is necessary to maximize

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live together. *Taking Steps to Curtail Black Student Self-Segregation at Harvard College*, *supra* note 89, at 14–15.

<sup>100</sup> ESPENSHADE & RADFORD, *supra* note 93, at 393; *see also* MICHAEL BOCIAN, HOUSING ON COLLEGE CAMPUSES: SELF-SEGREGATION, INTEGRATION, AND OTHER ALTERNATIVES 3 (1997), available at <http://www.eric.ed.gov/PDFS/ED446596.pdf> (“[H]ousing arrangements play a significant role in promoting or deterring interaction, dialogue, and friendship [in college residence halls].”).

<sup>101</sup> Richard R.W. Brooks, *Diversity and Discontent: The Relationship Between School Desegregation and Perceptions of Racial Justice*, 8 AM. L. & ECON. REV. 410, 429 (2006); *see also* ALLPORT, *supra* note 67, at 272 (noting the “trend of evidence” that living side by side with members of other races reduces prejudice but that the “mere fact of living together” is not decisive and that the real interaction depends on communication and whether the neighbors are “jointly active in community enterprises”).

<sup>102</sup> *See* ALLPORT, *supra* note 67, at 266–67 (discussing “intercultural education” such as taking class trips to ethnic neighborhoods and role playing).

<sup>103</sup> *See* Charles F. Hohm & Carol F. Venable, *Cultural Diversity Courses: The Students’ Perspectives*, in DIVERSITY IN COLLEGE CLASSROOMS 7, 9 (Ann M. Johns & Maureen Kelly Sipp eds., 2004).

<sup>104</sup> *See* Jeffrey F. Milem & Paul D. Umbach, *The Influence of Precollege Factors on Students’ Predispositions Regarding Diversity Activities in College*, 44 J.C. STUDENT DEV. 611, 613 (2003) (stating that “diversity-related initiatives benefit students who are exposed to them” and that the three types of diversity are mutually reinforcing).

<sup>105</sup> Mitchell J. Chang, *The Impact of an Undergraduate Diversity Course Requirement on Students’ Racial Views and Attitudes*, 51 J. GEN. EDUC. 21, 37 (2002).

educational benefits.”<sup>106</sup> Thus, mandating courses on cultural awareness may be yet another tool to maximize the benefits of campus diversity.

Universities can also encourage faculty to adopt practices associated with active learning, which have been shown to increase the benefits of diversity.<sup>107</sup> At the secondary education level, one high school “encouraged [teachers] to promote cooperative learning and group oriented projects so that students would be compelled to interact across racial groups in the classroom.”<sup>108</sup> One researcher has gone so far as to predict that “[i]ncreased structural diversity will likely fail in achieving its goals unless accompanied by efforts to make institutions more ‘student-centered’ in approaches to teaching and learning.”<sup>109</sup> Because faculty are unlikely to initiate a change in teaching style to maximize the benefits of classroom diversity,<sup>110</sup> universities should offer guidance and encouragement to make faculty aware of these practices.<sup>111</sup> Training faculty to create an atmosphere more conducive to positive interracial interactions thus represents another simple way to increase the benefits of students’ racial and ethnic diversity.

Such post-admissions steps need not be limited to the well-supported suggestions above. Additional ideas, such as encouraging mingling within<sup>112</sup> and across student groups<sup>113</sup> and assigning seats to

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<sup>106</sup> Mitchell J. Chang, *Preservation or Transformation: Where's the Real Educational Discourse on Diversity?*, 25 REV. OF HIGHER EDUC. 125, 131 (2002) (citing DARYL G. SMITH ET AL., *DIVERSITY WORKS: THE EMERGING PICTURE OF HOW STUDENTS BENEFIT* (1997)).

<sup>107</sup> Jeffrey F. Milem, *Increasing Diversity Benefits: How Campus Climate and Teaching Methods Affect Student Outcomes*, in *DIVERSITY CHALLENGED* 233, 240–41 (Gary Orfield ed., 2001); Carol F. Venable, *Collaborative Learning in the Diverse Classroom*, in *DIVERSITY IN COLLEGE CLASSROOMS*, *supra* note 103, at 96.

<sup>108</sup> Pedro A. Noguera, *Ties that Bind, Forces that Divide: Berkeley High School and the Challenge of Integration*, 29 U.S.F. L. REV. 719, 728–29 (1995); *see also* Jennifer H. Pfeifer et al., *Teaching Tolerance in Schools: Lessons Learned Since Brown v. Board of Education About the Development and Reduction of Children's Prejudice*, SOC. POL'Y REP., issue 2, 2007, at 3.

<sup>109</sup> Sylvia Hurtado et al., *Enhancing Campus Climates for Racial/Ethnic Diversity: Educational Policy and Practice*, 21 REV. HIGHER EDUC. 279, 289 (1998).

<sup>110</sup> *See* MILEM ET AL., *supra* note 96, at 24–26.

<sup>111</sup> *See* Shana Levin, *Social Psychological Evidence on Race and Racism*, in *COMPELLING INTEREST*, *supra* note 11, at 97, 118 (discussing “ways to incorporate diverse perspectives and knowledge bases into teaching methods, curricula, and areas of scholarly inquiry so as to better educate all students to live in a multicultural society”).

<sup>112</sup> *See* Po Bronson & Ashley Merryman, *Can Extracurricular Activities Solve the Self-Segregation Problem?*, NEWSWEEK (Sept. 9, 2009), <http://www.newsweek.com/blogs/nurture-shock/2009/09/09/can-extracurricular-activities-solve-the-self-segregation-problem.html> (citing academic studies showing that under Allport's interaction theory, “if school districts can widely integrate their sports teams and clubs, then they might see less self-segregation in the hallways and lunchrooms”).

<sup>113</sup> *See* ESPENSHADE & RADFORD, *supra* note 93, at 394 (suggesting maximizing the benefits of diversity by having campus leaders “provide incentives for co-sponsorship of events by two or more student groups”). Princeton University, for example, encourages “cross-group collaboration” such as the “Soul-Seoul Food Study Break” sponsored by both the Black Student Union and the

avoid racial clustering in classrooms,<sup>114</sup> should also be discussed and considered.<sup>115</sup> Other potential reforms, such as increasing or decreasing the prevalence of racially affiliated student groups, may have more mixed academic support but should be carefully considered in the individualized context of a particular institution.<sup>116</sup> Universities truly seeking to reap the full benefits of the numeric diversity of their campuses should consider these policies in good faith. This good faith consideration includes gathering and analyzing empirical data on what works and what does not<sup>117</sup> and is important both to maximize their institutions' diversity goals and to defend against a potential attack on the use of affirmative action in the admissions process, a topic to which this Note will next turn.

### III. THE CONSTITUTIONALITY OF RACE IN THE ADMISSIONS PROCESS

Because the educational benefits from diversity are not a function merely of numbers, and because institutional actions may be needed to ensure diverse interactions, universities that rely on *Grutter's* diversity rationale but fail to implement post-admissions policies may face con-

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Korean American Student Association. See *Guide to Using the Projects Board*, PRINCETON UNIV. UNDERGRADUATE STUDENT GOV'T, <http://www.princeton.edu/~pboard/guide.htm> (last visited Oct. 30, 2010).

<sup>114</sup> See Jerald Greenberg, *The Role of Seating Position in Group Interaction: A Review, with Applications for Group Trainers*, 1 GROUP & ORG. STUD. 310, 310 (1976) ("Research on affiliative relations found that physical closeness enhances friendship formation and is a reliable sociometric index of friendship choices within groups."); see also Mark Root-Wiley, *One Student's Call for Assigned Seats*, SCARLET & BLACK, Mar. 9, 2007, at 9, available at [http://web.grinnell.edu/sandb/archives/volume\\_123/number\\_19/sandb\\_vol123\\_num19.pdf](http://web.grinnell.edu/sandb/archives/volume_123/number_19/sandb_vol123_num19.pdf) ("Seating charts in every class . . . would constantly expose us to new people and would, bit by bit, take a bite out of the problem of insularity on our campus.").

<sup>115</sup> Although many of these policies are relatively costless in the monetary sense, they may still potentially bump up against other important rights, such as the right not to associate. Cf. *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). It is unlikely, however, that randomized, race-neutral interactions will be considered to infringe on First Amendment rights. There is no First Amendment right, for example, to attend a racially segregated school. Cf. *Brown v. Bd. of Educ.* 347 U.S. 483 (1954).

<sup>116</sup> The optimal level of racially affiliated student groups is controversial. While such groups may facially appear to be "self-segregation" and present opportunity costs in the form of time and social capital that might otherwise be devoted to cross-racial interaction, they may also provide support groups without which individuals might not have the comfort to participate in mainstream university life. See Hernandez, *supra* note 83, at 452 (acknowledging that some students perceive racially restrictive student groups as racially divisive and promoting racism but arguing that the members of racially defined organizations "find comfort and support in an organization that communicates with them in a way to which they can relate and they understand").

<sup>117</sup> See ALLPORT, *supra* note 67, at 267 ("An encouraging feature of modern intercultural education is its willingness to evaluate its programs of instruction. Do they, in fact, lessen prejudice? Do all of them do so, or only certain types?"); see also *id.* at 479-99 (offering research advice for how to evaluate the effectiveness of diversity programs).

stitutional challenges. Such challenges may question both the sincerity of the universities' purported compelling interest and the narrow tailoring of their programs.

*A. Compelling Interest and Post-Admissions Policies*

Failure to implement any post-admissions programs to maximize the benefits of diversity brings into question the sincerity of the institution's asserted interest in the educational benefits of diversity. In examining state interests against constitutional challenges, the Supreme Court has stated that the interest must be genuine.<sup>118</sup> Indeed, *Parents Involved* rejected a school's purported interest in the educational benefits of diversity as a "genuinely compelling state interest" where the state had used bare racial categories and the social science was mixed.<sup>119</sup> Justice Thomas criticized the dissent for "search[ing] for a compelling interest . . . [by] casually accept[ing] even the most tenuous interests asserted on behalf of the plans, grouping them all under the term 'integration.'"<sup>120</sup> Thus, *Parents Involved*, along with a line of other constitutional cases, supports the intuitive conclusion that a state interest will not be considered sufficient under strict scrutiny if it is not sincere.

While it is true that the Supreme Court has found that the benefits of diversity have the potential to be a compelling state interest, scholars have questioned whether this interest is sincere in individual cases.<sup>121</sup> To date, most of the doubt has been generated by an unwillingness on the part of universities to revise admissions policies, but an unwillingness to revise post-admissions policies could cast doubt on the seriousness of the diversity rationale as well. For instance, at the point of admissions, academics have argued that the lack of effort to

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<sup>118</sup> Cf. *Snyder v. Louisiana*, 128 S. Ct. 1203, 1212 (2008) (stating, in the context of peremptory challenges, that "the decisive question will be whether the counsel's race-neutral explanation for a peremptory challenge should be believed" (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality opinion) (internal quotation mark omitted)); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 793 (1978) ("The fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting shareholders . . . [and] suggests instead that the legislature may have been concerned with silencing corporations on a particular subject.").

<sup>119</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2773 (2007) (Thomas, J., concurring); see also *id.* at 2754 (majority opinion).

<sup>120</sup> *Id.* at 2775 (Thomas, J., dissenting) (quoting *id.* at 2820 (Breyer, J., dissenting)) (internal quotation marks omitted). Chief Justice Roberts similarly stated in his plurality opinion that "[t]he principle that racial balancing is not permitted is one of substance, not semantics." *Id.* at 2758 (plurality opinion).

<sup>121</sup> See, e.g., Earl M. Maltz, *Ignoring the Real World: Justice O'Connor and Affirmative Action in Education*, 57 CATH. U. L. REV. 1045, 1047-48 (2008) ("Admissions officers who had hitherto spoken almost exclusively in the language of redressing past discrimination suddenly discovered that the *real* reason to increase the number of [underrepresented minorities] who were admitted was to achieve the educational benefits of diversity.").

increase structural diversity in ways other than affirmative action calls the sincerity of the institution into question. One scholar questions why institutions are not willing to eliminate legacy admissions preferences, which generally advantage white applicants, if they are truly interested in a diverse class.<sup>122</sup> Another article questions why schools do not give greater consideration to the diversity of students within given racial categories if diversity is the true goal sought.<sup>123</sup> Taking this line of argument one step further, courts and observers should also recognize that lack of effort to increase interactional diversity after the point of admissions similarly brings an institution's devotion to diversity goals into question.<sup>124</sup> With the "true motive" of universities coming under scrutiny,<sup>125</sup> universities that do not implement post-admissions plans to promote interactional diversity could be vulnerable to legal challenges to their use of affirmative action in admissions.<sup>126</sup>

### B. *Narrow Tailoring and Post-Admissions Policies*

Failure to implement post-admissions diversity maximization plans may also call into question whether race preferences in admissions are truly narrowly tailored to the end goal of diversity benefits. Under equal protection, use of racial preferences must be narrowly tailored to the compelling interest, meaning that there are no race-neutral alterna-

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<sup>122</sup> See Patrick M. Garry, *How Strictly Scrutinized?: Examining the Educational Benefits the Court Relied upon in Grutter*, 35 PEPP. L. REV. 649, 657 (2008) ("[I]f higher education were that serious about achieving the educational benefits of diversity, it would eliminate its practice of legacy admits, which actually contradicts the goal of a more widely diverse student body.").

<sup>123</sup> See Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1185 (2007) ("[O]verrepresentation of certain groups of Blacks, such as second-generation West Indian Blacks or Blacks from the Northeast, decreases the likelihood of differing viewpoints in the classroom and on campus — differing viewpoints that may be influenced by coming from a different black ethnic group or from growing up in a different region of the country.").

<sup>124</sup> See Scott R. Palmer, *A Policy Framework for Reconceptualizing the Legal Debate Concerning Affirmative Action in Higher Education*, in DIVERSITY CHALLENGED, *supra* note 107, at 49, 53 (arguing that requiring institutions to demonstrate the link between structural diversity and educational goals serves the purpose of "ensuring that the articulated goal(s) is not merely a pretext for discrimination"); cf. Liu, *supra* note 63, at 407 (arguing that the evidentiary requirement of strict scrutiny functions "to ensure that racial classifications purportedly adopted for legitimate governmental purposes do not actually stem from invidious, unconstitutional motives").

<sup>125</sup> See L. Darnell Weeden, *Employing Race-Neutral Affirmative Action to Create Educational Diversity While Attacking Socio-Economic Status Discrimination*, 19 ST. JOHN'S J. LEGAL COMMENT. 297, 313–14 (2005) (arguing that "[t]he intellectual diversity rationale is just a pretext for a soft racial quota," *id.* at 313, and rejecting "the claim that the intellectual benefits of diversity is the true motive behind race-based admissions programs," *id.* at 314).

<sup>126</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Scalia, J., dissenting) ("[S]uits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter*. (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 . . .)").

tives available to attain the results.<sup>127</sup> As one scholar noted, “Diversity, in effect, is only the means to the end.”<sup>128</sup> If the smaller number of minority students admitted without affirmative action can create the same amount of diversity benefits when colleges implement diversity enhancement programs, then use of race preferences in admissions would not be the least restrictive means of attaining this goal.<sup>129</sup>

In the narrow tailoring analysis, much will turn on how courts choose to evaluate such claims. The least onerous, the serious consideration requirement, is akin to a good faith showing that the college has evaluated race-neutral alternatives and concluded they are ineffective.<sup>130</sup> Tracing its roots back to *City of Richmond v. J.A. Croson Co.*,<sup>131</sup> the test requires that entities using race preferences themselves carefully examine the efficacy of race-neutral alternatives.<sup>132</sup> A university may be able to meet this test by assessing the impact of its policies, such as roommate pairings or diversity courses, through empirical studies or surveys similar to the kinds used in the *University of Michigan Cases*.<sup>133</sup> Administrators may also keep themselves apprised of the

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<sup>127</sup> See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (plurality opinion); see also Kent Greenawalt, *Judicial Scrutiny of “Benign” Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 578–79 (1975).

<sup>128</sup> See Garry, *supra* note 122, at 652. Professor Patrick Garry suggests that “[o]ne measure of whether a school is serious about achieving a more lively classroom discussion is whether it has adopted new policies requiring its professors to institute classroom discussion . . . and to ensure that all viewpoints are raised.” *Id.* at 653. This comment reveals the overlapping inquiries of the compelling interest and narrow tailoring tests: on one hand, Garry accuses colleges of not taking the diversity goal seriously and sincerely for not implementing this policy; on the other hand, Garry’s accusation also provides a potential race-neutral way to create the benefits of diversity whether or not affirmative action is used in the admissions process and thus raises questions regarding the narrow tailoring prong.

<sup>129</sup> In the context of altering admissions procedures, “[i]f a university can find alternative criteria that provide the benefits of diversity without using race or ethnicity, the eventual elimination of race- and ethnic-based admissions criteria may be possible.” Adela de la Torre & Rowena Seto, *Can Culture Replace Race? Cultural Skills and Race Neutrality in Professional School Admissions*, 38 U.C. DAVIS L. REV. 993, 1013 (2005). If racial criteria are no longer necessary to achieve diversity benefits, under strict scrutiny, this elimination would not only be possible, it would also be constitutionally mandated. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2760 (2007) (concluding that where there are alternate means of attaining diversity without racial preferences, the means using racial preferences are not narrowly tailored). Failure to act is particularly susceptible to challenge in this context given the relative low cost, ease of implementation, and high reward for many of these policies.

<sup>130</sup> See Marcus, *supra* note 51, at 163–66.

<sup>131</sup> 488 U.S. 469 (1989).

<sup>132</sup> *Id.* at 507 (distinguishing an earlier case in which “Congress had carefully examined and rejected race-neutral alternatives before enacting the [race-conscious] set-aside”).

<sup>133</sup> One social scientist has examined post-admissions policies meant to “increase the college’s going rate of underrepresented students” and suggests that universities, at least as a contingency plan, must consider the policies that would get the most educational benefits per capita in case their states outlaw affirmative action. Bettina C. Shuford, *Recommendations for the Future*, in RESPONDING TO THE NEW AFFIRMATIVE ACTION CLIMATE 71, 77 (Donald D. Gehrig ed., 1998). But if after “[re]focus[ing] on diversity as an educational outcome,” *id.* at 75, it is possible

latest research on ways to maximize interaction, much like Justice O'Connor suggested in *Grutter*,<sup>134</sup> and take steps to implement and experiment with new ways to further their educational missions.<sup>135</sup>

A somewhat more burdensome possibility would be to require a university to demonstrate that its racial preferences actually result in educational benefits.<sup>136</sup> Although the stream of educational benefits that flow from diversity is potentially a compelling interest, if a university's admissions policies do not actually achieve them, the justification for using race-conscious measures no longer exists.<sup>137</sup> Although the Court has recognized that the benefits of interactional diversity are often intangible, the proponents of affirmative action in the *University of Michigan Cases* asserted that the effects of diversity were, in fact, empirically measurable and concrete and used scientific studies to provide support for their use of affirmative action.<sup>138</sup> Universities could thus make affirmative, empirical showings that their efforts have been fruitful, for example, by assessing the student body's level of diverse interactions before and after certain policies, like sustained dialogue or a reduction in affiliated housing, are implemented. They could also compare their campuses' level of diverse interactions with those of peer institutions to see if they are on track or if other policies might be useful. In this way, universities could show that the steps they are taking actually result in higher levels of interaction and that they are actualizing the potential of the structural diversity on campus.

Regardless of which standard the Court ultimately adopts to test the constitutionality of affirmative action programs, universities will

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to reap greater benefits with a smaller number of racial minorities, then in the equal protection context, affirmative action in admissions is clearly no longer narrowly tailored. *Cf. id.* at 75–77.

<sup>134</sup> *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (encouraging colleges to make “periodic reviews to determine whether racial preferences are still necessary to achieve . . . diversity”).

<sup>135</sup> *See id.* (noting states’ “experiment[ation] with a wide variety of alternative approaches”).

<sup>136</sup> *See* George La Noue & Kenneth L. Marcus, “*Serious Consideration*” of Race-Neutral Alternatives in Higher Education, 57 CATH. U. L. REV. 991, 1036 (2008); *see also* Milem *supra* note 11 at 127–28 (“Legal challenges to the use of race in college admissions require that attorneys, policy makers, scholars, and institutional leaders across the country search for empirical evidence that documents the benefits of diversity . . .”).

<sup>137</sup> *Cf. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2754 (2007). In *Parents Involved*, the ineffectiveness of the affirmative action plan (it made only a 3% difference in the schools’ racial compositions) called its constitutionality into question because affirmative action was apparently not necessary, and thus not narrowly tailored, to meet the diversity goal. *Id.* Analogously, measuring the impact of affirmative action against the ultimate goal of diverse interactions may mean that universities that are unsuccessful at creating diverse interactions may similarly fail strict scrutiny. *See* Charles J. Russo & William E. Thro, *Higher Education Implications of Parents Involved in Community Schools*, 35 J.C. & U.L. 239, 267–68 (2009).

<sup>138</sup> *See* Marcus, *supra* note 51, at 170 (“[T]hese educational goals are clearly measurable, as Dr. Gurin’s expert report in the Michigan case established.”); *see also* Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, in DIVERSITY CHALLENGED, *supra* note 107, at 187, 200–01 (“Responsibly defending these diversity policies . . . demands the use of empirical evidence . . .”).

be well advised to adopt post-admissions policies to show their good faith commitment to the diversity rationale. This commitment will be substantiated where universities have considered and implemented race-neutral supplements<sup>139</sup> to their affirmative action programs that are empirically shown to generate the educational benefits promised by diversity. Failure to do so could make universities susceptible to claims of unconstitutional use of race preferences under both the compelling state interest and the narrow tailoring prongs of strict scrutiny.

#### IV. CONCLUSION

To avoid legal challenges associated with the use of affirmative action in admissions processes, as well as to enrich the educational experiences of their students, universities should strive to create inclusive learning environments that incorporate as many opportunities for cross-racial interaction and socialization as possible. An institution's use of affirmative action in the admissions process alone is not enough to ensure that the benefits of diversity accrue to its students. This Note has explored just a handful of opportunities to bridge the gap between structural and interactional diversity, including diversifying roommate pairings, classroom seating charts, and campus organizations, but even more opportunities are likely to present themselves as colleges implement, revise, and experiment with ways to integrate their campuses into truly multicultural communities. Universities that seriously evaluate such policies will be in a much better position to fend off constitutional challenges to the sincerity of their interest in diversity's benefits and to their desired means of achieving it.

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<sup>139</sup> See Palmer, *supra* note 124, at 79 n.97 (“[T]he Court may look more favorably on the use of affirmative action if . . . race-neutral means are used in tandem with race-based means.”).